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ONE J

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VOLUME 4

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I. Introduction

In the past year, while the legislative front was relatively quiet, Pennsylvania saw significant cases involving a trespass claim based upon drainage due to hydraulic hydrofracturing operations (*Briggs*), zoning of oil and gas operations (*Gorsline*, *MarkWest Liberty Midstream and Resources, LLC*, and *Delaware Riverkeeper Network*), oil and gas lease disputes (*Butters* and *Slamon*), regulatory challenges (*Marcellus Shale Coalition* and *Wayne Land & Mineral Grp. LLC*), and title disputes (*Woodhouse Hunting Club, Inc.* and *Clutter*).

II. Judicial Developments

A. Pennsylvania Supreme Court

Gorsline v. Bd. of Supervisors of Fairfield Twp.

The Supreme Court held that proposed use of gas wells was not of the same general character as public utility services facility, reversing approval of conditional use permit.

The Fairfield Township Board of Supervisors approved unconventional gas wells operated by Inflection Energy, LLC, as a conditional use in Residential-Agricultural District in Lycoming County.¹ Resident objectors, the Gorslines, appealed the decision to the Lycoming Court of Common

1. *Gorsline v. Bd. of Supervisors of Fairfield Twp.*, 186 A.3d 375, 380 (Pa. 2018).

Pleas, which reversed the Board.² Inflection appealed this decision and the Commonwealth Court in turn reinstated the Board's approval.³ Plaintiff objectors appealed to the Pennsylvania Supreme Court.⁴

The Township Ordinance did not list gas wells as a permitted use in the District.⁵ Inflection applied for a conditional use under the Ordinance on the basis that the use was similar and compatible to permitted uses in the District and was not permitted in any other zones.⁶ Inflection argued that the wells were a similar use to a Public Service Facility under the Ordinance, which was defined to include power plants, substations, water treatment plants, pumping plants, and sewage disposal facilities.⁷ The Supreme Court determined that the approval was not supported with substantial evidence that the uses were similar.⁸ The Court found that testimony at the hearing was inconsistent as to whether gas wells were similar to a public service facility.⁹

The Court held that the uses were not similar because the proposed gas wells were not by a utility or by a municipality or governmental agency, but instead by a private for-profit commercial business.¹⁰ The Court also noted that there was no evidence that the extracted gas would benefit the local citizens of the Township.¹¹ The Court found that the Ordinance discouraged industrial uses in Residential-Agricultural Districts, and public service facility uses were only allowed "because they provide the necessary infrastructure for residential and agricultural development in the R-A district, including public utility services (water, sewage, electricity, natural gas, water treatment) as well as more general uses that support residential and agricultural development (e.g., hospitals, bed and breakfast inns, public recreation and agricultural businesses)."¹²

The Court rejected the approval permit but cautioned that "this decision should not be misconstrued as an indication that oil and gas development is never permitted in residential/agricultural districts, or that it is

2. *Id.* at 381.

3. *Id.*

4. *Id.* at 383.

5. *See id.* at 387.

6. *Id.* at 385.

7. *Id.* at 387.

8. *Id.* at 388.

9. *Id.* at 385.

10. *Id.* at 386.

11. *Id.* at 387.

12. *Id.* at 387-88.

fundamentally incompatible with residential or agricultural uses.”¹³ The Court noted that the Township could amend the Ordinance to permit oil and gas development in some of its zones.¹⁴

Justice Dougherty, joined by two other Justices, authored a dissent arguing that the Court improperly substituted its judgment for the Board, which had implicitly credited testimony that the uses were similar, and the Court ignored substantial documentary evidence that supported the similarity of the uses.¹⁵

Marcellus Shale Coalition v. Department of Environmental Protection

The Supreme Court upheld an order enjoining an administrative agency’s enforcement of oil and gas operation regulations currently subject to a pending challenge.

Marcellus Shale Coal. v. Dep’t of Env’tl. Prot. concerns a challenge to executive agency authority.¹⁶ This is a preliminary decision related to enforcement of regulatory provisions that are currently being challenged on the merits in a parallel action. The Court’s decision is not the final word on the validity of those challenged regulations, but sheds some light on how the Commonwealth Court and the Supreme Court may analyze the challenged provisions.

The Supreme Court affirmed in part and reversed in part the Commonwealth Court’s grant of a preliminary injunction enjoining the enforcement of regulations promulgated under Pennsylvania’s Oil and Gas Act of 2012 (“Act 13”).¹⁷ The Marcellus Shale Coalition (“MSC”), acting on behalf of itself and its members, filed a petition for review in the Commonwealth Court seeking declaratory and injunctive relief challenging the validity of certain regulations relating to unconventional oil and gas activities governed by Act 13.¹⁸ The regulations are located in Title 25, Chapter 78a of the Pennsylvania Administrative Code.¹⁹ The Commonwealth Court, acting in its original jurisdiction, issued an order enjoining enforcement of regulatory provisions pertaining to “public resources”; area of review, impoundments and site restoration pending a

13. *Id.* at 389.

14. *Id.*

15. *Id.* at 392 (Dougherty, J., dissenting).

16. *Marcellus Shale Coal. v. Dep’t of Env’tl. Prot.*, 185 A.3d 985 (Pa. 2018).

17. *See id.* at 1007

18. *Id.* at 986.

19. *Id.*

final resolution of the challenges to the regulations on the merits.²⁰ The Supreme Court affirmed portions of Commonwealth Court's order, but did not agree that injunctive relief was warranted on certain types of water impoundments or the challenged site restoration provisions of Act 13.²¹

The public resources provisions obligated drilling permit applicants to provide pre-application notices relative to "public resources."²² That term is not defined in the regulations, but includes "'common areas on school's property or a playground' and 'other critical communities.'"²³ As expressly stated, the permit applicant must notify each "public resource agency" which manages a public resource of the proposal.²⁴ This would include playground owners and the like. The court agreed with MSC's challenge to the public resources provision, concluding that MSC "raised a colorable argument that the regulations improperly expanded the list of protected resources" to potentially include all publicly-owned property, as well as privately owned property open to the public.²⁵ The court concluded that MSC had satisfied the "clear-right-to-relief" prong for injunctive relief as to public resources which would include "common areas on a school's property or a playground" and "species of special concern," which would include playground owners as public resource agencies.²⁶ The court stated that these provisions gave rise to irreparable harm *per se* and, additionally, irreparable harm due to the "cost [of] compliance with these provisions—costs that well applicants will be unable to recover . . . if this Court should rule in favor of MSC on the merits."²⁷

MSC challenged the validity of the "area of review" regulations related to the obligations of well operators relative to nearby wells and the operators of those wells.²⁸ The Environmental Quality Board estimated the cost of compliance with these sections was \$11 million.²⁹ That sum may not

20. The statutory bases for this review can be found at: 25 PA. CODE §§ 78a.1, 78a.15(f) and (g) ("public resources"); 25 PA. CODE §§ 78a.52a and 78a.73(c) and (d) (area of review), 25 PA. CODE §§ 78a.59b(d) and (e), 78a.59c (impoundments), and 25 PA. CODE § 78a.65(a) (site restoration).

