

HUPP V. BECK ENERGY CORP.: THE FUTURE OF OIL AND NATURAL GAS DEVELOPMENT IN OHIO

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I. INTRODUCTION

On July 12, 2012, Judge Ed Lane of the Court of Common Pleas for Monroe County, Ohio, raised eyebrows throughout the oil and gas industry when he granted six plaintiffs their motion for summary judgment in the *Hupp v. Beck Energy Corp.* case.¹ Judge Lane held that the plaintiffs' mineral leases with Beck Energy Corporation were perpetual leases, and therefore invalid as against public policy.² Additionally, on February 8, 2013, Judge Lane upheld a class action lawsuit for over 200 lessors with Beck Energy.³ The ruling, if affirmed on appeal, has the potential to turn Ohio's oil and gas industry on its head.⁴

This Article will explore various aspects of the *Hupp* decision. Part II will begin with an explanation and a recitation of the recent boom of natural gas production in the Marcellus Shale, which is partially located in Ohio. The discussion of the changing circumstances in that area will explain why attorneys should expect a rise in litigation from lessors challenging the validity of the oil and gas leases they signed prior to the boom. Part III will review the history and the use of habendum clauses and delay rentals in mineral leases, discuss how the courts have construed those clauses in the past, and then explain how those clauses establish the length of the lease and the obligations of the lessee. Part IV will provide an

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¹ *Hupp v. Beck Energy Corp.*, No. 2011-345, at 29 (C.P. Monroe Cnty., filed July 12, 2012), http://api.ning.com/files/Tj*yr2FU0NPge6NHN8Ps6cVJKrk1I54UJw-n3iCeLTnZzV47PI8cE7cjSOXPuzEzjLPI9Awo6TUa2gI3*j2utn-cJDI1ts9Q/beckdecision.pdf.

² *Id.*

³ *Class Action Suit Against Beck Energy Upheld After Challenge from XTO*, MONROE COUNTY BEACON (Feb. 20, 2013, 4:41 PM), http://www.mcbeacon.com/index.php?option=com_content&view=article&id=5247:class-action-suit-against-beck-energy-upheld-after-challenge-from-xto&catid=31:general&Itemid=149.

⁴ See Andrew Mills Holford, *Oil and Gas Leases, Public Policy, and One Trial Court's Recent Opinion*, COLUMBUS B. L. Q., Winter 2013, at 13.

overview of *Hupp* and review the holding. Part V will examine case law on which the *Hupp* court relied in reaching its holding, as well as case law on which the court should have relied. Part VI will apply the facts in *Hupp* to the case law discussed in Part V to explain why the appellate court should reverse the holding in *Hupp*. Part VII will explore the possible fallout if *Hupp* is not reversed and set forth brief recommendations for landowners, oil and gas producers, and attorneys reviewing their oil and gas leases. Part VIII will conclude this Article with a prediction on how the appellate court will decide the case.

II. THE MARCELLUS SHALE

A. Pre-Hydraulic Fracturing and Horizontal Drilling

Ohio sits atop two “super giant” gas fields, the Marcellus Shale and the Utica Shale.⁵ A super giant is the largest of the natural gas fields.⁶ To be classified as a super giant, a field must contain more than 850 billion cubic metres of natural gas.⁷ Geology professors have estimated that the Marcellus Shale might contain more than 500 trillion feet of cubic gas.⁸

Although geologists have long known about the Marcellus Shale, very few were excited about its potential as a major source of natural gas.⁹ Most of the wells drilled through the Marcellus Shale prior to the implementation of horizontal drilling and hydraulic fracturing produced some gas, but because of the large geographic dispersion of the natural gas, its yield was not in sufficient quantity to recoup the cost.¹⁰ Since the Marcellus is nearly a mile or more below the surface, it is a very expensive target.¹¹ A traditional vertical well can exceed one million dollars to drill; horizontal wells are even more expensive.¹² To be successful, wells must yield large volumes of gas to pay for the drilling costs and generate a profit.¹³

⁵ See Hobart King, *Marcellus Shale – Appalachian Basin Natural Gas Play*, GEOLOGY, <http://geology.com/articles/marcellus-shale.shtml> (last visited Feb. 24, 2013).

⁶ See *Supergiant Natural Gas Field*, ENCYCLOPEDIA BRITANNICA, <http://www.britannica.com/EBchecked/topic/574305/supergiant-natural-gas-field> (last visited Apr. 10, 2014).

⁷ *Id.*

⁸ King, *supra* note 5.

⁹ *Id.*

¹⁰ *See id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

Before 2000, the yields from producing wells in the Marcellus region were often unimpressive.¹⁴ Since then, experimentation with horizontal drilling and hydraulic fracturing methods in Texas has led to much higher production rates than in the old wells.¹⁵ Horizontal drilling starts the same as vertical drilling, but it moves laterally instead of straight down like a vertical well.¹⁶ While a vertical well is cheaper to drill than a horizontal well, it is also less productive.¹⁷ Hydraulic fracturing uses a mixture of sand, water, and chemicals in order to stimulate the gas trapped within the shale and make it flow.¹⁸ The combination of these two innovations increases the yield of wells.¹⁹ Consequently, this has led to new interest in the Marcellus Shale region by natural gas producers.²⁰

B. Post-Hydraulic Fracturing and Horizontal Drilling

The increased interest in the Marcellus Shale has caused leasing bonuses to skyrocket.²¹ In 2005, natural gas companies were not interested in leasing in the Marcellus Shale region and signing bonuses were only a few dollars per acre.²² In 2006, however, speculators began to appreciate the enormous potential for developing the Marcellus Shale and began paying higher signing bonuses, some as high as \$100 per acre.²³ By 2008, horizontal drilling and hydraulic fracturing technology proved to be effective in the Barnett Shale,²⁴ and more investors began leasing in the Marcellus region.²⁵ This caused area signing bonuses to rise from a few hundred dollars per acre to over \$2,000 per acre.²⁶ In 2008, there were 161 Marcellus Shale wells drilled in Pennsylvania;²⁷ by 2011, that number

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ Ken Silverstein, *Shale Gas Boom at 'Tip of Iceberg'*, FORBES, Oct. 10, 2013, <http://www.forbes.com/sites/kensilverstein/2013/10/30/shale-gas-boom-at-tip-of-iceberg/>.

¹⁷ *Id.*

¹⁸ *See id.*

¹⁹ *See King, supra* note 5.

²⁰ *Id.*

²¹ *See id.*

²² *Id.*

²³ *Id.*

²⁴ The Barnett Shale is located in North Central Texas. Mark Airhart, *The Barnett Shale Gas Boom: Igniting a Hunt for Unconventional Natural Gas Resources*, GEOLOGY, <http://geology.com/research/barnett-shale-gas.shtml> (last visited Apr. 10, 2014).

