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ONE J

Oil and Gas, Natural Resources, and Energy Journal

VOLUME 7 NUMBER 2

PENNSYLVANIA

*Nathaniel I. Holland,** *Jon C. Beckman*** *& Benedict J. Kirchner****

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A. Introduction

The worldwide COVID-19 pandemic led to the closure of courthouses across Pennsylvania in 2020 and 2021. Although courts and attorneys adapted to the use of video hearings and arguments, the overall volume of oil and gas decisions was down from prior years. Nonetheless, there were a number of noteworthy decisions. The Supreme Court held that oil and gas lessees could not be prosecuted under Pennsylvania's consumer protection law because they were not "sellers" under the statute[1] and rejected the application of the equitable doctrine of abandonment to an oil and gas lease unless there was a finding that the text of the lease did not provide an adequate remedy.[2] On remand from the Supreme Court in a long-running dispute over an alleged trespass from unconventional oil and gas operations, the Superior Court held that landowners failed to sufficiently allege that an operator had trespassed onto their adjacent property via hydrofracturing fluids and proppants.[3] A federal district court held that an oil and gas lease granted the right to transport gas via pipeline from adjacent lands.[4] Another district court ruled in a rare case involving a joint operating agreement that a non-operator's claims were time-barred and additionally barred by an exculpatory provision in the agreement.[5] A district court held that an oil and gas lease with an "at the wellhead" gas royalty clause permitted the lessee to deduct post-production costs.[6] In a final district court decision, the district court, on remand from the Third Circuit Court of Appeals, denied the Delaware River Basin Commission's motion for summary judgment against oil and gas owners who sought a

1. Commonwealth v. Chesapeake Energy Corp., 247 A.3d 934, 936 (Pa. 2021).
2. SLT Holdings, LLC v. Mitch-Well Energy, Inc., 249 A.3d 888 (Pa. Apr. 29, 2021).
3. Briggs v. Sw. Energy Prod. Co., 245 A.3d 1050 (Pa. Super. Ct. December 8, 2020).
4. Walls v. Repsol Oil & Gas USA, LLC, No. 4:20-CV-00782, 2020 WL 5502151 (M.D. Pa. Sept. 11, 2020).
5. Bradford Energy Capital, LLC v. SWEPI LP, No. 17-1231, slip op., 2020 WL 5747841 (W.D. Pa. Sept. 25, 2020).
6. Coastal Forest Resources Company v. Chevron U.S.A., Inc., No. 2:20-cv-1119, 2021 WL 1894596, (M.D. Pa. May 11, 2021).

declaration that the Commission did not have jurisdiction over oil and gas operations.[7]

B. Pennsylvania Supreme Court

1. Com. v. Chesapeake Energy Corp., 247 A.3d 934 (Pa. Mar. 24, 2021).

- The Pennsylvania Supreme Court held that the Commonwealth could not bring claims under the Unfair Trade Practices and Consumer Protection Law against oil and gas lessees based on allegedly unfair and deceptive conduct as a purchaser of mineral estates.

A 6-1 majority of the Pennsylvania Supreme Court halted a lawsuit against multiple oil and gas lessees by the Pennsylvania Office of the Attorney General (OAG) under Pennsylvania's Unfair Trade Practices and Consumer Protection Law (UTPCPL), 73 P.S. §§ 201-1—201-9.3.[8] The OAG filed an action under the UTPCPL for alleged deceptive and anticompetitive practices in obtaining oil and gas leases from landowners.[9] The UTPCPL is a consumer protection law against fraud and deceptive business practices. Lessees filed preliminary objections that they were not "sellers" under the terms of the UTPCPL because they acquired mineral rights from landowners.[10] The preliminary objections were overruled by the trial court, a decision subsequently affirmed in part by the Pennsylvania Commonwealth Court.[11]

The Supreme Court considered whether oil and gas leasing is "trade or commerce" that could trigger actionable claims under the UTPCPL.[12] 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."[13] The definition expressly applies to the sale of things of value, but not expressly to the purchasing of a thing or to the leasing of a thing. The lessees argued that the UTPCPL is designed to

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7. Wayne Land & Mineral Grp., LLC v. Delaware River Basin Comm'n., No. 3:16-CV-897, 2021 WL 54209 (M.D. Pa. Jan. 6, 2021).

8. *Commonwealth v. Chesapeake Energy Corp.*, 247 A.3d 934, 936 (Pa. 2021).

