Deeds, Title Companies and Related Issues
Attorney Joshua Hiznay

I. Kinds of Deeds

A. General Warranty Deed

1. Statutory deed form R.C. § 5302.05
   (Execution in accordance with Chapter 5301. of the Revised Code)
   a. GENERAL WARRANTY DEED

      . . . . . (marital status), of . . . . . County,. . . . . for valuable consideration paid, grant(s), with general warranty covenants, to . . . . ., whose tax-mailing address is . . . . . ., the following real property:

      (description of land or interest therein and encumbrances, reservations, and exceptions, if any)

      Prior Instrument Reference: Volume . . ., Page . . .

      . . . . ., wife (husband) of the grantor, releases all rights of dower therein.

      Executed this . . . . . day of . . . . ..

      . . . . . .
      (Signature of Grantor)

2. Four Covenants
   a. Time of delivery of deed that grantor was lawfully seized of the property
   b. Property free and clear of all encumbrances
   c. Grantor has good right to sell and convey property to grantees
   d. Grantor will warrant and defend to grantee against the lawful claims and demands of all persons
3. Best deed to receive

B. Limited Warranty Deed
   1. Statutory deed form R.C. § 5302.07
      (Execution in accordance with Chapter 5301. of the Revised Code)

      a. LIMITED WARRANTY DEED

         . . . . . (marital status), of . . . . . County,. . . . . for valuable consideration paid, grant(s), with limited warranty covenants, to . . . . ., whose tax-mailing address is . . . . . ., the following real property:

         (description of land or interest therein and encumbrances, reservations, and exceptions, if any)

         Prior Instrument Reference: Volume . . ., Page . . .

         . . . . ., wife (husband) of said grantor, releases to said grantee all rights of dower therein.

         Executed this . . . . . day of . . . . ..

         . . . . . .
         (Signature of Grantor)

   2. Two Covenants
      a. Time of the delivery of that deed the premises were free from all encumbrances made by the grantor
      b. Grantor will defend the same to the grantee and the grantee's heirs, assigns, and successors, forever, against the lawful claims and demands of all persons claiming by, through, or under the grantor, but against none other

C. Quit Claim Deed

1. Statutory deed form R.C. § 5302.11
   (Execution in accordance with Chapter 5301. of the Revised Code)

   a. QUIT-CLAIM DEED

      . . . . . (marital status), of . . . . . County, ... for valuable consideration paid, grant(s) to . . . . ., whose tax-mailing address is . . . . ., the following real property:

      (description of land or interest therein and encumbrances, reservations, and exceptions, if any)

      Prior Instrument Reference: Volume . . . . . ., Page . . . .

      . . . . . ., wife (husband) of the grantor, releases all rights of dower therein.

      Executed this . . . . . day of . . . .

      . . . . . .
      (Signature of Grantor)

2. No Covenants
   a. Whatever interest grantor has is being transferred to grantee

D. Fiduciary Deed
   1. Statutory deed form R.C. § 5302.09
      (Execution in accordance with Chapter 5301. of the Revised Code)
      a. DEED OF EXECUTOR, ADMINISTRATOR, TRUSTEE, GUARDIAN, RECEIVER, OR COMMISSIONER

         . . . . . ., executor of the will of . . . . . ., (administrator of the estate of . . . . . .) (trustee under . . . . . .) (guardian of . . . . . .) (receiver of. . . . . .) (commissioner), by the power conferred by . . . . . ., and every other power, for . . . . . .dollars paid, grants, with fiduciary covenants, to. . . . . ., whose tax-mailing address is . . . . . ., the following real property:

         (description of land or interest therein and encumbrances, reservations, and exceptions, if any)

         Prior Instrument Reference: Volume . . . . . ., Page . . . . . .

         Executed this . . . . . day of . . . .

         . . . . . .
         (Signature of Grantor)

   2. Three Covenants
      a. Grantor is duly appointed, qualified, and acting in the fiduciary capacity described in such deed
      b. Grantor duly authorized to make the sale and conveyance of the granted premises
      c. Grantor, in all of his proceedings in the sale thereof, has complied with the requirements of the statutes

E. Transfer on Death Affidavit
   1. Form provided in R.C. § 5302.22
      a. STATE of OHIO) TOD DESIGNATION AFFIDAVIT
         COUNTY of) [O.R.C Section 5302.22]

         _____, being first duly sworn according to law, state as follows:

         1. That Affiant(s), (marital status) , is/are the owner(s) of record of the following real property located at _____ as recorded at Vol. ___, Page ____ of _____ County deed records:

            [insert legal description]

         2. That title of record to the above property is held by Affiant(s) as follows:

            __Sole Owner
            __Tenant(s) in Common
            __Tenant(s) in Survivorship
            __Tenants by the Entireties

         3. [Alternate Paragraph A: To be used when Affiant(s) transfer entire undivided interest to a single beneficiary.]

            That Affiant(s) hereby designate(s) the entire undivided interest in the property for transfer on death to (Name of Beneficiary)
            as transfer on death beneficiary, to receive the title of Affiant(s) upon his/her/their death.

         OR

[Alternate Paragraph B: To be used when Affiant(s) transfer less than entire undivided interest, or transfer is made to more than one beneficiary.]

That Affiant(s) hereby designate(s) the entire undivided interest in the property [or if less than entire interest, state the undivided fractional interest owned by Affiants to be designated for transfer by each Affiant] held by Affiant(s) for transfer on death to the person or persons named below, as transfer on death beneficiary(ies), to receive the title of Affiant(s) upon his/her/their death as follows:

Name of Beneficiary	Undivided Interest of Affiant(s) Type of Tenancy
1.	[Sole Owner, etc.]
2.	
3.	

4. That_____, wife (husband) of the Affiant, states that her (his) dower rights are subordinate to the vesting of title to the real property in the transfer on death beneficiary or beneficiaries designated herein.

5. This Affidavit, and the beneficiary designation(s) set forth herein, hereby revokes, replaces and supersedes any prior beneficiary designation(s) by Affiant(s), whether by deed or affidavit, related to the above-designated real property.

