# TABLE OF CONTENTS

<table>
<thead>
<tr>
<th>Topic</th>
<th>Pages</th>
</tr>
</thead>
<tbody>
<tr>
<td>Introduction</td>
<td>1-2</td>
</tr>
<tr>
<td>Litigation Involving Hydraulic Fracturing</td>
<td>2-30</td>
</tr>
<tr>
<td>Litigation Involving Earthquakes and Hydraulic Fracturing</td>
<td>30-31</td>
</tr>
<tr>
<td>Studies Concerning Possible Connections Between Earthquakes and Fracking</td>
<td>31-37</td>
</tr>
<tr>
<td>Litigation Concerning Municipal Bans of Hydraulic Fracturing</td>
<td>37-40</td>
</tr>
<tr>
<td>Litigation Concerning State vs. Municipal Zoning Regulation of Hydraulic Fracturing</td>
<td>40-42</td>
</tr>
<tr>
<td>Litigation Involving Oil and Gas Lease Disputes</td>
<td>42-47</td>
</tr>
<tr>
<td>Lawsuits Brought by Citizens, States, and Environmental Groups</td>
<td>47-52</td>
</tr>
<tr>
<td>Litigation Involving Enforcement</td>
<td>52</td>
</tr>
<tr>
<td>Litigation Challenging Government Regulations</td>
<td>53</td>
</tr>
<tr>
<td>Litigation Challenging Disclosure Regulations</td>
<td>54-55</td>
</tr>
<tr>
<td>Settlements Involving Hydraulic Fracturing and Shale Drilling</td>
<td>55-56</td>
</tr>
<tr>
<td>Regulatory Investigations</td>
<td>56-57</td>
</tr>
<tr>
<td>Potential for Shareholder Litigation</td>
<td>57</td>
</tr>
<tr>
<td>Conclusion</td>
<td>57</td>
</tr>
<tr>
<td>About the Authors</td>
<td>57</td>
</tr>
<tr>
<td>Appendix A: Table of Cases</td>
<td></td>
</tr>
<tr>
<td>Appendix B: Resume of Barclay R. Nicholson</td>
<td></td>
</tr>
<tr>
<td>Resume of Stephen C. Dillard</td>
<td></td>
</tr>
</tbody>
</table>
Hydraulic fracturing involves the injection of highly pressurized fluids and proppants into shale or other non-porous hydrocarbon formations in order to increase production of oil and natural gas wells. Hydraulic fracturing utilizes large volumes of water; thus, it also produces large volumes of fluids called “flowback” or “produced water.” Most operators engaged in hydraulic fracturing dispose of their flowback or produced water by either treating and recycling the water, treating the water and disposing of it, or injecting the fluids into a well called a “Class II Well.”

Although hydraulic fracturing has been utilized in the United States for decades, within the past three years, hydraulic fracturing and its alleged impact on water quality have received increasing attention and scrutiny from the media, the U.S. Environmental Protection Agency (EPA), Congress, regulatory agencies throughout the United States, state and local governments, and various environmental groups. Various parties have raised concerns about the reduction of citizens’ water supplies due to the large volume of water used in the fracturing process, the alleged contamination of aquifers that supply drinking water, and the appropriate disposal of or recycling of the flowback or produced water. At the heart of these concerns are the additives used in fracturing fluids, which some argue contain potentially toxic substances such as benzene, toluene, xylene, methanol, formaldehyde, ethylene, glycol, glycol ethers, hydrochloric acid, and sodium hydroxide.

While lawmakers debate the need for policies and regulations, and environmental agencies prepare studies and conduct tests, the number of civil cases involving hydraulic fracturing continues to rise. Since August 2009, more than 35 lawsuits complaining of alleged groundwater contamination have been filed by landowners in Arkansas, Colorado, Louisiana, New York, Ohio, Pennsylvania, Texas, and West Virginia against oil and gas companies. Nearly all the plaintiffs in these suits are either landowners who leased oil and gas rights to the defendants, or landowners who reside in close proximity to where hydraulic fracturing operations have been conducted. Other shale and hydraulic fracturing lawsuits concern earthquakes, environmental issues, regulatory enforcement, municipal bans, government regulations, and oil and gas lease disputes.
This article discusses many of the recently filed lawsuits\(^3\) that implicate hydraulic fracturing, and the claims made in those cases. The cases are listed by filing date from earliest to latest. Many of the cases are in the early stages of litigation. In fact, the authors have not located any judgment to date against a well operator, drilling contractor, or service company for contamination of groundwater resulting from hydraulic fracturing.