9. *Id.* at 938.

10. *Id.* at 938-39.

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

12. *Com.*, 247 A.3d at 946.

13. *Id.* (citing 73 P.S. § 201-2(3)) (internal quotations omitted).

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protect *consumers* against deceptive behavior of sellers, rather than all parties to a given transaction. The Commonwealth Court disagreed with the lessees and concluded that the UTPCPL protected lessors in this context.[14]

The Supreme Court disagreed. The Supreme Court held that the UTPCPL regulates the conduct of sellers and does not provide a remedy for sellers against buyers.[15] The Court cited the definition of "trade" and "commerce" under the statute, concluding that the UTPCPL prohibits unfair and deceptive practices in the conduct of "advertising, offering for sale, sale or distribution" of goods.[16] The legislature chose to define trade and commerce as only acts of selling for purposes of the UTPCPL. This choice aligns with the intended purpose of the UTPCPL in protecting consumers. In leasing transactions, the lessee was in the position of a buyer not a seller, purchasing rights to the landowners' mineral estates in return for bonuses, royalties and other payments.[17] Therefore, the lessees were not subject to regulation or claims under the UTPCPL.

The Supreme Court also considered whether the OAG's "antitrust" claims were actionable under the UTPCPL. The OAG's additional anti-trust conduct claims were moot as a result of the decision that the alleged deceptive conduct as lessees did not fall under the UTPCPL.[18]

2. SLT Holdings, LLC v. Mitch-Well Energy, Inc., 249 A.3d 888 (Pa. Apr. 29, 2021)

- The Pennsylvania Supreme Court reversed finding of equitable abandonment of an oil and gas lease when lower courts did not consider whether lease provisions directly addressing termination provided an adequate remedy at law.

The leases at issue covered two parcels in Warren County, Pennsylvania. The first contained 350.51 acres and the second contained 1,112.1 acres. The leases were effective in 1985 and contained a five-year primary term that would be extended "for as long hereafter as oil or gas or other substances covered hereby are or can be produced in paying quantities, as determined exclusively by the Lessee, from the leased premises . . . or this lease is otherwise maintained pursuant to the provisions hereof."[19] The

14. *Id.* at 940-41.
15. *Id.* at 946.
16. *Id.*
17. *Id.* at 947 (citing *Com., by Creamer v. Monumental Properties, Inc.*, 329 A.2d 812, 826 (Pa. 1974)).
18. *Id.* at 950.
19. *SLT Holdings, LLC v. Mitch-Well Energy, Inc.*, 249 A.3d 888 (Pa. Apr. 29, 2021).

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leases contained a number of provisions that could extend the term of the lease, including a delay rental provision, a continuous operations clause and a shut-in royalty provision.[20] The leases also contained the following regarding notices of default:

> Default and Election of Remedies - In the event of a default, Lessor agrees to notify Lessee in writing as to the nature of the default and Lessee shall have thirty (30) days ... to cure such default. Lessor agrees that its exclusive remedy shall be to terminate this lease in the event a court ... determines that the default has not been cured ....[21]

The leases contained a drilling commitment that lessee drill one well in the first year and five additional wells per year until 203 wells had been drilled. In the event that lessee failed to meet its drilling commitment, the leases would terminate, but lessee would retain wells that had been drilled and twenty acres (subsequently reduced to five acres by amendment) around each well.[22] The leases also provided for a minimum royalty payment of $5.00 per year if the production royalties did not exceed $5.00.[23]

One oil well was drilled on each lease and there was oil production until 1996. From 1996 to 2013 the lessee failed to make any payments under the leases to the lessors.[24] There was no production from the lands during that time. In addition, the lessee did not maintain continuous drilling operations under the leases.[25] In 2013 lessors, SLT Holdings, LLC, Jack E. McLaughlin and Zureya McLaughlin ("Lessors") filed a complaint in equity against current lessee, Mitch-Well Energy, Inc. ("Mitch-Well"), seeking among other things, a court determination that the leases were abandoned. The trial court granted summary judgment on the abandonment claim and the Superior Court affirmed.[26] On appeal, Mitch-Well argued that the Superior Court failed to give effect to the provisions of the leases, specifically the term clause and the default clause.[27]

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20. *Id.*
21. *Id.* at 891.
22. *Id.*
23. *Id.*
24. *Id.*
25. *Id.*
26. *SLT Holdings, LLC v. Mitch-Well Energy, Inc.*, 217 A.3d 1258 (Pa. Super. Ct. 2019).
27. *SLT Holdings, LLC*, 249 A.3d at 892.