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

exploded to 2,073.²⁸ In Ohio, the demand for Marcellus Shale acreage caused lease bonuses to climb as high as \$5,200 per acre in 2012.²⁹

III. THE HISTORICAL DEVELOPMENT OF THE HABENDUM CLAUSE AND DELAY RENTALS

In 1859, “Colonel” Edwin Drake drilled the first commercial well in Titusville, Pennsylvania.³⁰ Since then, landowners have contracted with oil and gas companies to reap the financial benefits of drilling for the oil and gas hidden beneath their properties in the form of oil and gas leases.³¹ Oil and gas leases have evolved significantly over time.³² At first, leases between landowners and oil and gas companies usually granted the lessee company the right to drill for oil and gas for a finite period, known as the “primary term.”³³ Leases in this earliest era generally set long definite terms, ranging anywhere from ten to ninety-nine years.³⁴ If production started late in the term of those leases, or extended beyond the term’s end, then a definite term in the contract put the lessee at a disadvantage because the lessee would not get the opportunity to exhaust all of the minerals.³⁵ To remedy this, leases began to include in the habendum clause not only a definite term of years, but also an “as long as” or “so long as” clause that specified that the lease would continue “so long as” the product was being produced from the land in paying quantities.³⁶ The courts interpreted these clauses to establish a primary term, in which the lessee may develop the property, and an option for a secondary term, which would last so long as the producer continued to produce the mineral.³⁷ Consequently, the oil and gas companies were allowed to collect the long-term value of the lease and recoup the money spent in developing the property.³⁸

²⁸ *Id.*

²⁹ Casey Junkins, *Town Hall Set for Shale Development*, INTELLIGENCER (Jan. 16, 2012), <http://www.theintelligencer.net/page/content.detail/id/564470/Town-Hall-Set-For-Shale-Development.html?nav=510>.

³⁰ Edwin Laurentine Drake, ENCYCLOPEDIA BRITANNICA, <http://www.britannica.com/EBchecked/topic/170909/Edwin-Laurentine-Drake> (last visited Feb. 24, 2013).

³¹ *Hite v. Falcon Partners*, 13 A.3d 942, 946 (Pa. Super. Ct. 2011).

³² *Id.*

³³ *Id.*

³⁴ 2 NANCY SAINT-PAUL, SUMMERS OIL AND GAS § 14:1 (3d ed. 2014).

³⁵ *Hite*, 13 A.3d at 946.

³⁶ 2 SAINT-PAUL, *supra* note 34; Paying quantities in the thereafter provision of the habendum clause of an oil and gas lease means production of quantities of oil or gas sufficient to yield a profit over the operating expense to the lessee, even though the drilling or equipping costs are not recovered, and even if the undertaking as a whole may result in a loss. Douglas Hale Gross, *Meaning of “Paying Quantities” in Oil and Gas Lease*, 43 A.L.R. 3d 8 Part. I § 2 (1972).

³⁷ *Hite*, 13 A.3d at 946.

³⁸ *Id.*

A. The “No Term” Leases

In addition to the primary term, early lease forms usually contained a provision explaining the lessee’s obligation to immediately develop the property or suffer forfeiture.³⁹ If the lessee did not write an express provision to develop the land into the lease, then the courts would recognize the existence of an implied covenant to develop the land.⁴⁰ These express or implied covenants arose because the removal of the obligation to produce the land on the part of the lessee deprives the landowner of royalty payments. These royalty payments are a primary part of the consideration that induces a landowner to enter into the lease in the first place.⁴¹

A principal goal of an oil and gas producer is to have the option to drill, but not be required to do so.⁴² Because the courts developed a theory of an implied covenant to develop the land, the oil and gas companies could no longer specify a definite term of a large number of years, and then wait several years to start mining.⁴³ In order to keep a long primary term, but not violate any implied covenant to develop, the oil and gas companies began creating leases that allowed them to extend the period of exploration so long as they paid delay rentals to the lessors.⁴⁴ This was often achieved through the use of a habendum clause that conveyed the premises “on the following conditions. . . .” one of which would be payment of a rental.⁴⁵ This type of lease was known as a “no term lease.”⁴⁶ Oil and gas companies preferred this type of arrangement because it allowed them to extend the primary period for as long as they considered it worth paying the delay rentals.⁴⁷ An example of a “no term” lease is as follows:

To have and to hold the above premises unto the parties of the second part, their heirs and assigns, on the following conditions In case no well is completed within two years from this date, then this grant shall immediately become null and void as to both parties: provided, *that the second party may prevent such forfeiture from year to year by paying to the first party annually in advance eighteen*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ See JOHN S. LOWE ET AL., CASES AND MATERIALS ON OIL AND GAS LAW 337 (5th ed. 2008).

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Hite*, 13 A.3d at 946-47.

⁴⁵ *Id.* at 947.

⁴⁶ *Id.*

⁴⁷ See *id.*

*and 75/100 dollars, at her residence, until such well is completed.*⁴⁸

“No term” leases came into general use in Ohio as early as 1895.⁴⁹ However, those leases fell out of favor as some courts held that they were unenforceable against the landowner because they did not fix a time beyond which the lessee could no longer delay development.⁵⁰ Other courts held that the lease still held an implied duty to drill upon the premises within a reasonable time, and that, after giving notice, the landowner could seek forfeiture of the lease for breach of that implied duty.⁵¹ This judicial development destroyed the “no term” lease’s utility for the oil and gas companies.⁵²

B. “Rental Paid” Leases

Another way oil and gas companies tried to circumvent the implied covenant to develop was to create leases with fixed terms and a rental paid clause.⁵³ An example of this type of lease is as follows:

The party of the second part to have and to hold the said premises for and during the term of two years from the date hereof, and as much longer as oil or gas is found in paying quantities, *or the rental paid thereon*. It is further agreed that the party of the second part shall commence a well on the above-described premises within thirty days from the date above, and complete it within ninety days, or, in default thereof, pay to the party of the first part for further delay an annual rental of sixty dollars, payable quarterly in advance, on the premises from the time above specified for completing a well until such well shall be completed. . . . It shall be optional with the lessee at any time either to drill said well, to pay said rental, or to forfeit and surrender said lease.⁵⁴

The difference between this “rental paid” lease and the “no term” lease is subtle and mostly semantic. The “no term” lease provides that the

⁴⁸ *Lowther Oil Co. v. Guffey*, 43 S.E. 101, 101 (W. Va. 1903) (emphasis added).

