SUPREME COURT OF PENNSYLVANIA

Nos. 81 & 82 MAP 2019

COMMONWEALTH OF PENNSYLVANIA,
Appellee,
v.
CHESAPEAKE ENERGY CORPORATION; CHESAPEAKE APPALACHIA, L.L.C., CHESAPEAKE OPERATING L.L.C., CHESAPEAKE ENERGY MARKETING L.L.C., ANADARKO PETROLEUM CORPORATION, AND ANADARKO E&P ONSHORE L.L.C.,
Appellants.

Brief of Amici Curiae the Chamber of Commerce of the United States of America, the Pennsylvania Chamber of Business and Industry, and the National Association of Manufacturers in Support of Appellants

Appeal from the March 15, 2019 Order of the Commonwealth Court, Docket Nos. 58 & 60 CD 2018, affirming the December 15, 2017 Order of the Court of Common Pleas of Bradford County, Docket No. 2015IR0069

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STATEMENT OF INTEREST

The Chamber of Commerce of the United States of America ("U.S. Chamber") is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the U.S. Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the U.S. Chamber regularly files amicus curiae briefs in cases that raise issues of concern to the nation's business community.

The Pennsylvania Chamber of Business and Industry ("PA Chamber") is the largest broad-based business advocacy association in Pennsylvania. Thousands of its members throughout the Commonwealth and from every industry sector employ more than 50% of Pennsylvania's private workforce. The PA Chamber's mission is to improve Pennsylvania's business climate for its members.

The National Association of Manufacturers ("NAM") is the largest manufacturing association in the United States, representing small and large manufacturers in every industrial

sector and in all 50 states. Manufacturing employs more than 12 million men and women, contributes $2.25 trillion to the U.S. economy annually, has the largest economic impact of any major sector, and accounts for more than three-quarters of all private-sector research and development in the nation. The NAM is the voice of the manufacturing community and the leading advocate for a policy agenda that helps manufacturers compete in the global economy and create jobs across the United States.

The U.S. Chamber, the PA Chamber, and the NAM file this brief in order to assist the Court in evaluating the Attorney General's ability to create new antitrust causes of action and remedies through Pennsylvania's Unfair Trade Practices and Consumer Protection Law[1] (the "UTPCPL"), even though no such causes of action or remedies are available under the plain text of the statute and the General Assembly has repeatedly declined to pass antitrust legislation. The U.S. Chamber, the PA Chamber, and the NAM also explain the various policy considerations that counsel in favor of construing the UTPCPL as written—without implicating antitrust principles or

[1] Act of December 17, 1968, P.L. 1224, *as amended*, 73 P.S. § 201-1 – 201-9.3.

remedies—rather than allowing the Attorney General to engraft such causes of action and remedies onto existing legislation.

No one other than the *amici*, their members, or their counsel paid for the preparation of this *amici curiae* brief or authored this brief, in whole or in part.

ARGUMENT

This Court should not approve the Attorney General's attempt to engraft onto a consumer protection statute antitrust causes of action and remedies that the General Assembly has repeatedly rejected.

The question before the Court is of considerable importance to the business community in Pennsylvania: may the Commonwealth pursue antitrust remedies under the Unfair Trade Practices and Consumer Protection Law? For a variety of reasons, it is clear that the Commonwealth, through the Office of the Attorney General, cannot.

A. This Court has consistently recognized that matters of public policy and the creation of causes of action and remedies are within the exclusive domain of the General Assembly.

For decades, this Court has recognized an important principle of the Commonwealth government's tripartite structure: that "it is for the legislature to formulate the public policies of the Commonwealth." *Weaver v. Harpster*, 975 A.2d

555, 563 (Pa. 2009). As a result, "[t]he power of the courts to declare pronouncements of public policy is sharply restricted." *Id.* Accordingly, while "it is the Legislature's chief function to set public policy," it is "the courts' role to enforce that policy, subject to constitutional limitations." *Program Admin. Servs., Inc. v. Dauphin Cty. Gen. Auth.*, 928 A.2d 1013, 1017-18 (Pa. 2007).