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The Supreme Court determined that the lower courts failed to consider whether the Lessors had an adequate remedy at law before invoking the equitable doctrine of abandonment.[28] The Court also distinguished the present facts from two precedential decisions that discussed the doctrine of abandonment: *Aye v. Philadelphia Co.* and *Jacobs v. CNG Transmission Corp*.[29] *Aye* found an oil and gas lease abandoned after a four-year period after two initial wells drilled were dry. The subject lease did not address the issue of dry wells.[30] In *Jacobs* the district court concluded that the production rights under an oil and gas lease had been abandoned when the lessee made storage rental payments under the lease but did not produce any oil or gas for almost fifty years.[31] The Court concluded that the finding of abandonment in *Jacobs* was dicta because the district court also held that the lease was breached.[32] The Court found that in this case, the lower courts should have made the requisite finding that the lessors lacked an adequate remedy at law before proceeding to grant equitable relief.[33]

The Court concluded that lessors may have an adequate remedy at law under the terms of the contract. Principally, the lease contained the above-quoted requirement that the lessor give lessee notice of a default and an opportunity to cure.[34] Plaintiffs must first show that their legal remedy is inadequate before seeking equitable relief. Here, on summary judgment, the Lessors did not do so.[35] The Court reversed and remanded back to the trial court.

C. Pennsylvania Superior Court

1. Briggs v. Sw. Energy Prod. Co., 245 A.3d 1050 (Pa. Super. Ct. December 8, 2020)

- On remand from the Supreme Court, in a nonprecedential decision the Superior Court affirmed summary judgment in favor

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28. *Id.* at 894-95 (citing *Maritrans GP Inc. v. Pepper, Hamilton & Scheetz*, 529 Pa. 241, 602 A.2d 1277, 1286 (1992); *St. Joe Minerals Corp. v. Goddard*, 14 Pa. Cmwlth. 624, 324 A.2d 800, 802 (1974); *Sexton v. Stine*, 456 Pa. 301, 319 A.2d 666 (1974); Merrick v. Jennings, 446 Pa. 489, 288 A.2d 523 (1972)).

29. *Id.* at 895.

30. *Id.* (citing *Aye v. Philadelphia Co.*, 193 Pa. 451, 44 A. 555, 556 (1899)).

31. *Id.* (citing *Jacobs v. CNG Transmission Corp.*, 332 F.Supp.2d 759, 792 (W.D. Pa. 2004)).

32. *Id.*

33. *Id.* at 897.

34. *Id.*

35. *Id.*

> of oil and gas lessee on trespass claim because landowner failed to allege facts demonstrating physical trespass to subsurface estate.

On remand from the Supreme Court of Pennsylvania,[36] the Superior Court affirmed the trial court's grant of summary judgment in favor of defendant oil and gas operator and against the plaintiff landowners, where the landowners alleged a subsurface trespass to their oil and gas estate.[37]

The plaintiff-landowners, the Briggs, sued operator Southwestern Energy Production Company ("Southwestern") for trespassing on their lands by drilling and hydraulically fracturing unconventional wells on an adjacent property.[38] Southwestern moved for summary judgment on the Briggs' claims citing the rule of capture. The rule of capture is a "fundamental principle of oil-and-gas law holding that there is no liability for drainage of oil and gas from under the lands of another sold long as there has been no trespass."[39] The trial court granted summary judgment in favor of Southwestern applying the rule of capture.[40]

The Briggs appealed the trial court order in 2018. On direct appeal, the Superior Court reversed the trial court. The Superior Court distinguished unconventional oil and gas operations from conventional operations, citing the costs of drilling unconventional wells and the use of technology to influence drainage.[41] The operator subsequently appealed to the Supreme Court of Pennsylvania.