_____
Affiant

_____
Wife (Husband) of Affiant

(Notary Jurat)

2. Effect
   a. Grantor(s) still retain all rights to sell/transfer property without any consent of the beneficiaries
   b. Grantor(s) can revoke or change the affidavit at anytime
   c. File an affidavit of confirmation upon the death of the Grantor(s) with copy of death certificate
   d. Property passes outside of Probate

II. Proper Execution
   A. Statutory requirements
      1. Signed by grantor
         a. Best Practice Tip: Make sure the grantor's name matches the same name on the current deed (aka fka nka)
      2. Acknowledged by grantor before a notary, etc
         a. Taking an acknowledgment means:
            i. Person appeared before the notary and acknowledged execution
            ii. Person taking the acknowledgment knew the person or the person proved it
         b. The certificate contains "acknowledged before me" or a substantial equivalent
         c. Sample forms found at R.C. § 147.55
            i. For an individual:

               State of ……..
               County of ……

               The foregoing instrument was acknowledged before me this (date) by (name of person acknowledged)

               (Signature of person taking acknowledgment)

            ii. For a POA

               State of ……
               County of ….

               The foregoing instrument was acknowledged before me this (date) by (name of attorney in fact) as attorney in fact on behalf of (name of principal)

               (Signature of person taking acknowledgement)
      3. Notary to certify the acknowledgment and subscribe name to certificate of acknowledgment

B. Recording Requirements
   1. Any recorded document shall contain "Instrument Prepared by……." R.C. § 317.111
   2. Margins
      a. 3 inch margin of blank space on the first page of the instrument
      b. 1.5 inch margin of blank space on the subsequent pages
      c. 1 inch margin for the sides and bottom
   3. Paper size
      a. 8.5 inches x. 11 inches (min) (letter sized paper)
      b. 8.5 inches x. 14 inches (max) (legal sized paper)
   4. Font size
      a. Not smaller than 10 point font
   5. Font color
      a. Blue or black ink only
      b. No highlighting
   6. Recording fees
      a. $28 for the first two pages, $8 for each additional page
      b. $20 non-compliant fee if necessary
      c. $4 marginal notation if applicable
   7. Auditor's stamp
      a. Auditor must stamp and collect transfer tax
   8. Governmental/court documents are exempt

C. Constructive Notice
   1. Properly executed documents serve as constructive notice to the world

III. Issues to watch out for

A. POA
   1. Must be a durable POA
   2. Must be recorded prior to the transfer (note recording requirements apply)

B. Trusts
   1. Title to real estate is held in the name of the Trustee, not the trust itself.
      a. Best Practice: John Smith, Trustee of the Smith Family Revocable Living Trust UAD Jan 1, 2014.
      b. Although, if trust is in existence at time of conveyance and a memorandum of trust is filed containing a legal description of the property, then validity of deed is ok…will be treated as if conveyed to Trustee.
   2. Memorandum of Trust must be recorded
      a. Indicates the name of the Trustees, name of agreement, date of agreement, provisions dealing with real estate
      b. Allows the world to know that the trustee can manage the real estate without having to review the entire trust document
      c. Ideally, signed by settlor…but can be signed by a trustee (even a successor trustee)
      d. Recorded in county where real property is located

e. If no memorandum, entire trust will need to be recorded (defeating the purpose of privacy and adds to cost of transaction)

C. Death of Owner
    1. Joint with rights of survivorship
        a. File survivorship affidavit with copy of death certificate
    2. Dies testate
        a. Probably going to have to open a probate estate and probate the will to transfer the property
        b. Court will ultimately approve a certificate of transfer which will memorialize who the real estate transfers to. Present to county auditor and then recorder.
    3. Dies intestate
        a. Can open up a probate estate and allow the real estate to pass according to the laws of descent
        b. Or consider using the affidavit of inheritance outlined at R.C § 317.22(B)
            i. No probate estate needed
            ii. Provide date of death of owner, attach death certificate, legal description of real estate, names, addresses, ages, and relation of the next of kin entitled to inherit along with their percentage inherited.
D. Medicaid Recovery Form R.C. § 5302.221
    1. Filed with a transfer on death confirmation affidavit at the recorder's office
    2. Indicate whether the owner or his/her spouse was a receipt of Medicaid benefits.
    3. The form is not actually recorded.
E. Dower R.C. § 2103.02
    1. 1/3 life estate in real estate owned by spouse
    2. It is a recognized legal interest in real estate that belongs to the spouse
    3. Spouse must "release dower" before transfers/encumbrances
F. Divorces/Dissolutions
    1. Don't have clients sign quit-claim deeds until the real estate is refinanced. Otherwise, they are transferring their interest in the property but are still listed on the mortgage/note
    2. If the property is being sold, title companies are probably going to ask for the decree that provides how the money will be distributed. Make it easy on the title company and have it spelled out in the decree or have all parties agree that the money will be given to one of the attorneys and then they can distribute it.
    3. Stubborn client won't sign a deed? Civ.R. 70 allows a court to simply record an order to make the appropriate transfer.
G. Judgment Liens
    1. Judgments that are filed with the county clerk of court and attach to real estate owned by the debtor at the time the lien is filed.

H. Bankruptcy and Foreclosure
   1. *Lis pendens* attaches upon filing of Complaint in foreclosure R.C. § 2703.26
   2. Mortgagee must affirmatively show that it has an interest in the mortgage to foreclose (standing).
   3. Automatic Stay in Bankruptcy (11 U.S.C. § 362) may impact ability to record a deed
   4. Liens that exceed the value of the real estate or impair the exemption may be stripped off in bankruptcy in certain cases.