21. *Marcellus Shale Coal.*, 185 A.3d 985, 1007 (Pa. 2018)

22. *Id.* at 987.

23. *Id.* at 987 (citing 25 PA. CODE § 78a.1).

24. *Marcellus Shale Coal.*, 185 A.3d at 988.

25. *See id.*

26. *See id.* at 989.

27. *Id.* (citation omitted).

28. *Id.*

29. *Id.* at 990.

be recoverable, even if MSC was successful on the merits.³⁰ MSC challenged the provisions through a number of arguments, but the court found that MSC raised a substantial legal issue regarding the reasonableness of the monitoring and remediation provisions.³¹ Determining that MSC established irreparable harm that outweighed any harm in refusing to grant the injunction, and concluding that an injunction would restore the parties to the status quo, the court granted a limited preliminary injunction.³²

MSC's challenge to the impoundment provisions took issue with the fact that impoundments built in compliance with DEP regulations were not grandfathered in to the new standards.³³ Notably, the court found that "the new rules arose, not from a change in the law, but from a change in DEP's interpretation of longstanding law; and existing impoundments permitted and built to DEP standards would have to be retrofitted or closed under DEP's new interpretation."³⁴ The law, itself, remained the same—the change was in DEP's interpretation of that law.³⁵ The court found that operators were denied procedural due process if DEP enforced the impoundment provisions applied to existing, previously compliant impoundments.³⁶ Therefore, the court denied the injunction as to new impoundments, but applied the injunction to enforcement against existing impoundments.³⁷

As to the site restoration challenges, the court found that MSC raised a substantial legal question as to whether or not the site restoration provisions impose erosion and sediment control measure requirements on well owners and operators in excess of what is required under the Clean Streams Law.³⁸ DEP had described these provisions as "mere clarifications of [the] existing law."³⁹ The court noted that DEP's position was undermined "to the extent Section 78a.65(d) purports to abrogate any exemptions contained in the Clean Streams Law."⁴⁰ As such, the court determined that MSC had raised

30. *Id.*

31. *Id.*

32. *Id.* at 990-91.

33. *Id.* at 991.

34. *Id.*

35. *Id.*

36. *See id.*

37. *Id.*

38. *Id.* at 993.

39. *Id.*

40. *Id.*

a substantial legal question and thus had satisfied the clear-right-to-relief prong.⁴¹

Though litigation on the merits of the Petition continues in Commonwealth Court, DEP and the Environmental Quality Board appealed the order enjoining enforcement to the Supreme Court.⁴²

The Court's standard of review on a preliminary injunction is for abuse of discretion, but where there are issues of statutory interpretation involved the Court review is *de novo*.⁴³ Regarding the abuse of discretion standard, the Court noted:

We do not inquire into the merits of the controversy, but only examine the record to determine if there were *any apparently reasonable grounds* for the action of the court below. Only if it is plain that no grounds exist to support the decree or that the rule of law relied upon was palpably erroneous or misapplied will we interfere with the [decree].⁴⁴

Under this standard of review, the Court found the Commonwealth Court's order based upon reasonable grounds as to the preliminary injunction of enforcement of the public resources, area of review and a portion of the impoundment regulations.⁴⁵ The Court, however, found that the preliminary injunction of the remaining impoundment rules and the restoration provisions was not supported by any reasonable grounds.⁴⁶ The Court distinguished the rulemaking from the procedural due process issue noted by the Commonwealth Court. Here, DEP would not be making an adjudication of the rights of the operators and owners, but instead is using procedural mechanisms pursuant to the state's police powers.⁴⁷ As such, the Court reversed the preliminary injunction on well development impoundments. The Court affirmed, however, the injunction against enforcement of the provisions related to centralized impoundments.⁴⁸

Finally, the Court reversed the preliminary injunction against enforcing the site restoration provisions.⁴⁹ The Court, reviewing the potential conflict

41. *Id.*

42. *Id.* at 994.

43. *Id.* at 995.

44. *Id.* at 995-96 (emphasis in original).

45. *Id.* at 997, 1001, and 1005.

46. *See id.* at 1005-06.

47. *See id.* at 1003-04.

48. *See id.* at 1005.

49. *Id.* at 1006.

between the Chapter 78a regulations and the Clean Streams Law *de novo*, did not find a potential conflict.⁵⁰ The Court noted that if it did find a conflict, Chapter 78a would prevail as the more specific regulation.⁵¹ As such, the Court concluded that MSC had not demonstrated a clear right to relief in relation to the site restoration provisions.⁵²

B. Pennsylvania Superior Court

Briggs v. Southwestern Energy Production Company.

The Superior Court held that plaintiff stated claim for trespass to oil and gas estate by oil and gas drainage from hydraulic fracturing operations across property lines, rejecting application of the Rule of Capture.

In *Briggs v. Sw. Energy Prod. Co.*,⁵³ plaintiff landowners filed a complaint in the Susquehanna County Court of Common Pleas against defendant oil and gas operator, Southwestern Energy Production Company (“SWN”), alleging that defendant’s operation of unconventional wells on adjacent parcels caused gas drainage from the plaintiffs’ property by hydraulic fracturing.⁵⁴ The complaint alleged counts of trespass and conversion, and sought punitive damages.⁵⁵ SWN filed an answer and new matter, alleging that the claims were barred by the rule of capture.⁵⁶

Discovery ensued and SWN subsequently filed a motion for summary judgment, arguing that they did not enter the Briggs land, and that claims for drainage based on hydraulic fracturing were barred by the rule of capture. The trial court ruled in favor of SWN, holding that the claims were barred by the rule of capture, and the Briggs appealed to the Superior Court.⁵⁷

On appeal, the Briggs argued that the drainage of natural gas constituted a trespass because of the differences between hydraulic fracturing and conventional natural gas production.⁵⁸ Briggs argued that the gas on their tract would have remained trapped in the shale formation, if not for the

50. *Id.*

51. *Id.*

52. *Id.*

53. *Briggs v. Sw. Energy Prod. Co.*, 184 A.3d 153 (Pa. Super. Ct. 2018).

54. *See id.* at 154.

55. *Id.*

56. *Id.* at 154-55.

57. *See id.* at 155.

58. *Id.* at 156-57.

hydraulic fracturing, citing *Young v. Ethyl Corp.*⁵⁹ SWN argued that hydraulic fracturing was distinguishable from the process occurring in *Young* and that the rule of capture should apply to hydraulic fracturing.⁶⁰

The Superior Court first noted that claims for trespass in Pennsylvania are controlled by the Restatement (Second) of Torts § 158, which provides that:⁶¹

One is subject to liability to another for trespass, irrespective of whether he thereby causes harm to any legally protected interest of the other, if he intentionally

(a) enters land in the possession of the other, or causes a thing or a third person to do so, or

(b) remains on the land, or

(c) fails to remove from the land a thing which he is under a duty to remove.

