N.D.L.R. ENERGY LAW LECTURE SERIES

NORTH DAKOTA CLASS CERTIFICATION IN OIL AND GAS CASES

MARCH 14, 2013

CHRISTINE R. FRITZE
VISITING ASSISTANT PROFESSOR
UNIVERSITY OF NORTH DAKOTA
SCHOOL OF LAW
NDIC Director’s Cut

Production – Oil

- 2005 - Dec Oil 3,215,261 barrels
- 2010 - Dec Oil 10,659,867 barrels
- 2012 - Dec Oil 23,834,431 barrels

- Oklahoma – 8.14 M bbl
- Texas – 68.82 M bbl
Federal Rule 23

- (a) Prerequisites.
  - (1) Numerosity
  - (2) Commonality
  - (3) Typicality; and
  - (4) Adequate representation
Fed. Rule 23(b)

• Types of Class actions
  ○ 1) separate actions would create risk of:
    ▪ A) inconsistent or would establish incompatible standards of conduct for the party opposing the class; or
    ▪ B) individual adjudications would be dispositive to non-parties or would substantially impair or impede their ability to protect their interests
  ○ 2) party opposing the class has acted or refused to act on grounds that generally apply to the class so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole.
3) Common Questions of law or fact predominate & class action is superior. Matters pertinent to determination:

- A) class members’ interests in individually controlling the prosecution or defense of separate actions;
- B) the extent and nature of any ongoing litigation by other class members
- C) desirability or undesirability of concentrating the litigation in the particular forum; and
- D) the likely difficulties in managing the class
Rule 23. Class actions.
  (a) Commencement of a class action. One or more members of a class may sue or be sued as representative parties on behalf of all in a class action if:
    • (1) the class is so numerous that joinder, whether or not otherwise required or permitted, is impracticable; and
    • (2) a question of law or fact is common to the class.
  (b) certification hearing
    • As soon as practicable
North Dakota
13 Factors to be considered in certification

- 23(c) Criteria considered.
- (1)... the following and other relevant factors:
  - (A) joint or common interest;
  - (B) whether separate actions would create a risk of inconsistent or varying adjudications;
  - (C) individual class members actions (as a practical matter) would be dispositive of the interests of other members or substantially impair or impede their ability to protect their interests;
○ (D) whether defendant has acted or refused to act on
grounds that apply generally to the class;
○ (E) whether common questions of law or fact
predominate;
○ (F) whether other means of adjudicating the claims and
defenses are impracticable or inefficient;
○ (G) whether a class action is the most appropriate means
of adjudicating the claims and defenses;
○ (H) whether non class representatives have a substantial
interest in individually controlling separate actions;
(I) whether a subject claim is or has already been litigated;
(J) desirability of another forum;
(K) whether management poses unusual difficulties;
(L) whether any conflict of laws issues pose unusual difficulties; and
(M) whether the claims of individual class members are insufficient in the amounts or interests involved, in view of the complexities of the issues and the expenses of the litigation, to afford significant relief to the class members.

- Class = appx 6,000 (appx 2,300 wells)
- All wells in North Dakota purchased or sold oil (1975 – 1988) where the oil was measured by hand guaging
- 13 factors in Rule 23(c)
  - “The district court must weigh the competing factors and determine whether the class action will provide a fair and efficient adjudication of the controversy. [cite omitted] No one factor predominates over the others. [cite omitted]”
Ritter #1

- **Commonality**
  - Standardized conduct by defendants = common nucleus is typically presented, & commonality is met
    - Single type of transaction = purchase of ND crude
    - Single purchaser
    - Single commodity – oil
  - Reversed on ‘joint or common interest”
    - “district court may not rest its decisions on factors analyzed incorrectly”
Ritter #2

  - On Remand - Trial court:
    - “fair and efficient adjudication of the controversy”
    - Common interest – if Koch has to return profits, Koch’s liability would not depend on how the profits would be distributed
    - Still found a ‘joint or common interest’
  - N.D. Supreme Court – Affirmed
    - Had earlier recognized that the trial court does not have to address all 13 factors, but does have to analyze correctly.
  - Why would Plaintiffs keep pushing the joint or common interest?
    - Mandatory class ?
Ritter #3