I. Merger Doctrine
   1. Once a deed is accepted, the purchase agreement merges into the deed and no cause of action can be brought on the purchase agreement

IV. Title Companies

A. What they do
   1. Run the title
      a. Search the current owner, check for liens, restrictions, encumbrances, check the chain of title and check the buyer (for IRS tax liens, attach at time of purchase)
   2. Handle the money and documents
      a. Have parties sign the necessary documents, collect the money, record the documents, and disburse.
   3. Title Insurance
      a. Issue title insurance policies to lender/buyer
      b. Protect lender's mortgage in case of issues with title or recording
         i. Trustees set aside mortgages if not properly executed and recorded
      c. Protect buyer's interest in case of issues with title
         i. Forged deed somewhere in chain of title
         ii. Missed a lien/restriction to make property worthless
   4. In practice
      a. Need a preliminary judicial report in probate land sales and foreclosure proceedings
      b. Lists the ownership and interests in the real estate

Criminal Forfeiture of Property
Attorney David Toepfer AUSA

I. When does the government take property?

A. Property facilitated a crime (e.g. growing marijuana, storing and preparing heroin for sale)
B. Property represents proceeds of criminal activity (e.g., fast cars and jewelry)
C. The property facilitated money laundering (e.g., a rental property or car wash used to generate "legitimate" receipts for drug proceeds)
D. Property value will cover the costs of forfeiture
1. Worth at least $20,000 or 20% net equity, whichever is larger

II. How does the government take it?
A. Conduct a lien search and title search
1. Are there outstanding loans, tax liens, etc.?
2. Are there any innocent owners?
B. Start legal process against the property
1. Allege in an indictment
2. File a civil complaint against the property
C. File a *lis pendens* notice
1. "Buyer beware" notice that the property has been indicted or has a pending civil complaint
2. Not a lien – just a public notice on file to let title searchers know about the pending action
D. Obtain a preliminary order of forfeiture
1. Issued by the presiding judge following an event:
a. Defendant consents to forfeiture in a plea agreement
b. The property is "convicted" at trial
1) Prove it was criminal by a preponderance
2) Same burden in criminal or civil case
2. Notice of forfeiture is published and/or mailed to identified interest holders
3. Hold a hearing if someone makes a claim – two ways to prevail
a. Bona fide purchaser prior to the lis pendens
b. Innocent owner
4. Pay off any outstanding liens
5. For houses built before 1979, test for lead-based paint
E. Obtain final forfeiture order and sell the property
1. At sentencing, judge signs final order of forfeiture
2. Marshal Service becomes involved and prepares a "Marshal Deed" based upon the forfeiture order. Marshals file the deed with the recorder
3. Put property on the market
a. Through online auction at:
http://www.justice.gov/marshals/assets/sales.htm
b. Listing with a real estate agent

Oil & Gas Case Law Update
Judge Mary DeGenaro – 7th District Court of Appeals

Decided Cases

1. ***Conny Farms, Ltd. v. Ball Resources, Inc.***, 7th Dist. No. 09CO36, 2011-Ohio-547.

Background: Landowners brought action against lessees under two oil and gas leases, alleging that lessees breached the leases by failing to make any royalty or rental payments and that the leases had terminated because gas had not been produced or stored. The trial court granted summary judgment to lessees, enforcing the judicial ascertainment clause, which provided:

> It is agreed that this lease shall never be forfeited or cancelled for failure to perform, in whole or in part, any of its covenants, conditions or stipulations, until it shall have been first finally judicially determined that such failure exists, and after such final determination, lessee is given a reasonable time therefrom to comply with any such covenants, conditions or stipulations.

The trial court concluded that since there had been no prior judicial determination that the leases had been in violation of any of the lease covenants, conditions or stipulations there was no way that Conny Farms could sustain its case.

Holding: As a matter of first impression in the state, a judicial ascertainment clause in an oil and gas lease is unenforceable in Ohio as against public policy:

"In considering the arguments raised by the parties, we are mindful that "[i]n considering whether a provision in a contract is against 'public policy' [courts] must remember that the freedom to contract is fundamental, and that we should not lightly disregard a binding agreement, unless it clearly contravenes some established or otherwise reasonable public interest." *Hurst v. Enterprise Title Agency, Inc.,* 157 Ohio App.3d 133, 2004–Ohio–2307, 809 N.E.2d 689, at ¶ 19. However, we are persuaded by the analysis of our sister states as articulated in *Wellman,* in reaching the conclusion that judicial ascertainment clauses are against public policy in Ohio and therefore unenforceable. Ohio values judicial economy, which protects its citizens from repeated litigation over the same matter. More importantly, the purpose of the legal system in Ohio is to provide for the resolution of legal controversies, not to be used as a mechanism to enable one party to grind down another." *Conny Farms I,* ¶26.

2. *Conny Farms, Ltd. v. Ball Resources, Inc.,* 7th Dist. No. 12CO18, 2013-Ohio-2874. (***Conny Farms II***)

Background: Landowner brought an action against lessees under two oil and gas leases, asserting various claims centered on allegations that lessees breached the leases by failing to make any royalty or rental payments and that the leases had terminated because gas had not been produced or stored. On remand, the trial court granted the lessee's renewed motion for summary judgment. The leases contained the following clauses:

a. granting clause:

WITNESSETH: That the said Lessor, for and in consideration of the sum of One ($1.00) Dollar cash in hand paid, receipt of which is hereby acknowledged, and of the covenants and agreements hereafter contained on the part of the lessee to be paid, kept and performed, has granted, demised, and leased, and by these presented does grant demise, and lease exclusively unto [sic] said Lessee, for the purpose of drilling, operating for, producing, removing and disposing of oil and gas and for the further purpose and with the exclusive right in the Lessee, as he may see fit, to store gas of any kind and from any field or source by pumping or otherwise introducing the same into any sand or sands, substrata or horizon in or under said land, and to remove the same by pumping or otherwise through any well on said lands or other lands and laying of pipe lines and of building tanks, powers, [sic] stations, and structures thereon to produce, save and take care of and transport said products, all that certain tract of land situate [sic] in the * * *

b. habendum clause:

It is agreed that this Lease shall remain in force for the term of ten years from the date hereof, and as long thereafter as the said land is operated by the Lessee in the search for or production of oil or gas or so long as gas is being stored, held in storage, or withdrawn from the premises by Lessee.

c. change in ownership clause:

If the estate of either party is assigned—and the privilege of assigning in whole or in part is expressly allowed—the covenants hereof shall extend to the heirs, executors, administrators, and assigns, but no change in ownership of the land or assignment of rentals or royalties shall be binding on the lessee until after the lessee has been furnished with a written transfer or assignment or a true copy thereof.

Holdings: The landowner did not comply with the leases' change-of-ownership provisions; and the leases did not terminate under their habendum clauses:

"The undisputed evidence demonstrates that Conny Farms failed to comply with the change in ownership clause and thus Appellees were not obligated to make payments. Further, gas was continuously stored on and withdrawn from the property. Thus there are no genuine issues of material fact regarding the expiration of the leases. Accordingly, the judgment of the trial court is affirmed. *Conny Farms II*, ¶2.