⁴⁹ 2 SAINT-PAUL, *supra* note 34.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *W. Pa. Gas Co. v. George*, 28 A. 1004, 1004 (Pa. 1894) (emphasis added).

rights to the minerals will terminate if the oil and gas producer does not drill a well, but the lease can be saved and the term extended for an unspecified amount of time by paying a fee to the lessor. The “rental paid” lease is different because it expressly creates three options: the lessee can produce the oil or gas, pay the rental, or forfeit the lease. Literal interpretation of this clause would allow the lessee to postpone development of the premises by the payment of delay rentals for as long as the lessee needed.⁵⁵ When the courts interpreted a lease as a “paid rental” lease rather than a “no term” lease, they uniformly held that the rental referred to in that type of clause was not the delay rentals provided for in the drilling clause, but rather the gas or oil rentals paid to the lessee after production.⁵⁶ This meant that the lessee had to start production within the definite term and could not extend the lease indefinitely by paying the delay rentals.⁵⁷ It also meant that the leases were still valid leases, unlike those leases held to be “no term” leases.

C. Complications in Interpreting the “Thereafter” Provision

Problems also arose in the construction of the secondary terms. The secondary term usually contained a “thereafter” provision that extended the lessee’s rights to mine the land for “so long thereafter” as oil or gas is produced on the land.⁵⁸ This meant that if the lessee drilled a producing well within the primary term, then the lessee had the right to continue using that well for so long as he could continue to produce oil or gas from it.

Complications in interpreting the secondary term occurred where the lessee used different tenses of the verb “be” in conjunction with “discovered,” “found,” “obtained,” or “produced,” the one indicating present action and the other either future action or possibility.⁵⁹ Some of the uncertainty of this language has been removed by numerous decisions holding that the words “found” and “discovered” mean the same thing as “obtained” and “produced.”⁶⁰ Once again, the oil and gas producers were trying to extend the primary term as long as possible without losing the

⁵⁵ See 2 SAINT-PAUL, *supra* note 34.

⁵⁶ See *id.*

⁵⁷ *Id.*

⁵⁸ 2 SAINT-PAUL, *supra* note 34, § 14.8.

⁵⁹ *Id.*

⁶⁰ See *Tedrow v. Shaffer*, 155 N.E. 510, 511 (Ohio Ct. App. 1926) (holding the word “found” as used in the lease was synonymous with the word “produced,” since oil in the ground cannot be said to be “found” until it is brought to the surface and when it is brought to the surface it is then “produced”); *Murdock-West Co. v. Logan*, 69 N.E. 984, 984-85 (Ohio 1904) (holding that a lease term that reads “as much longer thereafter as oil or gas shall be found in paying quantities” means that the lessee must actually find oil in paying quantities, and that is the same as obtaining, and producing it in paying quantities); 2 SAINT-PAUL, *supra* note 34.

right to mine the land when they desired to do so. The courts' construction of the language in the "thereafter" provisions limits the oil and gas producers' ability to extend the lease without completely invalidating it.

D. The Delay Rental

The oil and gas producers created delay rental provisions to resolve the issues associated with creating a sufficiently long primary term with a definite termination date while also giving them adequate time to delay in drilling a well. In contrast to extending the primary term indefinitely like the "no term" and the "rental paid" leases, a properly created delay rental will only relieve the obligation to drill within the primary term.⁶¹ The delay rental clause relieved the lessee of the obligation to develop the land immediately upon entering into an agreement with the lessor, but it still limited their rights to the primary term of the lease.⁶²

Generally, courts have held that the presence of a delay rental clause in an oil and gas lease removes an implied obligation to drill a test well.⁶³ Courts reason that express primary terms supersede any implied covenant that conflicts with the terms of the lease, especially where the lease explicitly provides for a way for the lessee to maintain its rights without drilling.⁶⁴ It is now customary for parties to agree to delay rentals allowing the lessee to forego immediate production of the property during the primary term.⁶⁵ These payments are in the same nature as liquidated damages.⁶⁶ The lessee pays delay rentals in lieu of the royalty payment.⁶⁷ An early example of a valid delay rental provision in Ohio read as:

[G]ranted to said Smith all the oil and gas in and under said tract of land and also said tract of land, for the purpose of operating thereon for oil and gas; *said grant to be for the term of 10 years from the date thereof*, and as much longer as oil or gas was found in paying quantities, not exceeding in the whole the term of 20 years from the date thereof. . . .

Provided, however, that if a well be not completed on said premises within four months from the date hereof, unavoidable accidents excepted, then this lease and

⁶¹ See 2 SAINT-PAUL, *supra* note 34.

⁶² See EUGENE KUNTZ, LAW OF OIL AND GAS § 57.2 (Matthew Bender & Co. 2012).

⁶³ See *id.*

⁶⁴ See *id.*

⁶⁵ See *Hite v. Falcon Partners*, 13 A.3d 942, 946-47 (Pa. Super. Ct. 2011).

⁶⁶ See *id.*

⁶⁷ *Id.*

agreement shall be and become null and void *unless the lessee, within each and every year after the expiration of the time above mentioned for the completion of a well, elects to and does pay the sum of fifty dollars (\$50.00) until a well is completed thereon. . . .*⁶⁸

Today, nearly all leases contain a clause that allows the lessee to extend the lease from year to year within the primary term by paying delay rentals prior to the anniversary of the date the lease was signed.⁶⁹

The difference between this lease and a “no term” or a “rental paid” lease is that the delay rental attempts to delay the obligation of the implied covenant to reasonably develop within the length of the primary term. On the other hand, “no term” and “rental paid” leases try to extend the primary term indefinitely. In the delay rental lease discussed above, if the lessee never drills a well, then the lessee’s rights to the minerals end after ten years, even if the lessee pays delay rentals every year. In a “no term” or “rental paid” lease, the right to mine the minerals never ends so long as the lessee continues to make the rental payment as specified. Since the courts have held that “no term” leases are invalid and that the “rental paid” leases actually contemplate royalty payments and not a separate rental payment, today’s oil and gas leases will usually contain a primary term, a delay rental, and a secondary term.⁷⁰

The primary term of modern leases will typically specify the number of years in which the lessee has the right to drill a well. Since the courts have found an implied covenant in the lease to begin producing minerals in a reasonable amount of time, the lease will also usually contain a delay rental provision that states that the lessee may pay a delay rental every year in order to forego production within the primary term of the lease. In addition, the lease will contain a secondary term which states that the lessee’s rights to minerals will extend past the primary term for so long as it is producing minerals on the land. A lessee working under a valid lease with a primary term, a secondary term, and a delay rental provision has until the last day of the primary term to begin drilling so long as the payments under the delay rental provision have been made. If drilling does not occur by the end of the primary term, then the rights to the minerals terminate regardless of continuing delay rentals. On the other hand, if a well is drilled and minerals are being produced at the end of the primary term, then the secondary term will extend the lessee’s rights to the minerals in the land for so long as the lessee continues to produce minerals from the land.