The Supreme Court vacated the Superior Court's order and remanded for further proceedings, finding that the Superior Court erred by holding the rule of capture did not apply to unconventional development. The Supreme Court remanded the case to the Superior Court to consider whether the Briggs sufficiently alleged that fractures, proppant or fluids entered their lands from the parcel being developed. Without a physical trespass, the rule of capture precluded liability.[42]

On remand, the Superior Court affirmed the trial court's initial ruling in favor of the operator. The Briggs did not allege that Southwestern drilled onto their property or that it propelled proppants and fluids onto their

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36. *See Briggs v. Sw. Energy Prod. Co.*, 224 A.3d 334 (Pa. 2020).
37. *Briggs v. Sw. Energy Prod. Co.*, 245 A.3d 1050 (Pa. Super. Ct. 2020).
38. *Id.* at *1.
39. *Id.* at f. 2 (quoting Black's Law Dictionary (10th ed. 2014)).
40. *Id.* at *1.
41. *Briggs v. Sw. Energy Prod. Co*., 184 A.3d 153 (Pa. Super. Ct. 2018).
42. *Briggs*, 245 A.3d 1050 at *3.

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property.[43] Without allegations of a physical intrusion, the Briggs' claim for trespass failed.[44]

D. Federal District Court

1. Walls v. Repsol Oil & Gas USA, LLC, No. 4:20-CV-00782, 2020 WL 5502151 (M.D. Pa. Sept. 11, 2020)

- District Court granted a motion to dismiss in favor of an oil and gas operator affirming the operator's right to construct a pipeline under an oil and gas lease and transport gas from off the leasehold premises.

William M. Walls, James Oakes and Francis X. Oakes ("Landowners") entered into an oil and gas lease in 2002 ("Lease") that contained the following clause granting the initial lease operator, Victory Energy Corporation, and its subsequent assignee, Repsol Oil and Gas USA LLC ("Lessee"), the rights of:

> [d]rilling, producing, and otherwise operating for oil and gas and their constituents, including the right to conduct geophysical, seismic and other exploratory tests, and of laying pipe lines, and building tanks, roads, stations, and electric power lines, houses for valves, meters, regulators and other appliances, with all rights and privileges necessary, incident to or convenient for the operation of this land alone and [conjointly] with neighboring lands[45]

The Lessee pooled the Lease acreage into a gas production unit. In 2019, the Lessee began constructing a pipeline system on the leasehold to transport gas from the production unit, but also from lands that were not a part of the unit. The Landowners and the Lessee attempted to negotiate a separate pipeline agreement but failed. The Lessee constructed the pipeline under the rights granted in the Lease.[46]

The Landowners filed a lawsuit in the Court of Common Pleas of Tioga County seeking a declaratory judgment that the Lease did not authorize the construction of the pipeline or Lessee's use of the pipeline to transport gas from units that did not contain any of the Lease acreage. Lessee removed

43. *Id.* at *4.
44. *Id.*
45. *Walls v. Repsol Oil & Gas USA, LLC*, No. 4:20-CV-00782, 2020 WL 5502151, at 6 (M.D. Pa. Sept. 11, 2020).
46. *Id.* at1.

the action to federal court and filed a motion to dismiss because Landowners failed to state a claim upon which relief can be granted.[47]

The United States District Court for the Middle District of Pennsylvania agreed with Lessee and dismissed the complaint. The District Court found the plain language of the Lease unambiguous and finding no ambiguity, the District Court looked to the written Lease to determine the intent of the parties. The District Court concluded that "Plaintiffs agreed to a contract granting the lessee . . . authority to perform a set number of tasks, including 'laying pipe lines.'"[48]

Furthermore, the District Court explained that beyond the aforesaid enumerated rights, the Landowners granted Lessee "all other rights and privileges necessary, incident to or convenient for" the operation of the Lease acreage and neighboring lands.[49] Stated another way, the District Court said that "only the rights and privileges not specifically enumerated in the Lease must be 'necessary, incident to or convenient for' the operation of the land."[50] The District Court found that the granting clauses permitted the lessee the right to lay pipelines on the Lease lands, without restriction or limitation. As a result, the District Court granted Lessee's motion to dismiss.

2. Bradford Energy Capital, LLC v. SWEPI LP, No. 17-1231, slip op., 2020 WL 5747841 (W.D. Pa. Sept. 25, 2020).

- District Court granted summary judgment in favor of oil and gas operators where a non-operator's claims for breach of an operating agreement were barred by the statute of limitations and precluded by the exculpatory clause of the operating agreement.