The Court noted that trespass liability may extend to an actor “by throwing, propelling, or placing a thing” beneath the surface of the land of another.⁶²

The Court next reviewed the authority supporting the rule of capture, which precludes liability for the drainage of oil and gas from the land of another.⁶³ The rule is based upon the tendency of oil and gas to escape from land due to their “fugitive and wandering existence.”⁶⁴

In *Jones v. Forest Oil Co.*⁶⁵ the Pennsylvania Supreme Court ruled that the rule of capture applied to oil and gas produced with the aid of mechanical pumps. Additionally, the Court has held that the rule of capture applied even when a landowner placed wells near the boundary line of his property to drain his neighbor’s property, finding that the neighbor’s sole

59. *Id.* (citing *Young v. Ethyl Corp.*, 521 F.2d 771 (8th Cir. 1975) (determining that rule of capture did not apply to displacement of valuable salt water brine under plaintiff’s land by injection of water in wells on neighboring lands to produce brine)).

60. *Id.* at 157.

61. *Id.*

62. *Id.* (citing Restatement (Second) of Torts § 158, cmt. i).

63. *Id.* (citing *Westmoreland & Cambria Nat. Gas Co. v. De Witt*, 130 Pa. 235 (1889)).

64. *Id.* (citing *Browen v. Vandergift*, 80 Pa. 142, 147 (Pa. 1875)).

65. 194 Pa. 379 (1900).

remedy is to “go and do likewise.”⁶⁶ The rule was more recently recognized in *Minard Run Oil Co. v. U.S. Forest Serv.*⁶⁷

On the nature of hydraulic fracturing, the Court relied upon the description used in *Butler v. Charles Powers Estate ex rel. Warren*⁶⁸:

[Hydraulic fracturing] is done by pumping fluid down a well at high pressure so that it is forced out into the formation. The pressure creates cracks in the rock that propagate along the azimuth of natural fault lines in an elongated elliptical pattern in opposite directions from the well. Behind the fluid comes a slurry containing small granules called proppants—sand, ceramic beads, or bauxite are used—that lodge themselves in the cracks, propping them open against the enormous subsurface pressure that would force them shut as soon as the fluid was gone. The fluid is then drained, leaving the cracks open for gas or oil to flow to the wellbore. [Hydraulic fracturing] in effect increases the well's exposure to the formation, allowing greater production. First used commercially in 1949, [hydraulic fracturing] is now essential to economic production of oil and gas and commonly used throughout Texas, the United States [] and the world.

Engineers design a [hydraulic fracturing] operation for a particular well, selecting the injection pressure, volumes of material injected, and type of proppant to achieve a desired result based on data regarding the porosity, permeability, and modulus (elasticity) of the rock, and the pressure and other aspects of the reservoir. The design projects the length of the fractures from the well measured three ways: the hydraulic length, which is the distance the [hydraulic fracturing] fluid will travel, sometimes as far as 3,000 feet from the well; the propped length, which is the slightly shorter distance the proppant will reach; and the effective length, the still shorter distance within which the [hydraulic fracturing] operation will actually improve production. Estimates of these distances are dependent on

66. *Id.* at 158 (citing *Barnard v. Monongahela Nat. Gas Co.*, 65 A. 801, 802 (Pa. 1907) (1907)).

67. *Id.* (citing *Minard Run Oil Co. v. U.S. Forest Serv.*, 670 F.3d 236, 256 (3d Cir. 2011)).

68. *Id.* at 159 (quoting *Butler v. Charles Powers Estate ex rel. Warren*, 65 A.3d 885, 894 (Pa. 2013)).

available data and are at best imprecise. Clues about the direction in which fractures are likely to run horizontally from the well may be derived from seismic and other data, but virtually nothing can be done to control that direction; the fractures will follow Mother Nature's fault lines in the formation. The vertical dimension of the [hydraulic fracturing] pattern is confined by barriers—in this case, shale—or other lithological changes above and below the reservoir.⁶⁹

On the issue of whether the rule of capture applied to oil and gas drained with the aid of hydraulic fracturing, the Superior Court found only two decisions. The first was *Coastal Oil & Gas Corp. v. Garza Energy Tr.*,⁷⁰ in which the Texas Supreme Court held that the rule of capture barred a claim for trespass predicated on drainage of oil and gas by hydraulic fracturing.

The *Coastal Oil* Court cited the following four justifications for its holding:

(1) “the law already affords the owner who claims damage full recourse;” (2) “allowing recovery for the value of gas drained by hydraulic fracturing usurps to the courts and juries the lawful and preferable authority of the Railroad Commission to regulate oil and gas production;” (3) “determining the value of oil and gas drained by hydraulic fracturing is the kind of issue the litigation process is least equipped to handle” because “trial judges and juries cannot take into account social policies, industry operations, and the greater good[,] which are all tremendously important in deciding whether [hydraulic fracturing] should or should not be against the law;” and (4) “the law of capture should not be changed to apply differently to hydraulic fracturing because no one in the industry appears to want or need the change.”⁷¹

A partial dissent criticized the majority position for relying upon the alternate remedies of self-help and pooling, which it argued were insufficient, and for reducing the incentive of operators to lease small tracts within a unit.⁷²

69. *Briggs*, 185 A.3d at 159.

70. 268 S.W.3d 1 (Tex. 2008).

71. *Briggs*, 185 A.3d at 160 (quoting *Coastal Oil & Gas Corp. v. Garza Energy Tr.*, 268 S.W.3d at 14–17).

72. *Id.* at 160–161.

The second case came from the U.S. District Court for the Northern District of West Virginia which considered a similar claim of trespass by the owner for a Marcellus formation lateral that passed within 200 feet of the plaintiffs' property.⁷³ In that case, the landowners were under a lease assigned to the defendant operator, but the lease only permitted pooling for formations below the Onondaga formation, which does not include the Marcellus formation. The defendant filed a motion for summary judgment arguing that the claim was barred by the rule of capture. The District Court denied the motion, relying upon the dissent in *Coastal Oil*.⁷⁴ In particular, the District Court argued that the self-help remedy of drilling was insufficient and further distinguished the decision on the grounds that West Virginia did not have a comprehensive regulator of oil and gas operations comparable to the Texas Railroad Commission.⁷⁵ Lastly, the District Court determined that the *Coastal Oil* decision neglected the rights of small landowners.⁷⁶ The opinion was subsequently vacated after the parties settled the dispute.⁷⁷

In *Briggs*, the Pennsylvania Superior Court was persuaded by the reasoning of the *Coastal Oil* dissent and the *Stone* opinion. The Court concluded that drainage from hydraulic fracturing was distinguishable from the rule of capture because without hydraulic fracturing the gas was non-migratory in nature.⁷⁸ The Court cited the insufficiency of self-help because of the high cost of drilling a Marcellus well and was not swayed by the evidentiary difficulties in determining when a subsurface trespass has occurred.⁷⁹ The Court further found that applying the rule of capture would enable operators to avoid leasing owners of small tracts.⁸⁰ Finding that there was insufficient evidence of whether SWN had trespassed on the Briggs'

73. *Id.* at 161 (discussing *Stone v. Chesapeake Appalachia, LLC*, No. 5:12-CV-102, 2013 WL 2097397 (N.D.W. Va. Apr. 10, 2013), opinion vacated by *Stone v. Chesapeake Appalachia, LLC*, No. 5:12-CV-102, 2013 WL 7863861 (N.D.W. Va. July 30, 2013)).