⁶⁸ Kachelmacher v. Laird, 110 N.E. 933, 934 (Ohio 1915) (emphasis added).

⁶⁹ See JOSEPH SHADE, PRIMER ON THE TEXAS LAW OF OIL AND GAS 32 (4th ed. 2008).

⁷⁰ *Id.*

Beck Energy most likely intended to draft leases with the basic structure of a primary term, delay provision, and a secondary term. The following section will examine the success or failure of Beck Energy's approach.

IV. *HUPP V. BECK ENERGY CORP.*

In 2003, Beck Energy Corporation, an Ohio oil and gas producer, began entering into a number of oil and gas leases in Monroe County, Ohio.⁷¹ Some of the bonuses were for amounts as low as fifty dollars per acre.⁷² The leases were primarily identical, varying only in the date of the lease, the names of the lessors, and the description of the land.⁷³ On September 14, 2011, the plaintiffs, landowners in Monroe County who had previously entered into leases with Beck Energy, filed for declaratory judgment and quiet title.⁷⁴ At the time the plaintiffs filed suit, Beck Energy had not drilled any wells on any of the plaintiffs' lands.⁷⁵ In February 2012, the plaintiffs filed a motion for summary judgment claiming that the leases were void as leases in perpetuity.⁷⁶ The judge agreed and held that the leases were void *ab initio* and subject to forfeiture.⁷⁷

The primary issue considered by the court was the language found in two paragraphs of the leases. Those paragraphs state:

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 as much longer thereafter as oil or 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 the Lessee in the search for oil or gas and as provided in Paragraph 7 following.
3. This [l]ease, however, shall become null and void and all rights of either party shall cease and terminate unless, within -12- months from the date hereof, a well shall be commenced on the premises, or unless the Lessee shall

⁷¹ *Hupp v. Beck Energy Corp.*, No. 2011-345, at 3 (C.P. Monroe Cnty., filed July 12, 2012), http://api.ning.com/files/Tj*yr2FU0NPge6NHN8Ps6cVJKrk1I54UJw-n3iCeLTnZzV47PI8cE7cjSOXPuzEzjLPi9Awo6TUa2gl3*j2utm-cJDII1ts9Q/beckdecision.pdf.

⁷² See Casey Junkins, *Judge Voids 21,000 Acres of Leases*, INTELLIGENCER (Feb. 16, 2013), <http://www.news-register.net/page/content.detail/id/581400/Judge-Voids-21-000-Acres-of-Leases.html?nav=515>.

⁷³ *Hupp*, No. 2011-345, at 3.

⁷⁴ *Id.* at 1.

⁷⁵ *Id.* at 3.

⁷⁶ *Id.* at 10.

⁷⁷ *Id.* at 26.

thereafter pay a delay rental of \$108.00 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.⁷⁸

Beck Energy argued that a reasonable person could interpret these paragraphs to mean that Beck could drill a well within twelve months or have the right to pay the delayed rental for a period of ten-years and then drill the well within that ten-year period.⁷⁹

The court disagreed, however, holding the language in paragraphs two and three created leases in perpetuity that “clearly, unequivocally, and seriously offend public policy.”⁸⁰ Those paragraphs created “no term” leases which gave Beck Energy the right to postpone development of the properties indefinitely.⁸¹ The court read the language in paragraph two (which stated that the lease shall continue for “so much longer thereafter as oil or gas... are capable of being produced on the premises in paying quantities, in the judgment of the Lessee”) as not imposing any time limitation on the lease.⁸² This language was interpreted to grant Beck Energy the right to extend the lease for as long as it wanted simply by proclaiming that the land was still capable of producing oil or gas.⁸³ Additionally, the court held paragraph three also allowed Beck Energy to extend the lease indefinitely by continually paying delay rentals.⁸⁴

In February 2013, the trial court granted the plaintiffs’ motion for class certification.⁸⁵ Beck Energy appealed both the summary judgment decision and the order certifying the class action on March 7, 2013.⁸⁶ The trial court also rejected XTO Energy’s motion to intervene as a necessary party.⁸⁷ XTO wanted to intervene because it purchased over 20,000 acres in Monroe County from Beck Energy shortly before the *Hupp* court’s

⁷⁸ *Id.* at 3.

⁷⁹ *Id.* at 12.

⁸⁰ *Id.* at 15.

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.* *But see* *Tedrow v. Shaffer*, 155 N.E. 510, 511 (Ohio Ct. App. 1926) (holding the word “found” as used in the lease was synonymous with the word “produced,” since oil in the ground cannot be said to be “found” until it is brought to the surface and when it is brought to the surface it is then “produced”); *Murdock-West Co. v. Logan*, 69 N.E. 984, 984-85 (Ohio 1904) (holding that a lease term that reads “as much longer thereafter as oil or gas shall be found in paying quantities” means that the lessee must actually find oil in paying quantities, and that is the same as obtaining, and producing it in paying quantities).

⁸⁴ *Hupp*, No. 2011-345, at 16.

⁸⁵ *XTO and Beck Energy Appeal Ohio Judge’s Decisions*, W. VA. NAT. GAS BLOG (Mar. 12, 2013), <http://wvnaturalgasblog.blogspot.com/2013/03/xto-and-beck-energy-appeal-ohio-judges.html>.

⁸⁶ *Id.*

⁸⁷ *Id.*

decision.⁸⁸ XTO has appealed the trial court's denial of its motion to intervene, as well as its order granting summary judgment and class certification.⁸⁹

V. CASE LAW

In support of its holding, the *Hupp* court erroneously relies on two recent cases, *Ionno v. Glen-Gery Corp.*⁹⁰ and *Hite v. Falcon Partners*.⁹¹ This section takes a closer look at those prior decisions. It will distinguish the facts in *Ionno* and *Hite* from the facts in *Hupp*. Then it will conclude with a review of a 1915 Ohio Supreme Court holding in *Kachelmacher v. Laird*, which should have guided the *Hupp* decision instead.⁹²

A. Hite v. Falcon Partners

The *Hupp* court found the facts presented in *Hite* were similar to those presented before it in *Hupp*.⁹³ The court reasoned that both *Hite* and *Hupp* contained no-term leases, that neither lease contained traditional habendum clauses which specifically designated a primary and secondary term, and that both leases allowed the lessee to extend the primary term indefinitely.⁹⁴

In *Hite*, the leases granted and conveyed to the lessee “all the oil, gas, surface and Drilling Rights in, on and under” the plaintiff's land.⁹⁵ The lease stated the terms as follows:

3. *Term.* Lessee has the right to enter upon the Property to drill for oil and gas at any time withinone [sic] (1) year from the date hereof and as long thereafter as oil or gas or either of them is produced from the Property, or as operations continue for the production of oil or gas, *or as Lessee shall continue to pay Lessors two (\$2.00) dollars*

⁸⁸ Correction: *Exxon Buys 25K Acres of Utica Shale Leases in OH*, MARCELLUS DRILLING NEWS (Jan. 11, 2012), <http://marcellusdrilling.com/2012/01/correction-exxon-buys-25k-acres-of-utica-shale-leases-in-oh/>.

