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ONE J

Oil and Gas, Natural Resources, and Energy Journal

VOLUME 5

NUMBER 2

PENNSYLVANIA



*Nathaniel I. Holland** & *Jon C. Beckman***

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I. Introduction

This year saw a significant number of oil and gas cases in Pennsylvania. On the regulatory side, the supreme court rejected an operator's challenge to assessments of impact fees on some unconventional vertical wells (*Snyder Bros., Inc. v. PUC*) and ruled that zoning hearing boards could consider evidence from residents of different municipalities as to the oil and gas operations of a conditional use applicant (*EQT Production Co. v. Jefferson Hills*). In an important case, the commonwealth court rejected constitutional and statutory challenges to a township's permitting oil and gas operations in all districts (*Frederick v. Allegheny Township ZHB*). In another novel case, the commonwealth court held that oil and gas lessees could be liable for leasing practices and alleged anticompetitive conduct under a consumer protection statute (*Anadarko Petroleum Corp. v. Commonwealth*).

There were also a number of oil and gas lease dispute cases. Pennsylvania courts enjoined lessors from interfering with a lessee's oil and gas operations (*Porter v. Chevron Appalachia, LLC*), held that an underground lateral was not "on the premises" for purposes of a free gas clause (*Mitch v. XTO Energy, Inc.*), held that lessee's prior practice of not deducting post-production cost deductions did not forbid taking deductions in the future (*MAWC v. CNX Gas Col., LLC*), and refused to dismiss lessors' claims for breach of a pooling and unitization clause in a lease (*Chambers v. Chesapeake Appalachia, L.L.C.*). In a rare Pennsylvania royalty title case, the superior court held in a nonprecedential case that a deed reservation of royalties and income from oil and gas extended beyond the current lease (*Julia v. Huntley*).

II. Judicial Developments

A. Pennsylvania Supreme Court Cases

1. *Snyder Bros., Inc., v. Pa. Pub. Utils. Comm.*, 198 A.3d 1056 (Pa. 2018), *amended on reconsideration*, 203 A.3d 964 (Pa. 2019).

- Supreme Court of Pennsylvania concluded that unconventional vertical wells are “vertical gas wells” subject to assessment of yearly impact fee if production exceeds 90,000 cubic feet per day for at least one month of the year.

The Supreme Court of Pennsylvania reversed the commonwealth court’s *en banc* decision interpreting the assessment of yearly impact fees on natural gas wells under Chapter 23 Pennsylvania’s Oil and Gas Act (“Act 13”). Act 13 imposes impact fees on wells producing from unconventional formations. Only wells that produce in amounts greater than that of a stripper well trigger fees.¹ “Stripper well” is defined by Act 13 as “[a]n unconventional gas well incapable of producing more than 90,000 cubic feet of gas per day during any calendar month[.]”² The court considered the use of the word “any” in the definition of stripper well.³ In other words, would an impact fee be assessed whenever a vertical well’s production exceeds an average of 90,000 cubic feet of natural gas per day for *even one month* of the year, or must the well exceed this production threshold *in every month* of the year, for the fee to be imposed?⁴ The commonwealth court held that the impact fee cannot be imposed on wells where production from that well fell below the threshold during any month of the year.⁵ Reversing the *en banc* commonwealth court, the supreme court concluded that an impact fee will be assessed on wells if their production exceeds 90,000 cubic feet of natural gas per day for even one month of the year.⁶

Snyder Brothers drilled a number of unconventional vertical wells in the Commonwealth and submitted well production data to the Public Utilities Commission (“PUC”) pursuant to Act 13.⁷ PUC’s Bureau of Investigation and Enforcement concluded that Snyder Brothers underreported the

1. 58 PA. STAT AND CONST. STAT. ANN. § 2302(a).

2. *Id.* § 2301 (emphasis added).

3. *Snyder Bros., Inc., v. Pa. Pub. Utils. Comm.*, 198 A.3d 1056, 1061 (Pa. 2018), *amended on reconsideration*, 203 A.3d 964 (Pa. 2019).

4. *Id.* at 1057.

5. *Id.* at 1058.

6. *Id.*

7. *Id.* at 1061.

number of wells that met the impact fee criteria and filed a complaint seeking past impact fees and other costs.⁸ Snyder Brothers responded that certain wells had not been reported because they were exempt from the impact fees as stripper wells.⁹ The Pennsylvania Independent Oil and Gas Association (“PIOGA”) intervened. A PUC administrative law judge agreed with the Bureau of Investigation, concluding that a vertical gas well producing “more than 90,000 cubic feet per day in any calendar month in a calendar year [is] subject to the impact fee.”¹⁰ The administrative law judge gave “great deference” to the administrative agency to support the Bureau of Investigation’s assessment of fees.¹¹ Snyder Brothers and PIOGA appealed to the PUC.

PUC agreed with the administrative law judge, arguing that the dispositive issue is “whether or not the well met Section 2301’s definition of a stripper well, i.e., did not produce more than 90,000 cubic feet of gas per day in ‘any calendar month.’”¹² The PUC found the term “any” ambiguous. PUC “expressed its concern that relieving a producer of having to pay an impact fee based on only one month’s reduced production would create an incentive for ‘unscrupulous producers’ to deliberately reduce production at a well during one month of a calendar year to avoid paying the fee for the whole year.”¹³ PUC supported its liberal construction of the statute through the government’s desire to collect impact fees. PUC adopted the decision of the administrative law judge with slight modifications. Snyder Brothers and PIOGA appealed to the commonwealth court.¹⁴

The commonwealth court reversed the PUC *en banc*.¹⁵ The majority concluded that the term “any” as used in the definition of stripper well is not ambiguous. Therefore, a well that failed to exceed the 90,000 cubic-foot production threshold in any month of the year was exempt from the impact fee.¹⁶

While the commonwealth court found the plain meaning of the statute unambiguous, it analyzed the PUC’s interpretation through its own

8. *Id.* at 1060.

9. *Id.* at 1061.

10. *Id.*

11. *Id.* at 1062.

12. *Id.*

13. *Id.* at 1063.

14. *Id.*

15. *Snyder Bros. v. Pa. Pub. Utils. Comm.*, 157 A.3d 1018 (Pa. Commw. Ct. 2017) (*en banc*).

