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# Gas Leasing & Development

update

## Wealth Preservation Planning

Jonathan Samel

**How can you** best protect yourself, your family members and your property with Marcellus Shale from future liabilities or creditors? How can you successfully pass your property with Marcellus Shale on to your family either during your lifetime or upon your death? A well thought out wealth preservation plan will answer these questions.

Failure to begin planning as soon as possible often leads to fewer available options later. Without proper planning, an unexpected illness, death, or divorce in the family can greatly complicate your situation. Lack of communication among family members, lack of involvement in the management of the property, and the eventual transfer of the property without a well thought out plan in place will often lead to the division or sale of the property as the only way of resolving the distribution of assets.

Two important tools which are available in structuring a wealth preservation plan for Marcellus Shale property are trusts and limited liability business entities.

A trust can be designed to be a source of funds for the reasonable needs of family members, but at the same time, can protect the assets which remain in the trust from the creditors of the trust beneficiaries. You can transfer interests in your property to a trust which benefits your family members either during your lifetime or upon your death. In this manner, the assets can also be protected from being dissipated as a result of the marital problems of a family member. You can also design such a trust to insure that assets which are not needed by the current beneficiaries will pass to future generations of your family.

The use of limited liability business entities such as corporations, limited liabil-



ity companies and limited partnerships is a common wealth preservation planning technique. Your Marcellus Shale property is clearly a family business, and it will often make sense to own your gas rights through such a business entity. The business entity should be structured (1) to avoid exposing you and your family members personally to any uninsured risks relating to gas development on your property, and (2) to avoid exposing the property to the claims of an owner's personal creditors which are unrelated to activities on the property.

It is important that the owners of the business entity enter into a well written shareholder agreement, partnership agreement or operating agreement with protective asset protection provisions. Such an agreement among the family members should contain, among other things, restrictions on the subsequent transfer of ownership interests by any family member. Such restrictions can significantly limit the rights of the future creditors of the owners.

Wealth preservation planning involves a number of areas of law, including, business

law, estate planning, taxation, litigation, bankruptcy, real estate law and divorce law. HRMM & L takes a multi-disciplinary approach to wealth preservation planning, involving attorneys with expertise in a number of different areas of law. Please contact our office if you have any questions or want to learn more about our capabilities in this area.

### A L E R T

#### Recent Ruling Gives Life to a Homeowner's Challenges to the Validity of an Oil and Gas Lease

Mark F. Himsworth

On June 9, 2010, in *John Kropa v. Cabot Oil & Gas Corporation*, a federal judge entered an order refusing to dismiss a homeowner's cause of action against Cabot, based upon allegations that the homeowner was duped into entering into an oil and gas lease with Cabot, which provided merely for the payment of \$25.00 per acre for the lease. The homeowner alleged that Cabot told the homeowners that they would never pay more than \$25.00 per acre for the lease. If successful, the lease would be void, so that the homeowner would arguably be able to recover the fair market value, which is substantially more.

### A L E R T

## Residents' Suit Against Oil And Gas Company Survives Challenge

Mark F. Himsworth

**A federal judge has ruled** that township residents may sue a gas company for damages related to drilling operations on their properties. In *Fiorentino v. Cabot Oil & Gas Corporation*, residents executed gas leases with energy giant Cabot, giving Cabot the right to extract natural gas from the Marcellus Shale contained on their properties. However, they charged that Cabot's activities were improper and unsafe, which allowed the release of methane, natural gas and other toxins onto their land and into their ground water. As a result, they claim that they have suffered property damage, physical illness, and emotional and mental anguish as a result of contamination. The residents requested the judge to order that Cabot

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## Residents' Suit Survives Challenge *continued*

halt all gas drilling operations. They are also seeking money damages for the financial, physical and mental loss they claim to have suffered, including an award of punitive damages for what the residents believe is outrageous conduct committed by Cabot in ruining their land and putting their health at risk.

Cabot sought to dismiss the action but the judge has ruled that the residents' case can proceed. Particularly, the judge refrained from dismissing the residents' claim under the theory of strict liability. A defendant can be "strictly liable" for activity considered "abnormally dangerous." Cabot argued that since state courts have already determined similar activity, such as operating petroleum pipelines, or underground storage tanks, at gas stations are not abnormally dangerous, gas well drilling similarly should not be considered "abnormally dangerous." The Court said not so fast, and was reluctant to hold that gas well drilling was not abnormally dangerous. Instead, the Court allowed the case to proceed for more evidence to be discovered and developed.

We will continue to follow the progress of this important case and provide you with updates.

