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# Minimizing Antitrust Risks in Joint Ventures, Joint Bidding, and AMIs: A Review of Recent Enforcement Activities

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# MINIMIZING ANTITRUST RISKS IN JOINT VENTURES, JOINT BIDDING, AND AMIs: A REVIEW OF RECENT ENFORCEMENT ACTIVITIES

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Federal and state antitrust enforcers have recently focused their attention on some common practices in the oil and gas industry: joint ventures, joint bidding, and area of mutual interest (AMI) agreements. These enforcement actions highlight the need to proactively analyze the potential antitrust risks of these types of agreements, which typically involve entities that otherwise compete with each other. After summarizing the relevant antitrust laws, this article explains the significance of the recent enforcement actions and suggests some best practices to help minimize the antitrust risks in future transactions.

## *I. Federal and State Antitrust Laws*

The Sherman Act is the primary federal antitrust statute and every state has some state-law variation of it, which means that one must consider both federal and state enforcement actions, in addition to the possibility of private civil litigation.[1]

Section 1 of the Sherman Act provides that "[e]very contract, combination . . . , or conspiracy, in restraint of trade or commerce among

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1. 15 U.S.C. §§ 1–2 (West 2016); *see* THE ANTITRUST LAWS, https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/antitrust-laws (last visited Jan. 17, 2017) ("[M]ost states have antitrust laws that are enforced by state attorneys general or private plaintiffs. Many of these statutes are based on the federal antitrust laws.").

the several States or with foreign nations, is declared to be illegal."[2] Because every contract restrains trade to some degree, courts have found that a Section 1 violation arises only from agreements that unreasonably restrain trade. Courts apply two tests to determine if an agreement unreasonably restrains trade: (1) the *per se* test, and (2) the rule of reason. The *per se* test applies to a narrow group of agreements that are unreasonable as a matter of law, including price fixing, bid rigging, market division, and group boycotts.[3] The rule of reason applies to a wider range of agreements, and considering the defendant's intent and motive, balances an agreement's procompetitive and anticompetitive effects to determine if it unreasonably restrains trade.[4]

Section 2 of the Sherman Act applies to any "person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations." A Section 2 violation requires proof of monopoly power in a relevant market and the willful acquisition or maintenance of that power.[5] In layman's terms, this means that the defendant must be both "big" and "bad."

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2. 15 U.S.C. § 1.

3. *See* Northern Pac. Ry. Co. v. United States, 356 U.S. 1, 5 (1958) ("[T]here are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use.").

4. *See* F.T.C. v. Indiana Fed'n of Dentists, 476 U.S. 447, 457–58 (1986) ("Under our precedents, a restraint may be adjudged unreasonable either because it fits within a class of restraints that has been held to be per se unreasonable, or because it violates what has come to be known as the Rule of Reason, under which the test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition." (internal quotation marks omitted)); *see also NCAA v. Bd. of Regents*, 468 U.S. 85, 103 (1984) ("[D]espite the fact that this case involves restraints on the ability of member institutions to compete in terms of price and output, a fair evaluation of their competitive character requires consideration of the NCAA's justifications for the restraints").

5. *See* Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 455 (1993) ("[T]he plaintiff charging attempted monopolization must prove a dangerous probability of actual monopolization, which has generally required a definition of the relevant market and examination of market power."); *see also* United States v. Grinnell Corp., 384 U.S. 563, 570–71 (1966) ("The offense of monopoly under [§] 2 of the Sherman Act has two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.").

The Antitrust Division of the United States Department of Justice (DOJ) and the Federal Trade Commission (FTC) enforce federal antitrust laws. State antitrust laws are typically enforced by state attorneys general. Depending on the conduct at issue and the relevant enforcement agency, antitrust violations may result in criminal or civil fines, jail time for individuals, or conduct-based remedies.[6] As the cases discussed below indicate, private litigation (often in the class-action form) follows hot on the heels of federal or state antitrust investigations.

## *II. Oil and Gas Agreements*

Three types of agreements have recently caused federal and state antitrust enforcers to focus on the oil and gas industry: (1) AMI agreements; (2) joint-bidding agreements; and (3) joint ventures. AMI agreements can be risky because they require participants to offer opportunities within the AMI to their counterparties on a pro rata basis, thereby reducing the incentive of the counterparties to compete for opportunities, or obtain a superior position, within the AMI. Joint-bidding agreements can be risky because they involve competitors agreeing to act jointly with respect to a bid or bids, thereby reducing the number of potential bidders for a lease or group of leases. Finally, joint ventures can be risky because they sometimes facilitate collusion and the sharing of competitively sensitive information, in addition to eliminating other potential bidders.