The United States District Court for the Western District of Pennsylvania granted summary judgment in favor of oil and gas operators when a non-operator's claims for breach of joint operating agreement were barred by the statute of limitations and precluded by the exculpatory clause of the operating agreement.[51] Plaintiff Bradford Drilling Associates XXVII L.P. ("Bradford Drilling") entered into a Cost Plus Drilling and Operating

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47. *Id.*
48. *Id.* at 6.
49. *Id.*
50. *Id.*
51. *Bradford Energy Capital, LLC v. SWEPI LP*, No. 17-1231, slip op., 2020 WL 5747841 (W.D. Pa. Sept. 25, 2020).

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Agreement ("Operating Agreement") with East Resources, Inc. in 2009.[52] Plaintiff Bradford Energy Capital, LLC ("Bradford Energy") was the general managing partner of Bradford Drilling. East Resources was the designated "Operator" under the Operating Agreement and had exclusive decision-making authority with regard to the operation of oil and gas wells.[53] Bradford Drilling was a designated "Non-operator" under the Operating Agreement.[54] Bradford Drilling did not have decision-making authority.

The Operating Agreement contained an exculpatory clause limiting the Operator's liability to conduct resulting from the Operator's gross negligence or willful misconduct.[55] East Resources drilled a number of wells under the Operating Agreement in 2009, including the "Fitch Well" in Tioga County. The Fitch Well was completed in 2010 but appeared to have some irregularities during East Resources' completion that would affect productivity of the well.[56]

In 2010, East Resources merged with and into Royal Dutch Shell PLC ("SWEPI"). SWEPI became the Operator under the Operating Agreement and of the Fitch Well. SWEPI never developed the Fitch Well or put it into production.[57] Instead, SWEPI sought to place the Fitch Well on inactive status in 2012—meaning the well is capable of production but not producing.[58] Beginning in 2012, representatives from Bradford Energy expressed concern to SWEPI that the Fitch Well had not been placed into production.[59] SWEPI responded but did not indicate the Fitch Well would be placed into production any time soon.

In 2017, SWEPI sold its assets in Tioga County, including the Fitch Well, to Rockdale Marcellus LLC ("Rockdale"). Rockdale became the Operator under the Operating Agreement.[60] Bradford Energy and Bradford Drilling (together, "Bradford") filed suit on June 29, 2017, in the Court of Common Pleas of Allegheny County against SWEPI for breach of the Operating Agreement. SWEPI removed to federal court and Rockdale

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52. *Id.* at 3.
53. *Id.*
54. *Id.*
55. *Id.* at 4.
56. *Id.* at 6.
57. *Id.*
58. *Id.*
59. *Id.* at 7.
60. *Id.* at 8.

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intervened.[61] Bradford alleged that SWEPI breached the Operating Agreement by failing to connect the Fitch Well to a gathering system and that Rockdale assumed liability for SWEPI's breach under the asset Purchase and Sale Agreement entered by SWEPI and Rockdale.[62]

Rockdale filed its motion for summary judgment on two grounds: first, that Bradford's claims were barred by the statute of limitations, and second, that the exculpatory clause in the Operating Agreement precluded a finding of liability.[63] The District Court agreed on both accounts and granted judgment in Rockdale's favor as a matter of law.[64]

The District Court concluded that Pennsylvania's four-year statute of limitations for breach of contract actions applied to Bradford's claims.[65] Because Bradford commenced its action on June 29, 2017, its claims would be time barred if the cause of action accrued before June 30, 2013. Bradford admitted in its court submissions and through its witnesses that the alleged breach occurred in 2011. Under that admission, the District Court held that the statute of limitations precluded the claim.

The District Court noted in its analysis of the breach of contract claim that Bradford alleged SWEPI violated the Operating Agreement by failing to connect the Fitch Well to a nearby pipeline. Bradford's witnesses testified that a gathering system was completed in 2011. Bradford's expert witness gave an opinion that the breach occurred no later than January 2012.[66]

The District Court also looked at Bradford's prayer for relief, which sought damages dating back to January 1, 2012—i.e., the date the breach occurred. As such, the statute of limitations began to run no later than January 1, 2012, unless Bradford could show that an exception applied. Bradford's awareness that the Fitch Well was not producing and its communications with SWEPI demonstrated that Bradford knew of the alleged breach and simply failed to file a lawsuit. The District Court held that no exception applied, and the action was barred by the statute of limitations.[67]

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61. *Id.* at 9.
62. *Id.*
63. SWEPI also filed a motion for summary judgment arguing that any liability it may have had transferred to Rockdale pursuant to the asset sale. The court found SWEPI's motion mooted by its decision on Rockdale's motion for summary judgment.
64. *Id.* at 14, 18.
65. *Id.* at 11.
66. *Id.* at 12.
67. *Id.* at 14.