**Litigation Involving Hydraulic Fracturing**


In August 2009, Josephine Maring filed suit in Chautauqua County, New York against John Nalbone Jr., Universal Resource Oil & Gas, EnerVest Operating LLC, and Dallas Morris Drilling Inc. (collectively, “Defendants”). According to Plaintiff, Defendants own and operate approximately 20 natural gas wells within a two-mile radius of her property. Plaintiff alleges that Defendants’ drilling and extraction activities have resulted in the contamination of her water well with methane gas, making the water unfit for ordinary use.

The complaint alleges causes of action for trespass, nuisance, and negligence. Plaintiff seeks damages in the amount of $250,000 plus litigation costs. Although the complaint states that Defendants’ gas drilling and extraction operations caused methane contamination, the complaint does not specifically mention hydraulic fracturing. While the Defendants appeared on September 19, 2011, there has been little activity in this case since that date.


*Zimmermann v. Atlas America, LLC* was filed in Pennsylvania state court on September 21, 2009 against Atlas America, LLC (“Atlas”). Plaintiffs, George and Lisa Zimmermann (the “Zimmermanns”), are a married couple owning only the surface rights to their property in Pennsylvania. After attempting to prevent Atlas from conducting drilling operations on their property, the Zimmermanns entered into a settlement agreement with Atlas. The claims of contamination in the pending lawsuit arose after drilling had commenced.

The Zimmermanns, who agreed in the settlement agreement to permit Atlas to conduct hydraulic fracturing operations on their farm, allege that Atlas used toxic chemicals during the fracturing process, and that the use of such chemicals contaminated and polluted their freshwater aquifers. The Zimmermanns claim that their natural water aquifers and their previously pristine Heirloom Tomato farmland were destroyed as a result of Atlas’s hydraulic fracturing operations. The Zimmermanns’ suit alleges claims of trespass, nuisance, negligence, negligence per se, res ipsa loquitur, fraud and misrepresentation, and breach of the settlement agreement. The

\(^3\) Information in this White Paper identifying plaintiffs, defendants, and causes of action comes from the docket sheets, complaints, petitions, motions, and orders filed in each lawsuit. Any information that is not included in the pleadings is footnoted or identified in this White Paper.
Zimmermanns also allege that Atlas violated casing requirements of the Pennsylvania Oil & Gas Act.

In their trespass claim, the Zimmermanns allege that their surface rights extend to aquifers comprising the water table underlying their property. The Zimmermanns further allege that Atlas contaminated their soil and water with carcinogens and other pollutants, and that such contamination was beyond the agreed disturbance originally contemplated by the parties’ settlement agreement. The Zimmermanns assert in their nuisance claim that the contamination of their land and water, along with the release of noxious and harmful detectable gases into the air on their property, constitutes a private nuisance.

In their negligence claim, the Zimmermanns allege that Atlas owed them a duty of care to operate its mining operations with due regard to the rights of the property’s surface estate, use only so much of the property as reasonably necessary to conduct mining operations, and conduct mining operations so as to leave the property intact. According to the Zimmermanns, Atlas breached these duties by: (1) failing to conduct its mining operations in a reasonable manner to protect the property; (2) failing to employ alternative methods in the hydraulic fracturing process; (3) failing to take proper precautions to prevent toxic and carcinogenic chemicals from escaping and damaging the property; (4) failing to take appropriate measures after discovering damage to the surface estate; (5) selecting well sites that were in close proximity to the Zimmermanns’ home and natural water aquifers; and (6) employing the hydraulic fracturing method with knowledge that the use of such method would cause the surface estate of the property to be contaminated. The Zimmermanns claim that, as a result of Atlas’s breaches of duty, their property is permanently destroyed.

