



Will Ohio courts impute Pugh Clauses?

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A recent decision from an appellate court as well as the allowance of an appeal to Ohio's Supreme Court has cast doubt on the extent to which a producing well will hold a lease beyond its primary term. Traditionally, the entirety of the lands covered by a lease will be held by production where any portion of the leased lands contains a producing well. To protect against that potential underuse of the landowner's minerals, many lessors have negotiated Pugh Clauses into their leases.

Stated briefly, Pugh Clauses typically provide that those portions of leased lands which are not producing will be released from the lease at the conclusion of the primary term

In *Burke v. Excalibur Exploration*, Ohio's Eleventh District held that the nonproducing horizontal portions of leased lands are released at the conclusion of the primary term regardless of whether the lease contains a Pugh Clause. (11th Dist. Ashtabula No. 2016-A-0041, 2017-Ohio-999) The lessors in *Burke* sought to have any acreage which was not included in a drilling unit released from the lease. The court determined that the lack of language in the lease specifying that production from any portion of the lands will hold the lease for the entirety of lands evidenced that the parties did not intend such an effect. Thus, rather than require a Pugh Clause, the Eleventh District appears to find that a horizontal Pugh Clause is imputed absent language to the contrary.

Imputed *vertical* Pugh Clauses also appear set for a crucial decision in the coming months. In *Alford v. Collins-McGregor Operating Co.*, the Fourth District Court of Appeals rejected the argument that only those formational depths from which oil and gas is being produced should be held by the lease. (4th Dist. Washington No. 16CA9, 2016-Ohio-5082) The court found that production from only a limited number of formations does not violate the implied duties to reasonably explore and develop the lands. On March 15, the Ohio Supreme Court allowed the landowners' appeal. If the Supreme Court were to reverse *Alford*, many older leases that exploration and production companies have relied on as holding all depths will no longer be valid as to those depths vital to horizontal fracking.

HOW E&PS CAN TAKE ACTION

While the interpretation of the Eleventh District and allowance of an appeal in *Alford* has created some uncertainty, E&Ps can still take action to protect themselves regardless of how those cases are eventually resolved. To avoid any adverse impact from future court rulings on this issue, E&Ps should obtain amendments and ratifications of any questionable leases that specifically provides for the effect upon nonproducing vertical and horizontal portions of leased lands beyond the primary term. Ohio courts have steadfastly enforced the contractual terms of oil and gas leases, and thus language relating specifically to these issues will help protect E&Ps interests while we await clarification.



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