

# Typical Claims and Key Defenses in Recent Hydraulic Fracturing Litigation

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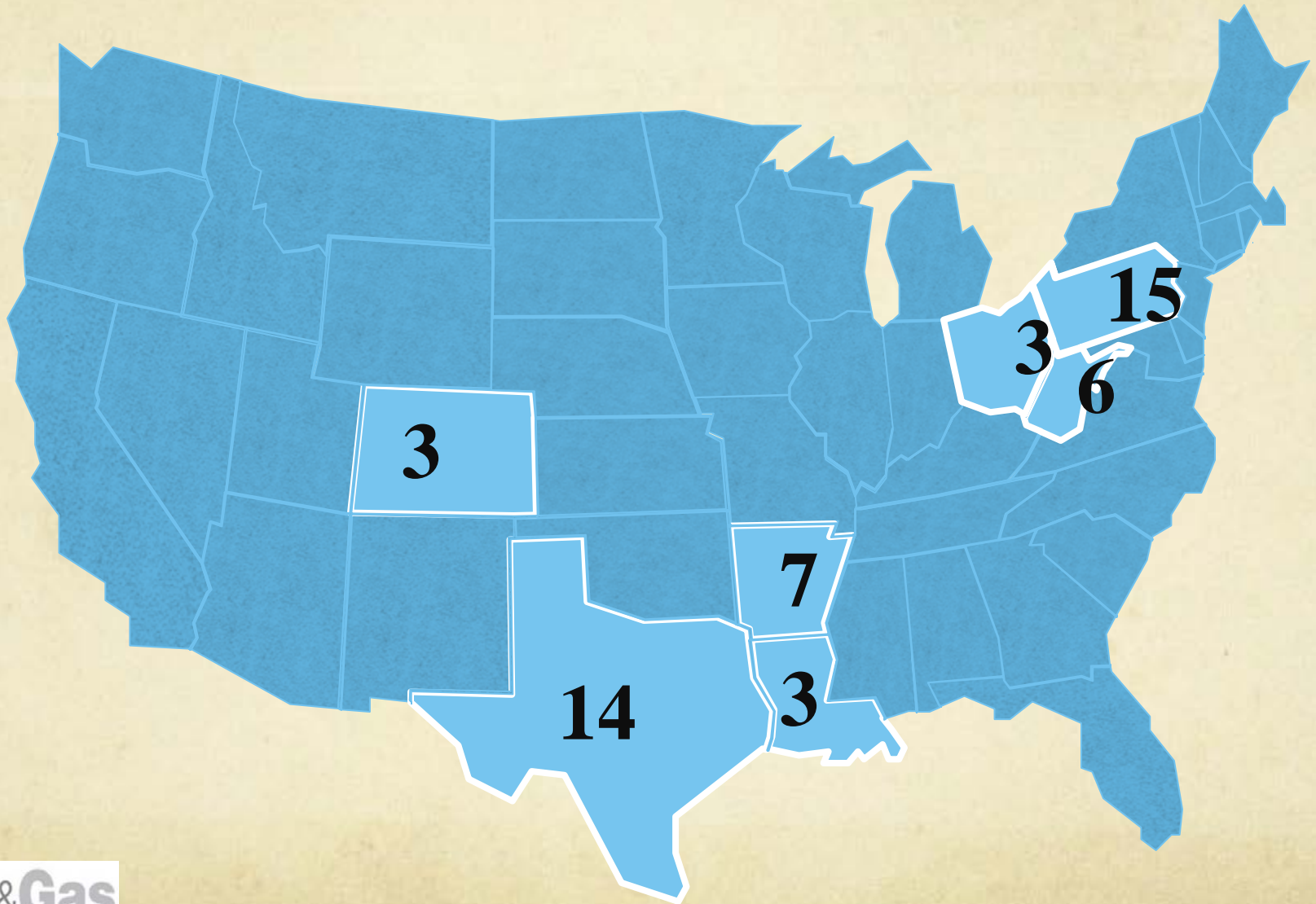


# HYDRAULIC FRACTURING CONTAMINATION LITIGATION

# OUTLINE

- Status of Pending Cases
- Typical Parties/Complaints
- Causes of Action
- Typical Damages
- Key Defensive Strategies
- Parr v. Aruba (Air not HF)

# Since 2009, over 50 lawsuits complaining alleged contamination from HF



# STATUS OF PENDING MATTERS

- Most are still in early stages
- To date – no finding HF contamination
- 16 Motions to Dismiss filed – 5 granted
- 6 MSJ filed – 3 have been granted
- 18 cases have settled
- 3 cases have been voluntarily dismissed