⁸⁹ See *XTO and Beck Energy Appeal Ohio Judge's Decisions*, *supra* note 85.

⁹⁰ *Ionno v. Glen-Gery Corp.*, 443 N.E.2d 504 (Ohio 1983).

⁹¹ *Hite v. Falcon Partners*, 13 A.3d 942 (Pa. Super. Ct. 2011).

⁹² *Kachelmacher v. Laird*, 110 N.E. 933 (Ohio 1915).

⁹³ *Hupp v. Beck Energy Corp.*, No. 2011-345, at 23 (C.P. Monroe Cnty., filed July 12, 2012), http://api.ning.com/files/Tj*yr2FU0NPge6NHN8Ps6cVJKrk1154UJw-n3iCeLTnZzV47PI8cE7cjSOXPuzEzjLPI9Awo6TUa2gI3*j2utn-cJDI1ts9Q/beckdecision.pdf.

⁹⁴ *Id.*

⁹⁵ *Hite*, 13 A.3d at 944.

per acre as delayed rentals, or until all oil and gas has been removed from the Property, whichever shall last occur.⁹⁶

Plaintiffs signed the leases in 2002 and 2003.⁹⁷ Six years later, the lessee still had not drilled, and the plaintiffs sent a termination notice to the lessee.⁹⁸ Lessee refused to accept the termination, so the plaintiffs sued to quiet title.⁹⁹

At trial, the plaintiffs and defendant both filed motions for summary judgment.¹⁰⁰ The trial court denied the defendant's motion, but granted the motion for the plaintiffs.¹⁰¹ The trial court held that paragraph three of the lease would read to an unsophisticated landowner as a one-year lease within which time the lessee could drill.¹⁰² The court determined that there would be no reason for the parties to agree on a one-year lease term if the lease could then be extended into perpetuity.¹⁰³ The defendants appealed the decision.¹⁰⁴

On appeal, the Pennsylvania Superior Court affirmed the lower court's holding in favor of the plaintiffs.¹⁰⁵ The defendant argued that the lease should enable it to maintain its production rights indefinitely, so long as it made delay rental payments.¹⁰⁶ The court rejected this argument and held that the delay rentals relieve the lessee of the obligation to develop the leasehold only during the primary term of the lease.¹⁰⁷ In the court's interpretation, paragraph three of the lease created a one-year primary term, which required the defendant to pay the plaintiffs two dollars per acre annually.¹⁰⁸ Thus, a single two-dollar-per-acre delay rental payment "relieved the [defendant] of any obligation to develop the leasehold during the one-year primary term."¹⁰⁹ After the one-year primary term expired, however, the payment of delay rentals alone was not enough to maintain the defendant's drilling rights.¹¹⁰

Further, since the 1890s, after fixed term leases first came into general use, the Pennsylvania courts already rejected claims that delay

⁹⁶ *Id.* (emphasis added).

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.* at 948.

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 944.

¹⁰⁵ *Id.* at 949.

¹⁰⁶ *Id.* at 948.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

rentals could extend leases beyond their fixed terms.¹¹¹ To construe the leases in such a way would be “inconsistent with the established ruling grounded in public policy considerations that under ‘no term’ leases a lessee could not postpone development indefinitely by a payment of delay rentals.”¹¹² To allow the lessee to pay delay rentals indefinitely would deny the lessor the financial benefits of actual production.¹¹³ Not only would that be at odds with the presumed intention of the parties in executing the lease in the first place, it would also be in “stark contrast” to the Pennsylvania court’s opinion that delay rentals are intended to spur the lessee toward development.¹¹⁴

B. *Ionno v. Glen-Gery Corp.*

The next case the *Hupp* court heavily relied on is *Ionno v. Glen-Gery Corp.* In *Ionno*, the lease was not for oil and gas, but rather for coal and clay.¹¹⁵ The *Hupp* court held that, like the lease in *Ionno*, the leases used by Beck Energy were no-term leases that gave the lessee the right to exercise the lease into perpetuity and were therefore unenforceable as against public policy.¹¹⁶

The terms of the lease in *Ionno* granted the defendant mining company the right to mine the coal and clay on the plaintiff’s property, and, in return, the defendant would pay the plaintiff a minimum rent royalty.¹¹⁷ The *Ionno* opinion explained the lease’s relevant provisions as such:

[L]essee was granted the right to “...mine, let and lease ... all merchantable, mineable and usable [sic] coal . . . and . . . clay” located upon a certain portion of lessor’s property. In return, lessee was obligated to pay lessors a royalty on the product mined or \$300 per year for the first two years and \$600 per year thereafter as “minimum rent or royalty” which payment would be “credited against the amount or amounts that shall thereafter become due for or on account

¹¹¹ *Id.*

¹¹² *Id.* (quoting *Jacobs v. CNG Transmission Corp.*, 332 F. Supp. 2d 759, 790 (W.D. Pa. 2004)).

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Ionno v. Glen-Gery Corp.*, 443 N.E.2d 504, 505 (Ohio 1983).

¹¹⁶ *Hupp v. Beck Energy Corp.*, No. 2011-345, at 17 (C.P. Monroe Cnty., filed July 12, 2012), http://api.ning.com/files/Tj*yr2FU0NPge6NHN8Ps6cVJKrk1154UJw-n3iCeLTnZzV47PI8cE7cjSOXPuzEzjLP19Awo6TUa2gl3*j2utm-cJDI1ts9Q/beckdecision.pdf.

¹¹⁷ *Ionno*, 443 N.E.2d at 505.

of the removal, mining or hauling of coal and/or clay. . .

