OHIO COURT OF APPEALS Issues a Series of New Marketable Title Act Opinions

Guest Column

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In September and October 2019, the Seventh District Court of Appeals issued another series of opinions, following the recent Supreme Court of Ohio decision of *Blackstone v. Moore*, 155 Ohio St.3d 448, 2018-Ohio-4959, which confirm and further clarify the application of the Marketable Title Act ("MTA") to the extinguishment or preservation of severed mineral and royalty interests. From these decisions, it is now clear that two Ohio statutes, the MTA and the Dormant Mineral Act (the "DMA") can potentially be used to terminate severed mineral or royalty interests.

These rulings, *Miller v. Mellott*, 2019-Ohio-4084, *Hickman v. Consolidation Coal Co.*, 2019-Ohio-4077, *West v. Bode*, 2019-Ohio-4092, and *Senterra Ltd. v. Winland*, 7th Dist. Belmont No. 18 BE 0051, 2019-Ohio-____ (Oct. 11, 2019), were clearly intended to provide guidance to the lower courts and assist surface and mineral owners in the analysis of whether a reserved mineral or royalty interest has been extinguished under the MTA.

In general, the MTA calls for an automatic extinguishment of property interests created prior to a person's chain of title to property, if that person has an unbroken chain of title of record to any interest in land for more than 40 years after the prior property interest was created and there are no specific references to the prior interest in the person's chain of title. In *Blackstone*, the Supreme Court applied the MTA to an oil and gas royalty interest and ultimately held that it was preserved because there was a specific reference in the chain of title to the interest.

The recent *Miller v. Mellott* and *Hickman v. Consolidation Coal Co.* decisions referenced above were rulings on motions for reconsideration that were filed subsequent to the Seventh District's issuance of merit opinions in each case earlier this year. The motions for reconsideration urged the Court to review, in light of the *Blackstone* decision, its holdings that the "root of title" (the starting point for reviewing whether a party has marketable title under the MTA) claimed by the surface owner in each case was not an actual root of title deed because the deed contained a repetition of a mineral reservation and therefore did not convey the interest that the surface owners were attempting to extinguish. The problem was that, in *Blackstone*, the Ohio Supreme Court analyzed a root of title deed that did contain the reserved royalty interest that was in dispute. Thus, the Court of Appeals should have performed the three-part Blackstone test to determine whether the references to prior mineral interests in each root of title deed were general or specific reservations. If the reserved interest was found to be general reservation, then the deed in question would be considered the proper "root of title" deed, but if the reserved interest was specific, then the reserved interest would not be subject to extinguishment under the MTA. These rulings represent a change in the law that was originally set forth in the original *Miller* and *Hickman* decisions from earlier this year.

Other decisions from the Seventh District clarified the MTA's overall applicability to mineral interests. While the Seventh District had previously held in *Pollock v. Mooney*, 7th Dist. Monroe No. 13 MO 9, 2014-Ohio-4435, that the MTA applies to extinguish or preserve all interests, including oil and gas interests, that issue had recently been challenged because of a perceived conflict between the MTA and DMA, which led to some trial court rulings that the MTA did not apply to extinguish mineral interests.

The Supreme Court's *Blackstone* case added fuel to this dispute, inasmuch as the Court's opinion did not explicitly state that the MTA applies to mineral interests, and one Justice wrote a concurring opinion questioning the MTA's applicability to mineral interests because the MTA was in conflict with the DMA, and when two statutes are in conflict, the more specific statute—here the DMA—should apply. However, following the re-

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lease of *Blackstone* on December 13, 2018, the Seventh District issued several decisions in which the Court continued to apply the MTA to severed mineral interests.

For example, in February 2019, in *Miller v. Mellott*, 2019-Ohio-504, the Seventh District held, citing to *Blackstone*, that both the MTA and DMA apply to mineral interests, and therefore, the trial court erred in holding that the MTA could not be applied to extinguish a mineral interest. Likewise, in *Soucik v. Gulfport Energy Corp.*, 7th Dist. Belmont No. 17 BE 0022, 2019-Ohio-491, the Seventh District applied both the MTA and the DMA to reverse a trial court ruling that terminated various reserved mineral interests. Finally, the following month in *Stalder v. Bucher*, 2019-Ohio-936(March 13, 2019), the Seventh District made it clear that the oil and gas interest at issue was subject to both the MTA and DMA.

In *West v. Bode*, the Seventh District took the extra step of providing a detailed analysis of why MTA and the DMA are not in conflict, thus concluding that the MTA applies to mineral interests and seemingly setting the table for a possible appeal to the Ohio Supreme Court. As the Court in *West* explained, "there is no conflict in applying the MTA and/or the DMA to a mineral interest. The MTA involves extinguishment after 40 years resulting in a null and void interest. ... The DMA involves an abandonment process which can be used after a 20-year absence of certain activity with notice requirements and the ability to file a post-notice-of-abandonment claim to preserve." Thus, following *West v. Bode*, the Seventh District has made it crystal clear that the MTA and DMA are two alternative remedies for terminating mineral interests and the two statutes are not in conflict.

Finally, in the case of *Senterra Ltd. v. Winland*, the Seventh District reaffirmed its holding that the MTA applies to mineral interests and conducted a detailed analysis of what a root of title is and how it is determined. This analysis is critical to any MTA claim and there were unanswered questions based on prior cases as to how a root of title was to be determined. In *Senterra*, the Court emphasized that a root of title deed may contain a repetition of a prior mineral reservation, only if it is determined, using the *Blackstone* test, that the repetition is a general repetition, and noted that several Seventh District cases from the 1980s holding otherwise were

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no longer good law following *Blackstone*. The Court held that if the repetition is determined to be specific, then the reserved interest is preserved and cannot be extinguished under the MTA. Also, it concluded that a proper root of title cannot contain the original mineral severance.

Next, the *Senterra* Court reviewed the process of examining the 40-year period from the root of title to determine if a preservation act occurred within the 40-year period. If there is no preservation act within the 40-year period, then the mineral interest is extinguished and cannot be revived. However, if a preservation act is found, then the chain of title should be re-examined to look for the next root of title 40 years prior to the preservation act to see if there is a 40-year period of an unbroken chain of title. Finally, the *Senterra* Court, applying *Blackstone*, reviewed one of the root of title deeds and determined that the reservation, "EXCEPTING all the Oil and Gas right found underlying said described premises" was a general reference because there was no reference to the reserving party it and it was not clear what interest was being referenced. Therefore, the mineral interest was extinguished.

In summary, Ohio law regarding the termination and preservation of mineral rights is still evolving. The rights and obligations of surface owners and mineral holders under the MTA are becoming clearer, with the Seventh District's rulings in *Miller v. Mellott*, *Hickman v. Consolidation Coal Co.*, *West v. Bode*, and *Senterra Ltd. v. Winland*. Nevertheless, surface owners and mineral owners will continue to face significant challenges in disputes over ownership of valuable mineral interests. Under both the MTA and the DMA, litigation is usually needed to "quiet title" to the disputed mineral or royalty interest before ownership of the interest can be recognized. The combined impact of continued uncertainties in the law and the need for litigation highlights the importance of retaining an experienced oil and gas attorney who can advise clients with regard to the termination, preservation and the ownership of mineral interests.

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