Recent Developments and Current Issues in Pennsylvania Oil and Gas Litigation – 2014-15

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I. Highlights

In 2014 and 2015, Pennsylvania courts have continued to resolve outstanding issues presented by the rapid 21st-century development of the Marcellus and Utica formations. This swirl of controversies can, broadly speaking, be grouped into three categories – lease disputes, title disputes, and environmental disputes:

• **First,** there continues to be a steady drumbeat of litigation over oil and gas leases, as landowners sought to undo leases (some long-standing, some more recent) that they believed to be less favorable than those that might have been available under the market conditions available when litigation commenced. These decisions take as points of departure the often-aged precedents developed during Pennsylvania’s early heyday as a leading oil and gas producer in the 19th and early 20th century, as well as general principles of Pennsylvania contract and conveyancing law.

Of note, the Pennsylvania Supreme Court continues to feel little need to align its decisions with the rules prevalent in other oil- and gas-producing states. Perhaps the most significant lease-interpretation decision of the past year confirms Pennsylvania’s willingness to “go it alone,” refusing to equitably toll a lease’s primary term while a challenge to the lease is pending. See Harrison v. Cabot Oil & Gas, 110 A.3d 178 (Pa. 2015). In so holding, the Pennsylvania Supreme Court
departed from the rule that has been well-established in other oil- and gas-producing jurisdictions.

In general, Pennsylvania courts continue to be strongly inclined to give lease terms their plain meaning, rejecting lessors’ *post hoc* challenges. For example, two Pennsylvania courts have held that “dual purpose” leases (providing both for production and storage) mean what they say, and that use of leased premises for either storage or production will keep the lease in effect, in its secondary term, for both purposes. *See Mason v. Range Resources – Appalachia, LLC*, No. 12-cv-369 (W.D. Pa. July 27, 2015); *Warren v. Equitable Gas Co.*, No. 697 WDA 2014 (Pa. Super Ct. Feb. 4, 2015). These courts have rejected landowners’ invitations to treat such leases as severable instruments, such that storage and production can be divorced from one another. Similarly, a federal court has enforced literally a lease provision requiring that the lessee be notified of changes in ownership, holding that a lease extension payment to a former landowner (in the absence of such notification by the new owner) was effective to continue the lease in force. *See Danko Holdings LP v. EXCO Resources (PA) LLC*, 57 F. Supp. 3d 389 (M.D. Pa. 2014), appeal pending.

In the coming year, the Pennsylvania Supreme Court’s willingness to adhere to existing doctrine will be tested by a decision involving “estoppel by deed” – *i.e.*, whether a lease purporting to cover more property than the lessor actually owns at the time of lease will be construed to encompass the entire described tract if the landowner subsequently acquires the remaining property. The Superior Court, applying well-settled Pennsylvania precedent, held that a landowner who purports to convey property that he or she does not own cannot avoid the binding effect of the lease over the entirety of the described property once the lessor comes to own the entire tract. *See Shedden v. Anadarko E. & P., L.P.*, 88 A.3d 228 (Pa. Super. Ct. 2014). The Pennsylvania Supreme Court has accepted an appeal, however, and the matter should be resolved in the coming year.

Further, there continue to be disputes over the deduction of post-production expenses prior to calculating royalty payments. While the Supreme Court’s foundational decision in *Kilmer v. Elexco Land Services, Inc.*, 990 A.2d 1147 (Pa. 2010), held that royalties calculated on the price “at the wellhead” permitted the deduction of post-production costs, there have remained unanswered questions that Pennsylvania courts have ventured and are venturing to address. Further, in light of recent controversies, the General Assembly continues to debate legislative measures to address the issue.

The effect of the current low-price environment on these litigation trends remains to be seen. Lessor efforts to avoid existing leases may subside, as current conditions in the leasing market become less advantageous. At the same time, royalty litigation and other disputes over payments to lessors may increase, as lessor payments decrease.
Second, ongoing litigation continues to resolve competing claims to oil and gas rights – rights which for decades were believed to have little value, but which now are actually worth fighting over. One of the most hotly-contested issues involves the validity of historical tax sales of “unseated” (i.e., undeveloped) land. Historically, property taxes on such land were deemed to be assessed against the land itself, in rem, and (the argument goes) landowners could “wash” their title – gaining title to previously-severed oil and gas interests – by defaulting on their taxes and buying the property back at the ensuing tax sale. As odd a result as this may seem, the Pennsylvania Superior Court upheld the practice in Herder Spring Hunting Club v. Keller, 93 A.3d 465 (Pa. Super. Ct. 2014), effectively holding its nose at a practice that it admitted was unfair in the interest of finality. The Supreme Court has accepted review, and will consider both the statutory construction and weighty Constitutional questions that this ruling presents. In the coming year, then, we can expect the Court to decide whether a party can improve its property rights, and retake property rights that it (or its predecessors-in-title) previously conveyed away, by intentionally defaulting upon the legal obligation to pay taxes.

Third, shale gas development continues to present a variety of environmental disputes. Most notably, litigation continues in the seminal Robinson Township matter, following the Supreme Court’s decision, 83 A.3d 901 (Pa. 2013), which (among other things) overturned state-wide land use provisions and which may have breathed new life into the Pennsylvania Constitution’s Environmental Rights Amendment.

Of particular note, the Commonwealth Court’s decision in Pennsylvania Environmental Defense Fund v. Commonwealth, 108 A.3d 140 (2015), has declined the invitation extended by the Supreme Court’s plurality opinion (concluding that it is not binding), and has thus construed Robinson Township narrowly. For the moment, this decision has forestalled some of the adverse consequences about which commentators (including the author) had previously warned. Even so, the matter at some point will likely need to be resolved by the (now differently constituted) Supreme Court. In the interim, the parameters of the Robinson Township decision continue to be explored, as citizen groups opposed to shale gas development use the plurality’s broad pronouncements as part of an effort to hinder drilling and production.

A notable feature of activists’ recent efforts is a shift in focus from seeking primarily to block “upstream” development (drilling and production) to attempting to obstruct “midstream” gathering and transmission projects. In the past year, citizens groups have fought pipeline development on a number of regulatory fronts, and this can be expected to continue in the coming years, as challenges to drilling and production by and large have not met with widespread success. The effect of the recent formation of a Pipeline Task Force by Governor Wolf remains to be seen, although its composition (heavily favoring activist groups and governmental officials) may not bode well for the pipeline industry.
There continue to be a variety of other challenges to various aspects of oil and gas production, including among other things continued efforts (i) to require Title V “major source” air permits for oil and gas operations by requiring the aggregation of emissions from multiple sources; (ii) to erode trade secret protections for proprietary fracturing fluid formulas; (iii) to limit or preclude seismic testing; and (iv) to prevent the beneficial reuse of abandoned mine drainage or drill cuttings. While decisions on these issues in the past year generally have favored the industry, many of those decisions are situation-specific or qualified, and so carry the germ of a future dispute.

Pennsylvania regulators also continue to be vigilant in policing and punishing environmental violations, assessing substantial fines and even pursuing criminal charges.

Finally, landowners who bring lawsuits or regulatory proceedings alleging property damage or contamination from drilling operations continue to face significant challenges. In *Kiskadden v. DEP*, 2015 WL 3798582 (Pa. Envt'l Hearing Bd. June 12, 2015), the Environmental Hearing Board upheld a Department of Environmental Protection determination that drilling operations did not contaminate a private well, and in *Ely v. Cabot Oil & Gas*, 2015 WL 140033 (M.D. Pa. Jan. 12, 2015), a federal court severely limited (but did not entirely preclude) a lawsuit asserting similar allegations. At the same time, a recent federal court decision, *Russell v. Chesapeake Appalachia LLC*, 305 F.R.D. 78 (M.D. Pa. 2015), points out that producers may not be able to expect quick and easy victories.

### II. Lease-Related Litigation

Each year since the onset of Marcellus Shale development, Pennsylvania courts have resolved significant open questions concerning the interpretation and application of oil and gas leases. The most significant decisions of 2014-15 include the following:

#### A. Equitable Tolling – *Harrison v. Cabot Oil & Gas Corp.*

Because current oil and gas leases have relatively short primary terms, a lease dispute can present the producer with a “Hobson’s choice”: it can incur substantial lease development expenses, to prevent the lease from expiring at the close of the primary term, with the risk that those expenses could be unrecoverable if the landowner ultimately prevails, or it can do nothing, and hope that the lease dispute is resolved in the producer’s favor before the primary term expires, so that it may then undertake the often-costly activities needed to hold the lease into its secondary term and forestall lease expiration. Given the slow pace of litigation – particularly in Pennsylvania state courts, where summary judgment is disfavored and early decisions on the merits are often hard to come by – this is
a very real problem. In most oil and gas producing states, the doctrine of “equitable tolling” minimizes this risk, holding that the running of a lease’s primary term stops during the pendency of a landowner-initiated lease challenge.

Pennsylvania is not one of those states. On February 17, 2015, the Pennsylvania Supreme Court issued its ruling in *Harrison v. Cabot Oil & Gas Corp.*, answering a question certified to it by the United States Court of Appeals for the Third Circuit, and holding that the primary term of an oil and gas lease would not be equitably tolled during the pendency of a landowner’s lawsuit challenging the lease’s validity. 110 A.3d 178 (Pa. 2015).

In *Harrison*, originally filed in the United States District Court for the Middle District of Pennsylvania, the landowners sought a declaration that their lease was invalid because of Cabot’s alleged fraudulent inducement as to the amount of per-acre lease bonus payments. Cabot counterclaimed, asking the District Court to declare that, should the Harrisons’ suit fail, the lease’s primary term would be equitably extended a period of time equivalent to the pendency of the litigation.

The district court agreed with Cabot on the merits, entering summary judgment against the landowner as to its fraudulent concealment claim, but predicted that Pennsylvania law would not allow equitable tolling of the primary term. Cabot appealed and requested certification to the Pennsylvania Supreme Court, which the Third Circuit granted and the Pennsylvania Supreme Court accepted.

The Supreme Court sided with the Harrisons (and with the district court), holding that the commencement of a declaratory judgment action does not constitute a repudiation of the lease, and declining to toll the lease’s primary term during the pendency of such a dispute. The Court agreed with the Harrisons that the risk factors associated with oil and gas development did not justify a diminution of existing legal principles or a curtailment of landowner rights. Id. at 185-86.