¹¹⁸

The lease contained no time period in which mining operations were required to commence.¹¹⁹ Rather, the defendant claimed that the payment of the rent royalty relieved it from its obligation to mine the land.¹²⁰ After the defendant refused to mine land for coal or clay for a period of eighteen years, the plaintiff sued to quiet title.¹²¹ At trial, the court ruled in favor of the defendant.¹²² The appellate court reversed the trial court's holding and ordered the defendant to forfeit the lease.¹²³ The defendant appealed to the Ohio Supreme Court.¹²⁴

On appeal, the Ohio Supreme Court held that waiting eighteen years without drilling was a breach of the implied covenant to reasonably develop the land.¹²⁵ In reaching this conclusion, the Court used a three-step analysis: (1) whether the defendant was under any obligation to reasonably develop the land; (2) whether the payment of an annual rental operated to relieve the defendant of its obligation to reasonably develop the land; and (3) whether a breach of the implied covenant was sufficient to justify forfeiture of the lease.¹²⁶

Addressing the first issue, whether the defendant was under any obligation to reasonably develop the land, the court explained that it had long held to the general principle that a mineral lease included an implied covenant to reasonably develop the land unless there was an express provision to the contrary in the lease.¹²⁷ Thus, where a lease failed to contain any specific reference to the timeliness of the development, the court inferred a duty to operate with reasonable diligence.¹²⁸ The court held that this case fell clearly within the general rule.¹²⁹

For the second issue, whether the payment of a rental to the plaintiff operated to relieve the defendant of his obligation to reasonably develop the land, the court held that it would contravene the spirit of the lease to allow the defendant to continue to hold the land for a considerable length of time without making any effort to mine the property.¹³⁰ The court

¹¹⁸ *Id.* (emphasis added).

¹¹⁹ *Id.* at 506.

¹²⁰ *Id.* at 507.

¹²¹ *Id.* at 508.

¹²² *Id.* at 506.

¹²³ *Id.*

¹²⁴ *See id.*

¹²⁵ *Id.* at 508.

¹²⁶ *Id.* at 506.

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.* at 507.

explained that this was not a contract which exacts a non-refundable annual payment of rent to the plaintiff as a separate and independent consideration. Rather, the rental payments were a liquidation of the real consideration for the lease: the expected returned derived from mining the land.¹³¹ Given that this was the true nature of the lease, it followed that there was an implied covenant to reasonably develop the land;¹³² “[t]o hold otherwise,” stated the court, “would allow a lessee to encumber a lessor’s property in perpetuity merely by paying an annual sum. Such long-term leases under which there is no development impede the mining of mineral lands and are thus against public policy.”¹³³ The defendant’s payment of rentals, therefore, did not relieve them of their duty to reasonably develop the land.¹³⁴

Finally, the court addressed the third consideration: whether or not the breach of the implied covenant was sufficient to justify the forfeiture.¹³⁵ In reversing the court of appeals decision to order forfeiture, the Ohio Supreme Court explained that the normal remedy for breach of an implied covenant is damages and not forfeiture.¹³⁶ Where legal remedies were inadequate, however, the court said that it was only then appropriate to order a forfeiture of the lease for the lessee’s breach of an implied covenant.¹³⁷ The plaintiff carries the burden of proving that damages are an inadequate remedy, and he must make a strong showing that the defendant violated a clear right in the lease before the court will declare a forfeiture.¹³⁸ Since the plaintiff presented no evidence as to damages, Ohio’s highest court believed it would be inequitable for a court to order forfeiture.¹³⁹ Therefore, it reversed the court of appeals’ decision, even though it agreed that the defendant breached its implied covenant to reasonably develop the land.¹⁴⁰

C. Kachelmacher v. Laird

Oddly absent from the *Hupp* opinion is the *Kachelmacher v. Laird* opinion. In *Kachelmacher*, the plaintiff signed a lease with the defendant, the lessee, which set the term to ten years and provided that:

¹³¹ *See id.*

¹³² *See id.*

¹³³ *Id.* at 508.

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *See id.*

¹³⁷ *See id.*

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.* at 507-08.

[I]f a well be not completed on said premises within four months from the date hereof, unavoidable accidents excepted, then this lease and agreement shall be and become null and void unless the lessee, within each and every year after the expiration of the time above mentioned for the completion of a well, elects to and does pay the sum of fifty dollars (\$50.00) until a well is completed thereon.¹⁴¹

The defendant did not drill a well on the land, but he did pay the delay rentals on time for four consecutive years.¹⁴² Plaintiff sued for an order requiring the lessee to drill or cancel the lease.¹⁴³ The defendant appealed to the Ohio Supreme Court seeking reversal of a judgment that held that there was an implied obligation on the part of the defendant to drill a well or cancel the lease.¹⁴⁴

On appeal, the Ohio Supreme Court reversed the court of appeals and held that the defendant did not breach any obligation to the plaintiff by paying an annual rental and not drilling a well.¹⁴⁵ The court held that, under the expressed terms of the lease, the defendant could continue the lease so long as he made rental payments.¹⁴⁶ Since the lease expressly discussed the payment of a rental in lieu of a royalty, no implied covenant could arise in opposition to the provision.¹⁴⁷ Furthermore, the lease did not require forfeiture if the defendant did not drill a well in four months, but rather only required forfeiture if the lessor did not drill a well in four months and did not pay a delay rental for that year.¹⁴⁸ The court stated that it had previously held under a lease with similar terms that “the lessee may retain the lease by paying the stipulated rental, or may elect to permit the lease to lapse.”¹⁴⁹

VI. ANALYSIS

This section will take the holding in each of the three cases discussed in Part V and apply the rules in those cases to the facts in *Hupp*. Comparing *Hite* and *Ionno* to the facts in *Hupp* demonstrates how the court erred in using these holdings in its analysis. Analysis of the facts in

¹⁴¹ *Kachelmacher v. Laird*, 110 N.E. 933, 934 (Ohio 1915).

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *See id.*

¹⁴⁵ *Id.* at 936.

¹⁴⁶ *Id.* at 935.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

Kachelmacher, on the other hand, will illustrate how the court should have construed the *Hupp* case.

A. *Hite and Hupp*

First, a comparison of *Hupp* to *Hite* should begin with a discussion of how the facts of *Hite* are distinguishable from those found in *Hupp*. Paragraph two of the *Hupp* lease reads that the lease would remain valid “for a term of ten-years and as much longer thereafter as oil or gas or their constituents are produced or are capable of being produced on the premises in paying quantities in the judgment of the Lessee.”¹⁵⁰ Paragraph three of the *Hupp* lease states that the lease would terminate within a year if no production began or “unless the Lessee shall thereafter pay a delay rental of \$108.00 Dollars each year” with the payments to be made on a quarterly basis.¹⁵¹ In comparison, the *Hite* lease states that the lessee can drill for minerals within one year or pay the lessor two dollars per acre as delayed rentals.¹⁵²