Despite this well-established principle, the Attorney General here is attempting, through the use of the courts, to create antitrust causes of action and remedies where no such causes of action or remedies have been created by the General Assembly. This attempt should be rejected as an improper usurpation of the General Assembly's exclusive role as the Commonwealth's policymaker. Any other result would upend the structure of the Commonwealth's government and threaten the delicate balance of power created in its Constitution.

This Court has ample experience adhering to these important constitutional principles. Indeed, the Attorney General's action here is not the first time this Court has been asked to expand statutorily-created rights or causes of action. And in keeping with the discrete roles of the legislature and the

judiciary, this Court has repeatedly rejected such requests in the absence of an express directive from the legislature. *See, e.g.*, *Benson ex rel. Patterson v. Patterson*, 830 A.2d 966, 967-68 (Pa. 2003); *D'Ambrosio v. Pa. Nat'l Mut. Cas. Ins. Co.*, 431 A.2d 966, 970 (Pa. 1981), *superseded by statute*, 42 Pa.C.S. § 8371. The Court should reach the same result here.

This Court's analysis in *Weaver* is particularly instructive. In that case, the Court refused to recognize a common law cause of action for workplace discrimination based on sex because the employer was not covered by the Pennsylvania Human Relations Act (the "PHRA"). *Weaver*, 975 A.2d at 556-57. The Court recognized the strong presumption against creating common law causes of action for wrongful discharge, except where the discharge violates the "clear mandate of public policy." *Id.* at 563. The Court emphasized that such policymaking is for the legislature, and "the power of the courts to declare pronouncements of public policy is sharply restricted." *Id.*

In refusing to recognize a common law cause of action, the Court relied on the General Assembly's policy decision to exempt small employers from the PHRA. The Court explained

that "[t]he legislature has had the opportunity to argue the merits of exempting small employers from compliance and to decide exactly where it should establish the threshold. It explicitly chose not to extend the protections against discrimination to employees of small employers." *Id.* at 569. "The wisdom of [that] decision [was] not before" the Court, and "[w]here the legislature has spoken, [the Court] will not interpret statutory provisions to advance matters of public interest." *Id.* The Court determined that "[e]xtending protections afforded by a statute beyond its explicit limitations would require the courts to act as a super-legislature." *Id.* This it was not allowed to do.

The Attorney General's lawsuit in this case presents the same situation. The Attorney General is attempting to assert antitrust causes of action and recover antitrust remedies through the UTPCPL. But the UTPCPL is not an antitrust statute. Rather, it is a statute meant for "fraud prevention." *Commonwealth ex rel. Creamer v. Monumental Props., Inc.*, 329 A.2d 812, 816 (Pa. 1974).

Moreover, the fact that the General Assembly has had numerous opportunities to enact an antitrust statute but has

rejected each opportunity should counsel against the courts reading an antitrust remedy into the UTPCPL. As discussed by Judge Covey in her dissent in this case, twenty-six different antitrust bills have been presented to the General Assembly, and the General Assembly has declined to adopt each of them. *Anadarko Petroleum Corp. v. Commonwealth*, 206 A.3d 51, 67 & n.6 (Pa. Cmwlth. 2019) (Covey, J., dissenting). This pattern has endured over many years, despite changes in the composition of the General Assembly and the executive branch.

By attempting to insert antitrust causes of action and remedies into the UTPCPL, the Attorney General is asking the courts to make public policy where the legislature has so far refused to do so. Yet, this Court has already recognized that "it is not the role of the judiciary to legislate changes in the law which our legislature has declined to adopt." *Benson*, 830 A.2d at 978. Allowing the Attorney General's antitrust claims to proceed now would upend decades of sound judicial policy that is based on the Commonwealth's governmental structure.

Antitrust law is far from one of "the clearest of cases [where] a court [may] make public policy the basis of its decision." *Weaver*, 975 A.2d at 593. Nor is this a situation

where a court can declare public policy because "a given policy is so obviously for or against public health, safety, morals, or welfare that there is a virtual unanimity of opinion in regard to it." *Mamlin v. Genoe (City of Philadelphia Police Beneficiary Ass'n)*, 17 A.2d 407, 409 (Pa. 1941). The fierce debates in the General Assembly over enacting an antitrust law, and the exact contours of such a law, demonstrate as much. Any ruling by the judiciary to create an antitrust statute out of the UTPCPL would involve precisely the type of judicial policymaking this Court has refused to sanction.

