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IN - H O U S E C O U N S E L

Expansion of OAG's Power to Regulate Anti-competitive Conduct in the Marketplace

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Special to the Legal

Unlike its federal brethren at the U.S. Justice Department, the Pennsylvania Office of Attorney General (OAG) is limited in its ability to fight anti-competitive conduct in Pennsylvania's marketplace. The OAG has tried in vain for years to get Pennsylvania to adopt the full measure of antitrust protections codified under federal law, both through unsuccessful attempts at legislation and in the courts through the attempted creation of antitrust common law.

Most recently, in *Anadarko Petroleum v. Commonwealth*, --- A.3d ---, 2019 No. 60 C.D. (March 15), the Commonwealth Court held that the OAG's power to regulate anti-competitive



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conduct is limited to the specifically enumerated definitions of "unfair methods of competition" and "unfair or deceptive acts or practices" contained in the Unfair Trade Practices and Consumer Protection Law (UTPCPL), 73 P.S. Section 201-2(4)(i)-(xx). The court further held that these definitions do not include the power to regulate monopolistic behavior or market-sharing agreements under the UTPCPL's catch-all provision prohibiting "any

other fraudulent or deceptive conduct that creates a likelihood of confusion or of misunderstanding." However, the Commonwealth Court also opined that the OAG's power

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to adopt "such rules and regulations as may be necessary for the enforcement and administration" of the UTPCPL would allow for the regulatory expansion of the UTPCPL to include anti-competitive conduct

not specifically prohibited by statute.

The OAG has begun the process of doing just that. On Aug. 11, 2018, the OAG published an advanced notice of proposed rulemaking in the Pennsylvania Bulletin proposing inter alia the addition of 10, new “unfair market-trade practices” and classifying them by regulatory fiat as “unfair methods of competition” and “unfair or deceptive acts or practices” under the UTPCPL. These new unfair market-trade practices would explicitly preclude price fixing and price-stabilization agreements, the manipulation of markets, the actual or joint monopolization or an attempt or conspiracy to engage in the same, as well as other forms of anti-competitive conduct, see 28 Pa.B. 4834 (proposing 37 Pa.Code Ch. 311).

Corporate counsel would be well advised to pay close attention to these new proposed rules once they formally begin their

journey through the regulatory review process. As any experienced regulatory practitioner can tell you, while the deck is stacked in favor of the government agency when it comes to weighing the equities of its proposed regulation, both the independent regulatory review commission and the General Assembly can operate as important checks on the promulgating agency’s power—particularly with regard to a regulatory proposal that proposes such a sweeping expansion of the UTPCPL—as long as the business community is properly motivated into action. Moreover, while the Commonwealth Court has been content to interpret Section 3.1 of the UTPCPL as authorizing the OAG’s expansion of the definitions of unfair methods of competition and unfair or deceptive acts or practices as it relates to specific industries like debt collectors, the Pennsylvania Supreme Court has not yet weighed in on the

validity of these holdings, which may be ripe for reversal in the case of a broad, industry-neutral expansion of the UTPCPL such as this. •

