Common Sense: Ohio Court of Appeals Further Illuminates Production in Paying Quantities Analysis for Oil and Gas Wells Metered in Common

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A recent case out of the Court of Appeals of Ohio has provided further clarification as to how the method of measurement of oil and gas production affects a production in paying quantities analysis in the state. The court in *Fiocca v. Aim Energy, LLC*, No. 19 CA 0930, 2019 WL 6713251, at *4–5 (Ohio Ct. App. Dec. 6, 2019) concluded that, in determining whether a gas well is producing in paying quantities, the fact that the well is being commonly metered with other wells is not fatal to the analysis. The court's decision illustrates that, in Ohio, while the common metering of wells on multiple leaseholds may still be subject to legal challenges, common metering is less likely to be an issue when it measures the production of multiple wells on the same leased premises. Companies that operate assets with common meters or that recently purchased held-by-production assets in the region should take note of this development.

In *Fiocca*, Appellant owned a one-third interest in the mineral rights underlying 126 acres of property and leased those interests under two leases with Appellee's predecessor in interest. *Id.* at *1. Although four wells had been developed under the leases, Appellant sought termination of the leases for lack of production in paying quantities. *Id.* Appellant argued that each of the four wells had to be producing in paying quantities to hold the surrounding acreage, as the leases' language expressly stated that each well that was developed would hold only the 40 acres surrounding the well rather than the entire property. *Id.* The trial court found that the leases were held in force by production in paying quantities, noting that even though it could not determine the actual production rates for each individual well due to the common metering system, the leases did not require separate metering. *Id.* at *2. Further, Appellant presented no evidence to demonstrate that any individual well was not producing in paying quantities. *Id.* On appeal, Appellant argued that the trial court erred when it found that "common metering satisfied production in paying quantities for all the wells." *Id.* at *3.

In support of his argument, Appellant relied heavily on *Lang v. Weiss Drilling Company*, 70 N.E.3d 625, 633 (Ohio Ct. App. 2016), where the Court of Appeals of Ohio held that, although common metering is an accepted practice for measuring oil and gas production to determine production in paying quantities, the court "must be able to quantify production from the particular well at issue," and it "should not be required to guesstimate the amount of gas attributable to the well in question where the party responsible for the metering has chosen to use a common meter for multiple wells as opposed to individual meters for each well." *Id.* at *4. The Court in *Fiocca* clarified, however, that its holding in *Lang* was not that common metering can *never* be considered in a paying quantities analysis, but rather that the trial court "was free to require a more accurate method of measuring oil and gas production" if, under the circumstances, the use of common metering created uncertainty regarding whether a single well was producing in paying quantities. *Id.*

Further, in *Fiocca*, the Court distinguished the facts at hand from the facts in *Lang*. It explained that, in *Lang*, the Court was required to determine whether a single well that ran through a common meter with multiple other wells was producing in paying quantities, while in *Fiocca* the controlling question was different. *Id.* The Court explained, in this regard, that it was "irrelevant if the production is coming from one well of the four wells or all four wells," because the leases provided that they would continue so long as oil or gas was found "*on the premises* in paying quantities . . .." *Id.* The Court observed that the evidence proving production in paying quantities (which was undisputed) included data from the common meters showing production, proof that appellant had been receiving and cashing royalty checks, copies of the Ohio Department of Natural Resources ("ODNR") Well Summaries, production reports for all four wells, and a net revenue schedule that set out royalties paid and revenue earned. *Id.* at *5. Ultimately, the Court held that it would not read new terms into the leases and because the leases did not "require production in paying quantities from each well drilled on the Property in order to hold its respective lease . . . the trial court correctly interpreted the Leases." *Id.*[i]

Therefore, under Ohio law, when there are multiple wells developed under a lease with common metering and the lease requires production in paying quantities *on the premises* rather than from each individual well, a showing that each *individual* well is producing in paying quantities may not be necessary. At a more general level, the *Fiocca* opinion provides further detail regarding which evidence is helpful to support a lessee's defense of production in paying quantities, such as proof of acceptance of royalty payments, ODNR records, and net revenue reports.

In evaluating leases held by production with common metering to ensure there is sufficient evidence of production, production companies should bear in mind that, under the *Fiocca* decision, an Ohio court will adhere to lease language when determining whether there must be production in paying quantities from the leased premises as a whole rather than from each individual well on the premises. As Ohio courts continue to refine their jurisprudence relating to production in paying quantities and lease terms, companies operating there should continue to monitor case law for further developments on these issues.

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[i] The Court further clarified that although a provision in the leases specified how many wells needed to be drilled to hold the acreage surrounding the well (40 acres surrounding each well), that provision did not mention production in paying quantities, and Appellee's development of four wells, each located in a different fourth of Appellant's 126-acre tract, was sufficient to hold the leases. *Id.* at *3–5.