Beck Energy’s lease created a ten-year primary term with delay rentals to be paid each year on a quarterly basis in order to ensure no breach of an implied covenant. It is important to remember that the lessee pays the delay rentals to the lessor in lieu of drilling.¹⁵³ Therefore, Beck Energy could pay delay rentals and relieve itself of the obligation to drill the land for ten years. The *Hite* lease, on the other hand, states that the lessee must drill in one year, or pay delay rentals.¹⁵⁴ In contrast to the *Hupp* lease, the *Hite* lease does not specify a term in which the lessee’s option to pay delay rentals will terminate. The failure to specify a termination of the right to pay delay rentals led the *Hite* court to interpret the lease as creating a one-year primary term, with the two-dollar-per-acre payment only relieving the lessee of the obligation to develop within that one-year term.¹⁵⁵

The *Hupp* court’s reliance on *Hite*, however, is misplaced. The plaintiffs in *Hite* sued six years after signing the lease, clearly outside the one-year primary term established in the lease.¹⁵⁶ In *Hupp*, Beck Energy

¹⁵⁰ *Hupp v. Beck Energy Corp.*, No. 2011-345, at 3 (C.P. Monroe Cnty., filed July 12, 2012), http://api.ning.com/files/Tj*yr2FU0NPge6NHN8Ps6cVJKrk1154UJw-n3iCeLTnZzV47PI8cE7cjSOXPuzEzjLPi9Awo6TUa2gl3*j2utn-cJDI1ts9Q/beckdecision.pdf.

¹⁵¹ *Id.*

¹⁵² *Hite v. Falcon Partners*, 13 A.3d 942, 944 (Pa. Super. Ct. 2011).

¹⁵³ KUNTZ, *supra* note 62.

¹⁵⁴ *Hite*, 13 A.3d at 949.

¹⁵⁵ *Id.* at 948.

¹⁵⁶ *Id.* at 944.

signed the plaintiffs to a ten-year primary term beginning in 2003.¹⁵⁷ The plaintiffs sued Beck Energy in 2011, clearly still within the ten-year primary term of the lease.¹⁵⁸ The *Hite* court never said that the lease was invalid for being a lease in perpetuity, but rather that the lease could not extend beyond the one-year primary term created in the habendum clause by the payment of a yearly rental.¹⁵⁹ Therefore, *Hite* would only be applicable if Beck Energy was trying to enforce the lease outside the ten-year primary term created in its lease with plaintiffs. As such, *Hite* does not support the holding of the *Hupp* court, and the court should not have relied upon its holding in interpreting the Beck Energy leases.

B. *Ionno and Hupp*

A comparison of the leases in *Hupp* and *Ionno* will distinguish those two cases from each other as well. The *Ionno* lease stated that the lessee had the right to mine the coal in return for an obligation to pay the lessors a royalty on the minerals produced or lessee would pay a rental in lieu of the royalty.¹⁶⁰ Importantly, the *Ionno* lease did not specify a definite period of time in which mining operations were to commence.¹⁶¹ Further, the plaintiff sued to quiet title eighteen years after signing the lease.¹⁶²

The facts of *Ionno* are distinguishable from *Hupp*, in which the lease expressed a ten-year primary term and the plaintiffs sued before the end of those ten years.¹⁶³ The *Ionno* court correctly held that the lease contained an implied covenant to reasonably develop the land and that the lessee breached that covenant when it did not mine the land for over eighteen years.¹⁶⁴ *Ionno* applied its three-step analysis to reach its conclusion: (1) whether the defendant was under any obligation to reasonably develop the land; (2) whether the payment of an annual rental operated to relieve the lessee of its obligation to reasonably develop the land; and (3) whether a breach of the implied covenant was sufficient to justify the forfeiture of the lease.¹⁶⁵ Because the *Ionno* lease did not have an

¹⁵⁷ *Hupp v. Beck Energy Corp.*, No. 2011-345, at 3 (C.P. Monroe Cnty., filed July 12, 2012), http://api.ning.com/files/Tj*yr2FU0NPge6NHN8Ps6cVJKrk1154UJw-n3iCeLTnZzV47PI8cE7cjSOXPuzEzjLPI9Awo6TUa2gI3*j2utn-cJDI1ts9Q/beckdecision.pdf.

¹⁵⁸ *See id.* at 1.

¹⁵⁹ *See Hite*, 13 A.3d at 949 (holding that when the one year primary term ended and defendant failed to commence production, then the agreement with the plaintiff expired).

¹⁶⁰ *See Ionno v. Glen-Gery Corp.*, 443 N.E.2d 504, 505 (Ohio 1983).

¹⁶¹ *Id.* at 506.

¹⁶² *Id.* at 508.

¹⁶³ *Hupp v. Beck Energy Corp.*, No. 2011-345, at 3 (C.P. Monroe Cnty., filed July 12, 2012), http://api.ning.com/files/Tj*yr2FU0NPge6NHN8Ps6cVJKrk1154UJw-n3iCeLTnZzV47PI8cE7cjSOXPuzEzjLPI9Awo6TUa2gI3*j2utn-cJDI1ts9Q/beckdecision.pdf.

¹⁶⁴ *See Ionno*, 443 N.E.2d at 508.

¹⁶⁵ *Id.* at 506.

express provision regarding when the lessee would start mining, the court held that there was an implied duty to operate with reasonable diligence.¹⁶⁶

In contrast, the Beck Energy leases expressly state that either Beck Energy will drill within twelve months of the lease's execution or it will pay the lessor a delay rental for that year.¹⁶⁷ Therefore, under the first step of the *Ionno* analysis, there is no implied duty to operate with reasonable diligence because the lease expressly stated that Beck Energy would drill within twelve months or it would pay delay rentals each year, on a quarterly basis, in lieu of the royalties.¹⁶⁸ The *Hupp* leases pass the second part of the analysis as well, because the rental payments do not relieve the lessee of the obligation to develop the land. The lease provided for a ten-year primary term which created a limitation on how long the lessee could delay production on the land and prevent the lease from extending into perpetuity through rental payments. Finally, *Hupp* did not require the plaintiff to meet its burden to prove that damages were an inadequate remedy under step three of the *Ionno* analysis.¹⁶⁹ Surprisingly, the *Ionno* court ultimately ruled in favor of the lessee because the lessor failed to prove that the breach justified forfeiture of the lease.¹⁷⁰ Since forfeiture was the only remedy the lessor requested, the court could not award additional damages and had to reverse the lower court's holding.¹⁷¹ Despite that explanation appearing in the *Ionno* holding, the *Hupp* court did not apply it here.

C. Kachelmacher and Hupp

Finally, the court erred in not relying on *Kachelmacher* because the case is more analogous to the facts in *Hupp* than either the *Ionno* or *Hite* cases. In *Kachelmacher*, the lease granted rights to the minerals for a term of ten years from the date of the execution of the lease.¹⁷² The lease stated that it would become invalid if the lessee did not complete a well within four months of the execution of the lease or pay fifty dollars "until a well is completed thereon."¹⁷³

The *Kachelmacher* lease sought to create the right to drill at any time within the ten-year primary term through the payment of delay rentals. Similarly, the leases in *Hupp* attempted to create a right to drill, while also

¹⁶⁶ *Id.* at 506-07.