74. *Id.* at 161-62.

75. *See id.*

76. *Id.*

77. Other than in *Briggs*, The *Stone* decision has only been cited in one West Virginia U. S. District Court case, which described the trespass issue as "unsettled" under West Virginia law. *See Barber v. Magnum Land Servs., LLC*, No. 1:13CV100, 2014 WL 5148575 (N.D.W. Va. Oct. 14, 2014).

78. *Briggs*, 185 A.3d at 162.

79. *Id.* at 163.

80. *Id.*

land, the Superior Court remanded the case to the trial court for further proceedings.⁸¹

Woodhouse Hunting Club, Inc. v. Hoyt

Superior Court held that unassessed oil and gas rights were lost by prior owner at “title wash” tax sale of unseated land

Plaintiff landowner, Woodhouse Hunting Club, Inc. (“Woodhouse”) brought a quiet title action against the potential owners of severed oil and gas rights from reservation in prior deed.⁸² In 1893, defendant’s predecessors, the Hoyts, conveyed the 937 acre tract in Tioga County to the Union Tanning Company, reserving oil, gas and mineral rights in grantors and their heirs and assigns.⁸³ The grantors did not notify the County Commissioner of Tioga County of their severed interest.⁸⁴ The property was assessed as unseated (undeveloped) land.⁸⁵

In 1902 the property was sold for unpaid taxes to the Morris Manufacturing Company.⁸⁶ After the tax sale but before the tax sale deed was recorded, the Union Tanning Company conveyed the tract to the Morris Manufacturing Company, subject to the 1893 reservation.⁸⁷ In 1932 the property was sold again at tax sale, but was redeemed by the owner after the expiration of the redemption period.⁸⁸ Eventually, Woodhouse acquired the oil, gas and mineral rights in a subsequent conveyance and brought the quiet title action in 2011.⁸⁹ The parties brought cross-motions for summary judgment and the Court of Common Pleas ruled in favor of Woodhouse, relying upon the Pennsylvania Supreme Court’s decision in *Herder Spring Hunting Club v. Keller*.⁹⁰

On appeal, defendants challenged the sufficiency of proof of the tax sales, because Woodhouse did not obtain recorded copies of the tax deeds.⁹¹ The Superior Court held that the record contained sufficient evidence of a

81. *Id.* at 164.

82. *Woodhouse Hunting Club, Inc. v. Hoyt*, 2018 PA Super 78, 183 A.3d 453, 455 (Pa. Super. Ct. 2018).

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.*

90. *See id.* at 456 (discussing *Herder Spring Hunting Club v. Keller*, 636 Pa. 344 (2016)).

91. *Id.*

proper sale, including minutes of the Tioga County Court showing the acknowledgment of the sale deeds in open court, record of the sale in the Treasurer's Register Book, and recitals of the sale in subsequent deeds.⁹² The Court also held that the title was washed prior to the 1932 sale, and that any event, a redemption after the expiration of the redemption period would not prevent a "title wash" of the unassessed oil and gas interest.⁹³

Defendants' argument that an undeveloped oil and gas interest could not be sold at tax sale was without merit.⁹⁴ *Herder Spring* barred defendants from arguing that notice was defective, as well as any other defects under the tax sales, after the expiration of the redemption period.⁹⁵

Clutter v. Brown

The Superior Court held that reservation of "one half of the oil and gas royalty" was a reservation of one half of the royalties under existing leases, not oil and gas in place, and reservation terminated on death of grantors.

In an unpublished decision, the Superior Court held that a reservation of "one half of the oil and gas royalty" was a reservation of one of the royalty interests, only, under leases existing at the time of the reservation.⁹⁶ It was not, as Defendants argued, a reservation of one half of the oil and gas in place. The facts before the Court centered on a 1919 deed executed while an oil and gas lease burdened the property conveyed in the deed.⁹⁷ The Clutters and the Lappings ("Landowners") own two tracts of land in Greene County, PA, derived from that common 1919 Deed executed by the heirs of Louisa McVay ("McVay Heirs").⁹⁸ In June 1901, Louisa McVay entered into oil and gas leases providing for the payment of certain royalties and delay rentals.⁹⁹ The 1919 Deed was executed while the 1902 Lease was still in effect. The 1919 Deed read in relevant part:

Reserving, also from this conveyance one half of the oil and gas royalty the party of the second part, however, is to have the

92. *Id.* at 458 (citing *Bell v. Provance*, 59 Pa. Cmwlt. 522, 430 A.2d 391, 392-93 (1981)).

93. *Id.* at 460.

94. *Id.* at 461 (citing *Cornwall Mountain Investments, L.P. v. Thomas E. Proctor Heirs Tr.*, 158 A.3d 148, 156 (Pa. Super. Ct. 2017)).

95. *Id.*

96. *See Clutter v. Brown*, No. 1542 WDA 2016, 2017 WL 4179747 at *5. (Pa. Super. Ct. Sept. 21, 2017).

97. *Id.* at *1.

98. *Id.* at *1-*2.

99. *Id.* at *2.

quarterly rental which is paid from quarter to quarter to prevent forfeiture of the lease.¹⁰⁰

The 1901 Lease terminated and neither the Landowners nor the Defendants ever received a royalty from that Lease.¹⁰¹ Landowners then entered into leases with EQT in 2011.¹⁰² EQT withheld one-half of the royalty based on the royalty reservation in the 1919 Deed.¹⁰³ The trial court granted summary judgment in favor of Landowners.¹⁰⁴ Defendants appealed, arguing that the trial court erred by failing to find that the 1919 reservation of one-half of the oil and gas royalty to the grantors therein constituted an *exception* of an interest in real property that passed by operation of law to the heirs of the grantors, being all Defendants.¹⁰⁵

Considering the 1919 Deed Clause, the Superior Court stated:

We must determine whether this clause constitutes an exception of the Property's gas and oil from the deed or whether it is a reservation of the royalty payments received from the extraction of gas and oil from the Property. If it is an exception, as Gemmell contends, then it excepted a real-property right to the oil and gas from the deed that would survive the death of the grantor. If, however, it is a reservation, as Landowners contend and the trial court implicitly found, then it reserved a right to personal property—the royalty payments—that did not survive the death of the grantor.¹⁰⁶

The Court then noted the distinction in terms: “A reservation pertains to incorporeal things that do not exist at the time the conveyance is made.”¹⁰⁷ “However, even if the term ‘reservation’ is used, if the thing or right reserved is in existence, then the language in fact constitutes an exception.”¹⁰⁸ Notably, “[i]f there is a reservation, it ceases at the death of the grantor, because the thing reserved was not in existence at the time of

100. *Id.*

101. *Id.* at *2.

