Oil and Gas Alert: U.S. District Court for the Southern District of Ohio Certifies DMA Questions to the Supreme Court of Ohio

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The U.S. District Court for the Southern District of Ohio recently certified two important questions of law concerning the Ohio Dormant Mineral Act (DMA) 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?

See *Chesapeake Exploration, L.L.C. v. Buell*. Though certain lower Ohio courts have held that oil and gas leases are title transactions under the DMA, the Supreme Court of Ohio has yet to squarely address the issue under the DMA. Given what it perceived as uncertainty in the law and "[b]ecause the context of the statute is extremely important," the District Court certified the question to the Supreme Court of Ohio.

The Supreme Court of Ohio will now review the memoranda submitted by the parties and issue an order identifying the questions it will answer or decline to answer.

Click here to read the *Buell* case.

Background

In 1958, Powhatan Mining Company transferred the surface rights to 90 acres in Harrison County, excepting all oil, gas, coal or other mineral rights. Thereafter, the surface rights to the 90 acres were transferred through numerous conveyances in 1983, 1984 and 1989. The property was then subdivided and surface portions were again conveyed in 1995, 1996 and 2011. The 1984 and 1989 conveyances repeated the exception and reservation language used in the original 1958 conveyance from Powhatan (reservation clause).

Powhatan later merged with North American Coal Company (NA) and transferred the mineral rights to NA. NA then entered into a series of oil and gas leases related to the mineral rights. These transactions included an oil and gas lease with National Petroleum Corporation for a primary term of 10 years. That lease expired at the end of its primary term in 1984. NA then entered into the second lease with C.E. Beck. That was recorded on February 6, 1984 and expired at the end of its primary term in January 1989.

In 2008, NA transferred the mineral rights to another entity, which entered into an oil and gas lease in January 2009. This lease was subsequently assigned to the plaintiffs, Chesapeake Exploration, L.L.C, et al.

Claims

At issue is whether the severed mineral rights were abandoned under the 1989 version of the DMA, or alternatively, preserved through the occurrence of title transaction savings events. The current surface owners argued that the last title transaction occurred in 1959, when Powhatan merged with NA Coal, and that because no title transactions occurred within the relevant time period, the mineral rights vested into the predecessor in title to the surface owners under the 1989 version of the DMA in 1992.

Chesapeake countered that the mineral interest was not abandoned under the 1989 version of the DMA due to the occurrence of three types of title transaction savings events.

1. Each surface conveyance that contained the reservation clause was a savings event.
2. The second lease — recorded on February 6, 1984 — was a savings event.
3. The expiration of the second lease at the end of its primary term in January 1989 was a savings event. Therefore, Chesapeake argued, the 20-year examination period under the 1989 version of the DMA did not expire until 2009 (which was after the effective date of the 2006 amendment to the DMA). Because the surface owners did not initiate the abandonment procedure under the 2006 version of the DMA, Chesapeake argued that the mineral interest was not abandoned under either version of the law.

The surface owners claimed that none of the types of title transactions alleged by Chesapeake constituted savings events. In the alternative, the surface owners argued that even if the second lease was a title transaction, because its expiration in 1989 was not memorialized through a recorded instrument, the expiration was not a separate title transaction.

The District Court's Holding

1.

A Reservation Clause in a Surface Conveyance is Not a Title Transaction Savings Event

The litigants submitted their briefs in *Buell* prior to the Seventh District Court of Appeal's decision in *Dodd v. Croskey*, which held that severed mineral rights are not the "subject of" surface conveyances that make reference to previously severed minerals, and that such surface conveyances do not qualify as savings events under the DMA. *Buell* adopted *Croskey's* reasoning and concluded that the surface conveyances in question did not operate to preserve the severed mineral interest.

2.

Whether an Oil and Gas Lease is a Title Transaction Savings Event is a Question for the Supreme Court of Ohio The surface owners argued that as a matter of statutory construction, an oil and gas lease is not a title transaction savings event for the purposes of the DMA. Specifically, they argued that an oil and gas lease was not enumerated within the statutory definition of "title transaction," and that construing an oil and gas lease as a title transaction savings event would render superfluous another portion of the DMA, namely the savings event trigged by the "actual production or withdrawal of minerals." The Court rejected these arguments, finding that the statutory list of title transactions is not exhaustive, that the provisions in the DMA are reconcilable, and that "[n]o part of the statute would be rendered superfluous by finding that an oil and gas lease is a title transaction."

The surface owners further argued that as a matter of substantive law, an oil and gas lease is "merely a license" and does not convey title. Conversely, Chesapeake contended that an oil and gas lease qualifies as a conveyance of a fee estate and as such, qualifies as a title transaction. The Court observed that "the nature of an oil and gas agreement in Ohio is unsettled." On one hand, the Supreme Court of Ohio's decision in *Harris v. Ohio Oil Co.,* "noted in dicta that an oil and gas lease conveys more than a mere license" and recognized that a "lease equated to a fee estate." On the other hand, the Supreme Court of Ohio, in *Back v. Ohio Fuel Gas Co*, found that an oil and gas lease was only a license.

"[T]he context of the statute has always been a key factor in how to consider the nature of the lease." Observing that the DMA was not enacted when *Harris* and *Back* were decided and"[b]ecause the context of the statute is extremely important," the Court declined to decide whether an oil and gas lease was a title transaction.

3.

Whether the Expiration of a Lease is a Title Transaction Savings Event is a Question for the Supreme Court of Ohio The surface owners argued that the expiration of an oil and gas lease was not a title transaction under the DMA, and if it was, because it was unrecorded, the expiration did not satisfy the requirement under the DMA that the title transaction be recorded with the county recorder's office. Chesapeake maintained that abandonment was tolled so long as a mineral rights holder was actively renting and collecting rental payments under a lease. The Court noted that the Supreme Court of Michigan, in *Energetics, Ltd. v. Whitmill*, concluded that an expiration of an oil and gas lease was a savings event under the Michigan Dormant Mineral Act. However, the court noted that because the Michigan Dormant Mineral Act's language differed from Ohio's statute, *Whitmill* was "instructive [but] by no means binding." Therefore, the Court also declined to decide whether the expiration of an oil and gas lease was a title transaction.

Next Steps

Vorys will continue to monitor this important case and provide updates on what issues the Supreme Court of Ohio decides to address.