Legal Backgrounder

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THREE LITIGATION TRENDS SHAPE LEGAL FRAMEWORK FOR HYDRAULIC FRACTURING

by
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Few recent topics have engendered as much virulent discussion and debate as hydraulic fracturing ("fracing") – the high-pressure injection of fluid into deep wells to fracture shale rock holding natural gas. Proponents, including the Obama Administration, hail fracing's potential to reduce America's dependence on foreign energy sources by developing "greener" domestic natural gas that, not incidentally, also creates tens of thousands of jobs. Opponents, including myriad national, state and local non-governmental organizations and interest groups, assail fracing for its perceived impacts to the environment, public health, and domestic tranquility.

Despite the scope and intensity of this ongoing debate, fracing for natural gas currently is taking place in more than ten states and it is now generally accepted that large-scale fracing will soon be underway in several more. As is so often the case when the oil and gas industry is involved, this growth has attracted the attention of another powerful interest group: trial lawyers.

More than fifty fracing-related cases are now pending in federal and state courts across the country, with new matters being filed almost every week. We have identified three recent trends from the cases that we believe are notable and worth following.

Early Proof of Injury and Causation

The majority of lawsuits filed thus far have pursued common law tort claims (*e.g.*, negligence, trespass, strict liability for ultrahazardous activity) for alleged fracing-related injuries to person or property. Most of these suits are brought by individual property owners or families, although several are putative class actions that – given the very individualized nature of injury and damages for each class member – may not withstand legal scrutiny in light of the U.S. Supreme Court's decision last March in *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011).

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Regardless, in each of these cases plaintiffs must prove, *inter alia*, actual exposure and causation. Because so many government and private studies have concluded that deep-well fracing poses little risk to surface owners and shallow drinking water users, courts increasingly seem eager to test plaintiffs' ability to prove exposure and causation on alleged tort claims. This trend was most recently illustrated by *Strudley v. Antero Resources Corp.*, No. 2011-CV-2218 (2d Jud. Dist. Ct. May 9, 2012), an environmental damage and personal injury case arising out of defendants' fracing activities in Battlement Mesa, Colorado. Shortly after the case was filed, the trial judge in *Strudley* issued a "Lone Pine" (reference to *Lore v. Lone Pine Corp.*, 1986 WL 635707 (NJ Sup. Ct. Nov. 18, 1986)) order that required plaintiff to make a *prima facie* showing of exposure and causation before the case would be allowed to proceed any further. Although Plaintiff responded with various affidavits and an expert report, the court concluded that it had not met the requisite showing and dismissed all claims with prejudice.[1]

Lone Pine orders essentially "put plaintiff to its proof" as a condition for proceeding further in litigation, a very effective way for judges to exercise their role as gatekeepers against weak or meritless claims. Such orders also can negate the *in terrorem* effect that a trial lawyer often hopes for when they file a case – *i.e.*, that a defendant will settle quickly to avoid the negative publicity, cost of defense, etc., and thus hand the trial lawyer a windfall for doing little or no work. The issuance of a Lone Pine order in *Strudley*, and the court's decision dismissing plaintiff's claims for failure to satisfy that order, sends an important message to the trial bar that the "race to the courthouse" is not without speed traps, and those who invoke the legal process must be prepared to commit upfront the work and resources necessary to establish minimal proofs of injury and causation in support of their clients' claims. Both sides of the proverbial "v." in fracing litigation need to pay heed to this emerging legal trend.

Potential Mineral Lease Pitfall

The language in natural gas leases is often derived from old mining leases or deeds, which typically granted lessee the right to go "through and under" the leased property to access and remove minerals beneath adjacent lands. This language is now the subject of two cases that have the potential to significantly impair fracing operations not only in Ohio and Pennsylvania, but anywhere that this "through and under" language has been used.

In *Jewett Sportsmen and Farmer's Club, Inc. v. Chesapeake Exploration, LLC*, No. CVH-2011-0113 (Ohio Ct. Common Pleas Harrison Co. filed Jan. 17, 2012), the trial court ruled that defendant could use the leased property surface to remove natural gas located within that particular property's boundaries, but it could not use the property surface to access and remove gas located beneath adjacent tracts of land. Specifically, the *Jewett* court focused on the "and" in the "through and under" language of the lease and interpreted it to mean, literally, that any natural gas originating outside the property boundaries had to remain "under" the leased land and could only be removed through the surface of another leased parcel.[2]

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[1] The *Strudley* court's issuance of a "Lone Pine" order, and decision dismissing the case with prejudice, may not bode well for the companion class-action lawsuit brought by the same plaintiffs' law firm, *Evenson v. Antero Resources*, No. 2011 CV 05118 (D. Colo. filed July 20, 2011), which is based on the same facts and claims as *Strudley*, and is pending before the same trial judge. Although "Lone Pine" orders are not common in class actions, the fact remains that eventually each plaintiff in *Evenson* will be required to prove causation – and the *Strudley* decision, while a road-map to what plaintiffs must prove to survive dismissal, sets the bar fairly high

[2] The authors recently have learned that a second lawsuit against Chesapeake recently was filed in Harrison County by

The same "through and under" language is at issue in *Kalp v. WPX Energy Appalachia, LLC*, No. 12 CI 02460 (Pa. Ct. Common Pleas Westmoreland Co. filed May 16, 2012), where defendant had finished constructing its well pad and begun drilling operations at the time the lawsuit was filed. The court in *Kalp* has not yet issued a decision interpreting the "through and under" language.