102. *Id.*

103. *Id.* at *3.

104. *Id.*

105. *Id.* (emphasis added).

106. *Id.* at *4.

107. *Id.* (citing *Walker v. Forcey*, 396 Pa. 80, 151 A.2d 601, 606 (Pa. 1959); *Lauderbach-Zerby Co. v. Lewis*, 283 Pa. 250, 129 A 83, 84 (Pa. 1025)).

108. *Clutter*, 2017 WL 4179747, at *4 (citing *Walker*, 151 A.2d at 606) (other citation omitted).

granting and the thing reserved vests in the grantee.”¹⁰⁹ An exception, however, “retains in the grantor the title of the thing excepted [and because] the exception does not pass with the grant, it demises through the grantor’s estate absent other provisions.”¹¹⁰

The Court concluded that the 1919 Deed created a reservation of the royalty payments from the oil and gas leases then in effect.¹¹¹ “A lease of minerals in the ground is a sale of an estate in fee simple until all the available minerals are removed; this leaves the lessor with only an interest in the royalties to be paid under the lease, which *are personal property*.”¹¹² The Court concluded that the 1919 Deed reserved one-half of the royalty payments, not one-half of the oil and gas.¹¹³ The payments, unlike the oil and gas, were “incorporeal things that [did] not exist at the time the conveyance [was] made.”¹¹⁴ Therefore, the deed created a reservation of a right to personal property that did not survive the death of the grantor.¹¹⁵

C. Pennsylvania Commonwealth Court

MarkWest Liberty Midstream and Res., LLC v. Cecil Twp. Zoning Hearing Bd.

In this case, the Commonwealth Court held that a zoning hearing board exceeded its authority by imposing excessive conditions on an application for a use that was a use by special exception in the proposed location.

In a panel decision on a land use appeal, the Commonwealth Court considered the reasonableness of conditions imposed by a zoning hearing board under a conditional use permit.¹¹⁶ Before the Commonwealth Court was MarkWest Liberty Midstream and Resources, LLC’s (“MarkWest”) appeal of a trial court order affirming the Cecil Township (“Township”) Zoning Hearing Board’s (“Board”) decision granting MarkWest’s application for special exception subject to twenty-six conditions (“Conditions”).¹¹⁷ MarkWest purchased a property upon which it planned to

109. *Id.*

110. *Id.*

111. *Id.* at *5.

112. *Id.* (emphasis added).

113. *Id.*

114. *Id.*

115. *Id.*

116. *MarkWest Liberty Midstream and Res., LLC v. Cecil Twp. Zoning Hearing Bd.*, 184 A.3d 1048, 1054 (Pa. Commw. Ct. Mar. 23, 2018).

117. *Id.*

construct a natural gas compressor station.¹¹⁸ Markwest's proposed use of the property was allowed by the Township's Unified Development Ordinance ("UDO") as a special exception.¹¹⁹ MarkWest applied to the Board for a special exception under the UDO in 2010.¹²⁰ The Board denied the request, which MarkWest appealed to the trial court who upheld the Board's denial.¹²¹ The Commonwealth Court reversed and remanded directing the Board to grant MarkWest's special exception application.¹²² The Board did so on remand but attached the Conditions to the approval.¹²³ MarkWest appealed to the trial court. The trial court affirmed the Board and MarkWest appealed to the Commonwealth Court.¹²⁴

The Court considered four issues on appeal: "(1) whether the Board-imposed conditions exceed the Board's authority under the Pennsylvania Municipalities Planning Code (MPC)" and the UDO; "(2) whether the Board is authorized to impose standards separate and apart from the UDO regarding where a particular use may be located; (3) whether the Board's conditions are unduly restrictive and result in disparate treatment of MarkWest's proposed use without a reasonable basis; and, (4) whether certain of the Board's conditions are preempted by Pennsylvania Department of Environmental Protection (DEP) statutes and regulations."¹²⁵ Affirming in-part and reversing in-part, the Court held that the Township exceeded its authority by imposing excessive conditions on MarkWest's application for special exception.¹²⁶

The Court reversed the trial court's upholding of the Conditions. The UDO allows the Board to "attach reasonable conditions and safeguards necessary to protect the public health, safety, and welfare."¹²⁷ The Board's power in this regard is derived from the MPC. Notably, however, the Board lacks the authority to amend the zoning ordinance.¹²⁸ Here, the UDO expressly allowed natural gas compressor stations as a special exception in the location of the proposed facility. The court determined that the Board

118. *Id.* at 1055.

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.* at 1056

124. *Id.*

125. *Id.* at 1054.

126. *See id.*

127. *Id.* at 1057.

128. *See id.* at 1060.

failed to make any findings that the compressor station would detrimentally impact the health and safety of the community.¹²⁹ Without such findings, the Board lacked the authority to impose the Conditions.¹³⁰

Furthermore, the court found that the Conditions were an attempt to dictate MarkWest's specific business operations on the site "under the guise of zoning regulation," which is prohibited by the MPC.¹³¹ "Based on the foregoing, regardless of the Board's best intentions, those Conditions not borne from the UDO/MPC and the record are unreasonable and, therefore, are an abuse of the Board's discretion."¹³² The court ruled that many (but not all) of the Conditions were unreasonable.¹³³ The court did not reach the issues related to preemption, since it had already held the Conditions subject to those arguments were unreasonable.

Delaware Riverkeeper Network v. Sunoco Pipeline L.P.

The Commonwealth Court affirmed that as a public utility, midstream operator was exempt from local zoning ordinances in locating its pipeline and rejected challenge based upon Pennsylvania's Environmental Rights Amendment.

In *Delaware Riverkeeper Network v. Sunoco Pipeline L.P.*, the Commonwealth Court considered the appeal of a trial court order dismissing appellants' complaint and denying petitions for injunctive relief against appellee, Sunoco Pipeline, L.P. to enjoin Sunoco's construction of a portion of the Mariner East 2 ("ME2") pipeline project.¹³⁴ Appellants, the Delaware Riverkeeper Network, Maya van Rossum, the Delaware Riverkeeper, and residential landowners Thomas Casey and Eric Grote (collectively, "Appellants"), sought to stop construction of ME2 by arguing that Sunoco's construction activities violated the West Goshen Township Zoning Ordinance (the "Ordinance").¹³⁵ The trial court sustained preliminary objections to the complaint raised by Sunoco alleging (1) lack of subject matter jurisdiction and a lack of authority to regulate; (2) lack of authority to regulate based on federal law (sustained as moot); and (3) that

129. *See id.* at 1068.

130. *See id.* at 1068-69.

131. *Id.* at 1060.

132. *Id.* at 1061.

133. *Id.* at 1061-1080.