- *Trico Land Co. v. Kenoil Producing, L.L.C.,* 5th Dist. No. 13CA008, 2014-Ohio-1700, discussing habendum, commencement of well/delayed rental, change in ownership, notice/forfeiture/recession and implied covenant clauses.

3. *New Hope Community Church v. Patriot Energy Partners, L.L.C.*, 7th Dist. No. 12CO23, 2013-Ohio-5882.

Background: Oil and gas leasehold owners filed action against assignor and assignee of leases, seeking rescission of leases, declaration that leases were null and void, and invalidation of the assignments. The trial court denied defendants' motion to stay pending arbitration. Court of Appeals reverses, matter stayed pending arbitration.

Holding: "While the trial court correctly concluded that the arbitration provision is substantively unconscionable, the trial court erred by concluding that the arbitration clause is procedurally unconscionable. Although none of the Property Owners had any past training in oil and gas leases, many had executed oil and gas leases in the past; were given time to review these leases and ask questions *73 prior to signing, some proposing amendments to the leases. Some simply did not read the leases including the arbitration provision or did not understand the arbitration clause, but conceded they could have sought outside counsel before signing and chose not to do so. In order for an arbitration provision to be held unconscionable, both substantive and procedural unconscionability must be present. Because the Property Owners only demonstrated that the arbitration clause was substantively unconscionable, the arbitration clause is valid." *New Hope,* ¶ 2.

a. *substantive unconscionability:*

"Whether a contract provision is substantively unconscionable requires an analysis of the terms of the provision itself and a determination of whether those terms are commercially reasonable. *Hayes v. Oakridge Home,* 122 Ohio St.3d 63, 2009-Ohio-2054, 908 N.E.2d 408, ¶ 33. No bright-line set of factors for determining substantive unconscionability has been adopted by the Ohio Supreme Court. *Id.* "The factors to be considered vary with the content of the agreement or provision at issue." *Id.*

When reviewing arbitration provisions for substantive unconscionability, courts have considered factors such as the cost of arbitration; the specificity of the provision, e.g., whether the rules governing arbitration and any required fees are disclosed; the relative prominence of the provision, e.g., whether the arbitration clause is set forth in fine print buried within a larger contract or is contained in a separate document; and whether the obligation to arbitrate applies equally to all parties. *See, e.g., Taylor Bldg Corp. of Am.,* ¶ 54–60; *Peltz,* 7th Dist. No. 06 BE 11, ¶ 47–48. *Robbins v. Country Club Ret. Ctr. IV, Inc.,* 7th Dist. No. 04 BE 43, 2005-Ohio-1338, 2005 WL 678765, ¶ 37; *Wascovich v. Personacare of Ohio,* 190 Ohio App.3d 619, 2010-Ohio-4563, 943 N.E.2d 1030, ¶ 43–54 (11th Dist.); *Eagle v. Fred Martin Motor Co.,* 157 Ohio App.3d 150, 2004-Ohio-829, 809 N.E.2d 1161 (9th Dist.); *Vanyo v. Clear Channel Worldwide,*

156 Ohio App.3d 706, 2004-Ohio-1793, 808 N.E.2d 482, ¶ 20 (8th Dist.). The party challenging the enforceability of the arbitration agreement bears the burden of presenting evidence to support that challenge. *Hayes v. Oakridge Home,* 122 Ohio St.3d 63, 2009-Ohio-2054, 908 N.E.2d 408, ¶ 27.

* * *

In sum, the very high administrative costs, coupled with the lack of specificity in the arbitration clause, along with the misleading nature of the clause, render it substantively unconscionable; we agree with the trial court's determination in this regard and we reach this conclusion mindful of our standard of review. Resolution of these particular issues depends upon the credibility of the witnesses; a central factor in the trial court's determination of whether or not the arbitration clause is unconscionable. By design, this court's ability to make credibility determinations is significantly limited; thus our deference to the trial court particularly when issue resolution is fact-driven. *Taylor Bldg. Corp. of Am.,* supra. However, *both* substantive and procedural unconscionability must be present to for a court to deem an arbitration clause unenforceable due to unconscionability." *New Hope,* ¶25-27, 39.

b. *procedural unconscionability*

"Procedural unconscionability concerns the formation of the agreement and occurs when no voluntary meeting of the minds is possible." *Ball v. Ohio State Home Servs., Inc.,* 168 Ohio App.3d 622, 2006-Ohio-4464, 861 N.E.2d 553, ¶ 7, quoting *Porpora v. Gatliff Building Co.,* 160 Ohio App.3d 843, 2005-Ohio-2410, 828 N.E.2d 1081, ¶ 7. Thus, courts must consider the circumstances surrounding the parties' bargaining. *Taylor Bldg. Corp. of Am.,* 117 Ohio St.3d 352, 2008-Ohio-938, 884 N.E.2d 12, at ¶ 44. Such circumstances include the parties' respective ages, educational backgrounds, intelligence, business acumen and experiences, along with who drafted the contract, whether alterations in the printed terms were possible and whether there were alternative sources of supply for the subject goods or services.

* * *

Further, the trial court's determination that the oil and gas leases at issue herein were procedurally unconscionable insofar as they were "contracts of adhesion" is unsupported by the record. A contract of adhesion is "a standardized form contract prepared by one party, and offered to the weaker party, usually a consumer, who has no realistic choice as to the contract term." *Taylor Bldg. Corp. of Am.,* 117 Ohio St.3d 352, 2008-Ohio-938, 884 N.E.2d 12, at ¶ 49, citing Black's Law Dictionary (8th Ed.2004) 342.

Here, although a form contract was utilized, Property Owners were given ample opportunity to review it and propose any revisions, and in fact, some did. There was

evidence introduced at the hearing that several of the leases were in fact modified pursuant to negotiations: one Property Owner negotiated and received a higher delay rental with Patriot; another negotiated for the inclusion of a provision protecting his well water. The fact that no Property Owner requested modification of the arbitration clause specifically does not transform the agreements into contracts of adhesion.

* * *

While the trial court correctly concluded that the arbitration provision is substantively unconscionable, the trial court erred by concluding that the arbitration clause is procedurally unconscionable. Although none of the Property Owners had any past training in oil and gas leases, many had executed oil and gas leases in the past; were given time to review these leases and ask questions prior to signing, some proposing amendments to the leases. Some simply *82 did not read the leases including the arbitration provision or did not understand the arbitration clause, but conceded they could have sought outside counsel before signing and chose not to do so. In order for an arbitration provision to be held unconscionable, both substantive and procedural unconscionability must be present. Because the Property Owners only demonstrated that the arbitration clause was substantively unconscionable, the arbitration clause is deemed valid." *New Hope*, ¶¶ 40, 48-9, 51.

