

Statute of Limitations In Lack of Production

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Is Now the Time to
Pursue Your Claims?



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Ohio's Fourth District Court of Appeals issued an important decision utilizing a statute of limitations to determine whether a landowner's claims that an oil and gas lease expired due to lack of production were time-barred. In that case, *Rudolph v. Viking Internatl. Resources Co., Inc.*, 2017-Ohio-7369 (August 11, 2017), the court applied the 21-year statute of limitations for recovery of real property under R.C. 2305.06, rather than a shorter eight-year statute of limitation urged by the producer. This ruling means that, in the Fourth District, landowners' declaratory judgment claims that a lease has expired for non-production may be barred if not brought within 21 years of the date when the landowner's cause of action based on non-production first accrued.

As a matter of background to this ruling, it is helpful to understand how most oil and gas leases may expire over time and why it is important to be able to confirm that an old lease has expired. Under Ohio law, most oil and gas leases contain a primary term and a secondary term. The primary term is a period of years within which the producer must commence drilling operations in search of oil and gas. The secondary term of an oil and gas lease is indefinite and extends the producer's rights under the lease.

If, after the expiration of the primary term, the conditions of the secondary term are not being met, then the lease automatically expires by its own terms. A secondary term that continues for so long as oil and gas are found in paying quantities requires that oil or gas actually be discovered and produced in paying quantities. There must be actual production that generates a profit over and above operating expenses attributed to the well. An oil and gas lease that is in its

secondary term expires on the day the well stops producing in paying quantities.

While there is no disagreement over the basic principle that an oil and gas lease in its secondary term expires on the day the well stops producing in paying quantities, there is debate over whether a statute of limitations applies to bar a landowner from bringing these types of cases due to the passage of time, and if a statute of limitations applies, which statute controls. Which statute controls is key because it sets forth the length of the limitations period that bars these types of cases.

Prior to the ruling in *Rudolph*, other Ohio courts, including the Fourth District Court of Appeals, had declined to impose a statute of limitations in lack of production cases. In *Schultheiss v. Heinrich Ents, Inc.*, 2016-Ohio-121, the Fourth District held that a case filed in 2013 based on a four-year production gap between 1977 and 1981 was not time-barred by a statute of limitations. Also, in a case out of the Fifth Appellate District, *Cox v. Kimble*, 2015-Ohio-2417, the Court of Appeals refused to find that the statute of limitations barred the Plaintiff's claims because the landowner's declaratory judgment claims did not accrue until the landowner demanded that the producer release the acreage, and the producer refused to do so, thereby causing damage to first occur.

Finally, there was a case out of the Seventh District Court of Appeals – the Appellate District representing the majority of the counties experiencing Utica Shale development – *Potts v. Unglaciated, Inc.*, 2016-Ohio-8559. *Potts* was critical of the *Schultheiss* case, stating that a statute of limitations must apply to all claims. Although the *Potts* Court analyzed the application of several statutes of limitations, it declined to apply one and affirmed the lower court's ruling in favor

of the producer on other grounds.

The Utica Shale boom has raised the stakes over the validity of old leases held by decades-old wells many of which are nearing the end of their productive lives. When leases expire because of a lack of production, the landowner stands to benefit from the lucrative signing bonuses and greater royalty payments. Conversely, if a local producer can operate its wells profitably enough to hold its leases in their secondary term, then the local producer may sell the valuable Utica Shale rights covered by those same leases. Thus, there is new, intense scrutiny over whether oil and gas leases have expired over the years.

The question addressed in *Rudolph* is now how far back in time can a landowner use lack of production as a basis for a lawsuit. The *Rudolph* case is likely the beginning of a trend in the Courts that will apply a limitations period to bar certain landowner cases seeking to declare leases as having expired due to lack of production.

This is important to landowners, because a new clock has started ticking on the time within which litigation must be filed to challenge the validity of an oil and gas lease based on lack of production. Therefore, landowners should not wait to file their lack of production claims, but instead should seek the aid of an experienced oil and gas attorney if they suspect their lease is no longer held by production in paying quantities to ensure they do not miss an opportunity to terminate an unproductive lease and regain ownership of their minerals.

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