The Certainty of Uncertainty

Energy players fume and fret, but the game is always fueled by price

MCC INTERVIEW: David Sweeney / Akin Gump Strauss Hauer & Feld LLP

Fossil fuels continue to drive the economy, but operators are under increasing pressure from governments and the public, who have questions about fracking and other unconventional extraction methods as they relate to seismic activity. Akin Gump partner David Sweeney, an industry expert who built a practice literally from the ground up as a landman, spoke to us about today’s hot-button issues in the industry. His remarks have been edited for length and style.

MCC: You came to Akin just last month with an interesting background, including two in-house stints and significant work as outside counsel. Tell us about your decision to join the firm.

Sweeney: I had worked across from a number of Akin attorneys, including people who are currently part of our team. I was also a client when I was in-house. I have a tremendous amount of respect for the lawyers I know and have stayed in touch with them. When the opportunity came up, I couldn’t say no. It’s a phenomenal group.

MCC: For many energy lawyers the difference between a Trump administration and a Clinton administration is night and day. Please tell us how you’re advising clients given the gap between current energy policy and what can be expected under the new Republican administration.

Sweeney: The watchword for the energy industry – it’s been the watchword for its recent lifespan – is uncertainty. I don’t know that there’s a big difference between a Trump and a Clinton administration on the 10,000-foot, strategic level. There are a lot of questions about what’s going to happen. If I had to say what a Trump administration is going to be like, I’d be telling fortunes for a living instead of helping clients with legal issues. At the end of the day, it’s all about how you handle uncertainty. In the energy industry, especially the oil and gas space, we live in an uncertain world. This is just layering on a bit more.

MCC: You’ve been involved in some of the most noteworthy M&A deals in the oil and gas sector in recent years. Do you expect to see the robust M&A activity continue in the next few years and maybe in some other energy sub-sectors as well?

Sweeney: I do. We’ve seen a substantial uptick in M&A activity recently. Uncertainty ebbs and flows in intensity. As it rolls back a bit, people stop playing their cards so close to the vest and start seeing opportunities to snap up or sell assets to redirect their focus to other areas. It’s been all the rage of late is to narrow the focus to drilling plays.

MCC: Do you think that there are any specific drivers behind that?

Sweeney: Price is the single biggest driver. We’re at a very interesting place right now. Retrenchment is a good word for it. The world as we know it, beyond whatever the new Republican administration.

MCC: You served as a landman. Can you describe what that role was like and how that experience informs your negotiating style and your ability to come to terms on highly complex deals?

Sweeney: I look at it as the bedrock. When I started as a landman, it was not a choice. I had worked across from a number of Akin attorneys, including people who are currently part of our team. I was also a client when I was in-house. I have a tremendous amount of respect for the lawyers I know and have stayed in touch with them. When the opportunity came up, I couldn’t say no. It’s a phenomenal group.

When you look back at the sweep of history, and you read books like Friday Night Lights, which is more about the oil bust in west Texas than about high school football, there’s an argument to be made that OPEC is much less important than it was and that U.S. unconsensals are increasingly a swing producer that are going to keep prices re-balanced. That drives M&A activity because when the world changes you sometimes find yourself holding cards you don’t want. You buy and sell to position yourself to deal with what’s happening now.

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MCC: Are you a noted expert, and have written a book, on worldwide joint operating agreements, a common form of upstream oil and gas arrangement. What are the legal and business challenges of dealing with these cornerstone agreements on a global scale?

Sweeney: To start with, they’re vastly different. My book on joint operating agreements focused on how this form of oil and gas agreement, which is ubiquitous in the industry, can be radically different in different places. The most common U.S. onshore form of joint operating agreement, although it’s been superseded recently, is the AAPL 610 Model Form Operating Agreement. It embodies a way of doing things in the oil and gas industry that has become almost a religion. I’ve dealt with operators who acted as though they had joint operating agreements but had never read one, and who don’t have any signed for a particular project. They do things like send out authorizations for expenditure and talk about non-consent penalties when there’s nothing – no contract – that would dictate that. Conversely, with projects in the Gulf of Mexico and outside of the U.S., the agreements tend to be hundreds of pages, with defined project phases. It’s all very orderly.

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It all starts with land work, taking leases and running titles in county courthouses and understanding what it is that you’re buying.

In the U.S. – you could call it the Wild, Wild West – the emphasis is on speed and repeatability. You don’t have to negotiate a new form every time because no single joint operating agreement is worth enough to justify dumping months of negotiation into it. It’s difficult to transition from one way of thinking, the Wild, Wild West way, to another way of thinking, more akin to the European Union way. I find that fascinating. When you take those agreements down to the granting instrument level, especially outside the U.S., it’s necessary to tie those things to the production sharing contract or concession that actually grants a right to explore for oil and gas and make sure that the industry standards work with local customs and law and the way things are done. The book was a lab of love. I learned a tremendous amount through doing it.

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MCC: Is it common for an oil and gas attorney at your level to have had that landman experience?

Sweeney: I don’t think it’s that common. For me it was a tremendously valuable experience. I started out doing primarily domestic work – Gulf of Mexico and onshore. I branched out to work outside the U.S. It’s relatively uncommon to cross that line and still see the link between the two sides. Land is the common theme.
Epic Energy

Continued from page 20

able to make some new law clarifying that if you're going to take a risk with a big upside, you have to assume the downside risk. I think that ruling will have implications worldwide as people recognize this is not a free-pass investment.

MCC: What, if any, impact will this have on third-party funding in the U.S. or in other jurisdictions?

Powell: The analysis done by the court was much more rigorous than is done in the U.S. system, where the backdrop for these activities is Rule 11 of the Federal Rules of Civil Procedure, which requires parties to have a good-faith basis for their claims. Many state courts have similar rules. The implications are that courts are beginning to look at the puppeteers, if you will, funding the litigation as being equally responsible for taking good-faith positions supported by the law and the facts. The pendulum is moving toward the direction of making the funders as responsible as the named parties.

Pearson: The key takeaway is that funders need to understand the local markets in which they're funding. A lot of American funders thought they could simply apply the same methodology they use in the states to a case that ends up being tried in the UK. That's overly simplistic. If you're a funder, you have to understand the nuances, the risks involved in any market in which you fund. It may well be very different from your home jurisdiction.

MCC: Is there anything that either of you would like to add?

Powell: The case went on for six years. Millions of documents were produced. Sitting in the courtroom was a surreal experience because of the number of lawyers and barristers, and often 50 to 100 observers interested in the case. The courtroom experience was unusual in the extreme for me.

Pearson: Surreal is a good word. Some people were making cartoons of the proceedings and putting them on YouTube as a weekly update of the trial. Some were doing amateur sleuthing to figure out who these mysterious funders were. It was like a mystery novel in which they felt they could play some part.