134. 179 A.3d 670, 673-74 (Pa. Commw. Ct. Feb. 20, 2018).

135. *Id.*

Plaintiffs failed to establish a substantive due process claim.¹³⁶ The trial court dismissed the complaint with prejudice.¹³⁷

On appeal, the Appellants argued, among other things, that Sunoco is not a public utility and ME2 pipeline facility is not a public utility facility and that the Township's Ordinance was not preempted by Pennsylvania's Public Utility Commission ("PUC") because PUC does not regulate the siting of pipeline facilities.¹³⁸ The Commonwealth Court affirmed, holding that because Sunoco is a public utility regulated by PUC and is a public utility corporation, the Township lacked authority to regulate the location of the pipeline facility.¹³⁹ The court rested on its *en banc* decision in *Sunoco I*¹⁴⁰ to dismiss Appellants' challenge to ME2's status as a public utility.¹⁴¹

Once the court found Sunoco to be a public utility corporation, the siting of the pipeline is a part of the "reasonableness and safety of [ME2 that are] matters committed to the expertise of the PUC by express statutory language."¹⁴² The court analyzed the Township's actions under the principals of both field preemption and conflict preemption.¹⁴³ Field preemption occurs when the legislature intends to occupy the entire field of an area of law.¹⁴⁴ Therefore, any local statute in that field is not valid. Under conflict preemption, a municipal ordinance is invalid if it conflicts with state law.¹⁴⁵ A municipal ordinance conflicts with state law to the extent it is contradictory to, or inconsistent with, a state statute. Furthermore, "a local ordinance will be invalidated if it stands as an obstacle to the execution of the full purposes and objectives of a statutory enactment of the General Assembly."¹⁴⁶

Holding that the Township's attempt to regulate ME2 is preempted by the Public Utility Code, the court found that the General Assembly intended the Public Utility Code to occupy the entire field of public utility

136. *Id.* at 676. (The trial court overruled Sunoco's preliminary objection alleging lack of standing).

137. *Id.*

138. *Id.* at 680-81.

139. *Id.* at 682.

140. *In re Sunoco Pipeline, L.P.*, 143 A.3d 1000 (Pa. Commw. Ct. 2016).

141. *Delaware Riverkeeper Network*, 179 A.3d at 682.

142. *Id.* (citing 66 PA. CONS. STAT. § 1505).

143. *Id.* at 690-94.

144. *Id.* at 690 (citing *Duquesne Light Co. v. Upper St. Clair, TP.*, 105 A.2d 287 (1954)).

145. *Id.* at 690 (citing *Hoffman Mining Co., Inc. v. Zoning Hearing Bd. of Adams Twp.*, 32 A.3d 587 (2011)).

146. *Id.* at 692.

regulation.¹⁴⁷ Moreover, the court concluded that conflict preemption barred the Township from enacting an ordinance prohibiting the pipeline because the Ordinance acted as an obstacle to the execution of the full purpose of the Public Utilities Code.¹⁴⁸

Appellants also raised an argument related to recent decisions made by the Supreme Court of Pennsylvania in *Robinson Township v. Commonwealth* and *Pennsylvania Environmental Defense Foundation v. Commonwealth* stating the Court “set forth the clear limitations on the General Assembly’s authority ‘to remove a political subdivision’s implicitly necessary authority to carry into effect its constitutional duties.’”¹⁴⁹ Those decisions recognized limitations imposed by Article 1, Section 27 of the Pennsylvania Constitution (the “Environmental Rights Amendment,” hereafter, “ERA”) on the General Assembly’s power legislate. Specifically, the ERA places a fiduciary duty upon the Commonwealth, as trustee, to conserve and maintain Pennsylvania’s public resources for all people, including “generations yet to come.”¹⁵⁰ Appellants argued that local governments, such as the Township, shared that fiduciary duty with “all Commonwealth agencies and entities.”¹⁵¹ Therefore, Appellants maintained that “as to the public trust provisions of the ERA Amendment, ‘the General Assembly can neither offer political subdivisions purported relief from obligations under the [ERA], nor can it remove necessary and reasonable authority from local governments to carry out these constitutional duties.’”¹⁵² As such, the Appellants argued that the trial court improperly removed the Township’s ability to carry out its constitutionally mandated duties by finding the Ordinance was preempted by the PUC’s authority.

Sunoco countered, arguing that “despite [Appellants’] contentions, the ERA does not grant regulatory power to municipalities where that power is preempted or otherwise prohibited.”¹⁵³ Sunoco noted that the timing of the municipality’s action is key to their duties under the ERA, which Sunoco argued, “requires municipalities to make decisions and take actions *they are already empowered to take*, in a manner that satisfies their duty to act as

147. *See id.*

148. *Id.* at 693.

149. *Id.* at 683 (citing *Robinson Township*, 80 A.3d 901, 977 (Pa. 2013) (*Robinson Twp. II*); Pa. Env’tl. Def. Found., 161 A.3d 911, 931 (Pa. 2017) (*PEDF*)).

150. PA. CONST. art. I, § 27.

151. *Delaware Riverkeeper Network*, 179 A.3d at 684.

152. *Id.* (citing *Robinson Twp. II*, 83 A.3d at 977).

153. *Id.* at 687.

trustee of Pennsylvania's public natural resources for the benefit of the people.”¹⁵⁴ Sunoco added that the PUC and the Department of Environmental Protection are empowered to exercise ERA duties over the ME2 pipeline and, in fact, had done so.¹⁵⁵

The court declined to adopt Appellants’ argument on the Township’s constitutional duties under the ERA for three reasons: first, both *Robinson Twp. II* and *PEDF* were distinguishable from the present facts because neither dealt with public utility services or facilities regulated by PUC.¹⁵⁶ Second, the court found that Appellants “do not explain how the [ERA] impacts long-standing, *pre-existing* law involving regulation of public utilities, without expressly referring to the topic.”¹⁵⁷ Noting that *Robinson Twp. II* and *PEDF* dealt with very recent enactments by the General Assembly, the court found that Appellants “ignore the comparative timing of the onset of legal duties, although such timing is usually a matter of significant[t] legal analysis.”¹⁵⁸ Finally, the court did not find that Appellants showed how the Ordinance furthered the Township’s ERA trustee duties or related to conserving public natural resources.¹⁵⁹ As such, the court did not find that the ERA protected the Ordinance from the preemption arguments advanced by Sunoco.

D. Pennsylvania Federal Courts

Wayne Land & Mineral Grp. LLC v. Delaware River Basin Comm'n

The Third Circuit reversed dismissal of mineral owner’s claim for declaratory judgment against DRBC regulation of unconventional natural gas operations.

Mineral owner Wayne Land and Mineral Group, LLC (“Wayne”) brought a declaratory judgment action in the United States District Court for the Middle District of Pennsylvania against the Delaware River Basin Commission (“DRBC”) seeking a declaration that the DRBC did not have the authority to require Wayne to obtain approval to drill and complete unconventional gas wells in Wayne County, Pennsylvania.¹⁶⁰

154. *Id.* (emphasis added).