4. *Gardner v. Oxford Oil Co.,* 7th Dist. No. 12MO7, 2013-Ohio-5885.

Background: Landowner brought declaratory judgment action against oil and gas lessee alleging all of lessee's right, title, and interests in and to the property had expired. The trial court granted summary judgment in favor of landowner.

Holdings:

1 An assignment of all of lessee's oil and gas rights, except the deep rights under the lease, did not constitute a novation, and thus, the deep rights remained subject to the terms of the original lease agreement.

2 The lease terminated after lessee ceased producing oil and gas in paying quantities from the well in question, or failed to continue to maintain operations on any other part of the leasehold;

3 The landowner did not have a duty to continue production after taking ownership of oil and gas well so as to preserve lessee's leasehold interest.

4 The landowner's use of well to provide gas to buildings on his property was incidental to the purpose of the lease, and did nothing to preserve lessee's deep rights.

5 The landowner's incidental use of well did not constitute operations under the terms of the lease, and did nothing to preserve lessee's deep rights.

5. *Riggs v. Patriot Energy Partners, L.L.C.,* 7th Dist. No. 11CA877, 2014-Ohio-558.
Background: Oil and gas lessors filed suit against oil and gas lessee and its assignee, asserting numerous claims, including rescission of the oil and gas leases and quiet title. Assignee filed motion to stay proceedings pending arbitration, which the trial court granted.
Holdings:
1 The lessors' miscellaneous claims did not involve title to or possession of real estate so as to fall within statutory exception to a contractual agreement to arbitrate.
2 The quiet title claim was not arbitrable.
3 Issues relating to validity of assignment of deep rights by lessee to assignee were matters for arbitration.
4 The arbitration clause was neither substantively nor procedurally unconscionable and therefore enforceable.

> "On appeal, the Property Owners contend that the arbitration clauses are unenforceable because their claims are exempt from arbitration pursuant to R.C. 2711.01(B)(1); that the clauses are unconscionable; and that the clauses should not be enforced because the leases themselves, or the assignments of the leases are invalid under a number of theories.
>
> Upon review, the Property Owners' arguments are meritless, with the exception of the second assignment of error, in part. The Property Owners have not proven both substantive and procedural unconscionability; thus the arbitration clause is valid and enforceable. Any issues concerning the validity of the leases or the assignments are to be resolved via arbitration; those issues have no bearing on the enforceability of the arbitration clause. Moreover, the oil and gas company assignees to the leases had the right to seek arbitration, despite the fact that they were nonsignatories to the original lease agreements.
>
> Finally, although most of the Property Owners' claims are subject to arbitration pursuant to R.C. 2711.01, the trial court erred by submitting the quiet title claim to arbitration because it is a controversy involving title to or possession of real estate and does not fall under any of the listed exceptions in R.C. 2711.01(B)(1). In cases where some claims are exempt from arbitration and others are not, trial courts properly stay claims exempt from arbitration until the claims subject to arbitration are resolved. In this case, the trial court properly required arbitration of those claims that do not purely involve the ultimate question of title; thus, until those claims are resolved via arbitration, the quiet title claim must be stayed in the trial court. Accordingly, the judgment of the trial court is affirmed in part, reversed in part and remanded. *Riggs,* ¶¶ 1-3.

6. Price v. K.A. Brown Oil & Gas, L.L.C., 7th Dist. Case No. 13MO13 2014-Ohio-2298.
Background: Lessors brought declaratory judgment action against lessee related to lack of royalty payments pursuant to oil and gas lease. The trial court granted summary judgment in favor of lessors, determining that lease had terminated.
Holding: The lessors did not waive termination provisions of lease by accepting de minimis royalty payments or by accepting free gas in excess of terms of lease.

7. Pollock v. Mooney, 7th Dist. No. 13MO9, 2014-Ohio-4435.
Background: The appellee-surface fee owner claimed the appellant's severed one-half royalty interest had vested with the surface fee owne because the severed interest had been extinguished pursuant to the Ohio Marketable Title Act. The trial court granted surface fee owner summary judgment.
Holding: A royalty interest in an oil and gas lease is a personalty interest and subject to MTA.

"Ohio's Marketable Title Act is found in R.C. 5301.47–5301.56. It acts as a 40–year statute of limitations for bringing claims against a title of record. *Collins v. Moran,* 7th Dist. No. 02 CA 218, 2004–Ohio–1381, ¶ 20. The MTA is meant to 'simplify and facilitate land title transactions by allowing persons to rely on a record chain of title[.]' *Semachko v. Hopko,* 35 Ohio App.2d 205, 301 N.E.2d 560 (8th Dist.1973), paragraph one of the syllabus.

The MTA extinguishes any interest existing prior to the root of title unless the interest is:

> (a) specifically stated or identified in the root of title;
> (b) specifically stated or identified in one of the muniments of the chain of record title within forty years after the root of title;
> (c) recorded pursuant to R.C. 5301.51 and 5301.52;
> (d) one of the other exceptions provided for in R.C. 5301.49;
> (e) one of the rights that cannot be barred by the Marketable Title Act provided for in R.C. 5301.53.

Id. at paragraph two of the syllabus.

'Marketable record title' is 'a title of record * * * which operates to extinguish such interests and claims, existing prior to the effective date of the root of title * * *.' R.C. 5301 .47(A). 'Root of title' is 'that conveyance or other title transaction in the chain of title of a person, purporting to create the interest claimed by such person, upon which he relies as a basis for the marketability of his title, and which was the most recent to be recorded as of a date forty years prior to the time when marketability is being determined.' R.C. 5301.47(E). The 'root of title' is effective on the date on which it is recorded. R.C. 5301.47(E)." *Pollock,* ¶12-14.