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The District Court next concluded that Rockdale could not be liable to Bradford for not putting the Fitch Well into production because that action fell within the Operating Agreement's exculpatory clause.[68] To prove liability and avoid the exculpatory clause, Bradford needed to show that SWEPI's decision not to put the Fitch Well into production constituted gross negligence or willful misconduct. Bradford could not rely upon a simple breach of the Operating Agreement or allegations of negligence.[69]

Gross negligence is behavior that is "flagrant, grossly deviating from the ordinary standard of care."[70] Willful misconduct is conduct where "the actor desired to bring about the result that followed, or at least that he was aware that it was substantially to ensure."[71] Considering the facts available to SWEPI at the time of the alleged conduct, the District Court concluded that SWEPI did not act with gross negligence or willful misconduct.

SWEPI looked at the data showing the Fitch Well experienced issues during completion and made a determination that it was not economical to produce the well. Bradford alleged that SWEPI was grossly negligent and exhibited willful misconduct because it should have known the Fitch Well would be highly productive.[72] The District Court concluded that Bradford's evidence did not establish a genuine question of fact as to whether the pre-2012 data available to SWEPI demonstrated that putting the Fitch Well into production would result in substantial profits to both SWEPI and Bradford.[73] Because there was no gross negligence or willful misconduct, the District Court held that SWEPI's decision not to put the Fitch Well into production fell within the Operating Agreement's exculpatory clause and granted summary judgment in favor of the defendants.[74]

3. Coastal Forest Resources Company v. Chevron U.S.A., Inc., No. 2:20-cv-1119, 2021 WL 1894596, (M.D. Pa. May 11, 2021).

- District Court granted a motion to dismiss a breach of contract suit claiming an oil and gas lessee improperly deducted post-production costs from royalty payments.

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68. *Id.* at 18.
69. *Id.* at 15.
70. *Id.* at 15 (quoting *Albright v. Abington Mem'l Hosp.*, 696 A.2d 1159, 1164 (Pa. 1997) (quoting *Bloom v. DuBois Regional Medical Center*, 597 A.2d 671, 679 (Pa. Super. Ct. 1991)).
71. *Id.* (quoting *Evans v. Philadelphia Transp. Co.*, 212 A.2d 440, 443 (Pa. 1965); *Renk v. City of Pittsburgh*, 641 A.2d 289, 293 (Pa. 1994)).
72. *Id.* at 17.
73. *Id.* at 18.
74. *Id.*

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Plaintiff oil and gas lessor Coastal Forest Resources Company ("Coastal") filed claims for breach of contract and accounting against oil and gas lessee Chevron USA Inc. ("Chevron") for alleged improper deductions from lease royalties.[75] Chevron filed a motion to dismiss for failing to state a claim under Federal Rule of Civil Procedure 12(b)(6).[76]

The lease contained the following gas royalty provision in relevant part:

> Gas: To pay Lessor as royalty for all gas and the constituents thereof, including all liquid, solid or gaseous substances produced and saved from any sand or sands on the leases premises, an amount equal to five-thirty-seconds (5/32) or 15.625% of the gross sales price received by Lessee from the sale of such gas and the constituents thereof *at the wellhead*.[77]

The District Court first reviewed *Kilmer v. Elexco Land Services, Inc.*,[78] in which the Pennsylvania Supreme Court considered whether oil and gas leases that calculated royalties by using the netback method violated the Guaranteed Minimum Royalty Act ("GMRA").[79] "Under the net-back method, royalties are paid subject to the right of the operator to recoup its post-production expenses."[80] Royalties are calculated as one-eighth of the sale price of the gas minus one-eighth of the post-production costs of bringing that gas to market. After considering a variety of industry specific treatises that broadly defined the term "royalty" the Pennsylvania Supreme Court concluded that the GMRA should be interpreted to permit "the calculation of royalties at the wellhead, as provided by the net-back method."[81]

The District Court rejected Coastal's contention that *Kilmer* was a case of narrow statutory interpretation limited to the construction of the GMRA and was not meant to provide an expansive definition that would allow the net-back method to be used when "at the wellhead" language is present.[82] The case cited by Coastal, *Marburger v. XTO Energy, Inc.*, was distinguishable because the royalty provision there did not use the term "at

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75. *Coastal Forest Resources Company v. Chevron U.S.A., Inc.*, No. 2:20-cv-1119, 2021 WL 1894596, 1 (M.D. Pa. May 11, 2021).