Notably, the Court added that its decision was bolstered by the fact that producers are free to negotiate express tolling provisions in their leases, pointing to the number of landowner challenges as clear evidence of the need for such language. *Id.* at 186.

The Court clarified, however, that while the mere challenge to a lease’s validity via a declaratory judgment action did not amount to a repudiation under Pennsylvania law, it was not entirely foreclosing the availability of equitable relief where a landowner takes affirmative acts to repudiate a lease (pointing, by way of example, to cases cited by Cabot in which landowners refused to surrender possession of leasehold premises). *Id.* at 186 & n.6.

In reaching this decision, the Supreme Court honored its usual practice of looking primarily to analogies from existing Pennsylvania law, even if its conclusions go against the principles of oil and gas law that prevail in other states. As a result,
because of *Harrison*, Pennsylvania law diverges from the overwhelming majority of other oil- and gas-producing jurisdictions on this issue.

*Harrison* does leave a number of open questions to be resolved in future challenges:

- Because the Supreme Court limited its holding and focused on the particular nature of and purpose for declaratory judgment actions, a different result may apply if the landowner brings a different cause of action (for example, a rescission claim).

- The decision does not reveal whether Cabot made a demand for adequate assurances after the lawsuit was filed. It is therefore unclear whether a consideration of the related doctrines of adequate assurance and anticipatory breach would have changed the result here. (These doctrines generally give a contracting party with reasonable grounds for insecurity the right to demand adequate assurance of future performance. The failure of the other party to provide the demanded assurance is then deemed to establish an anticipatory breach and a right for the insecure party to suspend performance.)

Nevertheless, certain things are clear in the wake of *Harrison*:

- Because the Court’s analysis focused on the fact that the lessee was free (but failed) to bargain for an express tolling provision, producers now know that Pennsylvania leases must include an express tolling provision, and/or a covenant that the lessor will not cause or create any encumbrance or cloud on title.

- Lessees should take steps to attempt to expedite litigation. Arguably, the potential lapse of the primary term, coupled with the risks associated with production activities on a contested property, should justify expedited treatment.

- Lessees should also consider early dispositive motions (e.g., motions to dismiss or preliminary objections, if appropriate, and early motions for summary judgment).

- Producers may wish to consider, in appropriate cases, taking steps to begin operations for exploring or producing oil and gas during the litigation (to the extent required to bring the lease into its secondary term), notwithstanding the risks.

B. **Estoppel by Deed/“After-Acquired Title” – *Shedden v. Anadarko E. & P. Co.***

It is not uncommon for landowners, through mistake or otherwise, to execute oil and gas leases covering property that they do not actually own. If that is the case,
and if the landowner subsequently acquires the property, what effect does that have upon the lessee’s rights? In the context of ordinary conveyances, the venerable principle of “estoppel by deed” prevents the landowner from using that initial defect to his or her benefit, but Pennsylvania until recently had not addressed whether that applies in the context of oil and gas leases.

The Pennsylvania Supreme Court – having accepted an appeal in Shedden v. Anadarko E. & P. Co. L.P. – will resolve that question. In Shedden, the Sheddens entered into a 2006 oil and gas lease with Anadarko, purportedly for a 62-acre tract. Afterward, it was discovered that an 1894 deed reserved half of the subsurface rights, leading Anadarko to reduce the bonus payment to the Sheddens accordingly. In 2008, the Sheddens successfully quieted title on the reserved interested, and thereby obtained subsurface rights to the entire 62 acre tract. In 2011, Anadarko sought to invoke an extension option in the lease, but the Sheddens in response sought a judicial declaration that they could lease the second half of their subsurface rights to another party.

The Tioga County Court of Common Pleas entered summary judgment in favor of Anadarko, and the Superior Court affirmed, applying that the equitable doctrine of estoppel by deed:

The equitable doctrine of estoppel by deed is well-settled in this Commonwealth. Over a century ago, our Pennsylvania Supreme Court stated that, under this doctrine, “where a party conveys land to which he had no title, or a defective title, and afterwards acquired a good title, that title immediately inures to the benefit of the grantee.” Additionally, the Supreme Court stated that where, as here, “one conveys land with a covenant of warranty against all lawful claims and demands, he cannot be allowed to set up against his grantee, or those claiming under him, any title subsequently acquired by him by purchase or otherwise.” Rather, the subsequently acquired title “will inure, by way of estoppel, to the use and benefit of his grantee, his and assigns.”

Shedden v. Anadarko E. & P. Co., L.P., 88 A.3d 228, 232 (Pa. Super. Ct. 2014) (citations omitted; quoting Dixon v. Fuller, 46 A. 553 (Pa. 1900)). Accordingly, the Superior Court affirmed that “the Sheddens are barred from denying that the Lease covers all 62 acres of the leased premises by pointing out that, at the time of execution of the Lease, they did not have the power to lease the rights to the reserved 31 acres,” and that their “after-acquired title to the reserved 31 acres inured, by the way of estoppel, to the use and benefit of Anadarko.” Id. at 233.

Further supporting the Superior Court’s ruling were decisions from other oil- and gas-producing jurisdictions (in the conceded absence of Pennsylvania case law on the issue in the specific context of oil and gas leases), as well as a warranty of title in the lease and a provision in the lease defining the leased premises as “62.00 acres whether actually containing more or less,” as well as “any and all strings or
parcels of land adjoining or contiguous to the above described land and owned or claimed by LESSOR.”

The Supreme Court allowed the Sheddens’ ensuing appeal, on the question whether the trial court erred in holding that “the [l]essors are estopped from denying that an oil[-]and[-]gas lease covered after-acquired oil[-]and[-]gas rights even though the [l]essee only paid the [l]essors in proportion to the [l]essors’ actual interest.”

The Supreme Court’s decision to accept the appeal has surprised many observers, in that the Superior Court’s ruling appears to be a straightforward application of settled law. Briefing on the appeal is complete, and the matter is scheduled to be argued at the Court’s November 2015 argument session in Harrisburg.

C. “Dual Purpose” Storage and Production Leases – Warren v. Equitable Gas Co. and Mason v. Range Resources – Appalachia, LLC

After production from Pennsylvania’s oil and gas fields first depleted in the early to mid-20th Century, those strata often came to be used for the underground storage of natural gas transported to Pennsylvania by pipeline. This ensured efficient use of interstate pipelines and guaranteed sufficient supplies of natural gas for heating during periods of peak demand. Many of the instruments used for the creation of these storage fields are so-called “dual purpose” leases, which allow a lessee to conduct both oil and gas production and natural gas storage, with the election of either activity holding the lease in effect for all purposes.

Because of the prevalence of natural gas storage in Pennsylvania, large tracts of promising shale gas reserves are encumbered by such dual purpose leases. As a result of the explosion in gas production in the area, landowners have been challenging these leases, trying to reclaim production rights associated with properties otherwise within or near gas storage fields.

While Pennsylvania federal courts have previously had occasion to analyze these dual purpose leases, they reached divergent results, and left certain unanswered questions, leading to confusion and uncertainty. See Penneco Pipeline Corp. v. Dominion Transmission, Inc., No. 05–49, 2007 WL 1847391 (W.D. Pa. June 25, 2007), aff’d, 300 Fed. App’x 186 (3d Cir. 2008); Jacobs v. CNG Transmission Corp., 332 F. Supp. 2d 759 (W.D. Pa. 2004).

In the past year, however, two decisions – one from the Pennsylvania Superior Court and one from the United States District Court for the Western District of Pennsylvania – have brought increasing certainty to the subject. Both courts have given the language of dual purpose leases its plain meaning, have refused to construe the two rights under the lease as severable, and thus have held that a lessee’s use of leased premises for storage keeps a dual-purpose lease fully in effect for all purposes, including production.
The Superior Court’s decision in *Warren v. Equitable Gas Co., LLC*, No. 697 WDA 2014 (Pa. Super Ct. Feb. 4, 2015), is the first occasion on which a Pennsylvania state appellate court has considered the effect of a dual purpose lease. In *Warren*, the plaintiff-landowners alleged that the lease expired because the lessee took no steps to produce native gas from the property since the lease’s execution in 1966. The *habendum* clause stated that the lease would extend beyond its 10-year primary term “so long as said land is operated for the exploration or production of gas or oil … or as long as said land is used for the storage of gas or the protection of gas storage on lands in the general vicinity of said land.” There was no dispute that the property had been used for the storage of natural gas, and the trial court held that this was dispositive, based upon the plain language of the lease; in so ruling, the trial court held the production and storage rights conferred by the dual purpose lease were not severable from each other. The plaintiff-landowners appealed this decision to the Superior Court of Pennsylvania, which affirmed the trial court decision.

On appeal, the landowners generally asserted that gas production was the *primary* purpose of the lease, and that gas storage was only a *secondary* purpose, and that the lease should be construed to further production. The Superior Court disagreed.

The Superior Court also rejected the landowners’ severance argument, which attempted to divide the lease into two contracts (one for storage, one for production). The Court held that the trial court properly examined the lease’s language, the circumstances surrounding the lease’s execution, and the discernible intent of the original contracting parties, as Pennsylvania law dictates. *See generally Jacobs v. CNG Transmission Corp.*, 772 A.2d 445, 452 (Pa. 2001).

The Superior Court also rejected the contention that the lessee had breached any implied covenant of production by electing to store gas on the property. Applying the Supreme Court’s decision in *Jacobs*, the Superior Court explained that no implied covenant to develop exists where the parties have expressly agreed that the landowner shall be compensated even where the lessee does not actively extract the resource. *See Jacobs*, 772 A.2d at 455. The Superior Court held that, because the lease expressly provides for separate rates to be paid for production and for storage, the lease did not obligate the lessee to produce gas and thus, under the plain language of the lease, the lessee’s ongoing storage activities extended the lease term to the present day. Accordingly, because the production and storage rights were not severable, and the land had been used for storage or the protection of storage since its primary term, the lease was held to remain in full force as to both production and storage rights.

