

## Pa. Fracking Gag-Rule Case Puts Trade Secrets At Risk

By **Matt Fair**

*Law360, Philadelphia (January 31, 2014, 7:24 PM ET)* -- Trade secrets in the burgeoning natural gas industry face an uncertain future as a Pennsylvania appeals court considers whether doctors granted access to information about the chemical makeup of fluids used in hydraulic fracturing can be prohibited from revealing the data.

As part of a landmark ruling striking down broad swaths of new statewide regulations on the oil and gas industry known as Act 13, the Pennsylvania Supreme Court called for evidentiary hearings to consider the merits of a provision in the law requiring doctors to agree not to share proprietary information about chemicals their patients may have been exposed to as a result of fracking.

While environmentalists and others challenging Act 13 are gunning for a ruling that would eviscerate protections on trade secrets, Morgan Lewis & Bockius LLP energy attorney Daniel Carmeli told Law360 that such protections were vital to companies' ability to compete.

"These trade secrets that we're talking about here, if they were not protected and it became public information, I think the ability to be competitive in that market would be challenged," he said. "You have all these different companies that are vying for the same market and producing products that are meant to do similar things. If all that became public, just like in any industry, it would be a challenge."

While the Supreme Court's December ruling dealt largely whether the regulations improperly restricted local municipalities from enacting their own zoning laws governing drilling activity, the justices reserved a small portion of the opinion to address whether Allegheny County physician Mehernosh Khan had standing to challenge the so-called gag rule.

The provision requires operators to disclose any chemicals or compounds claimed as a trade secret if requested by a doctor treating a patient for exposure, but the doctor must agree that the information "may not be used for purposes other than the health needs asserted and that the health professional shall maintain the information as confidential."

The state's Commonwealth Court had initially ruled that Khan, who claimed the provision was unconstitutionally drafted solely to apply to the oil and gas industry, did not have standing to pursue his challenge because he had not yet been presented with a situation in which he'd either been denied proprietary information or had his use of any such information restricted.

But the Supreme Court pointed to legal precedent allowing for pre-enforcement review of statutory provisions in cases where interested parties would be forced to “choose between equally unappealing options and where the third option, here refusing to provide medical services to a patient, is equally undesirable.” As such, they found that Khan had a real and immediate interest in promptly determining the constitutionality of the provision and remanded the case to the Commonwealth Court for further consideration.

The Supreme Court’s take on Khan’s standing to challenge the provision stands in contrast to a federal judge’s decision dismissing a similar suit in October. U.S. District Court Judge A. Richard Caputo nixed a suit brought by Dr. Alfonso Rodriguez claiming the provision infringed his First Amendment rights by barring him from sharing information about the contents of fracking fluid with colleagues, finding Rodriguez didn’t have standing because he’d never been required to abide by a confidentiality agreement in violation of any ethical standard of his profession.

While the Supreme Court’s decision remanding the case caught many off guard, attorneys told Law360 that they hoped the provision would remain intact as drafted in Act 13.

“We were surprised that the court saw that as an unresolved issue and directed the Commonwealth Court to take another look at it,” said Kevin Garber, an attorney in the energy practice at Babst Calland Clements & Zomnir PC. “We have to wait and see what the Commonwealth Court does with it, but I think the right answer is the court should apply the statute as written.”

For drillers and other players in the booming natural gas industry, Carmeli said fracking fluid formulas and other trade secrets were highly prized.

“It’s not all that dissimilar from any other manufacturer of a product, be it for industrial markets or consumer markets,” he said. “So the same question can be asked of Coca Cola’s recipe. Is that important to them? I’d say it probably is.”

In their initial complaint, the law’s challengers claimed the state was using the protection of trade secrets as a ruse to block doctors from carrying out their legal and ethical duties to share research and information about an industry that environmentalists worry is creating a grave public health risk.

“This concept of trade secrets seems to be used just as a cover. It’s not legitimate,” said Maya Van Rossum, head of the Delaware Riverkeeper Network, an environmental group involved in the legal challenge. “It seems very likely that there is this ulterior motive, which is that the administration knows that once doctors are privy to information about the serious contaminants that are being released into the environment, it’s going to be unsavory for the drilling industry.”

Pennsylvania isn’t the only state to enact such protections for the industry. According to Jean Mosites, an attorney at Babst Calland, very similar rules have been adopted in Colorado. Moreover, Carmeli said that Pennsylvania’s rule was based heavily on regulations first put in place in past decades by the U.S. Occupational Safety and Health Administration.

“There’s a long-standing body of pre-existing law regarding trade secrets, what needs to be disclosed, under what conditions doctors and health care providers can get this information, and what they can do with it,” he said.

Mosites added that Pennsylvania law on the books before Act 13’s enactment in 2012 required companies to submit to the state’s Department of Environmental Protection a list of chemical additives used in any so-called “stimulating fluids.” The regulation allows companies to declare specific portions of the list a trade secret and requires DEP to maintain the confidentiality of the information.

She suggested that Pennsylvania's provision actually resulted in physicians having greater access to information to treat patients because it creates an affirmative obligation for operators to hand over the chemical makeup of their fracking fluid.

"Actually, Act 13 increased the availability of this information because it expressly created that obligation to give it to health professionals," she said. "In any medical scenario that the doctor could face, he can get the information he needs under the provisions of Act 13 and use it as needed to treat a patient. The confidentiality agreement is that he can't use it for other, non-medical purposes. That's key."

Meanwhile, Carmeli suggested that the Commonwealth Court hearing the case on remand would not be able to maintain the affirmative obligation imposed on drillers to disclose their trade secrets while also striking down the law's restrictions on the use of such information.

"I don't think they are severable," he said. "The court cannot just pick and choose in the sense that they say, 'Yes, this obligation needs to stay here, but the limitations need to be discarded.'"

--Editing by Elizabeth Bowen and Richard McVay.

All Content © 2003-2014, Portfolio Media, Inc.