¹⁶⁷ *See Hupp*, No. 2011-345, at 3.

¹⁶⁸ *Id.*

¹⁶⁹ *See Ionno*, 443 N.E.2d at 506.

¹⁷⁰ *Id.* at 508.

¹⁷¹ *Id.* at 509.

¹⁷² *Kachelmacher v. Laird*, 110 N.E. 933, 933 (Ohio 1915).

¹⁷³ *Id.*

removing any implied obligation to do so before the expiration of the ten-year primary term via the payment of rentals on a quarterly basis.

Under the terms of the lease, Beck Energy could avoid termination of the lease either by drilling or by paying a delay rental. Beck Energy elected to pay the delay rentals up until the point the lessors sued. Because the facts are more analogous, the *Hupp* court should have applied *Kachelmacher* and held that the lease was valid and that Beck Energy could continue to pay the delay rental until the end of the ten-year primary term. If Beck Energy did not drill a well on any of the lessors' lands after ten years, then a quiet-title action would be ripe. After the ten-year period, the leases would have terminated according to the provisions agreed to by both parties.

VII. RECOMMENDATIONS AND CONSIDERATIONS

Jim Peters, the attorney for the lessors in *Hupp*, expressed the landowners' frustration when he told a local paper "all these people want is the right to lease their property for a reasonable rate. These leases were signed for amounts as low as \$50 per acre. The going rate around here now is about \$6,000 per acre."¹⁷⁴ There are landowners who are now unhappy with the agreements entered into before bonus payments in the Marcellus Shale region skyrocketed, especially if several years have passed since entering the lease and there is still no oil or gas production on their land. Since many of these landowners may start suing to quiet title with growing frequency in Ohio, courts applying the *Hupp* decision may disrupt the natural gas industry in Ohio and ultimately lead to the forfeiture of hundreds of leases. One district court has already distinguished *Hupp* in order to reject the lessor's argument that its lease was a perpetual lease.¹⁷⁵ Landowners, frustrated by the lack of production on their property, will likely advance similar arguments with growing frequency. If the gas producers in *Hupp* lose their appeal, then property owners in the state of Ohio will have a powerful precedent to challenge the validity of their lease.

The effect of the appellate court affirming the *Hupp* holding would be profound within Ohio. Beck Energy alone sends royalty payments to 600 landowners in Ohio in lieu of developing the natural gas beneath those properties.¹⁷⁶ If the leases with those 600 landowners have the same

¹⁷⁴ Casey Junkins, *Lease Invalid*, TIMESLEADERONLINE.COM, Feb. 15, 2013, <http://www.timesleaderonline.com/page/content.detail/id/544828/Leases-invalid.html?nav=5010>.

¹⁷⁵ See *Phillips Exploration, Inc. v. Reitz*, No. 2:11-cv-920, 2012 WL 6594915 (S.D. Ohio Dec. 18, 2012).

¹⁷⁶ *About Us*, BECK ENERGY CORP., <http://beckenergycorp.com/about-us> (last visited Feb. 24, 2013).

language as the roughly 200 leases in the *Hupp* case, then the courts will likely hold that they are also leases in perpetuity and as such, are void *ab initio*, or from the beginning. That means that the landowners could potentially win a quiet title action against Beck Energy despite the fact that the land is producing in paying quantities.

Further, as attorney Andrew Holford explains in his article on the possible effects of the decision, the principles expressed in *Hupp* may render many other leases in the state void *ab initio*.¹⁷⁷ According to Holford, Ohio courts may now hold that leases for the underground storage of natural gas are void.¹⁷⁸ In addition, Holford worries that the courts may declare that leases with “over broad” habendum clauses are leases in perpetuity and therefore against public policy.¹⁷⁹

In order to protect themselves in the future, oil and gas producers such as Beck Energy may consider drafting their leases with specific language that clarifies that the delay rental payments only work to relieve it of the obligation to drill within the expressed primary term. Additionally, when explaining the leasing process to a landowner, oil and gas companies may also want to explain why the bonus on the mineral lease is nothing more than speculation on the part of both the landowner and the oil and gas producer as to the future value of the mineral rights in the land. The landowner is speculating that the mineral rights will decrease in value, while the gas producer is speculating that the mineral rights will increase in value. The nature of speculation means that there is always going to be the chance that one party “loses.”

Perhaps the lessee could try to ensure that the landowner understands what the transaction really means – that whether he knows it or not, the landowner is gambling on the value of his mineral rights in the future. This knowledge may make it more difficult to sign a prospective mineral lessor, but it may also serve to recoup any money the oil and gas company loses on the front end of the transaction by preventing litigation of these issues later. Additionally, disclosure may help soothe the resentment of a landowner who leased his land out for fifty-dollars per acre and now sees his neighbor sign a deal worth 100 times that amount; all the while, the first lessor is still receiving a delay rental instead of a royalty payment.

In making a decision to challenge the validity of a lease, an attorney should be alert for any language that indicates the presence of a “no term” lease or a “rental paid” lease. This can be accomplished by paying special attention to whether the lease includes express provisions providing for a primary term, a time to drill, and a payment of delay rentals.

¹⁷⁷ Holford, *supra* note 4, at 13-14.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

If any of these provisions are missing from the lease and production has not started on the land, then the attorney may want to sue the lessee to quiet title. If the attorney believes that the lease is a no term lease or a rental paid lease, then he may decide to argue that the lease is a lease in perpetuity. If he wants to void the lease rather than accept damages for breach, then he must prove to the court that damages are not an adequate remedy for the breach.

VIII. CONCLUSION

In conclusion, the appellate court will most likely overturn *Hupp*. There is too much precedent against the holding and too much inequity in ordering a forfeiture of the leases. It is true that many of the landowners signed early leases with Beck Energy for a much lower price than they could receive today, and they have yet to receive the reward of a royalty payment for leasing out their mineral rights, but that is insufficient grounds to void a valid lease.

While leases in perpetuity are against public policy, the parties in *Hupp* agreed to leases that provided for the payment of delay rentals within an expressed ten-year primary term. That created a lease with a defined termination date if the lessee never started production. Production will either begin before the expiration of ten years or the leases will end and the landowner will have the right to lease the minerals to another lessee. There is nothing in such a lease that should be held to be contrary to public policy. Therefore, the appellate court will most likely hold that the leases are valid and reverse the holding of the lower court.