16. *Snyder Bros.*, 198 A.3d at 1063-64.

statutory construction.¹⁷ The majority rejected the notion that the desire to collect more impact fees for the government “was a legitimate basis for liberally construing the statute in the manner employed by the PUC.”¹⁸ The majority also declined to give deference to PUC’s interpretation embodied in its Proposed Rulemaking Orders. Lastly, the majority applied the rule of lenity—rather than applying a liberal construction—because the penalties imposed under Act 13 for failure to pay impact fees made the statute penal in nature.¹⁹

On appeal, the supreme court analyzed the commonwealth court’s decision using a *de novo* standard of review because the issues of statutory interpretation are questions of law.²⁰ The majority framed the “pivotal” question as “the definition of ‘stripper well,’ as it has been incorporated and utilized in the definition of ‘vertical gas well.’”²¹ The majority found that the term “any” can have either of two “divergent” meanings: it could mean “all or every” or it could mean “one.”²² The court looked to the context of the use of “any” within the “overall statutory framework in which it appears” to determine that the term “any” is ambiguous as used in the definition of stripper well.²³ The court then conducted its own statutory interpretation analysis to ultimately agree with the PUC and disagree with the commonwealth court.

The court determined that PUC’s interpretation ensured “stability in the impact fee assessment process,” whereas Snyder Brothers’ and PIOGA’s interpretation “would lead to an unreasonable result.”²⁴ As a public policy consideration, the court stated that appellee’s interpretation “would permit well operators who have enjoyed robust production from their wells for the majority of a calendar year to avoid paying the impact fees to the municipalities merely because of the happenstance of one month’s diminished production.”²⁵ With these considerations, the court found that commonwealth court’s holding impermissibly favored “the private financial interests of the producers over the public interest of counties and municipalities in having sufficient fiscal capabilities to protect their

17. *Id.* at 1064-65.

18. *Id.* at 1065.

19. *Id.*

20. *Id.* at 1071.

21. *Id.* at 1071-72.

22. *Id.* at 1072.

23. *Id.*

24. *Id.* at 1079.

25. *Id.*

residents from the deleterious effects of unconventional drilling activities.”²⁶ The court held that “under Act 13, an unconventional vertical well is a ‘vertical gas well’ subject to assessment of an impact fee for a calendar year whenever that well's natural gas production exceeds 90,000 cubic feet per day in at least one calendar month of that year.”²⁷

2. *EQT Prod. Co. v. Borough of Jefferson Hills*, 208 A.3d 1010 (Pa. 2019)

- The Supreme Court of Pennsylvania found that a municipality could admit the testimony of non-residents in an evidentiary hearing considering land use permit application.

The Supreme Court of Pennsylvania granted a petition for allowance of appeal to determine whether a municipality could consider testimony from nonresidents of the community when considering and oil and gas companies condition use permit application for the construction and operation of a well site.²⁸

EQT Production Company applied for a conditional use permit in 2015 to drill unconventional oil and gas wells in Jefferson Hills, Allegheny County.²⁹ There were no existing unconventional wells in Jefferson Hills at that time. Jefferson Hill’s zoning code permitted unconventional oil and gas well drilling as a conditional use. Upon consideration of EQT’s application, the Borough Planning Commission recommended that the Borough Council approve the permit application.³⁰

The Borough Council conducted a public hearing on the application as required by the Municipalities Planning Code (“MPC”).³¹ Eight people testified at the hearing in opposition to conditional use application (the “Objectors”) including three that did not live in Jefferson Hills, but resided in Union Township, Washington County, which is adjacent. Those three Objectors, along with a resident who recently moved to Jefferson Hills from Union Township, lived near an unconventional well operated by EQT. They testified that EQT’s oil and gas activities negatively impacted their health, quality of life and the community’s environment.³² The Borough Council

26. *Id.*

27. *Id.*

28. *EQT Prod. Co. v. Borough of Jefferson Hills*, 208 A.3d 1010 (Pa. 2019).

29. *Id.* 1011-12.

30. *Id.* 1012.

31. *Id.*

32. *Id.* at 1013.

denied the conditional use application after giving “significant weight” to the Objectors’ testimony.³³

The Borough Council found that EQT’s application met the general standards and specific requirements for the grant of a conditional use permit, but concluded that granting the permit for the proposed oil and gas well “does not protect the health, safety and welfare of the Borough and its residents[.]”³⁴ The Borough Council determined that “pursuant to Pennsylvania case law, [EQT] [has] not met [its] burden of proof for a conditional use application and the burden never shifted to the objectors to prove that the impact of the proposed use is such that it would violate the other general requirements for land use set forth in the Borough Zoning Ordinance.”³⁵ EQT appealed to the Court of Common Pleas of Allegheny County.

The court of common pleas reversed the Borough Council because the Council had found EQT met the general standards and specific requirements of the conditional use. Once EQT met the general standards, the burden should have shifted to the Objectors to prove that the use would adversely affect the general public.³⁶ The court of common pleas found that the Objectors did not meet this burden. The court characterized their testimony as “speculative regarding general oil and gas development,” and raising only “theoretical concerns about air pollution and odors.”³⁷ The Borough appealed to the commonwealth court.

A panel of the commonwealth court affirmed the court of common pleas.³⁸ The panel found that EQT had met its burden of complying with the requirements of the zoning ordinance, but the Objectors failed to meet their burden of showing a detrimental impact.³⁹ In her dissent, Judge Patricia A. McCullough noted that it is difficult for objectors to demonstrate that a novel use will have a negative impact on the health, safety, and welfare of the community, because they have not, heretofore, had any firsthand experience with the particular use.⁴⁰ Over the dissent, the majority

33. *Id.* at 1017.

34. *Id.*

35. *Id.* at 1017-18.

36. *Id.* at 1018.

37. *Id.*

38. *See* *EQT Prod. Co. v. Borough of Jefferson Hills*, 162 A.3d 554 (Pa. Cmwlth. Ct. 2017).

39. *EQT Prod. Co.*, 208 A.3d at 1019.

40. *Id.* at 1020 (McCullough, J., dissenting).

of the panel agreed that the Objectors' testimony, which was admitted into evidence, was too speculative.⁴¹

The Borough filed a petition for allowance of appeal to the Supreme Court of Pennsylvania.⁴² The court granted the petition and considered the following issue:⁴³

Whether the Commonwealth Court erred as a matter of law by imposing a standard upon the admissibility of objectors' evidence that effectively eliminates the ability to raise any objection to a land use application based on firsthand experience with a similar use when the proposed use does not already appear within municipal borders?

The court reversed the commonwealth court and remanded with instructions that the court of common pleas with instructions to consider the nonresident Objectors' testimony. The court stated that its review is one of evidentiary admissibility: "whether the testimony of the residents of a municipality regarding their firsthand experiences with the manner in which a particular land use was conducted by the owner of property in very near proximity to their own homes was admissible in a hearing held in another municipality on a land use application to conduct a similar land use there."⁴⁴

Notably, the court did not find that the commonwealth court reviewed the testimony for its sufficiency, but instead characterized the commonwealth court's finding that the testimony was speculative as "dismissive."⁴⁵ The court stated that the dismissive nature in which the commonwealth court handled the nonresident testimony "gives credence to the Borough's concern that the panel decision in this matter will be interpreted as a categorical bar to the admissibility of this type of firsthand experiential evidence in future conditional use hearings."⁴⁶ With this foundation, the court explained that the nonresident testimony at issue should have been admitted.