Unfortunately, the opinion was designated as non-precedential, and cannot be cited in Pennsylvania state court proceedings. Even so, it may influence federal courts. Further, because there is no reason to believe that a Pennsylvania appellate court would decide otherwise, it may help to bring additional certainty to companies claiming rights through historical dual purpose leases.
More recently, Mason v. Range Resources – Appalachia LLC, No. 12-cv-369 (W.D. Pa. July 27, 2015), also answers questions left open following the Penneco decision. In Mason, the plaintiffs challenged the validity of a dual purpose lease as applied to a property located partially in the protective buffer area of a storage field operated by Columbia Gas Transmission, LLC. The habendum clause provided not only that the lease would remain in force so long as the property was utilized in search for or in production of oil or gas, but also so long as it was used alone or conjointly with neighboring lands for storage of gas or for the protection of stored gas. Columbia subleased production rights under the lease to Range, and subsequently assigned its interest in the production sublease to NiSource Energy Ventures, LLC. The plaintiffs argued that the lease could not maintain both the storage and production rights because only a portion of their land was located in the buffer area, and because none of their land was located above the area designated as containing stored gas. They further argued that the sublease to Range operated as an assignment, severing the production and storage rights – a challenge left open by the court in Penneco.

After a bench trial, Chief Judge Joy Flowers Conti found that Columbia was in fact using the property for the protection of stored gas, and that this held the lease in effect for all purposes, and thus allowed NiSource Energy Ventures and Range Resources to retain the benefit of the associated production rights. Significantly, the decision directly confronted the argument that storage and production rights are severable, an argument left open in Penneco. The court held that even if production and storage rights were severable, the lease remained in effect for all purposes. Assuming that the ruling in Mason is affirmed on appeal, it may close the door on attacks on dual purpose leases in Pennsylvania, even where lessees sublease production rights to production companies.²

**D. Deduction of Post-Production Expenses – Pollock v. Energy Corporation of America**

It is well-established, under Pennsylvania law, that a lease providing that royalties are calculated on the price “at the wellhead” generally allows the lessee to deduct post-production costs. See generally Kilmer v. Elexco Land Services, Inc., 990 A.2d 1147 (Pa. 2010). Nonetheless, that decision has not settled the question definitively – there continue to be lawsuits, and decisions, exploring the limits of the Kilmer decision and shifting the terrain of battle from the abstract question whether post-production costs can be deducted to which post-production costs may appropriately be deducted, and under what circumstances.

For example, the long-running case of Pollock v. Energy Corporation of America – which has now proceeded past trial and to final judgment – challenged a number of ECA’s deductions. The court initially rejected many of the plaintiffs’ arguments on summary judgment (including a challenge to the method in which ECA allocated gathering, compression and dehydration costs, a challenge to

² The author represents NiSource Energy Ventures, LLC in this dispute.
ECA’s deduction of marketing costs, and an effort to recover the upside from ECA’s participation in hedging transactions. Even so, the case moved forward as to ECA’s deduction of interstate transportation costs and marketing fees that allegedly were incurred after ECA sold and transferred title to the gas. (Under Kilmer, post-production costs are defined as “expenditures from when the gas exits the ground until it is sold.” 990 A.2d at 1149 n.2.) See Pollock v. Energy Corp. of Am., 2013 WL 275327 (W.D. Pa Jan. 24, 2013), adopting 2012 WL 6929174 (W.D. Pa. Oct. 24, 2012).

After certifying a class on these issues, the case went to trial in March 2015, to enable ECA to attempt to prove that it actually incurred these charges before title to the gas transferred to its purchaser. At trial, the jury rejected ECA’s arguments and held that ECA had improperly deducted post-sale transportation and marketing costs. On June 18, 2015, the trial court denied ECA’s post-trial motion, and upheld a verdict for approximately $912,000 plus interest. See Pollock v. Energy Corp. of Am., 2015 WL 3795659. The matter is now on appeal.

This is not likely to be the end of these disputes – new actions continue to be filed. Perhaps the most well-publicized of these cases is the RICO lawsuit filed in February 2015 against Chesapeake Energy Corp. That lawsuit, A&B Campbell Family, LLC v. Chesapeake Energy Corp., No. 3:15-cv-00340 (M.D. Pa.), alleges that Chesapeake underpaid royalties by basing payments on artificially low gas prices and by deducting post-production costs in impermissible and excessive amounts. The suit arose, in part, from Chesapeake’s widely-reported sale of midstream assets to Access Midstream Partners, L.P.; plaintiffs allege that this involved Access’s payment of an artificially-inflated sale price, offset through artificially-inflated transportation charges paid to Access, that effectively created an “off-balance sheet” loan to Chesapeake. The matter remains pending: after a flurry of motions to dismiss, the plaintiffs filed an amended complaint (attempting to bolster their antitrust claims).

More recently, XTO Energy, Inc. was hit with a putative class action contending that it impermissibly deducted post-production expenses, allegedly in violation of the terms of the operative leases (which set a royalty of “one-eighth (1/8) of the proceeds received from time to time by lessee for all gas . . . produced, metered and sold, less lessor’s pro rata share of any severance or excise tax imposed by any governmental body”). See Marburger v. XTO Energy, Inc., No. 2:15-cv-00910 (W.D. Pa.).

Further, in light of recent controversies, the General Assembly continues to debate legislative measures to address the issue. Most recently, in June 2015, a bipartisan group of legislators proposed House Bill 1391, providing that the 12.5% minimum royalty provided by the Guaranteed Minimum Royalty Act, 58 P.S. § 33.3, could not be reduced through the deduction of post-production or other costs. The bill also contains fee-shifting and treble damage provisions for willful underpayment of royalties. A similar bill passed committee review last year, with bipartisan support, but stalled on the floor of the House.
E. Change of Ownership Clauses – Danko Holdings LP v. EXCO Resources (PA) LLC

Most oil and gas leases have a “change in ownership” clause, providing that no transfer of the property by the lessor binds the lessee until the lessee is provided with sufficient notice and documentation of the change. Until recently, no decision had considered the effectiveness of these provisions under Pennsylvania law.

On September 29, 2014, Judge Brann of the Middle District of Pennsylvania held, in Danko Holdings LP v. EXCO Resources (PA) LLC et al., 57 F. Supp. 3d 389, that an extension payment made by the defendant’s predecessor to the original lessors successfully extended the original lease, even though the original lessors had subsequently sold their interest to plaintiff, because neither plaintiff nor its predecessor satisfied the lease’s express change of ownership provision.

The lease at issue contained a five-year primary term expiring on May 2, 2010. It provided, however, for an additional five-year extension of the primary term. It also provided that “Lessee shall not be bound by any change in the ownership of the Leasehold until furnished with such documentation as Lessee may reasonably require. Pending the receipt of documentation, Lessee may elect either to continue to make or withhold payments as if such a change had not occurred.”

Although plaintiff Danko Holdings obtained title to a portion of the surface estate of the leased premises, neither Danko nor the original lessors provided notice of the change of ownership. Accordingly, when EXCO’s predecessor sought to extend the Lease, it made the requisite extension payment to the original lessors.

On January 13, 2014, Danko sued EXCO, seeking a declaration that the Lease expired by its own terms and asserting claims for ejectment, trespass, and conversion, because Danko did not receive the lease’s extension payment.

The court dismissed, ruling that the plain language of the change in ownership clause applied, and that EXCO and/or its predecessors extended the term of the Lease by making the extension payment to the original lessors. The court held it irrelevant whether EXCO or its predecessors had any actual or constructive notice of the ownership change. Id. at 394-98.

In the absence of Pennsylvania authority on the effect of a change of ownership provision in an oil and gas lease, the court relied on case law from other jurisdictions as well as oil and gas law treatises in granting EXCO’s motion to dismiss. The court specifically stated that “constructive notice is generally not sufficient to obviate the language of a change of ownership provision that specifically requires a lessor to provide documentation.” Furthermore, “[a] lessee should not be subject to liability both to make delay payments and to investigate the ownership of the property each time it makes payment.” Id. at 396-97. An appeal to the Third Circuit is pending.
The decision, if affirmed on appeal, confirms that oil and gas operators are under no continuing duty to search public property records, in order to confirm that their leases have not been affected by lessors’ ensuing property transactions, and that lessees may put the burden on lessors or lessors’ successors to provide formal written notice of intervening property transfers.

F. **Pooling Issues and Missing or Non-Consenting Oil and Gas Owners – Hilcorp Energy Co. v. DEP, In re Hill, and EQT Production Co. v. Opatkiewicz**

In most cases, the ability to “pool” contiguous lands into a single production unit is a necessary precondition to drilling horizontal wells in Pennsylvania, given the relatively-small tracts that are prevalent in most of the Commonwealth. While provisions expressly allowing such pooling are uniformly found in modern oil and gas leases, there remain instances where such pooling is unavailable. For example, “hold-outs” may hinder or prevent the efficient development of oil and gas resources. In other cases, missing co-owners of oil and gas rights cannot be located. In the final case, property may be governed by an existing lease that does not expressly provide for pooling. There are statutory provisions intended to address, under certain circumstances, all three of these scenarios. However, these statutes are largely untested, and it remains to be seen whether or how successfully they can ensure the fair and efficient exploitation of the Commonwealth’s resources.

**Oil and Gas Conservation Law:** It is a common misconception that “Pennsylvania has no forced pooling.” While that may be true for wells advanced into the Marcellus Shale or shallower formations, deeper formations – including the Utica Shale – may be subject to involuntary unitization under the 1961 Oil and Gas Conservation Law, 58 P.S. §§ 401 et seq. Under Section 7 of the Conservation Law, the “Oil and Gas Conservation Commission” under certain circumstances may establish well spacing and drilling units, id. § 407. Thereafter, under Section 8, the Commission, “[i]n the absence of voluntary integration . . . , upon the application of any operator having an interest in the spacing unit, shall make an order integrating all tracts or interests in the spacing unit for the development and operation thereof and for the sharing of production therefrom,” id. § 408(a).

The Conservation Law only applies to formations below the Onondaga, however. Further, it appears that the “Oil and Gas Conservation Commission” never got off the ground. As a result, until recently there was no indication that any operator had sought an involuntary unitization of tracts into a production unit.