## *III. Recent Antitrust Enforcement Actions and Litigation*

### *A. United States v. SG Interests and Gunnison Energy Corporation*

In 2005, the Bureau of Land Management published notice that it would be offering certain parcels for sale at an auction.[7] Shortly before the auction, SG Interests (SGI) and Gunnison Energy Corporation (GEC)

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6. *See, e.g.*, THE ANTITRUST LAWS, https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/antitrust-laws (last visited Jan. 17, 2017) ("The penalties for violating the Sherman Act can be severe. Although most enforcement actions are civil, the Sherman Act is also a criminal law, and individuals and businesses that violate it may be prosecuted by the Department of Justice.… The Sherman Act imposes criminal penalties of up to $100 million for a corporation and $1 million for an individual, along with up to 10 years in prison. Under federal law, the maximum fine may be increased to twice the amount the conspirators gained from the illegal acts or twice the money lost by the victims of the crime, if either of those amounts is over $100 million.").

7. Complaint, DOJ v. SG Interests I, Ltd., SG Interests VII, Ltd. and Gunnison Energy Corporation, 2012 WL 696249 ¶¶ 7–10 (D. Colo. Feb. 15, 2012).

entered into a memorandum of understanding (MOU) and an AMI agreement.[8] The MOU called for SGI to bid on three of the leases for sale, and if successful, to assign GEC a 50% interest in any leases acquired.[9] In exchange, GEC agreed not to bid at the auction.[10] Under the AMI, the parties agreed to acquire producing wells, acreage, and a gathering system.[11] Consistent with the MOU, SGI acquired the leases during the auction and assigned the 50% interests to GEC.[12]

After conducting a two-year investigation, the DOJ challenged the MOU under Section 1 and found that it amounted to illegal bid rigging.[13] SGI and GEC paid $550,000 to settle with the DOJ.[14] The DOJ did not, however, challenge the AMI agreement. This is likely because the DOJ determined that it was part of a legitimate, efficiency-enhancing joint venture under the rule-of-reason test.[15]

### *B. The Federal and State Investigations of Chesapeake, Aubrey McClendon, and Encana*

In 2012, news reports sparked a DOJ investigation of Encana Corporation and Chesapeake Energy Corporation for allegedly colluding to suppress lease prices at an October 2010 state-land lease auction in Michigan.[16] The DOJ focused on emails exchanged between the two companies that discussed competitively sensitive information and used phrases like avoiding "bidding each other up."[17] Despite these emails, the DOJ closed the investigation in April 2014 without making any formal charges.[18]

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8. *Id.* ¶¶ 11–21.
9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.*
13. *See* United States v. SG Interests I, Ltd., No. 12-cv-00395-RPM, 2013 WL 1932944 (D. Colo. Apr. 22, 2013) (ordering SGI to pay $275,000); United States v. Gunnison Energy Corp., No. 12-cv-00395-RPM, 2013 WL 1933990 (D. Colo. Apr. 22, 2013) (ordering GEC to pay $275,000).
14. *See supra* note 13.
15. *See supra* note 4.
16. Joshua Schneyer and Anna Driver, *Exclusive: Chesapeake, Encana near settlements on Michigan collusion probe* (Feb. 26, 2014), http://www.reuters.com/article/us-encana-chesapeake-idUSBREA1P0TJ20140226.
17. *Id*.
18. Joe Carroll, *Probe Into Chesapeake and Encana Michigan Gas Leases Ends* (May 1, 2014), https://www.bloomberg.com/news/articles/2014-05-01/probe-into-chesapeake-and-encana-michigan-gas-leases-ends.

However, the DOJ's decision did not stop Michigan's attorney general and Department of Natural Resources from bringing their own actions against both companies. Encana ultimately pleaded no-contest to state antitrust violations, paid a $5 million fine, and agreed to cooperate in the ongoing investigation of Chesapeake.[19] In April 2015, Chesapeake agreed to settle with Michigan during trial, by pleading no-contest to attempted antitrust violations and false pretenses and establishing a $25 million victim-compensation fund.[20]

Separately, on March 1, 2016, a federal grand jury indicted Chesapeake's former CEO, Aubrey McClendon, for allegedly conspiring with another unnamed oil and gas company to rig bids for prospective acreage in the Anadarko Basin.[21] The DOJ described the indictment as "the first case resulting from an ongoing federal antitrust investigation into price fixing, bid rigging, and other anticompetitive conduct in the oil and natural gas industry."[22] But the DOJ moved to dismiss the indictment the next day "for the reason that such action would best meet the ends of justice in that the defendant is now deceased" as the result of an automobile accident.[23]

### *C. Private Civil Lawsuits*

As mentioned above, private litigation often follows federal or state antitrust investigations. And the federal and state investigations of Chesapeake, Aubrey McClendon, and Encana were no exception. Chesapeake paid over $19 million to settle private civil litigation filed after the 2012 news reports and DOJ investigation, and a number of other private antitrust lawsuits have since been filed: (1) NorthStar Energy, LLC sued

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19. Joy Yearout, *Schuette Annoucnes $5 Million Civil Settlement, Criminal No Contest Plea by Encana Oil & Gas USA to Resolve Bid-Rigging Allegations* (May 5, 2014), http://www.michigan.gov/ag/0,4534,7-164-46849_47203-327764--,00.html.

