



Appellate Court Affirms Award of Attorney Fees Following Dismissal of CCPA Claim

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In an unpublished opinion dated March 26, 2009, the Colorado Court of Appeals affirmed an award of attorney fees to Beatty & Wozniak's client, Kinder Morgan, Inc., arising out of the dismissal of an action brought by the City of Aspen purporting to state a class action on behalf of Kinder Morgan's Western Slope customers.

The Complaint, brought in June 2004, alleged that Kinder Morgan, and its retail affiliates, had misrepresented the volume of natural gas sold to its Western Slope customers by failing to properly account for volumetric changes based upon altitude. Aspen purported to state claims for negligent and intentional misrepresentation and for violation of Colorado's Consumer Protection Act (the "CCPA"). Kinder Morgan successfully moved to dismiss the Complaint for lack of subject matter jurisdiction arguing that the Complaint was an attack on Kinder Morgan's rates which were subject to the exclusive jurisdiction of the Colorado Public Utilities Commission. The dismissal was affirmed on appeal.

Following the dismissal of Aspen's Complaint, Kinder Morgan moved for, and was awarded, attorney fees under the C.R.S. Section 13-17-201, which mandates an award of attorney fees upon a dismissal pursuant to Rule 12(b) of the Colorado Rules of Civil Procedure prior to trial of an action occasioned by tort. On appeal, Aspen argued that claims brought under the CCPA were not subject to Section 201 because CCPA claims were not tort claims and the CCPA had its own attorney fees provision that limited attorney fees awards to frivolous claims.

The Court of Appeals affirmed the award of attorney fees holding that Aspen's claims were based on allegations of tortious conduct and, thus, in this case, Aspen's CCPA claims were occasioned by tort and subject to the mandatory provisions of Section 201. In addition, the court found that there was not a conflict between the attorney fees provisions because each operated separately and addressed separate policy considerations. Finally, the court awarded Kinder Morgan its attorney fees on appeal and remanded the case to the district court for a determination of those fees.