Accordingly, under this Court's longstanding principles, the Attorney General's current attempts to bring antitrust causes of action and remedies under the UTPCPL, without any authorization from the General Assembly, must fail. The General Assembly has exercised its policymaking authority by repeatedly voting not to enact antitrust laws for the Commonwealth. That wisdom cannot be second-guessed by the Attorney General or by the judicial system. *See Snyder Bros. Inc. v. Pa. Pub. Util. Comm'n*, 198 A.3d 1056, 1083-84 (Pa. 2018) (Wecht, J., concurring) ("The only relevant policy-based concern entertained by a court engaging in statutory (as distinct

from common law) construction is the policy evinced by the statute, established by the legislative branch of our government. It is a legislative function to establish policy, and a judicial function to find and then apply that policy, subject always to constitutional limitations."). This Court should reverse the order of the Commonwealth Court insofar it held or implied that the Attorney General has the authority to bring antitrust claims under the UTPCPL.

B. By its plain language, the UTPCPL does not include antitrust causes of action, nor permit antitrust remedies.

Rather than acknowledging the attempt to shoehorn antitrust causes of action and remedies into the UTPCPL, the Attorney General has consistently maintained that the claims brought here are already encompassed within existing provisions of the UTPCPL. In particular, the Attorney General relies on the "catchall" provision, which states that "[e]ngaging in any other fraudulent or deceptive conduct which creates a likelihood of confusion or of misunderstanding" constitutes a violation of the UTPCPL. 73 P.S. § 201-2(4)(xxi).

It is axiomatic that the "object of all interpretation and construction of statutes is to ascertain and effectuate the

intention of the General Assembly." 1 Pa.C.S. § 1921(a). "To accomplish that goal, [courts] interpret statutory language not in isolation, but with reference to the context in which it appears." *Commonwealth v. Kingston*, 143 A.3d 917, 922 (Pa. 2016). "When the words of a statute are clear and free from all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit." 1 Pa.C.S. § 1921(b).

The Attorney General's interpretation of the UTPCPL runs afoul of each of these canons of statutory construction.

Contrary to the Attorney General's arguments, there is no indication that the General Assembly intended to include antitrust causes of action and remedies within the catchall provision—or any provision—of the UTPCPL. Rather, as this Court recognized in *Monumental Properties*, "the statute's underlying foundation is fraud prevention." 329 A.2d at 816; *see also id.* at 817 ("[T]he Consumer Protection Law was in relevant part designed to thwart fraud in the statutory sense."). The UTPCPL was the General Assembly's attempt, through "certain modest adjustments, to ensure the fairness of market transactions." *Id.* at 816. As a result, "[n]o sweeping changes in legal relationships were occasioned by the Consumer

Protection Law, since prevention of deception and the exploitation of unfair advantage has always been an object of remedial legislation." *Id.*

In this respect, the Court considered the UTPCPL to be akin to classic examples of fraud-elimination statutes such as the statute of frauds, the statute of limitations, and the statute of wills. *Id.* at 816 n.9. The Court also compared the UTPCPL to modern anti-fraud statutes, such as the federal Securities Act of 1933, the federal Securities Exchange Act of 1934, Pennsylvania's Uniform Fraudulent Conveyance Act, and the Pennsylvania Securities Act. *Id.* Notably absent from this list is any sort of antitrust statute. It is illogical to presume that the General Assembly surreptitiously intended to include antitrust causes of action and remedies in the UTPCPL under the guise of a "modest" anti-fraud statute effectuating "no sweeping changes." *Id.*; *see also* 1 Pa.C.S. § 1922 (explaining that, "[i]n ascertaining the intention of the General Assembly," it can be presumed that "the General Assembly does not intend a result that is absurd, impossible of execution or unreasonable").

The text of the statute also belies any interpretation that includes antitrust causes of action or remedies within the

catchall provision. The statute carefully defines twenty specific instances of what constitutes "unfair methods of competition" and "unfair or deceptive acts or practices." 73 P.S. § 201-2(4)(i)-(xx). The definition also includes the catchall provision as a twenty-first subsection. 73 P.S. § 201-2(4)(xxi). Despite its nickname, the catchall provision does not actually encompass every commercial activity that the Attorney General may consider "unfair" and want to penalize. Rather, to understand the catchall provision, the Court must again turn to the well-established tools of statutory construction.