20. Andrea Bitely, *Schuette, Creagh Annouce $25 Million Civil Settlement, Two Criminal No Contest Pleas by Chesapeake Energy Corp, to Resovle Racketeering, Bid-Rigging Allegations* (April 24, 2015), http://www.michigan.gov/ag/0,4534,7-164-46849-353198--,00.html.

21. DEPARTMENT OF JUSTICE: OFFICE OF PUBLIC AFFAIRS, Former CEO Indicted for Masterminding Conspiracy Not to Compete for Oil and Natural Gas Leases (March 1, 2016), https://www.justice.gov/opa/pr/former-ceo-indicted-masterminding-conspiracy-not-compete-oil-and-natural-gas-leases.

22. *Id.*

23. Motion to Dismiss, United States v. McClendon, No. 16-cr-00043M (W.D. Okla. March 3, 2016).

both Encana and Chesapeake;[24] (2) landowners filed (and continue to file) antitrust claims related to a joint venture in Pennsylvania's Marcellus Shale;[25] and (3) a consolidated class-action lawsuit against Chesapeake and SandRidge Energy was filed in Oklahoma.[26]

*1. NorthStar Energy, LLC sues Encana and Chesapeake*

In February 2013, NorthStar sued Encana and Chesapeake, alleging collusion between the two companies to restrict the price of land sales in Michigan through an agreement not to bid against each other for certain leasing rights.[27] NorthStar claimed that this agreement reduced competition and lowered the prices it received for its land.[28] To support its claim, NorthStar pointed to the publicly disclosed emails between Encana and Chesapeake, as well as the companies' internal documents.[29]

Chesapeake and Encana each moved to dismiss NorthStar's antitrust claim for failure to allege an actionable agreement to depress prices, but the Court denied the Companies' motions at the pleading stage, because it found that NorthStar alleged a plausible agreement and an actionable exchange of competitively sensitive information.[30] At this time, the case is currently scheduled for trial in November 2017 and discovery is ongoing.

*2. Pennsylvania lawsuits filed against Chesapeake, Access Midstream, Anadarko E&P, Statoil USA, and Mitsui E&P*

In February 2015, over ninety Pennsylvania landowners filed a lawsuit alleging, among other things, (1) that Chesapeake and Access Midstream used unlawful monopoly power over natural gas pipeline systems to reduce gas royalty payments to landowners; (2) that Chesapeake and Anadarko established an AMI with the intention "to restrict competition between them"; and (3) that Statoil USA and Mitsui E&P "later joined in and provided critical financial support for the conspiracy, acting with

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24. Northstar Energy LLC, v. Encana Corp., Chesapeake Energy Corporation, and O.I.L. Niagaran, LLC, 2013 WL 2658564 (W.D.Mich.).

25. Amended Complaint, A&B Family LLC et al. v. Chesapeake Energy Corp., No. 3:15-340 (M.D. Penn. July 18, 2015).

26. Amended Complaint, Thieme et al v. Chesapeake Energy Corp. et al, No. 16-cv-209 (W.D. Okla. Mar. 8, 2016).

27. Northstar Energy LLC, v. Encana Corp., Chesapeake Energy Corporation, and O.I.L. Niagaran, LLC, 2013 WL 2658564 (W.D.Mich.).

28. *Id*.

29. *Id*.

30. *Id*.

knowledge of and with the intent to enable Chesapeake and Anadarko to fully exploit, the anticompetitive and restrictive AMI."[31]

According to the landowners' lawyers, "[w]hile several class action lawsuits and class arbitrations have been filed against Chesapeake based on similar allegations, this is the first direct action by Pennsylvania royalty owners seeking to address what we believe is one of the underlying causes of the problem—the fact that the gathering pipeline system in most of Bradford County, and in parts of Sullivan, Susquehanna and Wyoming counties, were, and for the most part still are, owned and controlled by the same companies responsible for paying royalties on the gas transported through those pipelines, resulting in an inherent conflict of interest, as well as harm to competition."[32]

In September 2015, without explanation, the landowners voluntarily dismissed Statoil USA. The remaining defendants' motions to dismiss are currently pending.[33]

More than 400 additional landowners filed similar claims in Pennsylvania federal court in June 2016.[34] According to attorneys for the plaintiffs, hundreds more will file suit in the coming months. A federal judge certified a similar class action in Ohio in September.[35]

### *3. Oklahoma class-action lawsuit filed against Chesapeake, SandRidge Energy, and Tom Ward*

Although the DOJ dismissed its indictment against Aubrey McClendon, the allegations contained in that indictment continue. On March 3, 2016, landowners filed a class-action lawsuit against Chesapeake; SandRidge Energy (the abovementioned unnamed oil and gas company); and

31. *See supra* note 25, ¶¶ 242–43.