155. *See id.* at 688.

156. *Id.* at 695–96.

157. *Id.* at 696 (emphasis added).

158. *Id.*

159. *Id.*

160. *Wayne Land & Mineral Grp. LLC v. Delaware River Basin Comm'n*, 894 F.3d 509, 515 (3d Cir. 2018).

The DRBC was created in 1961 to administer the Delaware River Basin Compact (“Compact”) between Delaware, New Jersey, New York, and Pennsylvania.¹⁶¹ The Compact gives the Commission a broad range of powers to protect water quantity and quality within the Basin. Article 3 of the Compact requires the Commission to create a comprehensive plan for the immediate and long-range development and uses of the water resources of the Delaware River Basin.¹⁶² The plan must include all public and private projects and facilities which are required, in the judgment of the DRBC, “for the optimum planning, development, conservation, utilization, management and control of the water resources of the [B]asin to meet present and future needs[.]”¹⁶³ In 2009 the Executive Director of the DRBC issued a moratorium on natural gas “fracking” projects without prior DRBC approval. The DRBC has not issued any final regulations governing the review of unconventional gas well projects.¹⁶⁴

The DRBC filed a motion to dismiss Wayne’s complaint for lack of subject matter jurisdiction because the claim was not ripe and Wayne lacked standing. In the alternative, the DRBC sought a dismissal under Federal Rule of Civil Procedure 12(b)(6) “because there was no final agency action and Wayne did not exhaust available administrative remedies.”¹⁶⁵ The District Court denied the motion to dismiss for lack of subject matter jurisdiction, holding that Wayne had alleged an economic injury and was ripe because it only sought a declaratory judgment.¹⁶⁶ The District Court also found that Wayne had not failed to exhaust administrative remedies, again citing the limited nature of the declaratory relief sought by Wayne.¹⁶⁷ However, the District Court *sua sponte* dismissed the claim under Rule 12(b)(6), because on the merits, the definition of “project” under the Compact included the planned drilling operations.¹⁶⁸

On appeal, the United States Court of Appeals, Third Circuit (“Third Circuit”), first considered the ripeness of Wayne’s claim. Ripeness is “guided by three main considerations: the adversity of the parties’ interests, the conclusiveness of the judgment, and the practical utility of that

161. *Id.*

162. *Id.*

163. *Id.* (quoting Joint App. at 386, § 13.1.).

164. *Id.* at 518.

165. *Id.* at 519.

166. *Id.* at 520-21.

167. *Id.* at 521.

168. *Id.*

judgment.”¹⁶⁹ The Third Circuit concluded that there was adversity, given the costs of Wayne’s compliance with the DRBC’s required showings related to water usage and the risks of fines from proceeding without DRBC approval.¹⁷⁰ Second, there were sufficient facts to obtain a conclusive legal judgment given the purely legal nature of a declaration as to the DRBC’s jurisdiction.¹⁷¹ Third, a legal ruling would provide practical utility by clarifying the legal relationship between natural gas companies and the DRBC.¹⁷² The Third Circuit held that Wayne’s claim was ripe.¹⁷³

The Third Circuit also held that Wayne had standing, based upon the legal requirements imposed by the DRBC, the burden on Wayne realizing the market value of its mineral resources, and the threat of sanctions for noncompliance fulfilling the three elements of standing.¹⁷⁴ In addition, because Wayne was not challenging a DRBC action, but the proper interpretation of the Compact, the “final agency action” requirement was inapplicable and likewise the alleged failure to exhaust administrative remedies.¹⁷⁵

Last, the Third Circuit considered the merits of Wayne’s argument that drilling operations do not constitute a “project” under the Compact. The Compact defines a “project” as

any work, service or activity which is separately planned, financed, or identified by the [C]ommission, or any separate facility undertaken or to be undertaken within a specified area, for the conservation, utilization, control, development or management of water resources which can be established and utilized independently or as an addition to an existing facility, and can be considered as a separate entity for purposes of evaluation[.]¹⁷⁶

The Third Circuit was persuaded by Wayne’s argument that the DRBC read the word “for” out of the definition, since water use is incidental to natural gas development, not a purpose of the activity. The DRBC’s interpretation

169. *Id.* at 522 (citing *Marathon Petroleum Corp. v. Sec’y of Fin. for Delaware*, 876 F.3d 481, 496 (3d Cir. 2017)).

170. *Id.* at 523.

171. *Id.*

172. *Id.* at 524.

173. *Id.*

174. *Id.* at 524-25 (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-561 (1992)).

175. *Id.* at 526.

176. *Id.* at 529 (citing Joint App. at 363, § 1.2(g) (emphasis added)).

of “project” would include any activity that uses water. In addition, the court noted that it was questionable whether the quantity of water used in hydrofracturing operations is greater than that used in other operations that the DRBC has made no effort to regulate.¹⁷⁷ However, the Court thought there was some force to the DRBC’s argument that exempting hydrofracturing projects would treat them different from other regulated industrial water uses. The Third Circuit found that the definition of “project” was ambiguous, denied the DRBC’s motion to dismiss, and remanded the case to the District Court for additional fact-finding.¹⁷⁸

Butters v. SWN Prod. Co., LLC

The District Court for the Middle District of Pennsylvania denied defendant operator’s motion to dismiss lessors’ claim that lease terminated due to failure to diligently develop leasehold

Plaintiff landowners leased multiple tracts in Tioga County, Pennsylvania to lessee, who assigned those leases to operators, who, in turn, assigned the leases to operator defendant. The lease habendum clauses provided that the leases would be extended beyond the initial primary term if any of several conditions were satisfied, including if “drilling operations continue with due diligence[.]”¹⁷⁹ “Operations” were defined in the leases to include

any of the following: dirt work, building of roads and locations, drilling, testing, completing, reworking, recompleting, deepening, plugging back, repairing, abandoning or dewatering (meaning pumping or flowing of water and/or associated hydrocarbons from a well) of a well in search of or in an endeavor to obtain, increase or restore and/or market or render marketable or more valuable production of oil or gas, and/or production, actual or constructive, of oil or gas.¹⁸⁰

Prior to the expiration of the leases’ primary terms on December 8, 2015, portions of leases were unitized in two drilling units. On October 10, 2016, plaintiffs requested that defendant surrender the leases.¹⁸¹ Defendant rejected the request, asserting that drilling operations on the two units were

177. *Id.* at 530.

178. *Id.* at 533-34.

179. *Butters v. SWN Prod. Co., LLC*, No. 4:17-CV-797, 2018 WL 2766290, at *1 (M.D. Pa. June 8, 2018).

180. *Id.* at *2.