## Delaware River Basin Commission Proposes Gas Development Regulations

Since May of this year, the Delaware River Basin Commission ("DRBC") has imposed a moratorium on the withdrawing and discharging of water that has prevented extraction of gas from the Marcellus Shale located within the Delaware River Basin. Only a small portion of the Marcellus Shale formation in Pennsylvania is located within DRBC jurisdiction – primarily Wayne, Pike, Monroe and Carbon Counties. Of these, Wayne County at the state's northeastern corner is of greatest interest to gas companies. The proposed regulations will be subject to a 90-day comment period and likely will not be issued in final form for some months thereafter. Several aspects of the proposed regulations go beyond similar requirements in PADEP regulations and are likely to be controversial.

For example, developers of more than five well pads would be required to submit natural gas development plans that address impacts of all planned wells under the DRBC regulations. By contrast, PADEP issues permits on a permit-by-permit basis. The DRBC would also require pre- and post-construction surface and groundwater monitoring. Further, instead of allowing wastewater to be stored in ponds, all wastewater would be required to be stored in tanks or a central facility. With respect to wastewater disposal, the proposed regulations would require a treatability study demonstrating that the facility can successfully operate with applicable limitations. Further, financial assurance for the plugging and restoration of wells, and remediation of any pollution, would be required in the amount of \$125,000.00 per well, which significantly exceeds PADEP requirements.

In the coming months, lawyers will argue over DRBC's authority to regulate certain aspects of gas development, and environmental groups and gas companies will debate whether the proposed regulations provide enough protection. What is most paramount for landowners, however, is that the regulation of gas development in the Delaware River Basin is now upon us and has begun.

## Lease Expiration or Continuation

Kermit L. Rader

The typical lease for extraction of gas from the Marcellus Shale has a five year term. Many land owners who signed leases in the early days of the Marcellus Shale boom are wondering whether their leases are about to expire so that they can take advantage of the better financial terms available today. However, landowners should keep in mind that the typical gas company lease term is not necessarily limited to five years; rather, the lease may contain a number of conditions which can automatically extend the lease beyond the primary lease term. The most common of these extending conditions that appears in gas leases and triggers an extension is actual production of gas from the leasehold or lands pooled with the leasehold. Other conditions that often appear in leases require much less action on the part of the gas company.

Examples include: (1) operations in search of gas; (2) a well capable of production of gas; and (3) storage of gas, in each case on the leasehold or lands pooled with it.

In addition, the gas company making all required payments may extend the lease. Whether any of these or other conditions will extend your lease depends on how your particular lease is written. If you believe that the end of the term of your lease is approaching, you should determine whether in fact the lease will expire. To do so, it is critical that your lease terms are evaluated and compared with the extent and degree of activities that the gas company has undertaken on your land. The Gas Leasing and Development Group at HRMM & L has a great deal of experience evaluating such lease terms and would be happy to assist you with this analysis.

## *I Have a Gas Lease, But Should I Sign a Separate Easement?*

Merle R. Ochrach

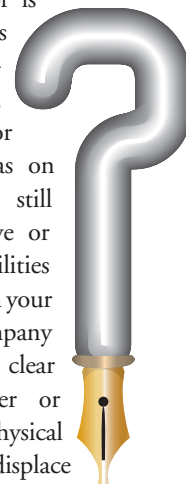
**You've signed your gas lease.** Visions of prosperity and wealth fill your imagination. Along comes again the man from the gas company with a document he needs signed. "Oh, it's just a pipeline easement or a right-of-way agreement. No big deal. Just sign and the gas company will move ahead with gas development and the royalties will start rolling in."

Stop! Not so fast. Don't sign that document before you have it reviewed by an attorney knowledgeable in gas leasing issues. What you and your attorney worked hard at negotiating in the gas lease could be taken away or altered by the easement or right-of-way agreement. Oftentimes what we are told such easements stand for is quite different from the terms that are contained in these agreements. If not careful, these agreements can dramatically change the condition, use and enjoyment of your land that you did not think allowable under the original lease.

Here are some examples of issues that such easements create. Are pipelines only to transport gas from your property or is the easement giving the gas company the right to transport from neighboring, outlying properties or perhaps even to store gas on your property? Do you still have the right to approve or reject the location of facilities and therefore operations on your property? Has the gas company expanded its right to clear your property of timber or landscaping? Will the physical scope of operations displace deer or substantially upset ecosystems on your property?

Any document you receive from the gas company following the signing of a gas lease should be carefully reviewed. It can impact you financially and may alter how you choose to use and enjoy your property.

If you have any questions or concerns about these, or other matters regarding gas leasing please contact me or another member of our gas leasing and development group.



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