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Oil and Gas Alert: Supreme Court of Ohio Decides That Oil and Gas Leases Are Title Transactions Under the Ohio Dormant Mineral Act

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Ilya Batikov

Gregory D. Russell

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On November 5, 2015, the Supreme Court of Ohio answered two questions concerning the Ohio Dormant Mineral Act (DMA). In *Chesapeake Exploration, L.L.C. v. Buell*, the Court held that under the DMA: (1) a recorded oil and gas lease is a title transaction that serves as a savings event that prevents minerals from being abandoned to a surface owner; but (2) that the unrecorded expiration of an oil and gas lease is not a savings event.

BACKGROUND

The petitioners are owners and lessees of severed minerals located in Harrison County, Ohio. The minerals were the subject of an oil and gas lease executed in 1984. In 1989, the lease expired pursuant to its terms. No release was filed of record to memorialize the lease's expiration. The respondents, the surface owners, claimed that the minerals were abandoned under the DMA. The petitioners disagreed, contending that the 1984 lease and its expiration in 1989 were "title transactions" that qualified as savings events, thereby preserving the minerals against abandonment.

Finding that no controlling precedent existed in Ohio on these issues, the U.S. District Court for the Southern District of Ohio certified two questions to the Supreme Court of Ohio:

1. Is the recorded lease of a severed subsurface mineral estate a title transaction under the DMA?
2. Is the expiration of a recorded lease and the reversion of rights granted under that lease a title transaction that restarts the twenty-year forfeiture clock under the DMA at the time of the reversion?

HOLDINGS

1. *A recorded oil and gas lease is a title transaction and a savings event under the DMA*

One of the six enumerated DMA savings events occurs when a severed mineral interest is the “subject of” a title transaction. Under the DMA, a “title transaction” is “any transaction affecting title to any interest in land including title by will or descent, title by tax deed, or by trustee’s, assignee’s, guardian’s, executor’s, administrator’s, or sheriff’s deed, or decree of any court, as well as warranty deed, quit claim deed, or mortgage.” Concluding that an “oil and gas lease affects title to the surface and mineral interests in land in a number of ways,” the Court found that an oil and gas lease is a title transaction of which the leased minerals are the subject, rejecting the respondents’ argument that the absence of the word “lease” from the list of examples should mean a lease is not such a title transaction.

The Court concluded that an oil and gas lease falls within the scope of a title transaction because it creates a “vested right to the possession of the land” and entitles the lessee to a reasonable use of the surface to accomplish the purposes of the lease. The Court held that “[d]uring the lease, the lessor effectively relinquishes his or her ownership interest in the oil and gas underlying the property in favor of the [lessee],” while the lessor retains a royalty interest in production and a reversionary interest in the oil and gas. In other words, the lessor continues to own the oil and gas only “on paper”—the rights of custody and use of the mineral estate are vested exclusively in the lessee during the duration of the lease.

2. The unrecorded expiration of an oil and gas lease is not a title transaction and is not a savings event under the DMA

While the Court found that an oil and gas lease is a title transaction and a savings event, the court rejected the petitioners’ claim that the unrecorded expiration of an oil and gas lease is also a savings event. The court emphasized that, in this case, the expiration of the oil and gas lease was unrecorded. The court noted that it was not presented with the question of whether a *recorded* release qualifies as a title transaction. In order to qualify as a savings event, the DMA requires that a title transaction be filed with the county recorder’s office. The Court rejected the petitioners’ argument that the filing of the oil and gas lease itself satisfies the recording requirement for both the creation of the oil and gas lease and the reversion of mineral rights that occurs at the expiration of the lease. While the oil and gas lease sets out the terms through which the lease *could* expire, it does not provide notice to third persons of when the lease *actually* expired. “In fact, the lease could expire in any number of ways that would not be discernible from a review of the lease itself.” Because the unrecorded expiration of an oil and gas lease is not a recorded title transaction, it is not a savings event under the DMA.

3. Concurring and Dissenting Opinions

Concurring in part and dissenting in part, Justice Pfeifer disagreed with the majority’s holding that an oil and gas lease is a title transaction. He noted that a lease was not among the enumerated items contained in the statutory definition of a title transaction. While these enumerated items were non-exhaustive, “every transaction mentioned in the statute either actually or potentially affects an ownership interest in the property.” In contrast, with a lease, “[t]he lessor retains the power to convey the mineral interest, subject to the lease.” While a lease may affect the value of property or the owner’s use of the property, “it does not affect the owner’s title to the property.”

While concurring in the answers to the certified questions, Justice Kennedy criticized the majority for reaching the issue of whether an oil and gas lease creates a particular interest in real property under Ohio law. Instead, Justice Kennedy would have simply found that under the plain statutory language, any

transaction that must be filed of record and asserts a claim or interest in land “affect[s] title” for purposes of the DMA.

Chesapeake v. Buell was limited to its two certified questions and did not consider other important DMA issues now pending before the Court. These issues, which include whether the 1989 version of the DMA provides for a “fixed” or “rolling” look-back period, and the interaction between the 1989 and 2006 versions of the DMA, will be addressed in subsequent Court decisions.

Questions relating to this decision may be addressed to Ilya Batikov (ibatikov@vorys.com), John Keller (jkkeller@vorys.com), or Greg Russell (gdrussell@vorys.com).