181. *Id.* at *4.

sufficient to extend the leases.¹⁸² Plaintiff filed claims for quiet title and declaratory judgment and defendant removed the claims to the District Court for the Middle District of Pennsylvania on diversity grounds.¹⁸³ Defendant then filed a motion for dismissal under Federal Rule of Civil Procedure 12(b)(6), asserting that plaintiffs' claims should be dismissed for non-compliance with the notice provisions under the leases and because its activities were sufficient to extend the leases as a matter of law.¹⁸⁴

The notice clause provided that "the leases shall not be terminated for [lessee's] failure to perform 'unless such obligation, covenant or condition remains unsatisfied and unperformed for a period of one year following the express and specific written demand . . . for such satisfaction and performance.'"¹⁸⁵ The District Court concluded that the clause was inapplicable to an expiration of the leases under the habendum clause, which was akin to an automatic reversion of a fee simple determinable.¹⁸⁶

Plaintiffs alleged that after unitization one spudded well was not further developed and the drilling permit expired.¹⁸⁷ Defendant argued that its activities, including setting containment on the well pad, performing a cement bond log, removing a bridge plug, and running a bit and scraper in the wellbore were sufficient to extend the leases.¹⁸⁸ The District Court held that Plaintiffs alleged sufficient facts to survive Defendant's motion to dismiss, as defendant's due diligence was a question reserved for the fact-finder.¹⁸⁹

Slamon v. Carrizo (Marcellus) LLC

The District Court for the Middle District of Pennsylvania denied defendant operators' motion to dismiss lessor's claims for breach of royalty clause in leases by basing royalty payments on improper prices, and deducting post-production costs, but dismissed a claim for breach of fiduciary duty.

Plaintiff oil and gas lessor brought a class action against defendants, Reliance Marcellus II, LLC, Reliance Holdings USA, Inc. (collectively "Reliance") and Carrizo (Marcellus) LLC ("Carrizo") alleging that: a) the

182. *Id.*

183. *Id.*

184. *Id.*

185. *Id.* at *6.

186. *Id.* (citing *T.W. Phillips Gas & Oil Co. v. Jedlicka*, 42 A.3d 261, 276 (Pa. 2012)).

187. *Id.* at *8.

188. *Id.*

189. *Id.* at *9.

royalties paid to the plaintiffs under their oil and gas leases were improperly calculated; b) that Reliance and Carrizo breached the lease by miscalculating the production royalty as well as deducting fees and post-production costs incurred from the sale of gas to a third party from the royalty paid to Plaintiff; c) that Reliance and Carrizo breach the implied duty of good faith and fair dealing in their contract with Plaintiff; and d) that Reliance and Carrizo breached their fiduciary duty to the Plaintiff.¹⁹⁰ Carrizo and Reliance filed motions to dismiss the complaint.¹⁹¹

The district court first considered the claim that royalty was paid upon an improper price. The lease's royalty clause provided that

[t]he value of oil, gas, or other hydrocarbon production shall be determined on the basis of the greater of (i) the prevailing local market price at the time of sale or use, or, NYMEX spot price as published at the time of sale, whichever is greater, or (ii) the price paid to Lessee from the sale or use of the gas, including proceeds and any other thing of value received by Lessee; provided, however, that when gas production is sold in an arms-length sale transaction with an unaffiliated third party, the value of such gas production shall be the price paid to Lessee.¹⁹²

The parties contested whether the final proviso only modified provision (ii) (as advocated by Plaintiff) or whether it modified the entire provision (as advocated by Defendants).¹⁹³ The district court found that the production royalty payment and valuation terms of the lease were susceptible to multiple reasonable interpretations and denied the Defendants' motion.¹⁹⁴

Second, the district court considered Plaintiff's claims that post-production costs were improperly deducted. The relevant provision in the leases stated that "Lessee shall pay Lessor the following royalty (the 'Royalty'), free of all costs, whether pre-production or post-production."¹⁹⁵ The lease did not define the term "post-production costs."¹⁹⁶ Reliance and Carrizo agreed with Plaintiff that the royalty provision did not allow them to deduct post-production costs, but Reliance and Carrizo argued that the

190. *Slamon v. Carrizo (Marcellus) LLC*, No. 3:16-CV-2187, 2017 WL 3877856, at *1-*2 (M.D. Pa. Sept. 5, 2017).

191. *Id.*

192. *Id.* at *3.

193. *Id.* at *4.

194. *Id.* at *5.

195. *Id.* at *4.

196. *Id.* at *6.

allegations in the complaint did not allege that they deducted post-production costs from Plaintiff's royalties.¹⁹⁷ Instead, Defendants noted that the complaint alleged that the third party buying the gas deducted its costs in calculating the price paid to Reliance and Carrizo. As such, Reliance and Carrizo argued that the costs incurred by the third party who purchased the gas did not fall within the definition of "post-production costs."¹⁹⁸

The district court found that the term "post-production costs" was not necessarily limited to only those production expenses incurred directly by Reliance and Carrizo. The district court concluded that because "the lease does not clearly limit "post-production costs" to only those production expenses incurred directly by Defendants—as opposed to those incurred directly to third parties and passed onto Defendants—Plaintiff has adequately pleaded a cause of action for breach of contract."¹⁹⁹

Plaintiff also alleged that the Defendants' accepted sale prices for natural gas that were well below market value, for natural gas, breached the implied duty of good faith and fair dealing.²⁰⁰ The district court noted that the lease did not constrain Defendants' discretion in setting a sales price for gas. Defendants argued that as a consequence they had no duty to sell at any particular price. However, the district court held that Plaintiff sufficiently alleged a claim: "Plaintiff's claim is [...] that Defendants' are nonetheless required by the implied covenant of good faith and fair dealing to exercise discretion in a reasonable way by selling gas at a commercially reasonable price [and because] there are no explicit and unambiguous terms in the [lease] to the contrary, Plaintiff has stated a claim for breach of the duty of good faith and fair dealing."²⁰¹

Finally, the district court held that Plaintiff did not adequately plead a cause of action for breach of fiduciary duty. "To allege a breach of fiduciary duty, a plaintiff must establish that a fiduciary or confidential relationship existed between her and the defendants."²⁰² "[T]he critical question is whether the relationship goes beyond mere reliance on superior skill, and into a relationship characterized by 'overmastering influence' on one side or 'weakness, dependence, or trust, justifiably reposed' on the

197. *Id.*

198. *Id.*

199. *Id.*

200. *Id.* at *7

201. *Id.* at *9 (citing *USX Corp. v. Prime Leasing Inc.*, 988 F.2d 433, 438 (3d Cir. 1993)).

202. *Id.* at *10 (quoting *Baker v. Family Credit Counseling Corp.*, 440 F. Supp. 2d 392, 414 (E.D. Pa. 2006)).

other side.”²⁰³ The district court held that Plaintiff failed to plead facts giving rise to a fiduciary relationship between Plaintiff and Defendants: “Rather, Plaintiff has pleaded the existence of a contractual relationship in which all parties sought to act in their own interest for a mutual benefit.”²⁰⁴

203. *Id.* (quoting *eToll, Inc. v. Elias/Savion Advert., Inc.*, 811 A.2d 10, 23 (Pa. Super. Ct. 2002)).

204. *Id.*