

No. 09-3009

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

In re SEMCRUDE, L.P., et al
Debtors,

In the adversary action of

SAMSON RESOURCES COMPANY, et al.,
Plaintiffs-Petitioners,

-vs-

Semcrude, L.P., et al.,
Defendants.

**BRIEF OF *AMICUS CURIAE*, THE STATE OF OKLAHOMA
IN SUPPORT OF PLAINTIFFS-PETITIONERS MOTION FOR
CERTIFICATION OF QUESTIONS OF LAW TO THE OKLAHOMA
SUPREME COURT**

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)	
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INTRODUCTION

Pursuant to Federal Rule of Appellate Procedure 29(a), the State of Oklahoma, as Amicus Curiae, respectfully submits this Brief in Support of Petitioners/Plaintiffs (the “Oklahoma Producers”) Motion for Certification of Questions of Law to the Oklahoma Supreme Court pursuant to the Uniform Certification of Questions of Law Act codified in Oklahoma at 20 O.S. §§1601-1611. The questions to be certified are as follows:

1. Whether §570.10(A) of the Oklahoma Production Revenue Standards Act, 52 O.S. §570.10(A), creates an implied trust, whether resulting or constructive, for the benefit of interest owners in oil and gas wells?

2. If §570.10(A) creates an implied trust, whether resulting or constructive, what property and what parties are subject to that trust?

INTEREST OF AMICUS

The State of Oklahoma has great interest in the questions presented for certification. These questions, and how they are ultimately decided, will have a significant impact on the governance of the oil and gas industry in Oklahoma. The oil and gas industry has played a major role in the shaping of Oklahoma's history, and continues to be an essential part of the Oklahoma economy. As this court is likely aware, Oklahoma is also one of the nation's largest oil and gas producers. In 2007, Oklahoma was the fifth largest producer of crude oil among the states, representing 3.3% of the country's production, and was the third largest producer of natural gas, representing 8.2% of the country's production. Mark Snead & Suzette Barta, *The Economic Impact of Oil and Gas Drilling on the Oklahoma Economy*, Center for Applied Economic Research Spears School of Business Oklahoma State University, p.5, October 2008 (prepared for the Oklahoma Energy Resources Board)(available at: <http://www.crossroads.odl.state.ok.us/cgi-bin/showfile.exe?CISOROOT=/stgovpub&CISOPTR=8629&filename=8890.pdf>).

Furthermore, "the Oil and Natural Gas industry contributed \$19 billion to Oklahoma's Gross State Product (GSP) in 2007, the last year for which detailed data

is available. This amounts to 13.6% of the state's total Gross State Product." Mickey Hepner, *The Economic Impact on the Oklahoma Economy Generated by Oklahoma's Oil and Natural Gas*, University of Central Oklahoma Policy Institute, p.1, Feb. 25, 2009 (available at <http://busn.uco.edu/ucopi/docs/2009/Oil%20&%20Gas%20Impact.pdf>). Including the direct, intermediate and induced effects, the oil and gas industry contributes \$29.9 billion to Oklahoma's gross state product, and generates 266,966 jobs within Oklahoma. *Id.* In addition to the jobs and revenue created by the oil and gas industry, in 2007 oil and natural gas companies paid \$973,346,617 in gross production taxes to the State of Oklahoma. It is further estimated that oil and gas employees pay an additional \$2 billion in state taxes. *Oklahoma Oil and Natural Gas Industry Impacts State Economy by \$40 Billion*, EXPLORATIONS, Fall 2008 (available at <http://www.oerb.com/Portals/0/docs/Newsletters/Explorations%20Fall%202008%20lowres.pdf>). Clearly, questions of law relating to the regulation of the oil and gas industry in Oklahoma are of great importance to the State of Oklahoma and its economy.

The recent opinion of the United States Bankruptcy Court for the District of Delaware, from which this appeal is taken, is in conflict with an opinion issued by the Oklahoma Attorney General dealing with questions similar to the ones that

Petitioners/Plaintiff are asking to be certified. This conflict has created uncertainty in the law. It is important for the Oklahoma Supreme Court to rule on these questions to give certainty to future transactions initiated under the Oklahoma Production Revenue Standards Act, to avoid needless litigation in the future and to promote the efficient administration of Oklahoma law.