76. *Id.* at 1.

77. *Id.* at 2 (emphasis provided).

78. 605 Pa. 413, 990 A.2d 1147 (Pa. 2010).

79. *Coastal Forest Resources Company*, 2021 WL 1894596 at 3; *see* 58 P.S. § 33.1

80. *Id.* at 2.

81. *Id.* at 4 (quoting *Kilmer*, 990 A.2d at 1158).

82. *Id.*

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the wellhead."[83] The District Court noted that the royalty owners could not point to any cases where "at the wellhead" was not found to permit deduction of post-production costs.[84]

The District Court concluded that "the Pennsylvania Supreme Court's determination was broad and should be afforded broad application whenever the term 'at the wellhead' is used."[85] Citing the express language of the lease which stated royalties are calculated "at the wellhead," the District Court concluded that the lease "expressly and unequivocally" allowed the lessee to deduct costs incurred while getting the gas to the market. Because there was no breach of the lease, the District Court granted Chevron's motion and dismissed Coastal's claims for breach of contract and accounting.[86]

4. Wayne Land & Mineral Grp., LLC v. Delaware River Basin Comm'n., No. 3:16-CV-897, 2021 WL 54209 (M.D. Pa. Jan. 6, 2021).

- The District Court denied motion for summary judgment by the Delaware River Basin Commission on claims that natural gas drilling operations constituted "projects" under the Delaware River Basin Compact requiring permits from the Commission.

Plaintiff Wayne Land and Mineral Group, LLC ("WLMG") filed a complaint against the Defendant Delaware River Basin Commission (the "DRBC") seeking declaration that the DRBC did not have jurisdiction over oil and gas projects.[87] The DRBC filed a motion for partial summary judgment asking the court to declare that WLMG's ("Plaintiff") planned activities of drilling for natural gas and related uses of land constituted a project within the meaning of the Delaware River Basin Compact.[88] The court denied said motion and did not grant summary judgment to the DRBC.

On May 17, 2016, WLMG filed a complaint against the DRBC. In the Complaint, Plaintiff asks the Court to enter a declaratory judgment holding that DRBC 'does not have jurisdiction over, or the authority to review and approve, or to require WLMG to seek prior approval from the [DRBC] for,

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83. *Id.* at 5 (citing *Marburger v. XTO Energy, Inc.*, No. 15-910, 2016 WL 11659184 (W.D. Pa. Jan. 26, 2016)).
84. *Id.* at 6.
85. *Id.* at 6.
86. *Id.* at 7.
87. *Wayne Land & Mineral Grp., LLC v. Delaware River Basin Comm'n*, No. 3:16-CV-897, 2021 WL 54209 (M.D. Pa. Jan. 6, 2021).
88. *Id.* at 1.

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or to otherwise preclude the development of, WLMG's proposed well pad, appurtenant facilities or the related activities to be carried out on the Property."[89] On March 23, 2017, the District Court granted the DRBC's motion to dismiss. This was appealed to the United States Court of Appeals for the Third Circuit who vacated the District Court's order and remanded for further proceedings.[90]

At issue was the power of the DRBC to declare the intended operations of WLMG as a project subject to the DRBC's approval. The DRBC was created under the Delaware River Basin Compact (the "Compact"), which was entered into by Delaware, New Jersey, New York, and Pennsylvania, on November 2, 1961. The DRBC "is tasked with the adoption and promotion of uniform and coordinated policies for water conservation, control, use and management in the Delaware River Basin."[91] Section 3.8 of the Compact defines a "project" as, "any work, service or activity which is separately planned, financed, or identified by the commission, 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[.]"[92] The District Court held that Plaintiff's planned activities were a project as defined under the Compact. The Circuit Court using a contract law analysis disagreed, holding that, "the proposed activities constituted a 'project,' concluding that 'the meaning of the word 'project' as used in the compact is ambiguous' and, therefore, the district court's decision on the merits was premature."[93]

The WLMG owned land in Wayne County, Pennsylvania, a portion of which lies within the Delaware River Basin and that they intended to drill for natural gas using hydraulic fracturing and follow a wastewater management plan. The District Court proceeded to analyze the term "project" first as it pertained to the express terms of the Compact. The DRBC acknowledged that although some of the proposed activities of WLMG, including hydraulic fracturing, were for the purpose of extracting natural gas, other activities were "for the purpose of managing wastewater

89. *Id.*

90. *Wayne Land & Min. Grp., LLC v. Delaware River Basin Comm'n*, 959 F.3d 569 (3d Cir. 2020).