The court noted that local agencies are not bound by the technical rules of evidence when conducting hearings, but may consider "all relevant

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.* at 1025.

45. *Id.*

46. *Id.*

evidence of reasonably probative value.”⁴⁷ The court found that local agencies need that flexibility in conditional use hearings because they are considering that evidence under their duty to protect residents from harm.⁴⁸ Under that broad evidentiary standard, and in fulfilling their duty to protect, the court concluded that the testimony of the nonresident Objectors was relevant and reasonably probative of the affects EQT’s proposed conditional use could have on Jefferson Hills.⁴⁹

The court relied on its 1990 decision in *Visionquest National, LTD v. Board of Supervisors of Honey Brook Township*, which affirmed the denial of a conditional use application based in part on the testimony of neighboring residents.⁵⁰ There, the operators of a youth rehabilitation facility sought a conditional use permit that had been operating in the community without a permit.⁵¹ The operator fulfilled the criteria for conditional use.⁵² Residents of the community testified as to effects of the presently operating facility on their daily lives. This included fears of escapes. Escapes had occurred, but no physical damage had resulted in the community.⁵³ Additionally, residents from a neighboring community that had a facility run by the same operator testified that escapes had caused physical damage in that community. The local governing body denied the application based in part on the fears articulated by the residents and nonresidents. The trial court upheld the denial, but the commonwealth court reversed, finding that the “possibility of an adverse impact, based on unsupported anxieties, was insufficient to meet the appellant’s burden of proof.”⁵⁴ The court reversed, rejecting the commonwealth court’s finding that the evidence was too speculative “because the residents’ testimony was based on their own firsthand experiences with the operation of the facility.”⁵⁵

Even though the evidence in *Visionquest* was related to a facility in the community and based upon testimony of the community’s residents, the court found the rationale controlling in the present matter.⁵⁶ “[The] firsthand experiences with a particular type of land use by people living

47. *Id.* (citing 2 PA. STAT. AND CONS. STAT. ANN. § 554 (West 2019)).

48. *Id.*

49. *Id.* at 1026.

50. 569 A.2d 915 (Pa. 1990).

51. *Id.* at 916.

52. *Id.* at 917.

53. *Id.*

54. *Id.*

55. *EQT Prod. Co.*, 208 A.3d at 1026.

56. *Id.* at 1026-27.

near it are relevant and probative evidence for a local government to consider in evaluating whether a similar land use activity conducted by the same entity, in a similar manner, and in a similar type of location” is relevant and reasonably probative of the impact on the community.⁵⁷

Justice Sallie Mundy dissented, disagreeing with the majority’s finding that “anecdotal evidence by lay witnesses regarding operations in a different municipality can serve as a basis for denying a conditional use to a landowner who has satisfied the objective criteria of the zoning ordinance.”⁵⁸ Justice Mundy would have relied upon precedent that shifted the burden to prove an adverse effect on the community to the Objectors once EQT met the permitting requirements. Because EQT had met those requirements, Objectors should have been required to provide sufficient evidence to establish that there is a high degree of probability that the use will cause substantial harm to the community.⁵⁹ Generalized grievances do not meet that burden.

The long-term effect of the court’s decision may not be significant. This opinion held that the evidence is *admissible*. Here, each tribunal admitted the evidence of the Objectors, but gave it little weight because of its speculative nature. As such, the court confirmed the admissibility of non-resident testimony as to harm, but the local agencies and lower courts must still weigh that evidence against an applicant’s entitlement to a conditional use permit when it satisfies the specific, objective criteria in the zoning ordinance for that conditional use.

B. Pennsylvania Commonwealth Court Cases

1. *Frederick v. Allegheny Tp. Zoning Hrg. Bd.*, 196 A.3d 677 (Pa. Commw. Ct. October 26, 2018), *pet. for allowance of appeal denied*, 449 WAL 2018 (Pa. May 14, 2019)

- The commonwealth court held that zoning ordinance did not violate substantive due process, Pennsylvania’s Environmental Rights Amendment, or the Municipalities Planning Code simply because it allowed oil and gas development as a permitted use in all zoning districts where the ordinance required the applicant to satisfy numerous health, safety and public welfare standards.

The commonwealth court reviewed a substantive validity challenge to a local zoning ordinance (“Ordinance”) in *Frederick v. Allegheny Township*

57. *Id.* at 1027.

58. *Id.* at 1031 (Mundy, J., dissenting).

59. *Id.* 1029 (citing *In re Cutler Group*, 880 A.2d 39, 43 (Pa. Commw. Ct. 2005)).

Zoning Hearing Board that also considered the applicability of Pennsylvania's Environmental Rights Amendment to zoning.⁶⁰ Three residents ("Objectors") challenged the Ordinance in question, which allowed oil and gas development as a permitted use in all zoning districts, but subject to certain health, safety and public welfare requirements.⁶¹ The Objectors argued that the Ordinance constituted illegal spot zoning in violation of substantive due process, violated the Environmental Rights Amendment ("ERA") of the Pennsylvania Constitution, and violated several provisions of Pennsylvania Municipalities Planning Code ("MPC").⁶² The court rejected the challenge *en banc*, finding that the municipality acted within state law in determining where oil and gas development may occur.⁶³

The Allegheny Township Board of Supervisors passed an amendment to an existing zoning ordinance in 2010 that allowed oil and gas operations in all zoning districts as a permitted use "by right." The Ordinance subjected the application to numerous standards and conditions designed to protect the public.⁶⁴

CNX Gas Company, LLC submitted a zoning permit application to construct an unconventional well pad in an R-2 (Agricultural/Residential) Zoning District. The application complied with the requirements of the Ordinance. The Township issued the permit.⁶⁵ The Objectors appealed the permit to the Allegheny Township Zoning Hearing Board ("Board").⁶⁶ The Objectors argued the Ordinance allowed an "industrial use" in a residential/agricultural zoning district in contravention of ERA and in violation of Objectors' substantive due process rights. The Objectors cited the supreme court's 2013 decision in *Robinson Township v. Commonwealth* (hereinafter *Robinson II*) in support of their argument.⁶⁷

After holding evidentiary hearings, the Board issued a written decision containing detailed findings of fact.⁶⁸ The Board found that the experts and the evidence submitted by the Objectors was not credible, but found that

60. 196 A.3d 677 (Pa. Commw. Ct. Oct. 26, 2018).