# TYPICAL PARTIES

## Plaintiff

1. Surface owner
2. Neighbor

## Defendant

1. Oil and gas operator
2. Service company that assisted in drilling
3. Midstream company that owns compressor station and related equipment

\*\*\*Five lawsuits have been asserted as class actions \*\*\*

# TYPICAL COMPLAINTS

- Oil and gas operations impacted:
  - Groundwater (more frequent)
  - Air
  - Complaints are often very similar
- One lawsuit claims that injection wells caused earthquakes in Arkansas

# CAUSES OF ACTION

## ■ Most Common

- Nuisance (public and private)
- Trespass
- Negligence
- Negligence Per Se
- Gross Negligence
- Strict Liability for Ultra-Hazardous Activities and Abnormally Dangerous Activities

## ■ Less Common

- Breach of Contract
- Negligent Misrepresentation
- Fraud
- Unjust Enrichment
- Impairment of Use of Property
- DTPA
- Premises Liability
- Fear of Developing Cancer
- Battery
- Intentional Infliction of Emotional Distress



# NUISANCE

- Best claim – at least in Texas
- Plaintiff does not have to prove that the Defendant fell below the standard of care.
- Very attractive for plaintiffs as nuisance can have the same practical effect as strict liability.

# TRESPASS

- Oil and gas operations can result in the unauthorized invasion of the property of another without any entry onto the surface of that land.
- These types of invasions are often referred to as “subsurface trespass.”
  - *Coastal Oil & Gas Corp. v. Garza Energy Trust* (Tex. 2008)
  - *FPL Farming v. Environmental Processing Systems* (Tex. 2011)
  - *Tucker v. Southwestern Energy Co.* (E.D. Ark. 2011)

# STRICT LIABILITY

- **Texas**

- Does not recognize abnormally dangerous activities as a basis for strict liability.
  - *Harris v. Devon Energy Production Company* (E.D. Tex. 2010)
  - *Mitchell v. Encana Oil & Gas (USA)* (N.D. Tex. 2010)

- **Arkansas**

- Whether HF is ultra-hazardous is a question of law, but one the Court cannot answer yet.
  - *Tucker v. Southwestern Energy Co.* (E.D. Ark. 2011)

- **Pennsylvania**

- Court will not rule on whether “drilling and operations” are abnormally dangerous for strict liability.
  - *Fiorentino v. Cabot Oil and Gas Corp.* (M.D. Pa. 2009)

# FRAUD

- **Must Plead Fraud with Particularity**
  - **Texas**
    - *Harris v. Devon Energy* (E.D. Tex. 2010)
    - *Mitchell v. Encana Oil & Gas (USA)* (N.D. Tex. 2010)
  - **Arkansas**
    - *Tucker v. Southwestern Energy Co.*, (E.D. Ark. 2011)
  - **Ohio**
    - *Boggs v. Landmark 4 LLC* (N.D. Ohio 2012)

# TYPICAL DAMAGES

- Property damages
- Cost of testing
- Loss use of land
- Loss of market value of land
- Emotional distress
- Exemplary damages
- Damages for future medical monitoring
- Injunctive relief

# MEDICAL MONITORING

- **Texas**

- Not a recognized cause of action in Texas.
  - *Norwood v. Raytheon Co.* (W.D. Tex. 2006)

- **Pennsylvania**

- Permitted. Court held that the Plaintiff has alleged elements of medical monitoring claim.
  - *Fiorentino v. Cabot Oil and Gas* (M.D. Pa. 2009)

# EMOTIONAL DISTRESS

- **Pennsylvania**
  - Manifestation of injury is required for fear of future illness and emotional distress claim.
    - *Fiorentino v. Cabot Oil and Gas* (M.D. Pa. 2009)
- **Arkansas**
  - The Court granted motion to dismiss as to emotional distress claim because plaintiff did not plead manifestation as required under Arkansas law.
    - *Berish v. Southwestern Energy Co.* (E.D. Ark. 2011)

# **KEY DEFENSIVE STRATEGIES**

- 1. Surface Estate vs. Mineral Estate**
- 2. Causation**
  - a. Lone Pine Orders**
  - b. State Action Levels**
  - c. No-Evidence**
- 3. Collateral Attack**
- 4. Permanent vs. Temporary Injury**



# SURFACE ESTATE VS. MINERAL ESTATE

- Use of a disposal pit by mineral estates was reasonable even though closed-loop alternative was available. Trespass claim was dismissed.
  - *Teel v. Chesapeake Appalachia, LLC* (W. Va. 2010)
- In MSJ Defendant claimed that owner of mineral estate has the right to burden the servient surface estate in whatever manner is reasonably necessary for development of minerals.
  - *Fiorentino v. Cabot Oil and Gas Corp* (M.D. Pa. 2009)