It is not hard to see how decisions like *Jewett* (and potentially *Kalp*) could significantly impair – or wipe out altogether – the negotiated rights of a fracing leaseholder. Because well pads are expensive to construct, an operator's ability to use a single well pad to access and remove shale gas from beneath multiple parcels of leased land often is essential to the economic viability of a shale gas operation. Most fracing operations are conducted on leased land; most require the pooling of multiple lease interests; and many of those leases contain the same "through and under" language at issue in *Jewett* and *Kalp*. Fracing stakeholders need to be aware of the potential pitfalls of this lease language and work to keep it out of their agreements.

"Home Rule" and Local Efforts to Ban Fracing

"Home rule" rights were written into several state constitutions long ago as a hedge against State power by securing towns' rights to govern locally in certain areas. One of those areas is zoning and land use, and several towns recently have amended their zoning ordinances to ban fracing within their borders even where state regulations would permit it. Many of these zoning ordinances have been challenged on preemption and other grounds, with mixed results.

The City of Morgantown, West Virginia, was one of the first to amend its zoning ordinance to ban fracing within municipal limits (and one mile outside those limits). That ordinance was held preempted by West Virginia's comprehensive Oil & Gas Law in a decision last year. *Northeast Natural Energy, LLC v. The City of Morgantown*, No. 11-C-411, (W.Va. Circuit Ct. Monongalia Co. Aug. 12, 2011) (Judge Susan B. Tucker). Apparently believing that the *Northeast Natural Energy* order hinged on its total ban of fracing, the City very recently announced that it intends to create six new zoning districts – only one of which (approximately 600 acres near the City's airport) will allow fracing. We believe that Morgantown has misinterpreted Judge Tucker's order; we expect the new ordinance to be challenged; and we predict that – because the new ordinance will continue to impinge on the State's authority to say *where* fracing may take place – it will be declared preempted.

While New York has not yet decided whether it will allow fracing, more than 100 towns across the state have amended their zoning ordinances to ban it anyway. Two of these ordinances were challenged on grounds that New York's Oil, Gas & Solution Mining Law preempts "all local laws or ordinances relating to the regulation of the oil, gas and solution mining industries[.]" N.Y. Envtl. Conserv. Law § 23-0303(2). Both ordinances were upheld in separate decisions earlier this year. *Cooperstown Holstein Corp. v. Town of Middlefield*, No. 2011-0930 (N.Y. Sup. Ct. Ostego Co. Feb. 24, 2012); *Anschutz Exploration Corp. v. Town of Dryden & Town of Dryden Town Bd.*, No. 2011-0902

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another landowner who had leased to the company almost 3,000 acres for oil and gas development. The lease and mineral deed in this second case reportedly contain the same "through and under" language that is at issue in *Jewett*, and plaintiff is seeking a similar permanent injunction against further natural gas production. However, unlike *Jewett* (where well pad construction was completed, but actual drilling had not yet begun), in this second case Chesapeake has been successfully operating production wells on its leased land for several months.

(N.Y. Sup. Ct. Tompkins Co. Feb. 21, 2012). Essentially, both courts held that the Oil & Gas statute preempts town ordinances that regulate *how* oil and gas operations may be conducted, but does not preempt ordinances which deal with *where* such operations may take place – even if "where" means "nowhere."

Both New York decisions are headed for appeal and are being closely watched in New York and elsewhere, particularly Pennsylvania and Colorado where similar preemption language exists in those state's respective oil and gas statutes. The Pennsylvania Legislature's attempt to preclude such zoning "bans" by statute (HB 1950, or Act 13) has been challenged by seven towns and Delaware Riverkeeper on constitutional grounds (*Robinson Township, et al. v. Commonwealth of Pennsylvania, et al.*, No. 284-MD-2012 (Pa. Commw. Ct. filed Mar. 29, 2012)). In Colorado, state regulators so far have indicated that they will not challenge "informal" local moratoria on fracing, although whether this position would hold in the face of a formal zoning ban is questionable given the level of oil and gas activity in the state.[3]

"Home rule" is a legal issue of paramount importance that should be followed closely in the months ahead. Local zoning bans reduce the number of viable natural gas plays; can discourage natural gas exploration and investment; and can essentially wipe out capital investments that a company may already have made. Indeed, if zoning bans are upheld in New York and elsewhere, the next phase of "home rule" litigation may be Fifth Amendment takings claims by property owners and leaseholders.

Conclusion

The three trends briefly discussed here are the proverbial "tip of the iceberg" in terms of what is out there in fracing litigation, and what may be coming down the pike. Claims for "future" damages; allegations of consumer fraud and failure to warn; causes of action for strict products liability; and even "Natural Resource Damages" claims have all been rumored to be under consideration by the plaintiffs' trial bar. In many ways, fracing litigation is following the familiar path which culminated in the mass tort MTBE docket that began last decade and continues to wind its way through the courts. Only time will tell where the litigation will lead, but for now anyone with an interest in fracing – proponents and opponents alike – need to keep a close eye on what litigants and the courts are doing. Because in many respects, the "rules of the road" for fracing going forward are being written in the legal complaints and decisions of today.

[3] On local moratoria, the acting director of the Colorado Oil & Gas Conservation Commission, Thom Kerr, recently stated: "If it's a permanent moratorium, the state does feel strongly that they can't do that... So long as it's a temporary one, I think that we probably won't take an active opposition to it." *Oil and Gas Drilling Moratorium on Fort Collins City Council Agenda*, COLORADAN.COM, http://www.coloradoan.com/article/20120509/ NEWS01/305080017/Oil-gas-drilling-moratorium-Fort-Collins-City-Council-agenda (last visited Jun. 4, 2012).