"[R]ecord marketable title shall be held by its owner and shall be taken by any person dealing with the land free and clear of *all interests, claims, or charges whatsoever,* the existence of which depends upon any act, transaction, event, or omission that occurred prior to the effective date of the root of title. *All such interests,* claims, or charges, *however denominated,* whether legal or equitable, present or future, whether such interests, claims, or charges are asserted by a person sui juris or under a disability, whether such person is within or without the state, whether such person is natural or corporate, or is private or governmental, are hereby declared to be null and void. (Emphasis added.); R.C. 5301.50. The MTA does not differentiate between different types of interests. It applies to *all* interests." *Pollock*, ¶21.

"An interest passing through probate court does qualify as a title transaction that has been recorded. Pursuant to R.C. 5301.47(B), 'records' include 'probate and other official public records, as well as records in the office of the recorder of the county in which all or part of the land is situate[d].' And ' '[r]ecording,' when applied to the official public records of the probate or other court, includes filing.' R.C. 5301.47(C). These definitions apply to Revised Code sections 5301.47 through 5301.56. R.C. 5301.47. Thus, filing a probate court judgment would satisfy the recording element of R.C. 5301.49(D)." *Pollock*, ¶26.

8. *Coldwell v. Moore*, 7t h Dist. No. 13CO27, 2014-Ohio-5323

Background: Purchaser brought action against vendor for specific performance of purchase agreement for sale of mineral rights in subsurface land parcels. Following bench trial, the trial court entered judgment in favor of vendor, rescinding purchase agreement.

Holding: The term 'minerals' as used in deed conveying right to parcels, included oil and gas.

Cases pending before the Ohio Supreme Court

1. *Dodd v. Croskey*, 7th Dist. No. 12 HA 6, 2013-Ohio-4257, appeal allowed, 138 Ohio St.3d 1432, 2014-Ohio-889 (2014) and appeal allowed, 140 Ohio St.3d 1406, 2014-Ohio-3708 (2014); Sup.Ct. No. 2013-1730.

-oral argument held August 20, 2014 on Proposition of Law I only, Court had denied cross-appeal.

-after oral argument held, Court accepted cross-appeal on Proposition of Law II; merits fully briefed, second oral argument not scheduled as of **February 3, 2015**.

7th District Opinion

Background: Surface fee owner and severed mineral rights owners filed cross motions for summary judgment; trial court granted summary judgment for severed mineral rights holders finding that the mineral rights were not abandoned.

Holding: "The 2009 deed that transferred the surface rights to appellants is not a title transaction within the meaning of R.C. 5301.56. Any deficiency in the notice provided to

the appellees of appellants' intent to have the mineral interests found to be abandoned is harmless because the publication notice reached at least one appellee, who filed an affidavit attempting to preserve the mineral interest. That affidavit complied with R.C. 5301.56(H) and accordingly preserved the mineral interests for appellees. Appellants did not provide any evidence to the trial court to dispute the information in the affidavit that the individuals listed in the affidavit are not mineral interest holders. Based upon those findings, we uphold the judgment of the trial court for appellees." *Dodd*, ¶ 3.

Propositions of Law:
No. I: Ohio Revised Code Section 5301.56(B)(3) requires a showing by a party claiming the preservation of a prior mineral interest of a "savings event" that occurred in the 20 years prior to notice being served and not a "savings event" after the date of the notice being served.
No. II: A restatement of a prior mineral reservation in later deeds is a "title transaction" within the meaning of §5301.56, Ohio Revised Code

2. *Walker v. Shondrick-Nau*, 7th Dist. No. 13 NO 402, 2014-Ohio-1499, appeal allowed, 140 Ohio St.3d 1414, 2014-Ohio-3785 (2014); Sup.Ct. No. 2014-0803.
-oral argument set for June 23, 2015

7th District Opinion
Background: Surface fee owner and severed mineral rights owners filed cross motions for summary judgment; trial court granted summary judgment for surface fee holder finding that the mineral rights were abandoned.
Holdings: Reiterated holding in *Dodd* regarding definition of title transaction; the 1989 ODMA controlled and is an automatic, self-executing statute; and declined to discuss constitutionality issue which was raised for the first time on appeal.

Appellant's Propositions of Law:
No. I: The 2006 version of the DMA is the only version of the DMA to be applied after June 30, 2006, the effective date of said statute.
No. II: To establish a mineral interest as "deemed abandoned" under the 1989 version of the DMA, the surface owner must have taken some action to establish abandonment prior to June 30, 2006. In all cases where a surface owner failed to take such action, only the 2006 version of the DMA can be used to obtain relief.
No. III: To the extent the 1989 version of the DMA remains applicable, the 20-year look-back period shall be calculated starting on the date a complaint is filed which first raises a claim under the 1989 version of the DMA.
No. IV: For purposes of R.C. 5301.56(B)(3), a severed oil and gas mineral interest is the "subject of" any title transaction which specifically identifies the recorded document creating that interest by volume and page number, regardless of whether the severed mineral interest is actually transferred or reserved.
No. V: Irrespective of the savings events in R.C. 5301.56(B)(3), the limitations in R.C. 5301.49 can separately bar a claim under the DMA.
No. VI: The 2006 version of the DMA applies retroactively to severed mineral interests

created prior to its effective date.

Amicus
No. I: The 2006 version of R.C. 5301.56 controls in the ODMA proceedings and quiet title action initiated by Plaintiff after 2006.

No. II: To establish a mineral interest as actually vested in the surface owner under the 1989 version of the ODMA, the surface owner must have taken some action to establish abandonment prior to June 30, 2006. In all cases where a surface owner failed to take such action to acquire the mineral interest, only the 2006 version of the DMA can be used to obtain relief.

No. III: The 2006 version of the ODMA applies retrospectively to severed mineral interests created prior to its effective date

3. *Chesapeake Exploration, L.L.C. v. Buell,* United States District Court, Southern District of Ohio, Eastern Division, No. 2:12–CV–916; Sup.Ct. No. 2014-0067.

-oral argument held August 20, 2014; opinion pending as of **February 3, 2015.**
-notices of new relevant authority filed after argument noting *Eisenbarth* and (below) amendment to R.C. 5301.09 passed by the General Assembly in December 2014.

Certified Question of State Law:

I. Is the recorded lease of a severed subsurface mineral estate a title transaction under the ODMA, Ohio Revised Code 5301.56(5)(3)(a)?

II. Is the expiration of a recorded lease and the reversion of the rights granted under that lease a title transaction that restarts the twenty-year forfeiture clock under the ODMA at the time of the reversion?