Two principles are particularly appropriate here. The first is *ejusdem generis*, meaning "of the same kind or class." Under this principle, "where general words follow the enumeration of particular classes of persons or things, the general words will be construed as applicable only to persons or things of the same general nature or class as those enumerated." *McClellan v. Health Maint. Org. of Pa.*, 686 A.2d 801, 806 (Pa. 1996).

The second, related concept is *noscitur a sociis*, which recognizes that "the meaning of words may be indicated or controlled by those words with which they are associated."

Northway Village No. 3, Inc. v. Northway Props., Inc., 244 A.2d 47, 50 (Pa. 1968). Put more succinctly, "[w]ords are known by the company they keep." *Id.* This rule "avoid[s] ascribing to one word a meaning so broad that it is inconsistent with its accompanying words, thus giving unintended breadth to the Acts" of the legislature. *Gustafson v. Alloyd Co., Inc.*, 513 U.S. 561, 575 (1995) (internal quotation omitted).

Applying these principles, it is clear that the catchall provision must be interpreted in the context of the twenty specifically enumerated examples of "unfair methods of competition" and "unfair or deceptive acts or practices." And none of these twenty examples encompasses antitrust claims. The first five examples address misleading sourcing, certification, or approval of goods or services. 73 P.S. § 201-2(4)(i)-(v). The next two examples involve the condition or quality of the goods being offered for sale. 73 P.S. § 201-2(4)(vi)-(vii). The eighth example addresses disparagement of another's goods, services, or business; and examples nine through thirteen involve advertising and promotions. 73 P.S. § 201-2(4)(viii)-(xiii). The next three examples involve warranties and repairs. 73 P.S. § 201-2(4)(xiv)-(xvi). There are

also provisions governing telephone and mail communications, 73 P.S. § 201-2(4)(xvii), (xix), as well as a provision banning confessions of judgment for consumer transactions. 73 P.S. § 201-2(4)(xviii). Finally, there is a provision specific to rustproofing of motor vehicles. 73 P.S. § 201-2(4)(xx).

Following the rules of *ejusdem generis* and *noscitur a sociis*, the catchall provision cannot be read to incorporate antitrust principles where no similar principles are included in the enumerated list of twenty specific UTPCPL violations. Yet this is precisely what the Attorney General seeks to do. Because there is no basis to conclude that the General Assembly intended antitrust violations to fall within the purview of the UTPCPL, and because traditional canons of statutory construction mandate against such a result, the Attorney General's attempts should be rejected. Accordingly, this Court should reverse the order of the Commonwealth Court insofar as it allowed the Attorney General to pursue antitrust claims under the UTPCPL.

C. Authorizing the Attorney General to bring antitrust causes of action and pursue antitrust remedies under the UTPCPL will create a chilling effect for the business community in Pennsylvania.

In addition to upending settled rules of judicial policy and statutory construction, allowing the Attorney General to bring antitrust causes of action and pursue antitrust remedies under the UTPCPL will likely have a detrimental impact on Pennsylvania's business community and on the Commonwealth's entire economy.

Businesses, like society in general, thrive when the laws governing their conduct are clearly defined at the outset. *Cf. F.C.C. v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012) ("A fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required."). When the rules governing their conduct are well established, businesses can conform their conduct to those rules in the most economically and competitively advantageous way possible. When businesses are successful, their employees benefit, and the economy as a whole thrives.

