

One to Keep a Close Eye On – Bradford County Permits the Pennsylvania Attorney General to Proceed with Novel Claims against Two Oil and Gas Operators

By Kenneth J. Witzel, Member at Frost Brown Todd LLC, Pittsburgh

On December 15, 2017—with the holiday season rapidly approaching and as accountants and tax attorneys were feverishly analyzing the recent changes to the Internal Revenue Code—the Court of Common Pleas of Bradford County, Pennsylvania, issued an 82-page Opinion (the “Opinion”) at *Commonwealth of Pennsylvania v. Chesapeake Energy Corp., et al.*, Docket No. 2015IR0069 (Bradford Cty.), that may prove to have a long-reaching impact on the way oil and gas operators conduct business in Pennsylvania.

Executive Summary

The Opinion is important for two reasons: First, it finds that the Pennsylvania Attorney General may proceed against two operators on various royalty-related claims brought on behalf of Pennsylvania landowners under Pennsylvania’s Unfair Trade Practices and Consumer Protection Law (the UTPCPL), a statute that imposes harsh penalties on violators.¹ Second, it suggests that the operators may have violated Pennsylvania’s common law on antitrust by entering into and acting under a joint development agreement as to a specific geographical area. Recognizing the significance of its holdings, the Bradford County Court’s Opinion certified two issues for immediate appeal to the Commonwealth Court.

Whether the case promptly settles or the operators take an immediate appeal, the case warrants close consideration and monitoring. Operators should proceed with heightened caution when determining how to calculate royalty payments under their oil and gas leases. They should also be cautious when acting under existing joint development agreements and when considering entering into new agreements that could be construed as attempts to unlawfully decrease the market rate for new leases in areas of mutual interest.

The Lawsuit

The Pennsylvania Attorney General initiated the proceedings in *Commonwealth v. Chesapeake Energy* against Chesapeake Energy Corp., Anadarko Petroleum Corp., and various entities related to each of them (Chesapeake Energy Corp. and its related entities are collectively referred to as “Chesapeake,” and Anadarko Petroleum Corp. and its related entities are collectively referred to as “Anadarko”). The Opinion, available here, addresses preliminary objections filed by Chesapeake and Anadarko to the Commonwealth’s Second Amended Complaint.

The Second Amended Complaint advances the following claims:

Count I – alleges that Chesapeake violated the UTPCPL by taking “inflated deductions for post-production costs” from royalty payments, and by “engaging in deceptive and misleading practices in connection with [their] lease obligations with those landowners.”

¹73 P.S. § 201-1, et seq.

Counts II and VI – allege that Chesapeake (Count II) and Anadarko (Count VI) violated the UTPCPL “by misrepresenting the applicability of deductions and the meaning of the Market Enhancement Clause,” causing the landowners to believe that they were signing leases free of deductions.

Count III – alleges that Chesapeake and Anadarko violated the UTPCPL by participating “in a joint commercial venture aimed at allocating exclusive areas of operation within geographic areas of mutual interest to one or the other of them,” which had “the effect of denying Pennsylvania landowners the benefit, inherent in a freely competitive marketplace, of the exercise of individual choice in the acquisition of oil and gas leases, and depriving those landowners of their freedom to meaningfully choose otherwise available market options.” Count III further claims that in “engaging in” the joint venture, the defendants “acted in restraint of trade or commerce in the oil and gas lease acquisition market by fixing, controlling, and/or maintaining at artificial and non-competitive levels, the acreage signing bonus and the royalties to be paid to Pennsylvania landowners.”

Count IV – alleges that Chesapeake and Anadarko violated the UTPCPL “by unfairly and deceptively misrepresenting the presence or absence of competition for the acquisition of oil and gas leases, and by representing to” landowners that acreage signing bonuses and royalties they had been offered were “competitive and fair.”

Count V – alleges that the Chesapeake and Anadarko violated “the Pennsylvania antitrust common law prohibiting restraint of trade by engaging in an unfair and deceptive joint marketing venture, viz., allocating to each other the option to acquire interests in oil and gas leases already secured by one or the other of them within a particular allocated territory.”²

The Second Amended Complaint asks the court to impose sweeping penalties on Chesapeake and Anadarko. In addition to an order enjoining them from “engaging in the acts and practices specifically alleged” in the lawsuit and “any other acts and/or practices violative of the UTPCPL,” the lawsuit seeks to require them to:

- Pay “affected Pennsylvania landowners money wrongfully deducted from royalty checks or otherwise acquired through any violation of the UTPCPL.”
- Pay civil penalties of either \$1,000 or \$3,000 to each “victim” (depending on whether the alleged victim is older than 60) for each UTPCPL violation found to have been committed by the defendants.
- Forfeit “all profits they have derived as a result of the unfair and deceptive acts” alleged in the lawsuit.

² Opinion, at 4-6.