In their fraud claim, the Zimmermanns state that prior to the commencement of drilling on their property, Atlas knew that the chemicals injected into sub-surface reservoirs contained and/or would release known hazardous contaminants into the soil and water. Further, the Zimmermanns claim that they could not have discovered the composition of the chemicals used by Atlas through their own reasonable efforts; thus, Atlas should have disclosed such information to them prior to commencing its drilling operations. Finally, the Zimmermanns allege that Atlas breached the settlement agreement by disturbing substantially more than the agreed acreage of property.

On August 4, 2011, the Court ruled on Preliminary Objections filed by Atlas about the causes of action claimed by the Zimmermanns. The Court determined that the res ipsa loquitur claim was insufficient as a matter of law and that the claim for gross negligence was redundant. Both were dismissed. While dismissing the fraud and misrepresentation claim for lacking an averment of the existence of a duty and lacking specificity as to an alleged breach, the Court stated that the Zimmermanns could amend their Complaint to correct the allegations and reinstate the claim.

The Zimmermanns now seek compensatory damages including permanent destruction of property, permanent destruction of water aquifers, loss of water well use, and reduction in value
of property, as well as punitive damages. Originally, the Zimmermanns included a claim for lost profits but dropped this claim during the Preliminary Objection hearing.

In recent months, the parties have engaged in contentious discovery, with motions to quash depositions, motions for sanctions and to compel production of documents and videotapes, and motions for protection. There have also been motions to disqualify counsel. The injunction hearing, originally scheduled for September 20, 2011, was continued, thus delaying the trial of this case until after the Court rules on dispositive motions.

**Fiorentino v. Cabot Oil & Gas Corp. and Gas Search Drilling Services Corp., No. 3:09-cv-02284 (M.D. Pa., Nov. 19, 2009)**

The Fiorentino case was filed in the U.S. District Court for the Middle District of Pennsylvania on November 19, 2009. Approximately 19 families in Susquehanna County, Pennsylvania (“Plaintiffs”) sued Cabot Oil & Gas Corporation (“Cabot”) and Gas Search Drilling Services Corporation (collectively, with Cabot, “Defendants”) for state law violations and common law claims, including negligence, gross negligence, negligence per se, nuisance, strict liability, fraudulent misrepresentation, breach of contract, medical monitoring trust fund, and violation of the Pennsylvania Hazardous Sites Cleanup Act. According to Plaintiffs, Defendants, among other things, allegedly (1) released combustible gas into the headspaces of Plaintiffs’ water wells; (2) caused elevated levels of dissolved methane to be present in Plaintiffs’ water wells; (3) discharged natural gas into Plaintiffs’ groundwater; (4) allowed excessive pressure to build up within gas wells near Plaintiffs’ homes and water wells which resulted in an explosion; (5) spilled diesel fuel onto the ground near Plaintiffs’ homes and water wells; (6) discharged drilling mud into diversion ditches near Plaintiffs’ homes and water wells; (7) caused an explosion due to the accumulation of evaporated methane in wellheads; and (8) caused three significant spills within a ten-day period.4

Plaintiffs are seeking compensatory damages including loss of property value, natural resource damage, medical costs, loss of use and enjoyment of property, loss of quality of life, emotional distress, and personal injury. Plaintiffs also seek punitive damages, the cost of remediation, the cost of future health monitoring, an injunction, and litigation costs and fees.

Cabot filed a motion to dismiss, which was granted as to Plaintiffs’ gross negligence claim. Cabot has consistently maintained that the Plaintiffs’ water was suitable for consumption. Testing by the EPA in the winter and spring of 2012 served to confirm Cabot’s position.5 On September 12, 2012, a joint stipulation of dismissal was filed with the Court. The stipulation covers the majority of Plaintiffs, with only three families continuing the lawsuit. On December

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4 The Pennsylvania Department of Environmental Protection (“PDEP”) also instituted a regulatory action against Cabot alleging methane contamination of certain residents’ water wells as a result of Cabot’s nearby drilling activities. The PDEP reached a settlement agreement with Cabot in December 2010. See Settlements Involving Hydraulic Fracturing and Shale Drilling, discussed infra.