In July 2013, Hilcorp Energy Company sought to revitalize the Conservation Law, asking the Department of Environmental Protection to establish well spacing and drilling units for several thousand acres of the Utica Shale in Lawrence and Mercer Counties. DEP told Hilcorp to seek relief from the Environmental Hearing Board, and the EHB in turn told Hilcorp to refile its application with DEP. See Hilcorp Energy Co. v. DEP, 2013 WL 6337842 (Pa.
Envt’l Hearing Bd. Nov. 10, 2013). Hilcorp did so, but the process proved interminable: DEP first appointed an independent hearing officer, and then rescheduled the hearing multiple times amid myriad disputes over the Conservation Law’s constitutionality and various parties’ right to participate. Ultimately, in September 2014, Hilcorp made a business decision not to proceed with the application.

Accordingly, while this remains a legally-prescribed mechanism for ensuring the rational development of Utica Shale resources, it remains untested.

**Dormant Oil and Gas Act:** A related issue involves missing co-owners of an oil and gas estate. In many cases, oil and gas rights (especially those that were severed from the surface estate) have been fragmented over the years, passing through generations of heirs. In some cases, locating these heirs – in order to obtain a lease from all owners of the oil and gas rights to a particular tract – is difficult or even impossible.

Pennsylvania’s Dormant Oil and Gas Act (“DOGA”), 58 P.S. § 701.1 et seq., attempts to ameliorate these difficulties, “facilitat[ing] the development of subsurface properties by reducing the problems caused by fragmented and unknown or unlocatable ownership of oil and gas interests....” *id.* § 701.2. (Unlike similar acts in other states, it does *not* attempt “to vest the surface owner with title to oil and gas interests that have been severed from the surface estate,” *id.*)

Under the DOGA, any person or entity with an interest in oil and gas may petition the court to create a trust in favor of absent owners (those whose identities or whereabouts cannot be located). *Id.* § 701.4(a). To obtain such a trust, the petitioner must show both that it has undertaken a diligent but unsuccessful effort to locate other owners, and that a trust is in the best interest of all owners. *Id.* § 701.4(b). A DOGA trust remains in force until all unknown owners are identified and have received their share of funds. *Id.* § 701.5(c).

To date, DOGA has had little apparent impact. In part, this could be because Pennsylvania’s “off the rack” rules allow one tenant in common to develop a property’s oil and gas resources, with absent co-tenants sharing proportionately in the net proceeds. *See generally Lichtenfels v. Bridgeview Coal Co.*, 496 A.2d 782 (Pa. Super. Ct. 1985).

A recent decision, however, shows that DOGA’s strict “diligence” requirement may also limit its applicability. In *In re Hill*, Chesapeake Appalachia LLC sought a DOGA trust as to a tract in Bradford County. Although the Court of Common Pleas initially granted the request, additional interested parties moved for reconsideration, on the ground that Chesapeake had not satisfied its due diligence obligation under DOGA. The court granted the motion, vacated the order creating the trust, and dismissed Chesapeake’s petition without prejudice. The Superior Court dismissed the ensuing appeal, on the ground that the trial court’s order was
not final and appealable, viewing the trial court’s order as one effectively directing Chesapeake to go back to the drawing board and re-file its petition. See In re Hill, No. 1125 MDA 2013 (Pa. Super. Ct. Apr. 21, 2014). The Superior Court stayed the appeal, in order to permit Chesapeake to obtain a final order and, when Chesapeake did not do so, quashed the appeal. See In re Hill, , No. 1125 MDA 2013 (Pa. Super. Ct. May 22, 2014).

**Senate Bill 259:** As noted above, historical leases in many cases would not expressly permit the leased premises to be combined into a pooled production unit with other properties. In 2013, the General Assembly amended the Oil and Gas Lease Act to address this situation, providing that, “[w]here an operator has the right to develop multiple contiguous leases separately, the operator may develop those leases jointly by horizontal drilling unless expressly prohibited by a lease.” 58 P.S. § 34.1. In such a case, royalties are determined (absent agreement by all affected owners) based upon the producer’s reasonable attribution to each lease. *Id.*

EQT Production Company attempted to utilize this provision to form a drilling unit in Allegheny County, but the affected lessees objected, compelling EQT to seek a declaratory judgment upholding its rights to combine sixteen leases into a single unit. Judge Christine Ward entered judgment on the pleadings, rejecting the landowners’ constitutional challenges. Judge Ward held that the pooling provision in Section 34.1 was not an *ex post facto* law, did not impair the obligations of contracts, did not effect an unconstitutional taking without just compensation, and did not violate the landowners’ inherent and indefeasible right to possess their property. See *EQT Prod. Co. v. Opatkiewicz*, No. GD-13-13489 (C.C.P. Allegheny C’ty July 22, 2013).

Although Judge Ward certified the matter for interlocutory appeal, it appears that the Superior Court did not accept the appeal. As such, these issues have yet to be resolved by an appellate court.

### III. Title-Related Litigation


One of the most hotly-contested issues in oil and gas law in recent years involves the validity of historical tax sales on severed oil and gas interests. It is commonplace for oil and gas rights in Pennsylvania to have been severed from the surface estate by predecessors-in-title. It was also commonplace for surface owners, in the mid-20th century, to employ a variety of machinations to seize back these subsurface rights surreptitiously.³

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³ For example, some surface owners would bring adverse possession claims, contending that they had adversely possessed subsurface rights even in the absence of actual production.
Under an 1806 statute, “every person . . . becoming a holder of unseated lands” – that is, undeveloped property – was obligated to make a detailed report of his or her lands to the county commissioners, so that those properties could be assessed and taxed. Act of March 28, 1806, P.L. 644, 72 P.S. § 5020-409. Historically, property taxes on such land were deemed to be assessed against the land itself, in *rem*, and landowners in the past have attempted to “wash” their title – thereby gaining title to previously-severed oil and gas interests – by defaulting on the taxes and buying the property back at the ensuing tax sale. They have argued that, absent explicit declaration of a retained oil and gas interest at the time of severance, the assessment (and tax sale) encompassed the entire estate, including severed oil and gas rights. Of note, because the taxes were deemed to be owed by the property *in rem*, these tax sales were conducted without any effort to provide individual notice to the affected owners that their property rights might be appropriated.


In *Herder Spring*, then-owners Harry and Anna Keller sold the surface of a parcel in Centre County in 1899, reserving to themselves the subsurface rights. The record did not contain evidence that the Kellers reported this severance to Centre County officials at the time. Thereafter, in 1935, Centre County obtained the property at a tax sale, and thereafter sold the property to Herder Spring’s predecessor-in-title in 1941.

In 2008, Herder Spring sought a declaration that the 1935 seizure terminated the 1899 deed reservation county’s move to repossess the land in 1935 effectively extinguished the 1899 reservation of subsurface rights. The Court of Common Pleas ruled in the Kellers’ favor, holding that the reserved oil and gas estate could not be taxed absent oil and gas production, and thus could not have been assessed and could not have been sold at the 1935 tax sale. The trial court also pointed to These owners would then aver, in conclusory fashion, that the record owners of the subsurface could not be located, and thus would obtain authorization for service by publication only. When the record owners predictably failed to respond to notice provided only by a small-print legal advertisement in the back pages of a rural newspaper, the surface owners would then take a default judgment. A number of cases challenging this process are presently working their way through Pennsylvania courts. See, e.g., *N. Forests II, L.P. v. Keta Realty Co.*, No. 88-02,356 (C.C.P. Lycoming C’ty Feb. 8, 2013) (striking default judgment against owners of reserved subsurface estate, for failure to comply with applicable rules), *appeal pending*, Nos. 1007 & 1054 MDA 2014; *id.* (C.C.P. Lycoming C’ty May 20, 2014) (entering judgment on the pleadings against the successors to the surface owner on their adverse possession claim against the owners of the reserved subsurface estate, for failure to allege actual production of oil and gas), *appeal pending*, Nos. 1007 & 1054 MDA 2014. (In the *Northern Forest v. Keta* matter, the author is counsel for a successor-in-title to the entity reserving subsurface rights.)
facts showing that Herder Spring knew of the Kellers’ 1899 reservation and included language in its deed acknowledging it, and thus was estopped from challenging the Kellers’ rights.

The Superior Court reversed, holding – in the absence of proof that the Kellers declared their reservation – that the tax sale conveyed the entire property. “When the property was horizontally severed in 1899, the Kellers never informed the county commissioners of their retention of the subsurface rights to the land after selling the surface rights. Pursuant to the act, it was their affirmative duty to do so. . . . Therefore, when the commissioners finally sold the property in 1941 . . . they sold what had been taken, the entire property.” 93 A.3d at 472.

The Superior Court “that our resolution of this matter is at odds with modern legal concepts,” and that “[t]his resolution may be seen as being unduly harsh.” Nonetheless, the court held its nose and approved the divestiture of property rights: “We do not believe it proper to reach back more than three score years to apply a modern sensibility and thereby undo that which was legally done.” Id. at 473.

The Supreme Court accepted the Kellers’ petition for allowance of appeal, to address the following issues:

- Did the Superior Court err by failing to strictly construe the 1806 tax statute and by ignoring or misconstruing prior Supreme Court holdings? The Kellers and their amici curiae pointed out that the statute applied only to “lands,” and the tax status of oil and gas as “land” at the time was ambiguous at best. They also noted that the statute applied only to those “becoming a holder of unseated lands,” and not to those retaining a partial real property interest after conveying the remainder. Finally, they point out that the statute explicitly provided a remedy other than forfeiture for non-compliance (a four-fold tax penalty).

- Did the Superior Court deny the Kellers’ due process rights under the United States and Pennsylvania Constitutions, by approving a tax sale that proceeded without “notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections,” Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950)?

- Did the Superior Court err in declining to hold that a grantee is bound by prior exceptions and reservations cited in its deed?

- Did the Superior Court err in making a factual finding that the Kellers never notified the Centre County Commissioners of their severed oil and gas estate, in the absence of evidence one way or the other?
Of course, Herder Spring and its *amici curiae* would answer all of these questions in the negative. Briefing is complete, and the parties are awaiting an argument date from the Court.