ARGUMENT & AUTHORITIES

Summary

The principal matter before this court hinges on the interpretation of 52 § 570.10(A) of the Oklahoma Production Revenue Standards Act. Aside from the Attorney General's opinion on this section of law, there is no additional guidance addressing whether a trust of any type is created by the statute in question. Oklahoma has a long tradition in gas and oil production that distinguishes it from most other states. The matter before this court is not one of simply unique circumstances, but is a matter of novel and unsettled law before a uniquely situated state, and the interpretation of the statute in question carries enormous ramifications for the State, thus making it appropriate to seek state certification. *See* *Arizonans for Official English v. Arizona*, 520 U.S. 43, 79 (1997). The process of certification was intended precisely for such matters as are presently before the court.

**PETITIONER/PLAINTIFF’S PRESENT AN
IMPORTANT QUESTIONS OF STATE LAW
WHICH IS A MATTER OF FIRST IMPRESSION IN
THE STATE OF OKLAHOMA**

The Oklahoma Production Revenue Standards Act (hereinafter “PRSA”), specifically 52 O.S. § 570.10(A) states:

All proceeds from the sale of production shall be regarded as separate and distinct from all other funds of any person receiving or holding the same until such time as such proceeds are paid to the owners legally entitled thereto. Any person holding revenue or proceeds from the sale of production shall hold such revenue or proceeds for the benefit of the owners legally entitled thereto. Nothing in this subsection shall create an express trust.

In its recent opinion, the Bankruptcy Court recognized it ruled on “novel issues of great significance to the parties, both in economic terms and as a business reality in the oil and gas industry.” Opinion p.3. Because the issues are novel and of great significance to the State of Oklahoma, it is proper to have the Oklahoma Supreme Court give its opinion and lend finality to the issue of whether the PRSA imposes an implied trust.

The local appellate rules for the third circuit offers direction on when certification of questions of state law is appropriate. Rule 110.1, “Certification of Questions of State Law” states,

When the procedures of the highest court of a state provide for certification to that court by a federal court of questions

arising under the laws of that state *which will control the outcome of a case pending in the federal court*, this court, sua sponte or on motion of a party, may certify such a question to the state court in accordance with the procedures of that court, and will stay the case in this court to await the state court's decision whether to accept the question certified. The certification will be made after the briefs are filed in this court. A motion for certification must be included in the moving party's brief.

(emphasis added). The Oklahoma Supreme Court Rules permit orders certifying a question of law pursuant to 20 O.S. § 1602. 12 O.S. Appendix 1 Oklahoma Supreme Court Rules, 1.10(f). The referenced statute, 20 O.S. § 1602, pertains to the courts power to answer, and it states the court is permitted to answer “if the answer may be determinative of an issue in pending litigation in the certifying court and there is no controlling decision of the Supreme Court or Court of Criminal Appeals, constitutional provision, or statute of this state.” It is clear that the underlying qualifications for certification exist.

The Supreme Court discussed when certification is proper in *Lehman Brothers v. Schein* 416 U.S. 386 (1974). Although a court is not required to certify a question of state law, the Court discussed the value stating, “[i]t does, of course, in the long run save time, energy, and resources and helps build a cooperative judicial federalism.” *Id.* at 391. The Court advises certification may be appropriate when considering the novelty of the question, the extent to which the question has been

reviewed previously, and evaluating the familiarity a court has with the state law in question. *Id.* Even the Supreme Court, as well versed in various laws as it may be, still defers to circuit judges' decision when appropriate, as it did in *Railroad Commn' v. Pullman Co.*, 312 U.S. 33, 39 (1941). *Id.* at 392.

Certification of a state question was also a central issue in *Town of Castle Rock, Colorado v. Gonzales*, 545 U.S. 748 (2005). The majority ultimately decided that seeking the state supreme court's opinion was not necessary; however, Justice Stevens, with whom Justice Ginsburg joined in dissent, felt certification would have been appropriate. In his dissent, Justice Stevens reviewed past decisions of the Supreme Court and outlined in detail why he believed certification would have been proper. He argued the "principles of federalism and comity favor giving a State's high court the opportunity to answer important questions of state law, particularly when those questions implicate uniquely local matters, such as law enforcement." *Id.* at 777. Oklahoma's oil and gas laws are even more unique to the state than local enforcement, because they are laws not commonly found in all states. Justice Stevens also argued that certification would have promoted judicial economy and fairness to the parties, because "the Colorado Supreme Court is the ultimate authority on the meaning of Colorado law, and if in later litigation it should disagree with this Court's provisional state-law holding, our efforts will have been wasted and respondent will

have been deprived of the opportunity to have her claims heard under the authoritative view of Colorado law.” *Id.* at 778.

