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Ullman v. Whitacre: Ohio's Seventh District Addresses Paying Quantities Evidence and the Plaintiff's Burden of Proof

In *Ullman v. Whitacre Enterprises, Inc.*, the Seventh District Court of Appeals dealt a blow to lease-busting landowners in their challenge to production in paying quantities.^[1] Reversing the trial court's grant of plaintiff's motion for summary judgment, the Seventh District highlights three practice pointers for producers at the bottom of the production curve.^[2]

Point No. 1 – Only direct costs of production matter.

Ullman reinforces the Court's prior holdings that it is the operating cost of the well that matters in a paying quantities analysis, not the cost of overhead. *Ullman* is the third in this line of cases.^[3] Here, the leaseholder, Whitacre Enterprises, Inc. ("Enterprises"), which owned *only* the leasehold interests and wells (what didn't they own?), paid flat, monthly payments to an affiliate, Whitacre Store, to manage day-to-day operations, production and maintenance of the wells.^[4] Enterprises' business records (from its "G.O.A.L.s" system) showed only its flat, monthly payments for each of the 350 or so wells Enterprises owned.^[5] As to the Ullman well, the monthly payments appeared to exceed its monthly revenue for a majority of months.^[6] To the Ullmans, this appeared to be indisputable proof that the well was not producing in paying quantities. Critically, the Ullmans had no other evidence showing the well was not producing in paying quantities.^[7]

Enterprises presented evidence through deposition testimony and with an exhibit summarizing Enterprise's G.O.A.L.'s records (the "Lisa Jones Report") that the flat monthly payment encompassed much more than the cost to operate the well.^[8] As the *Ullman* Court recounts, Enterprises owned no office, equipment, or employees, so the flat monthly payment, which appeared to be for the Ullman well,

was in fact payment to operate Enterprise's entire business, including overhead.^[9] Thus, when Enterprises plugged a well in its portfolio, the same monthly payment was paid, but the payment total was then spread across the remaining wells.^[10] The Lisa Jones Report broke out costs between "direct operating expenses," which included the direct expenses of operating the Ullman well, and "indirect operating expenses," which were the administrative and overhead costs.^[11] When only the direct costs were factored in the paying quantities analysis, the Ullman well's monthly revenue exceeded direct costs for most months.^[12]

Point No. 2 – The lessor bears the burden of proof.

Ullman shows that business records are not always conclusive in a paying quantities analysis because they may not tell the whole story. Considering Enterprises' business records evidence, the deposition testimony, and the Lisa Jones Report under the summary judgment standard,^[13] the Seventh District engaged in its own paying quantities analysis and determined that the trial court got it wrong:

While the trial court correctly acknowledged that both Koy Whitacre and Lisa Jones testified at their depositions that if a well was plugged that well would no longer be making a monthly payment, the court ignored testimony that if a well was plugged, the monthly payment for the remaining wells would be increased. The court also ignored evidence that the monthly fees pay both direct operating expenses per well and overhead expenses involved in operating the entire Whitacre Enterprises business. The court apparently discounted evidence that the monthly payment is merely a tax accounting mechanism to allow money to be transferred from one entity owned by Koy Whitacre to another entity also owned by Koy Whitacre, and that the money left after payment of all of the bills was retained by Koy Whitacre as profit. **Again, this matter was resolved after competing motions for summary judgment were filed and so this evidence was un rebutted and should be taken as true.**

With no evidence other than Enterprise's own records, the un rebutted deposition testimony and the Lisa Jones Report, the Seventh District found that the Ullmans did not satisfy their burden. [\[14\]](#)

Point No. 3 – Look to the standard of review.

In the prior two "Whitacre" lawsuits, the landowner/plaintiffs were batting .500, losing "*Whitacre I*" to summary judgment and prevailing in "*Whitacre II*," which was decided by bench trial.[\[15\]](#) Moreover, in *Whitacre II*, which involved very similar facts and a nearly identical report from Lisa Jones, the landowner/plaintiffs were successful in excluding the Lisa Jones Report as hearsay at trial.[\[16\]](#) Thus, the Ullmans argued *Whitacre II* as authority for why the Lisa Jones Report should have been excluded as hearsay.

The Seventh District disagreed. It found *Whitacre I* to be controlling because it was decided on summary judgment: **"While *Whitacre II* remains good law, this matter is controlled by *Whitacre I*. *Whitacre I*, like the instant matter, was resolved in summary judgment."**[\[17\]](#) The important difference is the standard of review that follows from each type of decision: "Further, because of the contested factual questions in *Whitacre II*, it was reviewed under a manifest weight of the evidence standard of review by this Court of Appeals following a bench trial. The discretion afforded to the trial court in a manifest weight review is not afforded in a case decided on summary judgment that involves only an issue of law, such as *Whitacre I* and the instant matter."[\[18\]](#)

Ullman, though not groundbreaking, reinforces important concepts for paying quantities cases. For producers, it's the importance of good record keeping and expense allocations. And for us lawyers, it's the need to know the fundamentals—rules of evidence, burden of proof and standard of review. For more information, please contact [Christopher Rogers](#) of Frost Brown Todd's [Oil & Gas](#) industry team.

[\[1\]](#) *Ullman v. Whitacre Enterprises, Inc.*, 7th Dist. Monroe No. 19 MO 0025, 2021-Ohio-4656. A full copy of the opinion can be found [here](#)

[2] Full disclosure: the author was counsel for an ancillary defendant, American Energy – Utica Minerals, LLC, in *Ullman* and the other Whitacre cases referenced in note 3, *infra*.

[3] These prior Whitacre cases were: (1) *Hogue v. Whitacre*, 2017–Ohio–9377, 103 N.E.3d 314 (7th Dist.), *appeal not allowed by Hogue v. Whitacre*, 152 Ohio St.3d 1480, 2018–Ohio–1990, 98 N.E.3d 294 (“**Whitacre I**”) and (2) *Kraynak v. Whitacre*, 7th Dist. Monroe No. 17 MO 0014, 2018–Ohio–2784 (“**Whitacre II**”).

[4] *Ullman* at ¶¶ 6–10.

[5] *Id.* at ¶ 8.

[6] *Id.* at ¶¶ 51–61 (discussing the Monthly payments in all of the Whitacre cases).

[7] *Ullman* at ¶ 59 (noting Enterprise’s evidence was unrebutted).

[8] *Id.* at ¶¶ 33–34, 55, 58,

[9] *Id.* at ¶ 8 (“Essentially, the monthly payments are a tax accounting mechanism that allows money from one entity to be moved to another entity.”)

[10] *Id.* at ¶ 9.

[11] See *id.* at ¶¶ 62, 63, 67, 69, 71.

[12] *Id.* at ¶¶ 62–87 (discussing evidence of direct and indirect expenses versus revenue for years 2011 through 2017).

[13] The Ullmans filed a motion to exclude the Lisa Jones Report as hearsay, but the trial court never ruled on that motion and, by default, that motion was presumed denied. See *id.* at ¶¶ 36–37.

[14] *Id.* at ¶ 87.

[15] See note 1, *supra*.

[16] See *Whitacre II*, *supra*.

[17] *Id.* at ¶ 26.

[18] *Id.*

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