R.C. 5301.09, Effective March 23, 2015 (~~deletions~~ and additions)

~~All~~ In recognition that such leases and licenses create an interest in real estate, all leases, licenses, and assignments thereof, or of any interest therein, given or made concerning lands or tenements in this state, by which any right is granted to operate or to sink or drill wells thereon for natural gas and petroleum or either, or pertaining thereto, shall be filed for record and recorded in such lease record without delay, and shall not be removed until recorded. No such lease or assignment thereof shall be accepted for record after September 24, 1963, unless it contains the mailing address of both the lessor and lessee or assignee. If the county in which the land subject to any such lease is located maintains permanent parcel numbers or sectional indexes pursuant to section 317.20 of the Revised Code, no such lease shall be accepted for record after December 31, 1984, unless it contains the applicable permanent parcel number and the information required by section 317.20 of the Revised Code to index such lease in the sectional indexes; and, in the event any such lease recorded after December 31, 1984, is subsequently assigned in whole or in part, and the county in which the land subject thereto is located maintains records by

microfilm or other microphotographic process, the assignment shall contain the same descriptive information required to be included in the original lease by this sentence, but the omission of the information required by this section does not affect the validity of any lease. Whenever any such lease is forfeited for failure of the lessee, ~~his~~ the lessee's successors or assigns to abide by specifically described covenants provided for in the lease, or because the term of the lease has expired, the lessee, ~~his~~ the lessee's successors or assigns, shall have such lease released of record in the county where such land is situated without cost to the owner thereof.

No such lease or license is valid until it is filed for record, except as between the parties thereto, unless the person claiming thereunder is in actual and open possession.

4. *Corban v. Chesapeake Exploration, L.L.C.,* United States District Court, Southern District of Ohio, Eastern Division, No. 2:13–CV–246; Sup.Ct. No. 2014-0804.

-merits fully briefed, oral argument set for May 6, 2015

-notice of relevant authority filed after briefing noting amendments to R.C. 5301.09.

Certified Question of State Law:

I. Does the 2006 version or the 1989 version of the ODMA apply to claims asserted after 2006 alleging that the rights to oil, gas, and other minerals automatically vested in the surface land holder prior to the 2006 amendments as a result of abandonment?

II. Is the payment of a delay rental during the primary term of an oil and gas lease a title transaction and "savings event" under the ODMA?

5. *Swartz v. Householder*, 7th Dist. Nos. 13 JE 24, 13 JE 25, 2014-Ohio-2359; appeal allowed, 140 Ohio St.3d 1506, 2014-Ohio-5098 (2014) (Sup.Ct. No. 2014-1208) and appeal allowed sub nom. *Shannon v. Householder*, 140 Ohio St.3d 1506, 2014-Ohio-5098 (2014) (Sup.Ct. No. 2014-1209)

-Both cases sua sponte held for decision and briefing stayed pending decision in *Walker v. Shondrick-Nau*

7th District Opinion

Background: Two separate surface owners filed complaint for declaratory judgment and quiet titled against mineral interest holder, seeking declaration that mineral interest under their property had been abandoned the ODMA. The trial court granted surface owners summary judgment. Mineral interest holder appealed and appeals were consolidated.

Holdings: The 1989 ODMA applied to surface owners' claim that mineral interest holder abandoned his interest; and mineral interest holder waived issue for review that the 1989 version violated state constitution.

6. *Clyde A. Hupp, et al. v. Beck Energy Corporation and XTO Energy, Inc*., 7th Dist. No. 12MO6, 13MO2,3 & 11; 2014-Ohio-4255; appeal allowed 141 Ohio St.3d 1454, 2015-Ohio-239; Sup.Ct. No. 2014-1933.

-appeal accepted January 28, 2015 as to Propositions of Law I & II; Pfeiffer and O'Neil would accept Proposition of Law III.

-sua sponte consolidated with *State ex rel. Claugus Family Farm, L.P.*

7th District Opinon

Background: Oil and gas lessors brought proposed class action against lessee, seeking declaratory judgment and quiet title. Purported assignee of leases sought to intervene. The trial court granted summary judgment in favor of named lessors, granted motion for class certification, entered order more specifically defining the class, and denied purported assignee's motion to intervene. Lessee and assignee appealed.

Holdings:

1 Lessee did not waive purported right to determination regarding class certification prior to determination of merits.

2 On issue of first impression, rule against one-way intervention did not apply to class actions seeking only injunctive or declaratory relief.

3 Trial court was not required to conduct evidentiary hearing on class certification and sua sponte expansion of class definition was warranted.

4 Oil and gas lease was not a no-term, perpetual lease, and therefore did not violate public policy.

5 Lease contained no implied covenant of reasonable development.

Propositions of Law:

No. 1: An oil and gas lease which can be maintained indefinitely without development is a perpetual lease that is void as against public policy. That a lease purports to establish a fixed term is of no consequence if the duration of that term can be extended without development.

No. 2: Where the express terms of an oil and gas lease effectively allow the lessee to postpone development indefinitely, and any stated time limits can be unilaterally extended by the lessee in perpetuity without any development, the lease is subject to an implied covenant of reasonable development notwithstanding a general disclaimer of all implied covenants.

Not Accepted:

Proposition of Law No. 3: In a Civ.R. 23(B)(2) class action challenging the validity of oil and gas leases, after the trial court has declared the leases void, it is error for an appellate court to retroactively toll the leases of absent plaintiff class members without notice, to a date before any motion to toll those leases was filed, and before the class was certified.

7. State ex rel. Claugus Family Farm, L.P. v. Seventh Dist. Court of Appeals, Sup.Ct. No. 2014-0423.

-mandamus and prohibition complaint filed against the court seeking peremptory writs prohibiting the court from enforcing and mandating the court vacate a tolling order issued September 26, 2013 as to the Relator as a proposed member of a Civ.R. 23(B)(2) class certified and defined by the trial court on June 10, 2013 in *Hupp v. Beck.* The trial court held that the form lease at issue was void ab initio and that Beck had entered into hundreds of such leases in Monroe and other Ohio counties. The trial court granted Beck's motion to toll the terms of the lease of the four named plaintiffs pending appeal; the Seventh District extended the tolling order to the entire class.

-Ohio Supreme Court declined to issue peremptory writ, instead sua sponte granting an alternative writ setting a briefing schedule.