Of note, the Supreme Court’s resolution of this issue is not likely to end litigation on these issues. Even if it upholds the Superior Court’s ruling, the validity and scope of individual tax sales likely will still need to be decided on a case-by-case basis. As a result, the Supreme Court’s ruling may just shift the focus of argument to other issues. In short, stay tuned for more developments on these issues.4

**B. Title Searching and Trespass Claims – *Sabella v. Appalachian Development Corp.***

In an ideal world, title disputes are raised and resolved before drilling or production commence on a property. That is not always the case, however. Indeed, given the Supreme Court’s rejection of equitable tolling, see supra § II.A, producers may increasingly be compelled to commence drilling before resolving title disputes, to protect their lease investment.

Drilling and production in the absence of clear title bear unquestionable perils for the operator, who risks being held – depending upon the outcome of the title dispute – to be a trespasser. The best case scenario – if the operator is found to have acted in good faith – is disgorgement of the trespasser’s net profits. If, however, the operator is held to have trespassed in bad faith, it must pay over all proceeds derived from the trespass, without offset for the cost of generating those funds. *See generally Sabella v. Appalachian Development Corp.*, 103 A.3d 83 (Pa. Super. Ct. 2014).

The Superior Court’s recent decision in the *Sabella* case highlights those risks. In *Sabella*, plaintiff Sabella was the owner of severed oil, gas and mineral rights pursuant to a duly-recorded 1997 tax sale deed. In 2001, Appalachian Development signed an oil and gas lease with the surface owners, apparently unaware of the recorded deed showing that the surface owners did not in fact own 66 acres of subsurface rights beneath their property. Appalachian then transferred its interest in the lease to two drillers, the Haners, who drilled a number of wells on the property. Importantly, the Haners only commissioned a “bring down” title search, and did not perform a full title search.

When Sabella learned of the drilling, he brought suit, seeking ejectment (promptly ordered on summary judgment) and damages for trespass and conversion. After an ensuing trial, the Court of Common Pleas found that the Haners were liable for trespass (both good-faith and bad-faith) and conversion. The Haners appealed, 4 The author represents before the Supreme Court, as *amici curiae*, the descendants of several large holders of reserved oil and gas estates.
and Sabella cross-appealed the determination that the Haners’ trespass was even partially in good faith.

On appeal, the Superior Court rejected the Haners’ arguments, but ruled in favor of Sabella on his cross-appeal. The court relied principally upon the fact that Sabella’s ownership of the subsurface was a matter disclosed in public deed records, thereby placing the Haners on constructive notice of Sabella’s ownership pursuant to 21 P.S. § 357. In short, as the court concluded:

In declining to conduct a full title search, when such would have revealed conclusively Sabella’s ownership of the OGMs, the Haners lost their claim to bona fide purchaser status and their recourse to the protections accorded with that status. . . . Because the Haners were not good-faith purchasers of the OGMs, they were entitled to no offsets whatsoever; rather, Sabella was entitled to recover the entirety of the revenues the Haners derived from their production upon Sabella’s OGMs.

Id. at 104.

The decision in Sabella has a number of implications for oil and gas producers:

• The Superior Court holds that producers who develop a property without performing a full title search do so at their peril. Given the presence of historical reservations of oil, gas and mineral rights – some more than 100 years old, see supra § III.A – this may impose a substantial burden.

• The Superior Court’s ruling, when coupled with Harrison v. Cabot Oil & Gas, also potentially places producers between a rock and a hard place in situations where there are legitimate disputes over title. If the producer awaits resolution of the dispute, the lease’s primary term may run before the lessee can take the necessary steps to continue the lease into its secondary term. On the other hand, if the lessee takes steps to continue the lease in force during the pendency of a title dispute, it risks losing any benefit from those expenditures.


There also remain other questions about the ownership of subsurface rights. For example, although it has been the law of Pennsylvania for more than 20 years that coalbed methane presumptively belongs to the owner of the coal seam, see United States Steel Corp. v. Hoge, 468 A.2d 1380 (Pa. 1983), the Superior Court just this year addressed issues surrounding the ownership and production of coalbed methane, see Kennedy v. Consol Energy, Inc., 116 A.3d 626 (2015), alloc. pending.

The Kennedy plaintiffs owned oil and gas rights beneath a large tract in Greene County, but Consol owned the coal underlying the property, and CNX Gas
Company drilled wells into the Pittsburgh coal in order to produce coalbed methane. The trial court made short work of the Kennedys’ quiet title claims, relying on *Hoge*.

The Superior Court affirmed. Although the court did not read *Hoge* as establishing a *per se* rule – holding that it merely established a presumption – the court found the language of the relevant instruments in *Hoge* and *Kennedy* as functionally indistinguishable.

The court also rejected the Kennedys novel effort to suggest that possible wellbore deviations into the overlying rock formation – through an extension of the “confusion of goods” doctrine – required that all proceeds from gas production be paid over, merely because some minuscule, but unquantifiable, volume of natural gas may have been extracted from those overlying formations.5

### IV. *Robinson Township v. Commonwealth* – Next Steps and Emerging Issues

More than a year and a half after the Pennsylvania Supreme Court’s decision in *Robinson Township v. Commonwealth*, the state of the law remains unsettled, and many of the questions left open by the plurality’s sweeping opinion remain unanswered.

#### A. To Recap…

The Supreme Court’s *Robinson Township* decision(s) have become well known (some would say infamous):

- Shortly after the enactment of Act 13 of 2012, a comprehensive legislative effort to address various policy issues that had arisen as a result of the Marcellus shale “boom” in northern and western Pennsylvania, it came under attack from a variety of challengers. The core challenge was to Act 13’s restrictions on local regulation of oil and gas activities, and its state-wide land use standards for oil and gas operations.


- On appeal, the Supreme Court agreed, but its decisions were fractured and there was no majority. Chief Justice Ronald Castille’s plurality opinion found that Act 13’s statewide land use violated the Pennsylvania

5 The author represents the defendants in this matter in connection with the pending petition for allowance of appeal.

- The plurality viewed Article I, Section 27 to “require[] each branch of government to consider in advance of proceeding the environmental effect of any proposed action.” *Id.* at 952.

- The plurality also for the first time gave municipalities independent authority, not flowing from an explicit state grant of power, ruling that the General Assembly “has no authority to remove a political subdivision’s implicitly necessary authority to carry into effect its constitutional duties.” *Id.* at 977.

- Finally, the plurality construed the Amendment to be self-executing, creating “a constitutional right personal to each citizen” that is judicially enforceable. *Id.* at 951 n.39; *see also id.* at 974.

- The plurality’s application of these principles appeared to reflect a deep hostility to shale gas development, in the absence of a fully-developed record that would support such a conclusion:

  "By any responsible account, the exploitation of the Marcellus Shale Formation will produce a detrimental effect on the environment, the people, their children, and future generations, and potentially on the public purse, potentially rivaling the environmental effects of coal extraction." *Id.* at 976.

**B. On Remand…**

On remand, the Commonwealth Court addressed the issues that remained following the Supreme Court’s ruling. *Robinson Twp. v. Commw.*, 96 A.3d 1104 (Pa. Commw. 2014). On the key regulatory and land use issues, the court ruled as follows:

- The court held that 58 Pa.C.S. § 3302 of Act, which provided that municipalities cannot regulate areas already covered by the Oil and Gas Act, was severable and valid. 96 A.2d at 1120. This confirms the continued validity of *Range Resources – Appalachia v. Salem Twp.*, 964 A.2d 569 (Pa. 2009) – holding that municipalities cannot regulate matters that are within the scope of the Oil and Gas Act – as codified in Section 3302.

- The court held that 58 Pa.C.S. § 3218.1, requiring DEP to provide notice of spills to public water supplies, was not an invalid special law. 96 A.3d at 1111-14.
The court did hold that 58 Pa.C.S. §§ 3305 through 3308 – permitting the Public Utility Commission to review local ordinances – was not severable from those portions of Act 13 that the Supreme Court had invalidated. 96 A.3d at 1120-22. (The PUC has asked the Supreme Court to review this aspect of the decision.)

As discussed below, see infra § VI.C, the court upheld provisions protecting proprietary information in the health care context.

Most recently, the Pennsylvania Independent Oil and Gas Association has sought to intervene in Robinson Township, requesting an order enforcing the judgment. IOGA contends that DEP is improperly applying the provisions of Act 13’s now-invalidated Section 3215(c), which required DEP to consider impacts upon a variety of natural and public resources in the course of reviewing a drilling permit application. (Accompanying this filing was a stand-alone petition for review in Commonwealth Court, seeking the same relief.)

C. The Commonwealth Court Revisits and Narrows Robinson Township – Pennsylvania Environmental Defense Fund v. Commonwealth and Other Decisions

The most significant decision to consider the effect of Robinson Township is the Commonwealth Court’s January 7, 2015 decision in Pennsylvania Environmental Defense Fund v. Commonwealth, 108 A.3d 140, which rejected a challenge to the Commonwealth’s allocation of oil and gas lease revenues. PEDF argued that Article I, Section 27 required funds generated from oil and gas leasing and extraction on public lands to be segregated from general revenues and spent for environmental protection or natural resource conservation, but the Commonwealth Court disagreed.

The most significant aspect of the PEDF case, going forward, is the Commonwealth Court’s conclusion that Robinson Township’s broad-ranging plurality opinion is not binding precedent. Further, the Court treated it as persuasive precedent “only to the extent it is consistent with binding precedent from this Court and the Supreme Court on the same subject.” 108 A.3d at 156 n.37. As a result, the court continued to apply the three-part test set out in Payne v. Kassab, 312 A.2d 86 (Pa. Commw. Ct. 1973): (1) Was there compliance with all applicable statutes and regulations relevant to the protection of the Commonwealth’s public natural resources? (2) Does the record demonstrate a reasonable effort to reduce environmental incursion to a minimum? (3) Does the environmental harm which will result from the challenged decision or action so clearly outweigh benefits so as to be an abuse of discretion? 312 A.2d at 29-30.

Applying the Payne test, the court rejected the supposition that all revenue from the sale or leasing of natural resources “must be funneled to these purposes and these purposes only,” and that it is sufficient that those funds be used “for the benefit of all people.” 108 A.3d at 168.
Also important to the Commonwealth Court’s reasoning – and to continuing efforts to give content to Robinson Township – is the explicit recognition that economic development is a legitimate state goal, that the Pennsylvania Constitution is intended to balance environmental protection with economic development, and that Article I, Section 27 was not intended to derail economic development that would lead to an increase in the general welfare. 108 A.3d at 156-57, 170.