Likewise, Oklahoma’s Supreme Court is the ultimate authority on the meaning of Oklahoma law. It is not a question of this court’s ability or knowledge of general law; however, this court should follow the Supreme Court’s guidance, as it has done in previous cases that have presented other such novel issues. *Michaels v. State of New Jersey*, 150 F.3d 257, 259 (3rd Cir. 1998)(stating that it would be particularly inappropriate to interpret state statutes governing allocation of certain financial responsibilities between the State and one of its subdivisions, to avoid attempting to ‘predict’ how a state’s highest court would rule); *Kendrick v. Dist. Attorney of the County of Philadelphia*, 488 F.3d 217, 219 n.1 (3rd Cir. 2007)(expressing gratitude to the state court for accepting the circuit court’s certified question, noting the importance of the certified question procedure, allowing a state’s supreme court the opportunity to elucidate an important state issue, and avoiding erroneous predictions); *see also Delta Funding Corp. v. Harris*, 466 F.3d 273, 273 n.1 (3rd Cir. 2005)¹.

¹The desire to avoid predicting how a state’s highest court would rule is not unique to the Third Circuit. The Eleventh Circuit commented that “[w]here there is any doubt as to the application of state law, a federal court should certify the question to the state supreme court to avoid making unnecessary *Erie* ‘guesses.’” *Mosher v. Speedstar Division of AMCA Int’l., Inc.*, 52 F.3d 913, 916 (11th Cir. 1995). The same court also cited a fellow circuit judge in a dissent opinion, “[Certification] is a useful adjudication tool. Only through certification can federal courts get definitive answers to unsettled state law questions. Only a state supreme court can provide what we can be assured are ‘correct’ answers to state law

CONCLUSION

The Oklahoma Production Revenue Standards Act has yet to be authoritatively interpreted by an Oklahoma court. The only guidance on the statute is that given by Oklahoma's Attorney General in his opinion dated November 5, 2008. 31 Op. Att'y Gen. (2008). Any interpretation of the PRSA will have an immediate and sustained impact on Oklahoma and its economy. Just as important, the interpretation of this particular statute will dictate the protections afforded to thousands of royalty interest owners in the future. Unlike the Petitioners/Plaintiffs in the current case, many of these royalty interest owners are individuals who likely would not have the ability to litigate their interests in the next bankruptcy that may come along. While the immediate economic impact of the pending case is approximately \$127 million, this sum is small when compared to the future impact of any interpretations of the PRSA that may come from this litigation. As Justices Rehnquist, O'Connor, and Chief Justice Burger cautioned in a concurring opinion in *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 510 (1985), "[t]he decision of the Court of Appeals represents a premature and avoidable interference with the enforcement of state law in an area of special concern to the States. Speculation by a federal court about the meaning of a

questions, because a state's highest court is the one true and final arbiter of state law. From our perspective, state law is what the state supreme court says it is, and a state supreme court's pronouncements are binding on every state and federal judge." *Sultenfuss v. Snow*, 35 F.3d 1494, 1504 (11th Cir.)(en banc) (Carnes, J., dissenting).

state statute in the absence of prior state court adjudication is particularly gratuitous when, as is the case here, the state courts stand willing to address questions of state law on certification from a federal court.” The Oklahoma Supreme Court is willing to address questions of state law on certification. The State of Oklahoma respectfully requests this court to do so to prevent uncertainty in such an important area of Oklahoma law.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

As required by Fed.R.App.P.32(a)(7)(C), I certify that this brief is proportionally spaced and contains 2151 words.

[X] I relied on my word processor to obtain the count and it is WordPerfect X3.

I certify that the information on this form is true and correct to the best of my knowledge and belief formed after a reasonable inquiry.

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