-motion to dismiss remains pending; merits fully briefed; consolidated with *Hupp*.

Jurisdictional Memoranda pending before the Ohio Supreme Court:

1. *Eisenbarth v. Reusser*, 7th Dist. No. 13MO10, 2014-Ohio-3792; Sup.Ct. No. 2014-1767.

- jurisdictional issue fully briefed; decision pending as of **February 3, 2015**.

7th District Opinion

Background: Lessors of mineral interest brought declaratory judgment action against one-half owners of mineral interest, seeking determination that mineral reservation did not reserve right to bonus money and that owners' ownership interest in mineral interest was deemed abandoned. The trial court granted summary judgment in favor of owners.

Holdings:

1 Oil and gas lease could be a title transaction that constituted a savings event.

2 Look-back period was 20 years from enactment of applicable version of ODMA, rather than floating 20-year period.

3 Deed's reservation of mineral interest entitled owners to one-half of bonus money.

Proposed Propositions of Law

No. 1: The 1989 DMA was prospective in nature and operated to have a severed oil and gas interest "deemed abandoned and vested in the owner of the surface" if none of the savings events enumerated in ORC §5301.56(B) occurred in the twenty (20) year period immediately preceding any date in which the 1989 DMA was in effect.

No. 2: Assuming, arguendo, that the 1989 DMA operates on a "fixed" twenty (20) year look-back period from the date of enactment, an oil and gas lease is not a "title transaction" within the meaning of ORC §5301.47(F) and Appellees' interest has nonetheless been abandoned.

Amicus Proposed Proposition of Law: The 1989 DMA was prospective in nature and operated using continuous twenty-year review periods.

2. ***Farnsworth v. Burkhart***, 7th Dist. No. 13MO14, 2014-Ohio-4184; Sup.Ct. No. 2014-1909.

-jurisdictional issue fully briefed; decision pending as of **February 3, 2015**.

7th District Opinion

Background: Surface owners brought quiet title action against purported mineral holders, seeking determination that mineral holders had abandoned their interests. The trial court granted summary judgment in favor of surface owners.

Holdings:

1 The 2006 ODMA did not apply retroactively.

2 Under the 1989 ODMA a fixed look-back period rather than rolling look-back period applied.

3 Recorded deed transferring surface estate was not title transaction regarding mineral rights.

Proposed Propositions of Law

No. 1: The 1989 version of R.C. § 5301.56, the Ohio Dormant Minerals Act ("Former DMA"), was prospective in nature; division (B) applies to any 20-year period that elapses while the Former DMA was is in effect.

No. 2: A Claim to Preserve filed and recorded under division H(I)(a) of the current version of R.C. § 5301.56 ("Current DMA") does not have the same effect as a claim filed and recorded under division B(3)(e) of the Current DMA.

3. ***Tribett v. Shepherd***, 7th Dist. No. 13 BE 22, 2014-Ohio-4320; Sup.Ct. No. 2014-1966.

-jurisdictional issue fully briefed; decision pending as of **February 3, 2015**.

7th District Opinon

Background: After surface owners published a notice of abandonment of mineral interest in a local newspaper, heirs of former owners filed an affidavit to preserve the mineral interests that they allegedly inherited. Surface owners filed an action for quiet title and declaratory judgment. The trial granted summary judgment in part for each party.

Holdings:

1 Transfers of land by deed reciting prior owner's previous reservation of mineral interests were not "savings events" under ODMA.

2 The 1989 ODMA applied to surface owners' abandonment claim, and the limitations period only began to run upon expiration of three-year grace period provided for in the statute.

3 The 1989 ODMA does not violate the Retroactive Laws provision of the state constitution.

4 The 1989 ODMA's look-back period was a fixed period from the date of enactment, as extended by the three-year grace period.

Proposed Propositions of Law

No. I: The 2006 version of the DMA is the only version of the DMA to be applied after June 30, 2006 (the effective date of said statute) because the 1989 version of the DMA was not self-executing.

No. II: To establish a mineral interest as "deemed abandoned" under the 1989 version of the DMA, the surface owner must have taken some action to establish abandonment prior to June 30, 2006. In all cases where a surface owner failed to take such action, only the 2006 version of the DMA can be used to obtain relief.

No. III: Interpreting the 1989 version of the DMA as "self-executing" violates the Ohio Constitution.

No. IV: A severed oil and gas mineral interest is the "subject of" any title transaction which specifically identifies the recorded document creating that interest by volume and page number.

No. V: Irrespective of the savings events in R.C.5301.53(B)(3), the limitations in R.C. 5301.49 can independently bar a claim under the DMA.

No. VI: If a Court applies the 1989 version of the DMA in a lawsuit filed after June 30, 2006, the 20-year look-back period shall be calculated starting on the date a complaint is filed which first raises a claim under the 1989 version of the DMA.

No. VII: A claim brought under the 1989 version of the DMA must have been filed within 21 years of March 22, 1989 (or, at the very latest, March 22, 1992), or such claim is barred by the statute of limitations in R.C. 2305.04.

4. *Dahlgren v. Brown Farm Properties L.L.C.*, 7th Dist. No. 13 CA 896, 2014-Ohio-4001; Sup.Ct. No. 2014-1655.

-two notices of appeal filed; Dahlgren appellants' jurisdictional issue fully briefed; in second appeal only Chesapeake's memorandum in support filed.

-decision pending as of **February 3, 2015**.

7th District Opinion

Background: Mineral rights owners brought declaratory action against surface owners and lessor after a notice of intent to declare mineral rights abandoned was sent. Surface owners brought counterclaim for declaration that the mineral interests were abandoned. The trial court entered judgment in favor of mineral rights owners. Surface owners appealed.

Holdings: Prior ruling that the 1989 ODMA could still be used to declare mineral interests abandoned had stare decisis effect on instant action, and would not address constitutionality issue.

Proposed Propositions of Law

No. 1: The 2006 amendment of Ohio's "dormant mineral" statute was remedial in nature and intended to apply to facts occurring before its enactment. In suits filed after June 30, 2006 (the effective date of the amendment), courts should apply the new version of the statute, rather than the old version.

No. 2: Under the 1989 version of Ohio's "dormant mineral" statute, the twenty year dormancy period is measured from the date suit was commenced to determine title to the minerals.