

Pennsylvania's Supreme Court Holds Unfair Trade Practices and Consumer Protection Law Does Not Apply to Oil & Gas Companies Acquiring Oil and Gas Leases

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On March 24, 2021, Pennsylvania's Supreme Court held, in a split decision, that Pennsylvania's Unfair Trade Practices and Consumer Protection Law ("UTPCPL") can be enforced only against sellers in *Commonwealth v. Chesapeake Energy Corporation, et al.*, 81 MAP 2019, 2021 WL 1114660 (Pa. Mar. 24, 2021). In so concluding, the six-Justice majority determined that the oil and gas company defendants were not "sellers" under the UTPCPL when they acquire oil and gas leases from property owners.

The case arose out of a lawsuit brought by the Pennsylvania Attorney General on behalf of Pennsylvania citizens against two oil and gas companies for allegedly improper efforts to acquire oil and gas leases in Northeastern Pennsylvania. The Pennsylvania Attorney General claimed the defendants essentially divided the counties between themselves in an effort to reduce competition and then persuaded property owners to enter into leases based on false statements, in violation of the UTPCPL (including antitrust provisions thereunder) and general antitrust law.

In overruling preliminary objections, the trial court (and, later, the *en banc* Commonwealth Court on appeal) concluded that the UTPCPL applied to the oil and gas companies' alleged conduct in acquiring oil and gas leases from property owners. The trial and Commonwealth courts rejected the defendants' argument that the UTPCPL was not applicable because they were purchasers of the leases at issue rather than sellers. Commonwealth Court Judge Covey, however, dissented, finding that the majority misconstrued the statutory text, misconstrued precedent, and violated statutory interpretation principles.

The Supreme Court granted the gas companies' petition to appeal to determine (i) whether the claims at issue were cognizable under the UTPCPL and (ii) whether the Commonwealth could pursue antitrust remedies under the UTPCPL. Justice Mundy, writing for the six-justice majority, set out in detail the reasoning of Commonwealth Court Judge Covey's dissent and concluded that the conduct at issue did not give rise to claims under the UTPCPL.

With respect to the first issue, Justice Mundy looked to the plain language of the statute, noting that the UTPCPL only allows claims related to the conduct of "trade or commerce." And because the definitions of "trade" and "commerce" are provided by the Legislature in the statute, the statutory definitions controlled, and the lower courts erred by looking instead to a dictionary definition.

Justice Mundy also explained that the lower courts mis-interpreted two Pennsylvania Supreme Court cases, *Commonwealth v. Monumental Properties, Inc.*, 329 A.2d 812 (Pa. 1974) and *Danganan v. Guardian Protection Services*, 179 A.3d 9 (Pa. 2018). The Court found that the lower courts expanded *Monumental Properties* by citing it for the proposition that the UTPCPL regulates both buyer and seller in a lease transaction. Instead, *Monumental Properties* simply said the UTPCPL applied to a residential lease situation because the tenants were "in every meaningful

sense consumers.” But in the oil and gas leasing situation, the oil and gas companies were the consumers (or purchasers), and the property owners were the sellers.

As to *Danganan*, the Pennsylvania Supreme Court found that the lower courts simply misread that decision. In *Danganan*, the Court interpreted the following definition of trade and commerce in the UTPCPL:

“Trade” and “Commerce” mean 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 this Commonwealth.

The Pennsylvania Supreme Court in *Danganan* noted that the clause relating to conduct directly or indirectly affecting people did “not modify or qualify the preceding terms. Instead, it is appended to the end of the definition and prefaced by ‘and includes,’ thus indicating an inclusive and broader view of trade and commerce than expressed by the antecedent language.” The majority in *Chesapeake Energy*, explained that the Commonwealth Court seized on that interpretation to find that “trade and commerce” was broader than simply selling but ignored the Court’s explanation that the second part of the definition did not “modify” or “quantify” the first part of the definition. Thus, the use of “trade or commerce” in the second part of the definition still required those terms to carry the definition in the first. Doing otherwise would, as Judge Covey explained in her dissent in the court below, lead to surplusage as the second part of the definition would essentially swallow the preceding clause.

The majority therefore held that, applying the “plain language” of the statute, the UTPCPL claims at issue were not cognizable because the oil and gas companies were “in the position of a buyer, purchasing rights from the landowners’ mineral estates. In turn, the landowners were in the position of a seller, conveying their rights in exchange for signing bonuses, royalty payments, and other considerations.” Thus, the oil and gas companies were “not conducting ‘trade or commerce’ for the purposes of the UTPCPL because [they were] not engaged in the ‘advertising, offering for sale, sale or distribution’ of anything; instead [they were] purchasing oil and gas interests from landowners....Section 3 of the UTPCPL simply does not regulate buyers’ conduct in commercial transactions.”

As to the second issue—whether the Commonwealth could pursue antitrust remedies under the UTPCPL—the majority reasoned that as the UTPCPL did not apply to the oil and gas companies’ conduct or support antitrust claims based on that conduct. Accordingly, the majority reversed the decision of the Commonwealth Court affirming the denial of the oil and gas companies’ preliminary objections.

Justice Daugherty penned a dissent that agreed with the majority that the UTPCPL applied only to sellers but concluded that the oil and gas companies could be sellers of natural gas exploration and drilling services. Thus, he would have affirmed the dismissal of the preliminary objections below and let the case proceed. The majority addressed Justice Daugherty’s dissent

rationale in a footnote by explaining that the oil and gas companies were not obligated to perform any services under the leases.

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