  - Trial Court granted summary judgment to Koch
    - Conversion
    - Unjust enrichment
    - Accounting
  - N.D. Supreme Court
    - Conversion - “Koch's alleged conduct in wrongfully depriving the plaintiffs of the excess unreported oil and the proceeds from its sale involves more than a failure to pay under the terms of a contract and may give rise to liability independent of any contractual liability.”
    - Unjust enrichment – applies only in absence of contract
    - Accounting – conversion claim supplies equitable basis
**Bice #1 - Commonality – Bice #1**

- Common nucleus of operative facts
  - Proof as to one will be proof as to all
    - Differing lease language
  - As the trial court observed, "Defendants are alleged to have calculated royalties for each plaintiff in the same way regardless of lease language," and "the propriety or legality of the deductions taken from royalty payments made to all these plaintiffs is in question." ... *We conclude that Petro-Hunt's standardized conduct toward the royalty owners presents a common nucleus of operative facts meeting the commonality requirement...***
We join the majority of states adopting the "at the well" rule and rejecting the first marketable product doctrine. Thus, we conclude the district court properly determined Petro-Hunt can deduct post-production costs from the plant tailgate proceeds prior to calculating royalty. We affirm the district court's order granting Petro-Hunt summary judgment regarding the use of the work-back method to calculate royalties.
So What’s Left?
N.D.C.C. 38-08-06.3. INFORMATION STATEMENT TO ACCOMPANY PAYMENT TO ROYALTY OWNER

- ... an information statement that will allow the royalty owner to clearly identify the amount of oil or gas sold and the amount and purpose of each deduction made from the gross amount due....
Interest on late payments

- N.D.C.C. - 47-16-39.1. Obligation to pay royalties – Breach
  - ...breach of the obligation may constitute grounds for the cancellation of the lease
  - 18% interest
    - Exceptions:
      - Semi-annually if the aggregate amount is less than fifty dollars;
      - Take in kind;
      - Title disputes (to extent of dispute);
      - When a mineral owner cannot be located after reasonable inquiry by the operator.
• Unit operator – fiduciary duty?
  ○ The Oklahoma Supreme Court has "recognized the existence of a fiduciary duty owed by a unit to the royalty owners and lessees who are parties to the unitization agreement or subject to the order creating the unit. This is not a duty created by the lease agreement but rather by the unitization order and agreement." *Leck v. Continental Oil Co.*, 1989 OK 173, 800 P.2d 224, 229
N.D. affiliate transactions

- **BTA Oil Producers, et al. v. MDU Resources Group, Inc., et al.; 2002 ND 55; 642 N.W.2d 873**
  - Koch bought and processed natural gas at its processing plant in McKenzie County from BTA and others.
  - BTA cited evidence showing Koch used inter-affiliate transfers as "sales" of liquid hydrocarbons, paid its own affiliates to transport the liquid hydrocarbons, and charged various fees through its affiliates and subsidiaries, which lowered the price the producers ultimately received for the liquid hydrocarbons.
Affiliate Transactions

- **Howell v. Texaco Inc., 2004 OK 92; 112 P.3d 1154;**
  - “A royalty owner has a right to be paid on the best price available. [Johnson cite omitted]; When the actual value is not obtainable because of a producer's self-dealing, the courts will carefully scrutinize the transactions on which the royalty payments are based. [Tara cite omitted]. Whenever a producer is paying royalty based on one price but it is selling the gas for a higher price, the royalty owners are entitled to have their payments calculated based on the higher price. *Id.* The plaintiffs here are entitled to have their royalty payments based on the prevailing market price or the work-back method, whichever one results in the higher market value. **We hold that an intra-company gas sale cannot be the basis for calculating royalty payments.**” [cite omitted]
Certification Hearing

- #1 – Adequate Representation
  - Quality vs. Quantity