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The Ohio Supreme Court Affirms The 7th District Court of Appeals in *Hustack v. Beck Energy Corporation* (formerly *Hupp v. Beck Energy Corporation*)

On January 21, 2016, The Supreme Court of Ohio (the "Supreme Court") issued its decision on the consolidated matters of *Hustack v. Beck Energy Corporation* (formerly *Hupp v. Beck Energy Corporation*) and *The State ex rel. Claus Family Farm, L.P. v. Seventh District Court of Appeals et al.* 2016-Ohio-178. Keeping in line with long-standing Ohio jurisprudence and the common interpretation of oil and gas leases, the Supreme Court affirmed the Seventh District Court of Appeals' (the "Seventh District") determination, holding that the leases at issue were **not** no-term, perpetual leases that were void as against public policy.

A Brief History

This case began in 2011 when four landowners filed a suit against Beck Energy Corporation ("Beck") alleging that Beck's lease form contained terms that resulted in the leases being perpetual, and therefore were void as against public policy in Ohio. The leases at issue were the G&T (83) lease forms, and the language at issue within those forms were the habendum clause and the delay rental provision.

The habendum clause provided:

2. This lease shall continue in force and the rights granted hereunder be quietly enjoyed by the Lessee for a term of ten years and so much longer thereafter as oil and gas or their constituents are produced or are capable of being produced on the premises in paying quantities, in the judgment of the Lessee, or as the premises shall be operated by lessee in the search for oil or gas and as provided in paragraph 7 following.

The delay rental provision provided:

3. This lease, however, shall become null and void and all rights of either party hereunder shall cease and terminate unless, within ___ months from the date hereof, a well shall be commenced on the premises, or unless the Lessee shall thereafter pay a delay rental of ___ Dollars each year, payments to be made quarterly until the commencement of a well. A well shall be deemed commenced when preparations for drilling have been commenced.

On July 12, 2012, the Monroe County Court of Common Pleas (the “Monroe County Court”) held that the leases were perpetual in nature and against public policy and that Beck failed to reasonably develop the land by failing to drill on the leased premises (this despite the fact that the leases were still within their primary term.) The Monroe County Court also certified a class action to void other leases subject to the same lease form and tolled the class representative’s lease. The decision was appealed to the Seventh District.

On September 26, 2013, a year prior to the Seventh District’s decision on the merits, the Seventh District expanded the Monroe County Court’s tolling order to include all leases subject to the class, which prompted the Claugus Farm original action. This original action was eventually consolidated with the *Hustack* appeal by the Supreme Court.

On September 26, 2014, the Seventh District issued its ruling, reversing the Monroe County Court and finding that the leases at issue were not perpetual leases, and therefore **not void** under Ohio law. In a well-reasoned opinion, the Seventh District provided an education on the fundamentals of oil and gas leases and the mechanics of habendum clauses and delay rental provisions in oil and gas leases. This decision was appealed to the Supreme Court.

Ohio Supreme Court Decision

On appeal, the Supreme Court unanimously agreed with the Seventh District’s holding that the leases at issue were not no-term, perpetual leases. Echoing the Seventh District’s opinion, the Supreme Court, applying long-standing Ohio law, methodically

dismantled these arguments holding, in summary, as follows:

- Delay rental provisions apply only during the primary term of the lease and therefore cannot perpetuate a lease beyond that fixed term.
- The phrase “capable of being produced” cannot extend the time in which delay rentals may be paid to hold the lease, but rather applies only when a well exists.
- The phrase “in the judgment of the lessee” does not grant the lessee unfettered discretion to perpetuate a lease indefinitely, but requires the existence of a well and refers to the lessee’s judgment regarding the capability of that well to produce.
- An implied covenant to produce in a reasonable period of time does not apply when the lease either provides the specific time in which development must occur (i.e. a primary term) and/or where the lease expressly disclaims implied covenants.

With regard to the Claugus Family Farm original action seeking a writ of prohibition permanently enjoining the Seventh District’s from tolling all G&T (83) lease forms and a writ of mandamus directing it to vacate its order doing so, the Supreme Court held against the Claugus Family. In deciding this issue, the Supreme Court first discussed the requirements for entitlement to a writ of prohibition (in summary, (1) court of appeals is about to exercise power or has done so, (2) that exercise is unauthorized by law, (3) resulting injury for which no other adequate remedy exists or, even if one exists, where the appeals court patently and unambiguously lacked jurisdiction), and the requirements for a writ of mandamus (in summary, clear legal right to relief, clear legal duty by court of appeals to provide it, and lack of adequate remedy at law). Applying these to the Claugus Family arguments, the Supreme Court concluded that the Claugus Family failed to meet the requirements for this relief because it had an adequate remedy at law since they could have intervened in the appeal, and the Seventh District had jurisdiction (i.e. did not patently and unambiguously lack jurisdiction).

Finally, the Supreme Court denied Beck's motion to toll the leases because it held the leases are valid.

For more information, please contact [Christopher W. Rogers](#) or any attorney on Frost Brown Todd's [Energy and Utilities Industry Team](#).

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