- Be stripped of the right to engage in “any natural gas-related activity or business” in Pennsylvania until all damages, civil penalties and costs have been paid.³

The UTPCPL

To appreciate the Attorney General’s UTPCPL claims, a brief overview of the statute may be helpful. The UTPCPL is Pennsylvania’s consumer protection law.⁴ Its purpose is to protect the public from unfair or deceptive business practices.⁵ It does so by declaring certain “[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce” to be “unlawful.”⁶ The methods, acts and practices declared unlawful are listed in subsection (4) of the UTPCPL’s definition section.⁷ Importantly, subsection (4) includes a “catch-all” provision that makes it unlawful to engage in “any other fraudulent or deceptive conduct which creates a likelihood of confusion or of misunderstanding.”⁸ The UTPCPL defines “trade” and “commerce” as meaning “the advertising, offering for sale, sale or distribution of any services and any property, tangible or intangible, real, personal or mixed, and any other article, commodity, or thing of value wherever situate, and includes any trade or commerce directly or indirectly affecting the people of this Commonwealth.”⁹

The UTPCPL authorizes “the Attorney General or a District Attorney” to bring an injunction action under the UTPCPL if he or she “has reason to believe that any person is using or is about to use any method, act or practice declared ... to be unlawful” under the UTPCPL and that “proceedings would be in the public interest[.]”¹⁰ If a court issues a permanent injunction in response to a proceeding initiated by the Attorney General or a District Attorney, it has the discretion to “direct” the defendant to “restore to any person in interest any moneys or property, real or personal,” that the defendant acquired by means of conduct that violates the UTPCPL.¹¹ If the court finds that the defendant “is willfully using or has willfully used a method, act or practice declared unlawful” under the UTPCPL, the Attorney General or District Attorney may also recover, on the Commonwealth’s behalf, a civil penalty not exceeding \$1,000 per violation where

³ *Id.* at 6-7.

⁴ *Knight v. Springfield Hyundai*, 81 A.3d 940, 949 (Pa. Super. 2013).

⁵ *Id.*

⁶ 72 P.S. § 201-3.

⁷ 72 P.S. § 201-2(4).

⁸ 72 P.S. § 201-2(4)(xxi). An extensive body of case law has developed around the catch-all provision. This body of law is beyond the scope of this memorandum.

⁹ 73 P.S. § 201-2(3).

¹⁰ 73 P.S. § 201-4.

¹¹ 73 P.S. § 201-4.1. If the defendant violates the terms of an injunction, upon petition of the Attorney General or a District Attorney, the court must order the defendant to “forfeit and pay to the Commonwealth a civil penalty of not more than” \$5,000 per violation. 73 P.S. § 201-8. The court may also, in its discretion and in response to a petition filed by the Attorney General or a District Attorney, “order the dissolution, suspension or forfeiture of the franchise or right to do business” of the defendant, and appoint a receiver of the company’s assets. 73 P.S. § 201-9.

the victim is under 60 years of age, or not exceeding \$3,000 per violation where the victim is 60 years of age or older.¹²

Although not relevant to the claims before to court in *Commonwealth v. Chesapeake Energy*, but of fundamental general importance for oil and gas operators, the statute also allows “[a]ny person who purchases or leases goods or services primarily for personal, family or household purposes” to seek redress for conduct that violates the UTPCPL.¹³ In such a private cause of action, the court may, in its discretion, award the plaintiff “up to three times the actual damages sustained,” as well as any additional relief it deems “necessary or proper[.]” including costs and reasonable attorney fees.¹⁴ The entry of a permanent injunction, judgment or order by a court in proceedings brought by the Attorney General or a District Attorney constitutes prima facie evidence in a private cause of action that the defendant engaged in conduct that violated the UTPCPL.¹⁵

The Opinion

The Opinion addresses various preliminary objections raised by Chesapeake and Anadarko to the Commonwealth’s Second Amended Complaint. It reached the following key conclusions:

1. The UTPCPL authorizes the Attorney General to bring legal actions against oil and gas operators for “allegedly engaging in unfair acts or practices in connection with the purchase of oil and gas leases from private landowners.”¹⁶

¹² 73 P.S. § 201-8.

¹³ 73 P.S. § 201-9.2.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ Opinion, at 16-33. In reaching this conclusion, the court rejected the Chesapeake’s and Anadarko’s argument that purchasing oil and gas leases from Pennsylvania landowners did not constitute “trade” or “commerce” under the UTPCPL. As noted above, the UTPCPL defines “trade” and “commerce” as meaning “the advertising, offering for sale, sale or distribution of any services and any property, tangible or intangible, real, personal or mixed, and any other article, commodity, or thing of value wherever situate, and includes any trade or commerce directly or indirectly affecting the people of this Commonwealth.” 73 P.S. § 201-2(3). The court adopted a broad reading of the definition and held that the definition’s second clause, “any trade or commerce directly or indirectly affecting the people of this Commonwealth[.]” is not limited by the language that proceeds it. Opinion, at 21. Under the court’s reading, the UTPCPL’s definition of “trade” and “commerce” is not limited to cases that “involve a traditional consumer as an aggrieved party[.]” but applies to “any trade or commerce” that “directly or indirectly” affects the people of the Commonwealth. *Id.* at 21-22. In other words, as explained by the court, “whereas the UTPCPL clearly applies to interactions between buyers and sellers of goods and services primarily intended for household use, it also extends to business transactions, generally.” *Id.* at 32. The court also held that the purchase of oil and gas leases from landowners was a “distribution of services” under the first clause of definition. *Id.* at 21.