61. *Id.* at 679.

62. *Id.*

63. *Id.* at 701-02.

64. *Id.* at 680.

65. *Id.* at 679.

66. *Id.*

67. 83 A.3d 901 (Pa. 2013) (hereinafter *Robinson II*).

68. *Frederick*, 196 A.3d at 683-84.

the expert and evidence submitted by the permittee was.⁶⁹ The Board disagreed with the Objectors' contentions that the land use would have an adverse effect on public health, safety and welfare. Instead, the Board found that the Ordinance promoted the public health, safety, and welfare of the Township.⁷⁰ Likewise, the Board did not find that land use would have an adverse effect on the environment. The Board upheld the validity of the Ordinance and rejected the Objectors' reliance on *Robinson II*.⁷¹ The Objectors appealed to the Court of Common Pleas of Westmoreland County. The court of common pleas affirmed and the Objectors appealed to the commonwealth court.⁷²

The commonwealth court affirmed the Board by a 5–2 majority and issued an *en banc* opinion. The majority addressed the Objectors' three arguments: (1) whether the Township's zoning ordinance violates substantive due process by instituting illegal spot zoning; (2) whether CNX Gas Company's permit to develop an unconventional gas well in the R-2 Zoning District violates the ERA; and (3) whether permitting oil and gas development in every zoning district violates the MPC.⁷³

First, the court held that the Ordinance did not violate substantive due process. The court noted that the Objectors stated concerns about oil and gas development outside of industrial zoning districts, but did not support their concerns with credible evidence, but only with speculation.⁷⁴ The court looked to its recent decisions and explained that objections to well pad construction activities must be based on more than mere speculation of a possible harm to carry an objector's burden of proof.⁷⁵ The court distinguished oil and gas development from heavy industry that is often relegated to "industrial" zoning districts.

Next, the majority determined that the Ordinance did not violate the ERA, which states in relevant part, "[t]he people have a right to clean air, pure water, and to preservation of the natural, scenic, historic and esthetic values of the environment."⁷⁶ Notably, the court concluded that the

69. *Id.* at 685.

70. *Id.*

71. *Id.*

72. *Id.* at 686.

73. *Id.*

74. *Id.* at 687.

75. *Id.* at 689-90 (citing *Gorsline v. Bd. of Supervisors*, 123 A.3d 1142 (Pa. Commw. Ct. 2015), *rev'd on other grounds*, 186 A.3d 375; *EQT Prod. Co. v. Borough of Jefferson Hills*, 162 A.3d 554 (Pa. Commw. Ct. 2017) *pet. for allowance of appeal granted in part*, 179 A.3d 545 (Pa. 2018)).

76. Art. I, § 27 PA. CONST.

Township could not “replicate the environmental oversight that the General Assembly has conferred upon [Department of Environmental Protection] and other state agencies.”⁷⁷ The Objectors argued that the Township was required by *Robinson II* to complete an environmental impact analysis prior to passing the 2010 amendments to the Ordinance.⁷⁸ Furthermore, the Objectors argued that the permitted use would harm the local environment.⁷⁹

The court looked to *Robinson II* and the recent decision in *Pennsylvania Environmental Defense Foundation v. Commonwealth*, to state that the applicable standard should be whether or not the governmental action “unreasonably impairs those values” provided in the ERA.⁸⁰ Noting that “[i]t is axiomatic that a zoning ordinance must balance the public interests of the community with the due process rights of private property owners,” the court highlighted that the Township could not act “beyond the bounds of [its] enabling legislation.”⁸¹ Therefore, the Township is precluded from replicating the environmental oversight afforded to the Department of Environmental Protection.⁸²

Considering these restraints on the Township’s role, but also applying the Board’s factual findings, the court concluded that “Objectors did not prove [the Ordinance] is a law that unreasonably impairs their rights under the [ERA].”⁸³ In sum, Objectors did not prove that [the Ordinance] does not reasonably account for the natural, scenic, historic and esthetic values of the Township's environment.”

Finally, the majority concluded that the Ordinance did not violate the MPC by allowing oil and gas development “contrary to the state of community objectives set forth in [the ordinance],” places “water sources and other environmental assets at risk,” and allows incompatible uses to take place within the R-2 Zoning District.”⁸⁴ The court found these arguments analogous to those advanced in the substantive due process

77. *Id.* at 697.

78. *Frederick*, 196 A.3d at 691.

79. *Id.* at 693.

80. *Id.* at 694 (citing *Pa. Env'tl. Def. Found. v. Commonwealth*, 161 A.3d 911 (Pa. 2017) (*PEDF*)).

81. *Id.* at 695.

82. *Id.* at 696.

83. *Id.* at 697.

84. *Id.* at 699.

claim. As such, the court repeated its conclusion that the Objectors failed to support their claim with credible evidence.⁸⁵

The majority drafted a conclusion concisely explaining its rejection of the Objectors' claims and its affirmance of the Board.⁸⁶ The conclusion contained the following short paragraph noting an inconsistency in the present appeal:⁸⁷

Objectors' objectives in this litigation are confounding. Were they to succeed in invalidating Zoning Ordinance 01-2010, then they release oil and gas operators from the ordinance conditions that relate to noise, lighting, hours, security and dust. Absent Zoning Ordinance 01-2010, CNX's permit could be invalidated. However, CNX would no longer need a "zoning compliance permit" to operate the Porter Pad.

In their dissenting opinions, Judge McCullough and Judge Ceisler voiced concerns over the majority's application of the ERA. Judge McCullough would have remanded back to the Board to take additional evidence to determine whether the Ordinance is compatible with the ERA.⁸⁸ Judge McCullough would remand in light of *PEDF*, but also noted that "the Township ventured into uncharted, choppy waters when it enacted the Ordinance" allowing oil and gas development in all zoning districts.⁸⁹ Notably, Judge McCullough wrote that the Ordinance "should be subjected to strict scrutiny and analysis in the same manner that courts provide to other fundamental rights."⁹⁰ Judge Ceisler agreed with much of the majority's reasoning but dissented because she "took issue with its conclusion that [the Ordinance] does not violate the [ERA]."⁹¹ Judge Ceisler would hold that the Ordinance "clearly, palpably, and plainly violated the [ERA]."⁹²

The Supreme Court of Pennsylvania declined to hear further appeal on the matter. As such, the commonwealth court decision provides guidance on the application of the ERA to zoning.

85. *Id.* at 700.

86. *See id.* at 700-02.

87. *Id.* at 701.

88. *Id.* at 702.

89. *Id.* at 703.

90. *Id.* at 707.

91. *Id.* at 711.

92. *Id.* at 715.