Courts’ efforts to keep Robinson Township within reasonable bounds are also reflected in observations in other decisions:

- In Feudale v. Aqua Pennsylvania, Inc., 2015 WL 4461069 (Pa. Commw. Ct. July 22, 2015), the court dismissed, on preliminary objections, claims for improper management of state forest lands in connection with a water line replacement, on the ground that the petitioner had failed to exhaust administrative remedies by appealing DEP’s permit issuance to the Environmental Hearing Board. In so doing, the Court also found petitioners’ constitutional challenge to be without merit. Id. at *3-*4. The court reiterated its reliance on Payne v. Kassab to evaluate governmental compliance with Article I, Section 27, and observed that “merely to assert that one has a common right to a protected value under the trusteeship of the State, and that the value is about to be invaded, creates no automatic right to relief.” Id. at *4 (quoting PEDF, 108 A.3d at 158).

- In Duke Energy Fayette II, LLC v. Fayette C’ty Bd. of Assessment Appeals, 116 A.3d 1176 (Pa. Commw. 2015), the court – in the context of a tax assessment challenge – cited Justice Saylor’s dissent for the proposition that municipalities are creatures of the General Assembly and that “the latter’s dictates” are “preeminent.” Id. at 1180.

- In ION Geophysical Corp. v. Hempfield Township, 2014 WL 1405397, at *7 (W.D. Pa. Apr. 10, 2014), the court declined to consider the effect of Robinson Township on other aspects of the Oil and Gas Act, holding that it would not presume that Robinson Township had an effect on existing pre-Act 13 laws.

D. Efforts to Apply and Extend Robinson Township

Not surprisingly, given the plurality opinion’s broad statements – and notwithstanding the Commonwealth Court’s effective disregard of that plurality opinion as a rule of decision x– citizen groups now appear to view Robinson Township as “a case for all seasons.” It is now routinely dropped into a wide variety of regulatory and legal challenges to state and private party actions.

As one example, Robinson Township’s most inflammatory “findings” were cited in Gorsline v. Board of Supervisors of Fairfield Township, No. 14-000130 (C.C.P. Lycoming C’ty Aug. 29, 2014), which invalidated a conditional use permit for a well pad as inconsistent with the governing ordinance. (The landowners in that matter were represented by attorneys from PennFuture.) An appeal of that decision has been argued, and a decision from the Commonwealth Court is pending.

Citizen groups are also attempting to leverage Robinson Township’s plurality opinion in regulatory settings:

- For example, in September 2014, three groups appealed a DEP ruling permitting Range Resources to beneficially use vertical drill cuttings for well pads and access roads. While the groups offered procedural and substantive objections to the DEP decision, the core of their appeal was the contention, citing Robinson Township, that the DEP failed to consider the impact that its decision would have on “public trust resources,” an impact analysis that the Robinson Township plurality can be read to require. Delaware Riverkeeper Network v. DEP, No. 2014-128 (Pa. Envt’l Hearing Bd.). (That appeal remains pending.)


E. What’s Next?

The ultimate impact of Robinson Township remains unclear. As discussed above, the Commonwealth Court and EHB both have declined to apply the plurality’s sweeping interpretation of Article I, Section 27, and have continued to apply Payne v. Kassab’s three-part test to assess compliance with the amendment.
Nonetheless, litigants continue to cite the plurality, and it would appear to be a matter of time before the issue comes before the Supreme Court again. In that event, would the Court as a whole speak so broadly? (Of note, only one of the members of the *Robinson Township* plurality – Justice Todd – remains on the Court.)

What *Robinson Township* may (or may not) mean:

- State-wide land use regulation, for all practical purposes, *may* now be impossible. (For example, could the General Assembly now mandate affordable housing or medical care facilities in all districts?)

- Local zoning *may* now be “constitutionalized,” *i.e.*, there might be a constitutional right to retain a particular zoning classification, enforceable by municipalities and landowners. (For example, can the General Assembly, having given municipalities the right to enact zoning ordinances, withdraw that authorization? Do citizens’ “reasonable expectations” about existing zoning prevent a municipality from ever allowing more intensive land uses in an existing district?)

- There *may* now be a “constitutional tort” available to challenge just about any governmental act. (After all, “it is difficult to conceive of any human activity that does not in some degree impair the natural, scenic and esthetic values of any environment.” *Payne v. Kassab*, 312 A.2d 86, 94 (Pa. Commw. Ct. 1973).) The Commonwealth Court seemed to assume as much in *Feudale*, even though it rejected the claim on the merits.

And indeed, even under the *Payne v. Kassab* standard, there remains considerable room for argument, on questions that are inherently situation-specific: Was there a reasonable effort to minimize the environmental incursion? Does the environmental harm outweigh the benefits? *See, e.g.*, *Sludge Free UMBT v. DEP*, 2015 WL 4410439, at *4-*6 (Pa. Envt’l Hearing Bd. July 1, 2015) (denying summary judgment because of questions of fact about DEP’s compliance with *Payne v. Kassab*’s second and third prongs).

- Article I, Section 27 *may* allow indirect challenges to purely private activity, on the theory that governmental bodies have failed to restrain it. (If the Amendment gives rise to “a duty to refrain from permitting or encouraging the degradation, diminution, or depletion of public natural resources, whether . . . through direct state action or indirectly, *e.g.*, because of the state’s failure to restrain the actions of private parties,” 83 A.3d at 957 (emphasis added), does this mean that litigants can challenge private activities, on the ground that the government (by failing to regulate or preclude private action) has violated the Amendment?)
There **may** now a constitutionally-based, judicially-imposed “environmental impact assessment” requirement. (If the Amendment requires the government “to consider in advance the environmental effect of any proposed action,” including not only the actual but also the “likely degradation,” 83 A.3d at 952, 953, does this require that any governmental action be preceded by a formal or explicit assessment of its likely environmental impact? If so, what are the standards?)

V. **Emerging Challenges to Midstream Development**

To date – despite activist group’s win in *Robinson Township*, which arguably allows a municipality-by-municipality “war of attrition” over the siting of oil and gas facilities – these groups have had limited success in preventing oil and gas producers from drilling wells. As a result, citizen groups have been shifting their strategy, refocusing on hindering or precluding midstream operations. (The theory seems to be that, by preventing oil and gas from getting to market, groups can limit its upstream production in the first place.)

Given that there is an urgent need for more gathering and transmission pipelines, to resolve supply chain bottlenecks and bring Marcellus and Utica Shale gas to market, this would appear to be a fertile ground for regulatory obstruction by those opposed to oil and gas development.

In the past months, these battles have been playing out over a number of regulatory fronts, involving challenges to air permitting, land use decisions, FERC certificates of public convenience and necessity, etc. Whether these efforts have a material effect on the development of needed gathering and transmission resources, or whether they are simply a “bump in the road,” remains to be determined. What does appear clear, however, is that participants in the midstream industry may expect regulatory challenges at just about any stage in the permitting process, and that pipeline development this will inevitably be more prolonged and more costly.

While Governor Wolf has created a “Pipeline Task Force,” intended to offer policies and guidelines for the build-out of midstream infrastructure, it remains to be seen whether that group will be a constructive or obstructive force. (The task force is ostensibly intended, among other things, to develop best practices for pipeline planning and siting, to identify construction methods to reduce environmental impact, and to develop operations and maintenance plans.) As an initial observation, fewer than one-third of the task force’s 48 members are affiliated with the upstream and midstream industries, and the task force membership is heavily tilted in favor of state and local officials, academics, and members of advocacy groups. The membership of the work groups that will advise the task force is, with only a few exceptions, even more tilted against industry participation. As such, some skepticism may be in order, on the part of the oil and gas industry, about the task force’s ultimate impact.
Some of the more notable recent decisions exemplifying these challenges include the following:

A. **Air Permitting and Source Aggregation**

A principal avenue of attack, by environmental groups seeking to hinder midstream development, is the contention that multiple pipeline facilities constitute a single “source” for air emission permitting purposes. Because that “source’s” potential to emit determines the type of permit that is needed, this contention – if adopted – in many cases would have the effect of requiring more complicated and more costly “major source” permitting and “new source review” under Title V of the Clean Air Act.

The viability of this argument was dealt a substantial, but perhaps not fatal, blow on February 23, 2015, when Judge Mariani in the United States District Court for the Middle District of Pennsylvania entered a summary judgment in *Citizens for Pennsylvania’s Future v. Ultra Resources, Inc.*, 2015 WL 769757.

In 2011, Citizens for Pennsylvania’s Future (PennFuture) sued Ultra, contending that Ultra had violated the Clean Air Act by constructing a major source (allegedly producing more than 100 tons per year of nitrogen oxides) without the proper “new source review” permit. PennFuture’s lawsuit was predicated upon the underlying allegation that eight separate compressor stations in Tioga and Potter Counties together constituted only one “source” of air emissions. (In issuing permits to Ultra, DEP determined that each station should be considered individually.) The relevant regulatory text effectively provided that multiple emitting activities can be considered a single “source” if they (1) are under common control; (2) “are located on one or more contiguous or adjacent properties”; and (3) belong to the same major industrial grouping. 40 C.F.R. § 71.2. The question before the court was whether these compressor stations were “contiguous or adjacent.”

In the absence of Third Circuit precedent on the issue, the court looked to the Sixth Circuit’s decision in *Summit Petroleum v. EPA*, 690 F.3d 733 (6th Cir. 2012). There, the Court of Appeals applied the plain meaning of the term “adjacent” and overturned EPA’s determination that several gas wells spread across 43 square miles were “adjacent” to a Summit natural gas treatment plant. In so doing, the Sixth Circuit rejected EPA’s view that “functional interdependence” can render spatially-separated facilities “adjacent.” *See* 2015 WL 769757, at *8.