32. Thomas McNamara, *Indik & McNamara, P.C. Announces Antitrust and RICO Lawsuit Against Chesapeake Energy and Williams Partners By Landowners in Bradford County*, Pennsylvania (Feb. 19, 2015), http://www.prweb.com/releases/2015/02/prweb12528188.htm.

33. Notice of Voluntary Dismissal Without Prejudice of Statoil USA Onshore Properties, Inc., A&B Family LLC et al. v. Chesapeake Energy Corp., No. 3:15-340 (M.D. Penn. Sept. 17, 2015).

34. Cara Bayles, *Chesapeake, Anadarko Staked Out Marcellus, RICO Suit Says*, (July 5, 2016), https://www.law360.com/articles/813665/chesapeake-anadarko-staked-out-marcellus-rico-suit-says.

35. Second Amended Class Action Complaint, Henceroth et al. v. Chesapeake Exploration, LLC, No. 4:15-cv-02591-BYP (N.D. Ohio Apr. 25, 2016).

SandRidge's co-founder, Tom Ward.[36] According to the landowners' complaint "Defendants and their co-conspirators agreed to, and did in fact, restrain trade or commerce by bid rigging and depressing the prices for leasehold interest and producing properties below competitive levels."[37]

SandRidge filed for Chapter 11 bankruptcy in May 2016.[38] In response, the Court administratively terminated the case until after SandRidge's bankruptcy proceeding concluded.[39] SandRidge emerged from bankruptcy on October 4, 2016.[40] And, on October 13, 2016, the landowners moved the court to reopen the case.[41]

### *IV. Lessons Learned*

The recent enforcement actions and litigation described above provide some important lessons for future oil and gas agreements.

1. Any agreement should identify the business justification for it. If a legitimate business justification is lacking, enforcers are more likely to view it as anticompetitive.
2. The parties should maintain competition outside the scope of their agreement. Antitrust enforcers are concerned that collaborative agreements—like AMIs, joint bids, or joint ventures—can be used to facilitate collusion outside that particular agreement, so parties should continue to vigorously compete outside the scope of their agreement.
3. Antitrust risks are lessened when parties enter into an agreement to do something together that they could not, or would not, do

36. Amended Complaint, Thieme et al v. Chesapeake Energy Corp. et al, No. 16-cv-209 (W.D. Okla. Mar. 8, 2016).

37. *Id*. ¶ 41.

38. http://investors.sandridgeenergy.com/investor-relations/press-releases/press-release-details/2016/SandRidge-Energy-Files-Pre-Arranged-Reorganization-Under-Chapter-11-Announcing-Restructuring-Support-Agreement-with-Creditors-Holding-Over-Two-Thirds-of-its-41-Billion-in-Funded-Debt-Obligations/default.aspx.

39. Administrative Closing Order, Thieme et al v. Chesapeake Energy Corp. et al, No. 16-cv-209 (W.D. Okla. May 20, 2016).

40. http://investors.sandridgeenergy.com/investor-relations/press-releases/press-release-details/2016/SandRidge-Energy-Emerges-from-Reorganization-with-Approximately-525-Million-of-Liquidity/default.aspx

41. Motion to Reopen Case, Thieme et al v. Chesapeake Energy Corp. et al, No. 16-cv-209 (W.D. Okla. Oct. 13, 2016).

individually. For example, a project that is too big or expensive for one company to undertake alone is a prime candidate for a procompetitive joint venture.

4. Parties should avoid exchanging competitively sensitive information with their counterparties. Antitrust enforcers dislike parties exchanging information, plans, or strategies about current or future pricing, leasing, development, or bidding.
5. Parties should remember that there is often a sliding scale for antitrust risk. If there are only a few potential bidders, it is more risky to enter into an AMI or joint bidding agreement, because it will reduce the number of bidders even further.
6. Parties should have a robust antitrust compliance, training, and audit program. This will help sensitize employees to the antitrust risks associated with their jobs and identify problem areas in advance, which will help reduce the likelihood of a federal or state antitrust enforcer knocking on the door.