2. *Anadarko Petroleum Corp. v. Commonwealth*, 206 A.3d 51 (Pa. Commw. Ct. March 15, 2019)

- The commonwealth court concluded that (i) a lessee under an oil and gas lease may be liable under the Unfair Trade Practices and Consumer Protection Law and (ii) the Attorney General can maintain anti-trust claims under the UTPCPL.

On interlocutory appeal, the majority of an *en banc* panel of the commonwealth court decided that the Office of Attorney General could bring antitrust claims against oil and gas lessees under the Unfair Trade Practices and Consumer Protection Law (“UTPCPL”).⁹³ First, the commonwealth court considered whether the Attorney General could bring a cause of action against lessees pursuant to the UTPCPL for allegedly wrongful conduct perpetrated by lessees in the context of leasing subsurface mineral rights from private landowners.⁹⁴ Second, the court determined whether the Attorney General can bring a cause of action against those lessees pursuant to the UTPCPL for alleged antitrust violations.⁹⁵ The court of common Pleas of Bradford County concluded that the Attorney General could bring both types of claims, and overruled Appellants’ preliminary objections to the claims.

On appeal, the commonwealth court reviewed whether oil and gas leasing could trigger actionable claims under the UTPCPL. The General Assembly declared unlawful 21 separate categories of unfair methods of competition and unfair or deceptive acts or practices in the conduct of trade or commerce under the UTPCPL along with other acts designated by the Attorney General through the administrative rulemaking process.⁹⁶ The commonwealth court had to first consider whether oil and gas leasing is “trade or commerce” under the UTPCPL.

The UTPCPL defines “trade and commerce as the advertising, offering for sale, sale or distribution of any services and any property, tangible, real, personal or mixed, and any other article, commodity, or thing of value wherever situate, and includes any trade or commerce directly or indirectly affecting the people of this Commonwealth.”⁹⁷ The definition applies to the

93. *Anadarko Petroleum Corp. v. Commonwealth*, 206 A.3d 51 (Pa. Commw. Ct. 2019).

94. *Id.* at 53.

95. *Id.*

96. *Id.* at 55 (citing 73 PA. STAT. AND CONS. STAT. ANN. §§ 201-3, 201-2(4), 201-3.1 (internal quotations omitted)).

97. *Id.* (citing 73 PA. STAT. AND CONS. STAT. ANN. § 201-2(3)) (internal quotations omitted)).

sale of things of value, but not expressly to the purchasing of a thing or to the leasing of a thing. Under this definition, Appellants argued that the UTPCPL is designed to protect *consumers* against underhanded behavior of sellers, rather than all parties to a given transaction.⁹⁸ The court disagreed, finding that Appellants' leasing of Appellee's mineral interest constitutes "trade and commerce" as those terms are "understood in the context of the Law."⁹⁹ The court cited a case that considered residential property leasing to be within the definition of "trade and commerce" in support of its finding.¹⁰⁰

Finding that oil and gas leasing fit within "trade and commerce," the court then found that the Attorney General stated a legally viable claim against the Appellants based on allegedly unfair conduct in obtaining the oil and gas leases. The commonwealth court held that the trial court properly overruled Appellants' preliminary objections that their behavior in securing the oil and gas leases was not actionable under the UTPCPL.

Next, the court considered whether the Attorney General's "antitrust" claims were actionable under the UTPCPL. The complaint contained two separate counts alleging antitrust violations. The first count alleged that Appellants' joint venture and market sharing agreements intrinsically violated the UTPCPL. The second alleged that Appellants "deceived and acted unfairly towards private landowners by giving them misleading information, and/or failing to disclose information, regarding the open market's true appetite for subsurface mineral rights leases, as well as whether terms of the agreed-to leases were competitive and fair."¹⁰¹ Appellants noted that the UTPCPL does not expressly disallow joint venture agreements, as the Appellants had entered into. Moreover, Appellants cited to the General Assembly's repeated failure to pass an antitrust law. As such, Appellants argued that the Attorney General could not use the UTPCPL to bring antitrust claims.¹⁰²

The court agreed with Appellants' on the first count: the mere existence of a joint venture does not create "impairment of choice and the competitive process" to sufficiently state a claim within the 21 enumerated violations under the UTPCPL.¹⁰³ The commonwealth court reversed the trial court's

98. *Id.* at 56 (emphasis added).

99. *Id.*

100. *Id.* (citing *Commonwealth v. Monument Props., Inc.*, 329 A.2d 812, 820-26 (Pa. 1974)).

101. *Id.* at 61.

102. *Id.* at 59-60.

103. *Id.* at 60.

overruling of Appellants' preliminary objection to the count alleging the Appellants' joint venture was actionable.¹⁰⁴

The court affirmed the trial court with regard to the count alleging deception and unfair actions toward the landowners.¹⁰⁵ The court found that the Attorney General's allegations fit with one of the enumerated actions within "unfair methods of competition and unfair or deceptive acts or practices."¹⁰⁶

Judge Covey filed a concurring and dissenting opinion. Judge Covey noted that the Appellants are lessees under the oil and gas leases and, therefore, are purchasers or consumers. Judge Covey agreed with Appellants, that no court ever interpreted the UTPCPL as authorizing a claim by or on behalf of a seller *against* a person who acquires something from the seller.¹⁰⁷ Concluding the UTPCPL is not an antitrust statute, and that the Majority wrote its own causes of action in to the Law, Judge Covey concluded, "I find it unconscionable that as a direct result of the Majority's decision, Appellants may be retroactively liable for engaging in conduct that was not considered to be violative of state law at the time such activities occurred."¹⁰⁸

C. Pennsylvania Superior Court Cases

1. *Porter v. Chevron Appalachia, LLC*, 204 A.3d 411 (Pa. Super. Ct. 2019).

- The Superior Court of Pennsylvania affirmed a preliminary injunction enjoining landowners from denying operator access to surface to construct a well pad to develop oil and gas from unitized properties.

The Porters appealed an order granting a preliminary injunction in favor of Chevron that enjoined the Porters from "preventing access to and development of Chevron's oil and gas rights."¹⁰⁹ Chevron was the assignee of a 2002 oil and gas lease ("Lease") that granted the lessee exclusive rights to use the surface of the property in conjunction with oil and gas development "regardless of . . . the location of the wells."¹¹⁰ The Lease

104. *Id.* at 61.

105. *Id.*

106. *Id.*

107. *Id.* at 62 (J. Covey, concurring and dissenting).

108. *Id.* at 67.

109. *Porter v. Chevron Appalachia, LLC*, 204 A.3d 411, 415 (Pa. Super. Ct. 2019).