The *PennFuture v. Ultra* court also looked to DEP guidance, which considered proximity when determining “aggregation,” and which provided that properties within one-quarter mile of each other could be considered “adjacent.” (The DEP guidance also provided, however, that properties that are further apart can be considered “adjacent” on a case-by-case basis.) *See* 2015 WL 769757, at *9-*10.
Applying these authorities, the court held that the eight compressor stations at issue could not be considered “adjacent,” and “should not be ‘daisy-chained’ together to establish a contiguous grouping.” Id. at *10-*11. These stations – located no closer than three-quarters of a mile apart, within a five-square mile area – were “not connected in any other way, and operate independently of one another,” and “there is no discernable relationship between the individual emission stations.” Id. at *13.

Even so, *PennFuture v. Ultra* is not a stake through the heart of the argument:

- The court would not categorically rule out “functional interrelatedness” as a basis for aggregating multiple sources, for fear that the industry would manipulate the structure of its facilities. “[W]e recognize that to strictly limit that determination so as to never consider functional interrelatedness would run afoul of PADEP’s guidance and could very likely lead to the anomalous situation wherein emitting sources which are clearly functionally related are able to avoid the more stringent standards applicable to major sources under the [Clean Air Act] and state law because of a wooden and inflexible definition of adjacency.” Id. at *14. (The court merely held that PennFuture had not presented any material facts to show that the compressor stations were functionally associated.)

- Further, the court had previously denied a motion to dismiss, which argued that PennFuture had forfeited its right to seek judicial review by failing to appeal the permits’ issuance to the Environmental Hearing Board. *See 898 F. Supp. 2d 741 (M.D. Pa. 2012).* As a result, the decision arguably invites collateral attacks on DEP permits, without following the prescribed method for obtaining judicial review.

The Environmental Hearing Board foreshadowed the difficulties that may confront companies seeking to avoid aggregation of sources in its October 31, 2014 order in *National Fuel Gas Midstream Corp. v. DEP*, 2014 WL 6537086, denying permittees’ motion for summary judgment on the question of aggregation. There, DEP had determined that a Seneca compressor and a National Fuel Gas dehydrator and generator together qualified as a single source for permitting purposes. Although Seneca and National Fuel Gas sought judgment as a matter of law, Judge Beckman declined the invitation, holding that “The issues of air aggregation in the oil and gas industry are legally and factually complex and the board strongly believes that these issues, which remain a matter of first impression in Pennsylvania, will be best decided with the benefit of a full factual record and post-hearing brief” on this “mixed question of fact and law.” Id. at *9, *7.
B. Challenges to Pipeline Companies’ Condemnation and Other Authority as “Public Utilities”

Those opposed to pipeline expansion also are increasingly challenging pipeline companies’ ability to exercise the rights of “public utilities,” including the right to take property by eminent domain and an exemption from local land use regulations.

The experiences of Sunoco Pipeline LC in attempting to construct the Mariner East pipeline demonstrate some of the difficulties pipeline companies have encountered.

Where Sunoco found itself unable to acquire rights-of-way for the Mariner pipeline by agreement, it has sought to invoke the power of eminent domain given to “public utilities.” This argument faced an immediate roadblock in one case: in response to landowner objections, a judge of the York County Court of Common Pleas ruled that Sunoco, regulated by FERC as a “common carrier,” was thus not a “public utility” and could not avail itself of a “public utility’s” powers, including the power of eminent domain. *Sunoco Pipeline v. Loper*, No. 2013-SU-4518-05 (C.C.P. York C’ty Feb. 24, 2014).

(Of note, trial court rulings on the issue are not uniform: on November 7, 2014, Judge Gray of the Lycoming County Court of Common Pleas reached a different result in the context of a condemnation initiated by UGI Penn Natural Gas, Inc., holding that UGI PNG was not attempting to take private property for private enterprise, even though the proposed transmission line would serve only one customer. *In re Condemnation of Temporary Construction Easement across Lands of Curtis R. Lauchle*, Nos. 14-02,219 & 14-0,1791 (C.C.P. Lycoming C’ty).)

Thereafter, in March 2014, Sunoco sought an order from the Pennsylvania Public Utility Commission declaring that it was a “public utility” within the meaning of Section 619 of the Municipalities Planning Code, 53 P.S. § 10619, and that, as such, certain proposed pump and valve stations were exempt from municipal zoning. In the absence of a definition in the MPC, Sunoco sought to invoke the definition contained in Section 1103 of the Business Corporation Law, which included not only those entities subject to regulation by the PUC but also those regulated by “an officer or agency of the United States.” 15 Pa.C.S. § 1103. Because Sunoco was regulated as a common carrier by FERC pursuant to the Interstate Commerce Act, it argued that it qualified as a “public utility” under the MPC.

The Delaware Riverkeeper Network predictably, promptly, and loudly objected, arguing (i) that because Sunoco was a “common carrier,” it was not a “public utility”; and (ii) that Sunoco’s application violated Article I, Section 27 of the Pennsylvania Constitution (relying on the plurality opinion in *Robinson Township*).
Two administrative law judges initially rejected Sunoco’s arguments in July 2015, granting preliminary objections dismissing its amended petitions for lack of jurisdiction, on the ground that it was not a “public utility.”

The full PUC, however, reversed the ALJ ruling in October, holding in a 4-1 decision that Sunoco was a “public utility corporation.” Before the issue could be resolved definitively, however, Sunoco reached agreements with the affected municipalities and withdrew its petitions.

Accordingly, the status of pipeline companies as “public utilities” entitled to exercise the statutory powers given to such entities remains unsettled, and will need to be determined in subsequent administrative proceedings or lawsuits.

C. Case Study – the PennEast Pipeline

The recent experiences of a consortium of companies, proposing a 100-mile pipeline across eastern Pennsylvania and New Jersey, exemplifies citizen groups’ emerging strategy:

- In August 2014, PennEast Pipeline announced its plans, which would deliver up to 1 bcf/day to end users in New Jersey and the northeast.

- In November 2014, the Delaware River Basin Commission – at the behest of the Delaware Riverkeeper Network – announced that PennEast would be required to obtain a permit from it before proceeding.

- In December 2014, a New Jersey state senator introduced a resolution opposing the project, alleging that it would adversely affect water supplies, preserved lands and “our residents’ quality of life,” “could also have a serious impact on property values” and “is wrong for our region.”

- Another state senator and two assemblymen thereafter urged FERC not to certificate the project, claiming among other things that it would “permanently scar an exceptionally pristine, rich agricultural heritage,” “lower property values,” “impact quality of life for residents” and “damage the state’s dwindling open spaces.”

- In February 2015, the New Jersey chapter of the Sierra Club urged FERC to deny the application, claiming that it would cause “the destruction of one of the last remaining stretches of rural New Jersey.”

- In June 2015, environmental groups (including the Delaware Riverkeeper Network and the Pennsylvania and New Jersey chapters of the Sierra Club) urged the DRBC and FERC to hold separate, rather than joint, public hearings on the project, as DRBC had proposed. (Whatever the ostensible justification – the groups protested that DRBC and FERC have “entirely different” and “unrelated missions” – the only certain
consequences of accepting this request will be complication, delay and expense.)

- That same month, a coalition of New Jersey organizations announced that it was mobilizing to battle so-called “dirty energy,” with the elimination of all fossil fuels. A key aspect of this, according to the Delaware Riverkeeper Maya Van Rossum, was opposition to pipeline development; she called pipelines “a known and growing source of water pollution, air pollution, forest and wetland devastation” which “threaten our lives and when they fail inflict hundreds of millions of dollars of damage a year.”

- Most recently, in July, Mercer County, New Jersey rescinded authorization for PennEast to conduct survey operations on public land, contending that even the soil borings used in preliminary surveying were “potentially environmentally harmful.”

There is no reason to believe that these efforts will not continue, not only with respect to PennEast, Mariner and Mariner 2, but also with any other efforts to construct midstream gathering and transmission assets.

VI. Other Environmental Litigation Trends

A. Environmental Enforcement Trends

Environmental enforcement, often with substantial civil penalties, also has intensified:

- In September 2014, DEP assessed a $4.2 million civil penalty on consent against Range Resources – Appalachia, LLC, under the Pennsylvania Clean Streams Law and Oil and Gas Act, for alleged leak violations at six surface impoundments in Washington County.


- In June 2015, DEP assessed an $8.9 million civil penalty against Range Resources – Appalachia, LLC, under the Pennsylvania Clean Streams Law and Oil and Gas Act, based upon Range Resources’ alleged failure to submit a satisfactory plan to repair a leaking gas well impacting surface and groundwater in Lycoming County. Range Resources has appealed this assessment. See Range Resources – Appalachia, LLC v. DEP, No. 2015-099 (Pa. Envt’l Hearing Bd.).
The Commonwealth is also beginning to pursue criminal charges in some cases:

- Most notable is the Attorney General’s pursuit of criminal charges against XTO Energy, Inc. for alleged violations of the Clean Streams Law and Solid Waste Management Act, in connection with storage tank spills at a Lycoming County well site. Although XTO moved to dismiss the charges, the Lycoming County Court of Common Pleas denied the motion to dismiss in April 2015. See Commw. v. XTO Energy, Inc., No. CP-41-CR-0002-2014 (C.C.P. Lycoming C’ty Apr. 14, 2015).

- More recently, in October 2014, the Attorney General filed misdemeanor charges against EQT Production Co. in the Environmental Hearing Board, in connection with the 2012 Tioga County wastewater spill, contending that EQT committed “pollution of waters” and “disturbance of waterways” in violation of 18 Pa.C.S. §§ 2502(a) and 2504(a)(2). The Attorney General acted upon the reference of the Pennsylvania Fish and Boat Commission, and at the behest of a number of citizen groups.

With the change in administrations, and the appointment of a DEP secretary who was the former government relations manager for PennFuture, it is reasonable to expect that enforcement efforts will not subside.

B. Contamination Claims

While a number of litigants have alleged bodily injury or property damage due to alleged releases of chemicals during oil and gas production, these cases have proven to be long and difficult for these claimants. Recent developments confirm that this continues to be the case, although the oil and gas industry’s success has not been final or unqualified.