2. The UTPCPL does not permit the Commonwealth to recover its investigation and prosecution costs (although the Commonwealth may be entitled to an award of civil penalties if an injunction is entered and subsequently violated).¹⁷
3. The Commonwealth Attorneys Act authorizes the Attorney General to bring legal actions to enforce alleged violations of Pennsylvania’s antitrust common law.¹⁸ Under such actions, equitable relief may be granted, but monetary damages may not.¹⁹
4. Although monetary damages are not recoverable under common law antitrust violations, common law antitrust violations may give rise to valid UTPCPL claims, which do allow for monetary damages.²⁰
5. The Second Amended Complaint alleges a cognizable UTPCPL or antitrust claim arising from the “joint commercial venture” between Chesapeake and Anadarko.²¹ The court found the following averments to be sufficient:
 - Chesapeake and Anadarko entered into an agreement to “allocate territories within areas of mutual interest, thereby restricting what would otherwise have been a freely competitive market place.”
 - Anadarko, as a participant in the alleged joint venture, “restrained trade and commerce in respect of the acquisition of oil and gas leases from landowners by affecting, fixing, controlling and/or marketing at artificial and non-competitive levels, the acreage signing bonus and royalty for oil and gas leases within the area of mutual interest.”
 - Anadarko, as a joint venture participant, “impaired the competitive process which deprived Pennsylvania landowners from receiving an acreage signing bonus and royalty which would otherwise have been competitive and fair.”²²

Issues Certified for Appeal

¹⁷ *Id.* at 58-60.

¹⁸ Opinion, at 33-37 (interpreting 71 P.S. § 732-204(c)).

¹⁹ *Id.* at 40-45.

²⁰ *Id.* at 47-50. The court noted that the issue was a close call, but indicated that it was “not prepared at this early stage of the procedural progress of the instant case to hold that Plaintiff Commonwealth improperly advanced allegations of unfair or deceptive conduct under the UTPCPL, and particularly under Section 201-2(4)(xxi), the ‘catchall’ provision of statute.” *Id.* at 49.

²¹ *Id.* at 68-70.

²² Opinion, at 69 (internal quotation marks omitted).

The court certified two issues for immediate appeal to the Commonwealth Court.²³ The first is “whether the UTPCPL is broad enough in its scope to permit the Attorney General to invoke its provisions to protect the people of Pennsylvania in cases that go beyond, or do not involve, commercial transactions where there is a buyer and a seller.”²⁴ The second is whether the purported common law antitrust violations alleged by the Commonwealth may give rise to cognizable UTPCPL claims.²⁵ The court noted that each of these issues presented questions of first impression.²⁶

Conclusion

The conclusions reached by the Bradford County Court of Common Pleas are not remarkable for their precedential value. The Opinion does not constitute binding authority beyond Bradford County’s borders. But the Opinion is important because it marks the first time that a court has allowed claims under the UTPCPL raised by or on behalf of an oil and gas lessor to proceed against an oil and gas lessee.²⁷ The Opinion is also important as it marks the first time that common law antitrust claims based on an oil and gas joint development agreement have been allowed to proceed in Pennsylvania.

Of course, many questions remain. The questions include, for instance: May an individual lessor bring an action under the UTPCPL? What specific conduct by an oil and gas lessee may be deemed to violate the UTPCPL? What specific conduct by oil and gas operators acting pursuant to a joint development agreement may be deemed to violate Pennsylvania’s common law on antitrust? Some of these questions may be resolved over the course of the proceedings in *Commonwealth v. Chesapeake Energy* (assuming Chesapeake and Anadarko do not settle the Commonwealth’s claims against them first). Others, such as whether individual lessors may pursue claims under the UTPCPL for matters associated with oil and gas leases, are beyond the scope of the litigation, and the answers will likely come gradually through other litigation (some of which may be prompted by the Opinion). Given the uncertainties that the Opinion creates as to claims under the UTPCPL and Pennsylvania’s antitrust common law, operators should proceed with caution when determining how to calculate royalty payments, and when acting under, and considering entering into, joint development agreements.

²³ *Id.* at 73-75.

²⁴ *Id.* at 73.

²⁵ *Id.* at 74-75.

²⁶ *Id.* at 73, 75.

²⁷ Such claims have been rejected by other courts applying Pennsylvania law. *See Hagerman v. Anadarko E & P Co., LP*, Civil No. 4:CV-12-0919, 2012 WL 6138479, at *4 (M.D. Pa. Nov. 15, 2012) (“we find that Plaintiffs have not satisfied the threshold element required to bring a private action under the UTPCPL since they failed to allege facts that the oil and gas lease was “primarily for personal, family or household purposes”), *report and recommendation adopted*, Civil No. 4:12-CV-919, 2012 WL 6138482 (M.D. Pa. Dec. 11, 2012).

For more information, please contact [Ken Witzel](#) or any other member of Frost Brown Todd's [Energy Industry Team](#)