110. *Id.* at 414.

allowed the lessee to unitize the leased property (“Porter Farm”). Chevron’s predecessor drilled multiple conventional wells on the Porter Farm. In 2017, Chevron gave notice to the Porters that it intended to construct a well pad to develop multiple, unconventional wells to produce oil and gas from neighboring properties.¹¹¹ The Porters filed a complaint asking for declaratory relief that the court declare Chevron may not use the surface of the Porter Farm to construct a well pad for use in the production of oil and gas from neighboring properties.¹¹² Chevron filed preliminary objections to the complaint.

While the preliminary objections were pending, Chevron notified the Porters that it would be entering the property to conduct environmental and geophysical investigations and that it would be “staking” the property in accordance with Pennsylvania’s One Call System.¹¹³ Chevron personnel arrived to find the gate to the property locked. After staking the property, one of the Porters removed the stakes and confronted Chevron personnel upon their return. He then stated to the Chevron personnel, “you best get off my property while the getting’s good.”¹¹⁴ Chevron considered the statement as a threat, left the property, and filed a motion for injunctive relief.¹¹⁵ After a hearing, the trial court granted Chevron’s motion and Porters appealed.

The Porters raised three issues on appeal before the superior court:

1. Whether the trial court abused its discretion by ordering the Porters to permit Chevron to conduct geotechnical testing on the surface of the Porter Farm where Chevron failed to provide any clear evidence that it would suffer immediate and irreparable harm if such testing was delayed?
2. Where Chevron had never previously entered onto the surface of the Porter Farm to conduct any activities relative to the production of oil and gas from beneath adjoining lands, whether the trial court erred or abused its discretion by effectively changing that status quo by ordering the Porters to permit Chevron such access?

111. *Id.* at 415.

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.*

3. Whether the trial court committed an error of law or abused its discretion by effectively determining on the merits that Chevron has an absolute right to operate on the surface of the Porter Farm to produce oil and gas from beneath adjoining lands in order to support its grant of a mandatory preliminary injunction?¹¹⁶

The superior court began by reciting the six factors that must be established to show a party is entitled to a preliminary injunction:

(1) [R]elief is necessary to prevent immediate and irreparable harm that cannot be adequately compensated by money damages; (2) greater injury will occur from refusing to grant the injunction than from granting it; (3) the injunction will restore the parties to their status quo as it existed before the alleged wrongful conduct; (4) the petitioner is likely to prevail on the merits; (5) the injunction is reasonably suited to abate the offending activity; and (6) the public interest will not be harmed if the injunction is granted.¹¹⁷

Porters' first issue on appeal related to prevention of "immediate and irreparable harm."¹¹⁸ They argued that Chevron failed to show that a delay would be more than an "inconvenience to Chevron."¹¹⁹ The trial court disagreed, citing precedent that irreparable harm is deemed to exist where the rights involve interference with contractual rights in land.¹²⁰ "In light of the unique and intrinsic value of land, interference with ... contractual rights to ownership of that land must be deemed irreparable harm."¹²¹ The superior court agreed that the Porters' actions "deprived Chevron of contractual rights in land pursuant to the 2002 lease, which in and of itself supports a finding of irreparable harm."¹²²

Additionally, Chevron introduced evidence demonstrating that interference with Chevron's access to perform the necessary testing "would

116. *Id.* at 416

117. *Id.* (citing *Brayman Constr. Corp. v. Com. Dep't of Transp.*, 13 A.3d 925, 925 (Pa. 2011)).

118. *Id.* at 416.

119. *Id.* at 417.

120. *Id.*

121. *Id.* (citing *New Eastwick Corp. v. Phila. Builders Eastwick Corp.*, 241 A.2d 766, 770 (Pa. 1968)).

122. *Id.*

result in delay-related costs that would be impossible to quantify.”¹²³ Considering both the interference with Chevron’s contractual rights in land and the evidence that damages could not be accurately quantified, the superior court concluded that the record contained reasonable grounds for the trial court to find irreparable harm.

Second, the Porters argued that preliminary injunctive relief should restore the status quo. Porters argued that Chevron, itself, had never entered the property prior to its recent entry to stake the property.¹²⁴ The trial court disagreed, finding that “the status quo existing immediately prior to the wrongful conduct was that Chevron's predecessor, Atlas, had access to the Porters' land under the Lease as well as in practice. Chevron, as successor-in-interest to Atlas under the Lease, is entitled to the same status.”¹²⁵ Because Atlas had access under the Lease, Porters’ interference with Chevron’s access disrupted the status quo. The superior court concluded that these were reasonable grounds for the trial court to find that the injunction was necessary to restore the status quo.¹²⁶

Finally, the Porters argued that the trial court improperly adjudicated the ultimate issue by determining Chevron could access the property “for whatever oil and production activities it wants” under the Lease. *Id.* Paragraph 10 of the lease (unitization clause) expressly states:

Lessee the right at any time to consolidate the leased premises or any part thereof ... with other lands to form an oil and gas development unit or units ... for the purpose of drilling a well thereon, but the Lessee shall in no event be required to drill more than one well on any such unit or units.¹²⁷

The Porters argued that this clause only allowed Chevron to drill one well on the property. To the Porters, Chevron’s proposed use exceeded the scope of the lease.¹²⁸

First, the trial court disposed of the argument that the trial court’s order gave Chevron unfettered access.¹²⁹ The injunction only allowed access “for the limited purposes of conducting necessary testing to obtain a DEP

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.* at 418 (emphasis original).

128. *Id.*

129. *Id.* at 419.

permit.”¹³⁰ Second, one of the factors weighed by the court when considering an injunction is whether the moving party is likely to prevail on the merits of the case—the movant must “establish a prima facie right to relief.”¹³¹ As such, the trial court is required to analyze the underlying claims. Here, the terms of the lease gave rise to the action. The trial court was required to analyze and interpret the terms of the lease to determine whether Chevron was likely to prevail on the merits.¹³²

Applying principles of contract law to interpret the clause, the superior court agreed with the trial court’s determination that the Lease allowed the lessee to unitize the land for the purposes of drilling, but use of the indefinite article “a” did not restrict the lessee to only drilling one well.¹³³ Considering the remaining clause of that sentence, that “Lessee shall in no event be required to drill more than one well,” the trial court concluded that the context of the use of “a” well did not limit Chevron to drilling one well, it simply provided that Chevron was “not *required* to drill more than one well.”¹³⁴ The superior court concluded that reasonable grounds existed for the trial to conclude Chevron was likely to succeed on the merits of the case and affirmed the grant of injunctive relief.¹³⁵

2. *Mitch v. XTO Energy, Inc.*, 212 A.3d 1135 (Pa. Super. Ct. 2019)

- The superior court held that an underground lateral was not a well “drilled on the leased premises” for purposes of a free gas clause

Lessor Mitch brought an action in 2016 against lessee XTO Energy, Inc. (“XTO”) for breach of an oil and gas lease relating to alleged payments due under a free gas clause.¹³⁶ Paragraph 4 of the lease addendum provided that:

If any well(s) is (are) drilled on the lease premises and is (are) producing in paying quantities, the surface owner shall be entitled to receive a payment in lieu of free gas equal to 300,000 cubic feet of gas multiplied by the average price received by

130. *Id.*

131. *Id.* (citing *Synthes USA Sales, LLC v. Harrison*, 83 A.3d 242, 249 (Pa. Super. Ct. 2013)).