91. *Wayne Land & Mineral Grp., LLC*, 2021 WL 54209 at 2.

92. *Id.*

93. *Id.* at 3.

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and protecting and conserving water resources."[94] The DRBC argued that "the literal language of the definition of 'project' compels the conclusion that WLMG's wastewater activities and structures constitute a 'project.'"[95] The WLMG responded that the activities identified by DRBC did not satisfy the Compact definition of project because they were not a separate entity for purpose of evaluation as required by the definition of "project" under § 1.2(g) of the Compact.[96] The District Court determined that there was ambiguity in the definition of "project" under the Compact.

The District Court looked at the legislative history of the Compact, the Compact's course of performance, and other interstate compacts. The WLMG asserted that "'Projects,' as that term was used and understood by those involved in [sic] history and negotiation of the Compact, meant water resource development undertakings like reservoirs. Second, ... by no means did those involved use or understand the term 'project' to encompass individual pieces of equipment like the pieces of equipment identified in the Commission's motion."[97] The DRBC asserted that "project" should encompass anything that they have the "authority over control and development of water resources within the Basin including 'water supply, pollution control, flood protection, watershed management, recreation, hydroelectric power, and the regulation of withdrawals and diversions of water.'"[98] The District Court concluded that the legislative history did not sufficiently support the DRBC's summary judgment motion.

As to the course of performance, the DRBC cited a 1964 amendment to its comprehensive plan:

> The underground water resources of the Basin shall be utilized, conserved, developed, managed and controlled in view of the needs of present and future generations, and of the resources available to them. To that end, the use, interference, impairment, *penetration* or artificial recharge of *an aquifer* or of any other underground water resource *shall be subject to review and evaluation under the Compact*.[99]

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94. *Id*. at 9.
95. *Id*.
96. *Id*. at 10.
97. *Id*. at 12.
98. *Id*.
99. *Id*. at 14 (emphasis in original).

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The DRBC argued that because the WLMG's proposed activities would penetrate an aquifer and return wastewater to the surface, its actions should be subject to DRBC review.[100] The WLMG refuted this stating that:

> until its recent assertion of jurisdiction over gas wells, and now their component parts, the Commission routinely exercised jurisdiction over prototypical water resource development and management projects. Doc. 175 at 42. The Commission reviewed water supply wells, industrial and public water supplies, wastewater treatment plants, navigation projects and surface water outtakes. Id. The Commission, however, did not review any of the thousands of residential, commercial or industrial developments in the Basin or their component parts.[101]

Due to the disagreement about the course of performance, the District Court declined to assess the arguments during pretrial motions.[102]

Lastly, the court looked at other interstate compacts, notably the Susquehanna River Basin Compact ("SRBC"), which was enacted in 1970 by Maryland, New York, Pennsylvania, and the United States. The parties agreed that the definition of "project" under the SRBC was similar to that under the Compact. The DRBC stated that "the Susquehanna River Basin ("SRBC") by regulation has identified unconventional natural gas development and hydrocarbon development as 'projects' as defined in the Susquehanna River Basin Compact, a definition similar to the definition of 'project' in the Delaware River Basin Compact."[103] The WLMG disagreed, focusing again that their proposed activities were for hydrocarbon development and not "for the conservation, utilization, control, development or management of water resources."[104] The WLMG argued that because the SRBC permitted natural gas development activities "pursuant to a permit-by-rule process" persons seeking to develop their natural gas rights had not had sufficient reason to challenge the SRBC's jurisdiction."[105] Ultimately the District Court denied the motion for summary judgment because of the ambiguity related to the term "project" found by both it and the Circuit Court.[106]

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100. *Id.* at 15.
101. *Id.* at 16.
102. *Id.* at 17.
103. *Id.* at 17.
104. *Id.*
105. *Id.* at 18.
106. *Id.* at 19.

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