The potentially far-reaching ramifications of the Attorney General's lawsuit in this case are of particular concern to the business community. Whereas antitrust cases brought in federal court are subject to well-established rules and limits, it is unclear whether similar limitations will apply in a UTPCPL qua antitrust lawsuit brought by the Attorney General. For example, the Attorney General may argue that principles of antitrust standing in federal court—which serve to prevent harm to the competitive process, rather than harm to individual competitors or consumers, *see Broadcom Corp. v. Qualcomm, Inc.*, 501 F.3d 297, 308 (3d Cir. 2007)—do not apply to newly-created antitrust claims brought under the UTPCPL. The Attorney General may also argue that UTPCPL-antitrust claims should be evaluated under the *per se* rule (which, under federal law, is reserved for only the most pernicious and obvious restraints on trade) rather than under the more common rule of reason. *See State Oil Co. v. Khan*, 522 U.S. 3, 10 (1997). The Attorney General may similarly argue that the strictures of *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), in which the United States Supreme Court held that indirect purchasers lack standing to seek damages for violations of the Sherman Act, do not apply

to antitrust claims brought under the UTPCPL. The specter of such ill-defined potential liability will likely dissuade businesses from engaging in conduct that may be pro-competitive, such as joint ventures, that involve any ancillary restraints of trade, for fear that evolving case law under this new form of UTPCPL-based state antitrust liability will be applied to their arrangements.

If the Attorney General were to prevail in this lawsuit, the resulting uncertainty is likely to have real consequences. In a recent survey, a national sample of in-house general counsel, senior litigators, and other senior executives were asked how likely "it is that the litigation environment in a state could affect an important business decision at [his or her] company, such as where to locate or do business." U.S. Chamber Institute for Legal Reform, 2017 Lawsuit Climate Survey: Ranking the States, 3 (Sept. 2017).[2] An overwhelming 85% percent answered that the litigation environment was either somewhat likely or very likely to impact these important decisions. As noted by the study, "[t]his is a significant increase from 75% in 2015 and 70% in 2012." *Id.*

[2] Available at: https://www.instituteforlegalreform.com/uploads/pdfs/Harris-2017-Executive-Summary-FINAL.pdf.

As more and more businesses are evaluating the litigation environment—including the potential for liability—lawsuits brought by an attorney general alleging statutory violations on behalf of a large swath of residents will likely be at the forefront of these businesses' concerns. Businesses may be less willing to invest or expand into Pennsylvania based on the uncertain landscape for antitrust liability. Consumers and residents in Pennsylvania will be hurt most by such decisions.

Finally, the Attorney General's lawsuit raises serious due process concerns that are likely to have a chilling effect on businesses in Pennsylvania, especially if the Attorney General attempts to apply the ruling retroactively. If the General Assembly were to pass an antitrust statute, the statute would apply only to conduct occurring after the law's effective date. *See Bell v. Koppers Co., Inc.*, 392 A.2d 1380 (Pa. 1978); *see also* 1 Pa.C.S. § 1926. Businesses would therefore be able to conform their conduct and future plans in light of the new law. By contrast, if successful here, the Attorney General may bring antitrust claims under the UTPCPL against businesses and claim retroactive application. Under such a theory, the Attorney General could challenge any actions taken by

businesses in the last six years. *See* 42 Pa.C.S. § 5527(6). The due process problems inherent in such an approach are obvious. *See Krenzelak v. Krenzelak*, 469 A.2d 987, 991 (Pa. 1983) (explaining that "[r]etroactive application of new legislation will offend the due process clause if . . . such application would be unreasonable," and that reasonable retroactive laws include those that "disturb no vested right . . . and do not vary existing obligations contrary to their situation when entered into and when prosecuted" (internal quotation omitted)).

Given the potentially significant consequences of the Attorney General's attempt to read new antitrust authority into the UTPCPL, this Court should be reticent to approve of such an approach. Rather, any decision to enact antitrust causes of actions and remedies should be left to the sole discretion of the General Assembly. Until such an effort is successful, this Court should refuse any attempt to read antitrust provisions into existing statutes.

CONCLUSION

For the foregoing reasons, this Court should reverse the order of the Commonwealth Court insofar it allows the

Attorney General to pursue antitrust claims or remedies under the UTPCPL.

January 9, 2020

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH WORD LIMIT

I certify that this brief complies with the word count limits in Pa.R.A.P. 531(b)(3) because it contains 3,584 words.

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CERTIFICATE OF COMPLIANCE WITH PUBLIC ACCESS POLICY OF THE UNIFIED JUDICIAL SYSTEM OF PENNSYLVANIA

I certify that this filing complies with the provisions of the *Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts* that require filing confidential information and documents differently from non-confidential information and documents.

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