132. *Id.*

133. *Id.* at 418.

134. *Id.* (emphasis added).

135. *Id.* at 419.

136. *Mitch v. XTO Energy, Inc.*, 212 A.3d 1135 (Pa. Super. Ct. 2019).

Lessee during the preceding year of production, provided the surface owner has his primary residence on the lease premises.¹³⁷

After the lease was executed, XTO built a well pad on adjacent property and unitized the multiple tracts, including the lease premises, under a pooling and unitization clause.¹³⁸ A lateral well was drilled on the wellpad that passed under Mitch's tract. Mitch and XTO brought motions for summary judgment after discovery and the Court of Common Pleas of Butler denied Mitch's motion for summary judgment and granted XTO's.¹³⁹

On appeal, the superior court noted that oil and gas leases are subject to the rules of contract interpretation, with the court's goal being to interpreting the lease to ascertain and effectuate the intention of the parties.¹⁴⁰ Mitch argued that because a horizontal well passed through the leased tract, that well is "on the lease premises" for purposes of the lease addendum Paragraph 4. XTO argued that only a well on the surface of the property constituted a well "on the leased premises" for purposes of Paragraph 4.¹⁴¹

The superior court found that Paragraph 4 was unambiguous.¹⁴² The court further concluded that the parties intended the term "on the leasehold premises" in Paragraph 4 to mean on the surface of the leasehold.¹⁴³ "It is unreasonable to find that the parties intended to compensate a **surface owner** (who may be different from the lessor) where a well, situated on the surface of another's property, has a horizontally-drilled portion that traverses the surface owner's land thousands of feet beneath the surface."¹⁴⁴ The use of the phrase "on the lease premises" to indicate the location of Mitch's house in the second part of Paragraph 4 also supported this interpretation. The superior court affirmed the ruling of the trial court.¹⁴⁵

137. *Id.* at 1137.

138. *Id.*

139. *Id.*

140. *Id.* at 1138 (citing *Porter v. Chevron Appalachia, LLC*, 204 A.3d 411, (Pa. Super. Ct. 2019)).

141. *Id.* at 1140.

142. *Id.*

143. *Id.* at 1141 (citing *Trizechahn Gateway LLC v. Titus*, 976 A.2d 474, 483 (Pa. 2009); *RESPA of Pennsylvania, Inc. v. Skillman*, 768 A.2d 335, 340 (Pa. Super. Ct. 2001)).

144. *Id.* (emphasis in original).

145. *Id.* at 1142.

3. *Julia v. Huntley*, No. 632 MDA 2018, 2019 WL 311121 (Pa. Super. Ct. Jan. 24, 2019).

- In a non-precedential decision, the superior court held that a deed reservation of “one half of any and all royalties and income or return from any oil or gas which may be produced on or from the premises hereby conveyed” reserved oil and gas rights beyond lease in effect at time of execution

Julia was the successor to grantee of deed 1931 that reserved “one half of any and all royalties and income or return from any oil or gas which may be produced on or from the premises hereby conveyed.”¹⁴⁶ In 2007 Julia executed an oil and gas lease, which was amended in 2011 to designate that half of the royalties be paid to the Huntleys, heirs of the grantors of the 1931 deed.¹⁴⁷ In 2015 Julia filed a quiet title action against the Huntleys, claiming title to all the oil and gas in and under his property. The Huntleys entered appearances and filed a motion for summary judgment which was granted by the Court of Common Pleas of Susquehanna County.¹⁴⁸

On appeal Julia argued that “the Huntley-Ames deed only reserved one half of the *royalty payments* from the oil and gas produced, not one-half of the oil and gas itself.”¹⁴⁹ Julia further contended that the royalty payments were only reserved under the then-existing lease and that once the lease terminated the oil and gas rights reverted to his predecessor.¹⁵⁰

A reservation is the creation of a right or interest that did not previously exist; but if the thing or right exists at the time of conveyance, the deed’s language is treated as making an exception.¹⁵¹ The superior court concluded that the deed language was not ambiguous, noting that “[i]f Huntley had intended to limit the reservation clause to the lease with Northeastern, he could have included language reflecting that intent.”¹⁵² The court concluded that “[b]y intentionally placing the word ‘and’ between the two phrases ‘one half of any and all royalties’ **and** ‘income or return from any oil or gas,’ Huntley meant to reference circumstances *in addition to* the lease, i.e.,

146. *Julia v. Huntley*, No. 632 MDA 2018, 2019 WL 311121, at *1 (Pa. Super. Ct. Jan. 24, 2019).

147. *Id.* at *2.

148. *Id.*

149. *Id.* at *3.

150. *Id.*

151. *Id.* at *4 (citing *Ralston v. Ralston*, 55 A.3d 736, 741 (Pa. Super. 2012)).

152. *Id.*

royalties **and** oil and gas rights.”¹⁵³ The superior court affirmed the judgment of the court of common pleas in favor of the Huntleys.

D. Federal District Court Cases

1. Mun. Auth. of Westmoreland Cty. v. CNX Gas Co., L.L.C., 380 F. Supp. 3d 464 (W.D. Pa. Mar. 29, 2019).

- Lessor failed to state breach of lease claim or conversion claim based on lessee’s prior waiver of post-production cost deductions, but stated sufficient claim that deductions were unreasonable to survive motion for summary judgment

Lessor Municipal Authority of Westmoreland County (“MAWC”) and prior lessee, Dominion Exploration & Production, Inc., entered into an oil and gas lease in 2002 covering 2,255 acres in Westmoreland County, Pennsylvania.¹⁵⁴ Lessee did not deduct post-production costs (“PPCs”). The lease was subsequently assigned to CNX Gas Company, LLC (“CNX”), and Noble Energy, Inc. (“Noble”), and in 2011 they began deducting post-production costs from royalty payments.¹⁵⁵ MAWC filed a lawsuit in state court against CNX and Noble for breach of the lease and conversion. Noble removed the case to federal district court. The parties cross-moved for summary judgment.