# CAUSATION – LONE PINE ORDER

- Scheduling Device - requires Plaintiff to make prima facie case that exposure caused harm before discovery can proceed.
  - **Entered/Reversed** - *Strudley, et al. v. Antero Resources, Corp.*, (Colo. 2012)
  - **Entered** - *Boggs, et al. v. Landmark 4 LLC*, (N.D. Ohio 2012)
  - **Agreed** - *Teekell v. Chesapeake Operating, Inc.*, (W.D. La. 2012)
  - **Denied** - *Kamuck v. Shell Energy Holdings GP, LLC*, (M.D. Pa. 2011)
  - **Denied** - *Roth v. Cabot Oil & Gas Corp.*, 287 F.R.D. 293 (M.D. PA. 2012)

# CAUSATION – STATE ACTION LEVELS

- *Taco Cabana Inc. v. Exxon Corporation* (Tex. App. – San Antonio 1999)
  - No causation – soil contaminants did not exceed state action levels which would trigger a duty for corrective action.
  - Common law duties were replaced by Legislature delegating to State appropriate clean up standards.
- *Scoma v. Chesapeake Energy Corp.* (N.D. Tex. 2010)
  - MSJ claimed that Plaintiff’s claims fail as a matter of law since the test results are below the TCEQ’s Safe Drinking Water levels.
- *Harris v. Devon Energy Production Company* (E.D. Tex. 2010)
  - Plaintiffs voluntarily dismissed claim because recent testing showed that the contamination was no longer at a toxic level.

# CAUSATION – NO EVIDENCE

- *Hagy v. Equitable Production Co.* (W. Va. 2010)
  - MSJ granted - no evidence of causation for negligence, trespass and nuisance claim.
- *Strudley, et al. v. Antero Resources, Corp., et al.*, 2011 CV 2218 (Colo. D.Ct. 2012)
  - MSJ granted - following entry of Lone Pine Order, no evidence of causation.
- *FPL Farming, Ltd. v. Environmental Processing Systems* (Tex. App. – Beaumont 2009)
  - MSJ affirmed on appeal - there was no evidence that the injection well was a danger to the drinking water.

# COLLATERAL ATTACK

- *Lipsky v. Range Resources Corp.*, (Parker County, Tex. 2011)
  - Plaintiff's nuisance and trespass claims were an impermissible collateral attack on the Texas Railroad Commission's Final Order which found that Range's operations "have not caused or contributed, and are not causing or contributing to contamination of any domestic water wells."

# PERMANENT VS. TEMPORARY INJURY

## ■ Statute of limitations

- Continuing tort doctrine does not apply to claims which arise from permanent injury to the land.
  - *Scoma v. Chesapeake Energy Corp.* (N.D. Tex. 2010).

## ■ Measure of Damages

- Plaintiff's damages cannot exceed fair market value.
  - *Teel v. Chesapeake Appalachia, LLC* (W. Va. 2010)

# PARR V. ARUBA (AIR NOT HF)

- Background/Overview of the case
- TCEQ Enforcement of Aruba
- Interesting Rulings from the Court
- Verdict
- What makes this case unique?
- Lessons Learned

# BACKGROUND

- Allegations in Eleventh Amended Petition
- Evidence at trial
- Plaintiffs
- Defendants
- Venue
- Judge
- How active was the litigation?



# TCEQ ENFORCEMENT

- Agreed Order = \$35,000
- Findings of Facts in Agreed Order
- Additional TCEQ documents
- Motion in Limine?

# RULINGS FROM THE COURT

- January 2014 order
  - Only nuisance claim permitted
  - Personal injury claims limited only to symptoms typical of discomfort rather than disease
  - Avoids traditional causation analysis

# VERDICT

- Intentionally created nuisance? Yes
- Abnormally and out of place? No
- Damages = 2.9 million
  - 2 million = past pain and suffering
  - 250,000 = future pain and suffering
  - 400,000 = mental anguish
  - 250,000 = property damages
- 5 out of 6 = needed unanimous for punitive

# WHAT MAKES THIS CASE UNIQUE?

- Air contaminants not water
- High density of wells
- Court allowed damages for symptoms of “discomfort” versus proof of disease
- TCEQ Agreed Order?
- Other lawsuits?

# LESSONS LEARNED

- Criticisms by Parr's experts
  - Vapor recovery units/scrubbers
  - Vapor combustors (flares)
  - Air monitors
  - No leak detention policy
- Additional scrutiny when facing state enforcement proceedings
- Venue

# SUMMARY

- Causation is biggest hurdle
- State agency investigations have casted doubt on claims
- Could increase if EPA study shows link between HF and contamination
- Look for more claims related to air or waste water injection

# QUESTIONS?



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