**Kiskadden v. DEP:** One of the most eagerly-anticipated rulings in this area was the Environmental Hearing Board’s June 12, 2015 adjudication in Kiskadden v. Department of Environmental Protection, 2015 WL 3798582. In Kiskadden, a resident of Washington County contended that Range Resources’ drilling activities on a nearby well pad caused groundwater contamination impacting his private well (including elevated concentrations of iron, manganese and methane). Kiskadden asked DEP for an alternative water supply; when DEP refused, concluding that Range Resources’ drilling had not caused the complained-of contamination, Kiskadden appealed that determination to the EHB.

After prolonged and contentious proceedings, and a lengthy evidentiary hearing – with the EHB considering the issue de novo, as it is required to – the EHB agreed with DEP’s determination, finding “that the Appellant has not met his burden of proving by a preponderance of the evidence that his water well was impacted by gas drilling operations conducted by Range Resources. Although the Appellant presented extensive evidence of leaks and spills that occurred at Range’s site, some of which were not reported to the Department of Environmental Protection..."
in a timely manner, he did not demonstrate by a preponderance of the evidence that a hydrogeological connection exists between his water well and the Range site.” 2015 WL 3798582, at *1.

**Ely v. Cabot Oil & Gas Corp.** The production company also enjoyed a largely-favorable outcome in another well-publicized dispute, from the opposite corner of the Commonwealth. On January 12, 2015, the court in *Ely v. Cabot Oil & Gas Corporation*, 2015 WL 140033 (M.D. Pa.), adopting 2014 WL 7508091 (M.D. Pa. Apr. 21, 2014), entered partial summary judgment against the remaining ten plaintiffs (out of the original 44), who alleged that drilling operations caused methane and other contamination in their private wells. The court rejected their breach of contract claim and claim for lost royalties, their claim under the Pennsylvania Hazardous Substances Cleanup Act, their fraudulent inducement claim, their claim for medical monitoring, their negligence *per se* claim, and their claims for bodily injury.

The court did, however, permit the “far narrower” private nuisance and negligence claims for property damage to go forward to trial; even though the supporting evidence was “somewhat limited,” it was minimally sufficient to survive a motion for summary judgment. 2014 WL 7508091, at *2.

An attempted interlocutory appeal was unsuccessful, see *Hubert v. Cabot Oil & Gas Corp.*, No. 15-1439 (3d Cir. May 14, 2015), and the matter is headed toward a trial on those few issues that remain.

**Russell v Chesapeake Appalachia LLC** The predominant issue in any case alleging environmental contamination from oil and gas operations is causation: did the challenged operations in fact cause the complained-of injuries? Because this issue is so often outcome-determinative – and because it is an issue that should be supported in fact before the allegation is made in the first place, see Fed. R. Civ. P. 11(b)(3); Pa. R. Civ. P. 1023.1(c)(3) – a key tool for defending these cases is the so-called Lone Pine order, which requires a plaintiff to come forward with evidence of causation at the outset of the case.

Because Lone Pine orders impose a substantial initial burden on plaintiffs, before full discovery effectively commences, they have proven to be quite controversial, and some courts have become increasingly hesitant to impose them. On March 2, 2015, Judge Brann of the United States District Court for the Middle District of Pennsylvania denied, without prejudice, the defendant’s motion for a Lone Pine order in *Russell v. Chesapeake Appalachia, LLC*, 305 F.R.D. 78. The Russell plaintiffs, residents of Bradford County, alleged that noise, traffic, lights and other aspects of Defendants’ oil and gas operations constituted a nuisance, negligence and negligence *per se*.

A Lone Pine order, the court held, was unwarranted at such an early juncture. The court opined that a Lone Pine order “should issue only in an exceptional case and after the defendant has made a showing of significant evidence calling into
question plaintiffs’ ability to bring forward” evidence of causation.” Id. at 84 (internal quotation omitted). Judge Brann’s ruling anticipated the Colorado Supreme Court’s similar decision the next month, which held that the Colorado civil rules did not permit pre-discovery Lone Pine orders. See Antero Resources Corp. v. Strudley, 347 P.3d 149 (Colo. 2015).

Although Judge Brann explicitly invited another Lone Pine motion following more discovery, his ruling, coupled with the decision from Colorado, may dissuade judges from requiring plaintiffs to come forward, at the outset of the case, with facts demonstrating that their initial allegations have evidentiary support. This may have the effect of prolonging and complicating litigation that would otherwise fail on its merits at the outset of the case.

C. Trade Secret Protection for Fracturing Fluid Composition

Well service companies jealously guard the composition of their fracturing fluids, and zealously seek to prevent wide public disclosure of their proprietary formulas. These efforts – although generally upheld – have not been unqualifiedly successful, and recent decisions reveal avenues through which disclosure may be required.

Robinson Township v. Commonwealth – again: One of the centerpieces of Act 13 was a provision balancing trade secret protection for fracturing fluids against public health needs. That provision, 58 Pa.C.S. § 3222.1(b)(11), allows health professionals to obtain “the specific identity and amount” of chemicals if “necessary for emergency treatment” in a “medical emergency,” but also prohibits health professionals from using this information “for purposes other than the health needs asserted,” and requires health professionals to “maintain the information as confidential.”

This provision came under immediate challenge on a variety of fronts. One of the original litigants in the Robinson Township case was a physician, Dr. Khan, who contended that Act 13’s restrictions on obtaining and sharing information with other physicians impeded his ability to diagnose and treat his patients properly. The Commonwealth Court ruled that Dr. Khan lacked standing to assert these claims until he actually requested confidential information and that information either was not supplied at all or was supplied with restrictions interfering with his ability to provide proper medical care to his patients. Robinson Twp. v. Commw., 56 A.3d 463, 477-78 (Pa. Commw. Ct. 2012). The Supreme Court reversed this decision, holding that Dr. Khan did have standing. See Robinson Twp. v. Commw., 83 A.3d 901, 923-25 (Pa. 2013).

On remand, the Commonwealth Court ruled against Dr. Khan on the merits, rejecting the contention that these provisions were an invalid special law or violated the “single subject rule.” See Robinson Twp. v. Commw., 96 A.3d 1104, 1115-19 (Pa. Commw. Ct. 2014). Even so, the industry’s victory was a qualified one: in dismissing Dr. Khan’s complaints, the Commonwealth Court observed
that “[n]othing” in the statute’s confidentiality provisions “precludes a physician from including the information in patient records, medical treatment or evaluations, including evaluations based on trade secrets that physicians are required to keep,” or “precludes a physician from sharing with other medical providers any trade secrets that are necessary for the diagnosis or treatment of an individual.” Id. at 1117.

It remains to be seen whether this is a straightforward recognition that even proprietary information may be disclosed as necessary, under suitable protections, or whether this is the “camel’s nose under the tent,” a harbinger of unrestricted disclosure of proprietary industry information.

Rodriguez v. Secretary: Another physician’s effort to challenge these restrictions also failed, although again, it is not a complete victory for the oil and gas industry. Dr. Alfonso Rodriguez challenged the statute in federal court, claiming that it violated his First Amendment rights right to share information with his patients and the medical community. The United States District Court for the Middle District of Pennsylvania dismissed Dr. Rodriguez’s claims, holding that he lacked standing, in that he had not alleged that he had been in any situations where he needed or attempted to obtain confidential information, that his communications had been constrained, or that he had been compelled to enter into a confidentiality agreement. See Rodriguez v. Krancer, 984 F. Supp. 2d 356 (M.D. Pa. 2013); Rodriguez v. Abruzzo, 29 F. Supp. 3d 480 (M.D. Pa. 2014). The Third Circuit agreed. In so doing, it declined to rely on the Pennsylvania Supreme Court’s contrary holding in Robinson Township, observing that the standing requirement in state court is less stringent than standing in federal court under Article III’s “case or controversy” requirement. Rodriguez v. Secretary, 604 Fed. App’x 113 (3d Cir. 2015).

Haney v. Range Resources – Appalachia, LLC: Indeed, it appears that many courts freely require the disclosure of proprietary information on fracturing chemicals in discovery in civil litigation. For example, in Haney v. Range Resources – Appalachia, LLC, the plaintiffs alleged bodily injury and property damage caused by air and groundwater contamination, allegedly resulting from drilling activities. In discovery, they sought information regarding chemicals used at the drill site. After an order directed at the non-party manufacturers of these products failed to generate responses, the plaintiffs sought to compel Range Resources to gather and provide the information. The Washington County Court of Common Pleas granted the requested order.

Although Range Resources attempted to appeal, the Superior Court ruled, in a non-precedential April 14, 2015 decision, that it lacked jurisdiction. Range Resources had attempted to characterize the order as an appealable “collateral order,” but the Court disagreed, holding that the issue was not “too important to be denied review.” 2015 WL 1812842.
**Kiskadden v. DEP:** The ruling in *Haney* is reminiscent of an earlier ruling from the Environmental Hearing Board in a related appeal, *Kiskadden v. DEP* (whose final adjudication is discussed above, *see supra* § VI.B), resolving a long-running discovery dispute between Range Resources and Kiskadden over the contents of proprietary fracturing fluids. Range Resources initially declined to produce certain proprietary information concerning chemicals used at the drill site at issue. Ultimately, the EHB required Range Resources to provide the information; a number of manufacturers refused to provide the information to Range Resources, however. In response, the appellant filed a motion seeking to hold Range Resources in contempt. The EHB declined to grant appellants an adverse inference, but did shift the burden of proof, creating a “rebuttable presumption that contaminants present in the [a]ppellant’s water supply may have been used by Range at the . . . site and/or in Range’s operations.” *See Kiskadden v. DEP,* 2014 WL 2747482 (Pa. Envt’l Hearing Bd. June 10, 2014).

In sum, while Pennsylvania law protects proprietary commercial information regarding the composition of drilling and fracturing chemicals, via (among other things) a statutory provision that has to date withstood challenge, that protection remains qualified and incomplete in litigation. To date, objections to producing this information based on confidentiality concerns have not been successful at outweighing adjudicative bodies’ ordinary preference for complete discovery of arguably relevant information. Further, the confidentiality protections built by Act 13 are arguably somewhat porous, in light of the Commonwealth Court’s ruling in *Robinson Township.* In consequence, participants in the oil and gas industry who wish to protect their confidential commercial information may wish to be doubly cautious in availing themselves of more typical mechanisms (such as protective orders limiting disclosure).