MAWC did not dispute that the lease expressly permitted the deduction of PPCs but argued that the lease was modified or that the right to deduct PPCs was “waived.”¹⁵⁶ The district court concluded that MAWC was arguing that the lease was modified (as opposed to a waiver of the right to deduct PPCs from past royalty payments).¹⁵⁷ However, there was insufficient evidence of a modification of the lease. There was no consideration for a modification of the lease, as required under Pennsylvania law.¹⁵⁸ Nor did MAWC establish that it detrimentally relied on royalty payments without deduction of PPCs.¹⁵⁹ Claims for equitable estoppel failed as well, due to MAWC’s failure to establish detrimental

153. *Id.* (emphasis original).

154. *Mun. Auth. of Westmoreland Cty. v. CNX Gas Co.*, 380 F. Supp. 3d 464 (W.D. Pa. 2019).

155. *Id.* at 467.

156. *Id.* at 468-70.

157. *Id.* at 470.

158. *Id.* at 471 (citing *Shedden v. Anadarko E. & P. Co.*, 136 A.3d 485, 490 (Pa. 2016)).

159. *Id.* at 472 (noting that royalties constituted approximately five percent of MAWC’s budget and that royalty income exceeded budgeted revenues).

reliance, and the district court dismissed MAWC's claims for breach for deducting PPCs and equitable estoppel.¹⁶⁰

The district court refused to dismiss MAWC's claims that CNX and Noble improperly deducted processing costs charged by a CNX affiliate for dry gas that did not require processing.¹⁶¹ Similarly, MAWC raised a triable issue as to whether Noble improperly deducted electricity costs that were not used to compress MAWC's gas.¹⁶²

The district court dismissed MAWC's remaining claims for conversion under the gist of the action doctrine. Under the gist of the action doctrine, a party cannot assert a tort claim against another party to a contract when the gravamen of such a claim is, in actuality, breach of contract.¹⁶³ If the duty is created by the terms of the contract, then the claim sounds in breach of contract; if it derives from a party's "broader social duty owed to all individuals," the claim must be regarded as a tort.¹⁶⁴ The district court found that the duty to pay royalties was purely contractual, hence MAWC's conversion claims were improper.¹⁶⁵

2. *Chambers v. Chesapeake Appalachia, L.L.C.*, 359 F. Supp. 3d 268 (M.D. Pa. 2019).

- The district court denied motion to dismiss lessor's claims for breach of lease's unitization clause and royalty clause

Oil and gas lessors, including the Chambers, brought an action against lessees alleging breaches of unitization clauses and royalty clauses in the leases.¹⁶⁶ The unitization clause provided that:

Lessor hereby grants to the Lessee the right at any time to consolidate the leased premises or any part thereof or strata therein with other lands to form [an] oil, gas, and/or coalbed methane gas development unit of not more than 640 acres, or

160. *Id.* at 473 ("Under the theory of equitable estoppel applicable to contracts, a party's conduct may modify an existing contract if: (1) the conduct induces another contracting party to act in a manner contrary to the agreement's terms, and (2) the other party justifiably relies on this conduct to its detriment." (citing *Kreutzer v. Monterey Cty. Herald Co.*, 747 A.2d 358, 362 (Pa. 2000))).

161. *Id.* at 475-76.

162. *Id.* at 477.

163. *Id.* at 477 (citing *Bruno v. Erie Ins. Co.*, 106A.3d 48, 68 (Pa. 2014)).

164. *Id.*

165. *Id.* at 478 (citing *Rahemtulla v. Hassam*, 539 F. Supp. 2d 755, 777 (M.D. Pa. 2008)).

166. *Chambers v. Chesapeake Appalachia, L.L.C.*, 359 F. Supp. 3d 268, 272 (M.D. Pa. 2019).

such larger unit as may be required by state law or regulation for the purpose of drilling a well thereon and Lessee shall be required to maintain a well density of at least 1 well per 160 acres contained in such unit.¹⁶⁷

Lessees formed the Wootten North Unit containing 300 acres with one well. Lessors alleged that doing so violated the well density requirement in the clause of “1 well per 160 acres contained in such unit.”¹⁶⁸

The lessors also alleged that lessees violated the royalty clauses by deducting post-production costs from gas royalty payments.¹⁶⁹ The leases contained language that was crossed out stating that the royalty would “less or net any post-production costs paid by Lessee to prepare for and/or deliver the oil, gas, and/or coalbed methane gas for sale[.]”¹⁷⁰ Lessee Chesapeake Appalachia, L.L.C., allegedly violated the clause by deducting post-production costs directly while lessee Equinor Onshore USA Properties, Inc. (“Equinor”), allegedly violated the clauses by selling gas at an artificially lower price to an affiliate.¹⁷¹

Lessees argued that the well density requirement only applied to a “larger unit as may be required by state law or regulation” whereas lessors argued it applied to all wells. The district court found that the clause was patently ambiguous as to the proper interpretation. Lessees further argued that under the clause a well was only required for each 160 acres meaning that only a unit of 320 acres would require two wells. On the other hand, lessors argued that a unit with greater than 160 acres required at least two wells. The district court found in favor of lessors, reasoning that lessor’s interpretation “would yield strange results elsewhere in the contracts.”¹⁷² The court denied the motion to dismiss.

Regarding the claim that Equinor violated the royalty clause, the court noted that the claim that Equinor had sold gas at an artificially low price was based on a duty to market the gas.¹⁷³ Lessee noted that the lease expressly disclaimed any implied covenants.¹⁷⁴ Lessors argued that the lease created an express duty for lessee to “market” the gas, by describing

167. *Id.* at 273.

168. *Id.* (internal quotation omitted)

169. *Id.*

170. *Id.*

171. *Id.* at 273-74.

172. *Id.* at 278

173. *Id.* at 279 (citing *Canfield v. Statoil USA Onshore Properties Inc.*, No. CV 3:16-0085, 2017 WL 1078184, at *22 (M.D. Pa. Mar. 22, 2017)).

174. *Id.* at 280.

using the phrase “marketed and used off the premises.” The district court found that lessors’ argument was “reasonable” and that it would avoid “the absurd and unreasonable result that Equinor could sell gas to ENG for a nominal fee and still comply with the leases.”¹⁷⁵ The district court acknowledged that the lease did not broad express duty to market language, but ultimately concluded that “I am not convinced at this early stage that the royalty clauses are unambiguous in the way Equinor suggests.”¹⁷⁶ The district court denied the motion to dismiss the royalty claim against Equinor.

175. *Id.* (citing *W.W. McDonald Land Co. v. EQT Prod. Co.*, 983 F. Supp. 2d 790, 804 (S.D.W. Va. 2013)).

176. *Id.* at 281.