5 On August 22, 2012, the PDEP gave a green light to Cabot to resume fracking seven wells in Dimock County.
17, 2012, the Court allowed counsel for the three families to withdraw, giving these families 60 days in which to secure new attorneys or to proceed pro se.

**Scoma v. Chesapeake Energy Corp., Chesapeake Operating, Inc., and Chesapeake Exploration, LLC, No. 3:10-cv-01385 (N.D. Tex., July 15, 2010)**

Plaintiffs Jim and Linda Scoma (“Plaintiffs”), landowners in Johnson County, Texas, brought an action for negligence, nuisance, and trespass against Chesapeake Energy Corporation, Chesapeake Operating, Inc., and Chesapeake Exploration, LLC (collectively, “Chesapeake”). Plaintiffs dismissed Chesapeake Energy Corporation without prejudice on July 27, 2011. Plaintiffs settled their claims and, on December 9, 2011, the Court entered a Final Judgment dismissing all claims with prejudice.

Plaintiffs own property near oil and gas wells being developed by Chesapeake. In their complaint, Plaintiffs allege that Chesapeake stored drilling waste at sites and disposal wells and disposed of fracturing waste in injection wells near Plaintiffs’ property. According to the complaint, Plaintiffs’ water well became contaminated as a result of Chesapeake’s hydraulic fracturing and disposal activities, showing an increase in benzene, toluene, ethylbenzene, xylene, barium, and iron.

In their nuisance claim, Plaintiffs alleged that Chesapeake interfered with their private interest in their land by contaminating their only source of drinking water, thereby preventing Plaintiffs from the use and enjoyment of their well water for drinking and washing. Plaintiffs argued that the contaminated well water offended their senses and made the enjoyment of their property uncomfortable and inconvenient. Plaintiffs stated in their trespass claim that Chesapeake exceeded the rights granted for drilling on land adjacent to Plaintiffs’ property, causing petroleum by-products to enter Plaintiffs’ land and contaminate their water. As for their negligence claim, Plaintiffs alleged that Chesapeake breached its duty of care by negligently or unnecessarily damaging Plaintiffs’ estate and well water. The damages requested in this case included the cost of water testing, loss of use of land, loss of market value of land, loss of intrinsic value of well water, emotional harm and mental anguish, nominal damages, exemplary damages, and injunctive relief.


Limited; and Union Drilling, Inc.)\textsuperscript{6} (collectively, with Southwestern, “Defendants”). On August 21, 2012 and August 31, 2012, the Court issued orders dismissing various claims from the Third Amended Petition. The Court dismissed all personal injury claims (except for the minor who retained the right to assert a personal injury claim in the future if she develops an injury), all claims for natural resource damages, and all claims for negligence per se. On November 6, 2012, Schlumberger Limited was voluntarily dismissed from the lawsuit. A trial is currently scheduled for February 2013.

The complaint alleges that beginning in 2008, hydraulic fracturing and horizontal drilling in close proximity (700 to 1,700 feet) to Plaintiffs’ water wells caused the wells to become contaminated. Plaintiffs claim that Southwestern’s natural gas well was improperly cased, allowing contaminants such as diesel fuel, barium, manganese, and strontium to migrate to Plaintiffs’ water wells. According to the complaint, at least one plaintiff is exhibiting neurological symptoms consistent with exposure to heavy metals.

Plaintiffs allege many of the same causes of action as in the early cases, namely, negligence per se, common law negligence, nuisance, strict liability, medical monitoring trust fund, and violation of the Pennsylvania Hazardous Sites Cleanup Act. On February 3, 2011, the Court dismissed the section 1115 portion of Plaintiffs’ citizen’s suit under the Pennsylvania Hazardous Sites Cleanup Act.

Plaintiffs also allege a cause of action for trespass, claiming that Defendants’ acts resulted in the physical invasion of Plaintiffs’ property and the aquifers underlying their property.

In their negligence claim, Plaintiffs allege that Defendants had a duty of care to (1) responsibly drill, own, and operate the natural gas well; (2) respond to spills and releases of hazardous chemicals; (3) prevent such releases and spills; and (4) take all measures reasonably necessary to inform and protect the public, including Plaintiffs, from the contamination of their water supply and exposure to hazardous chemicals and combustible gases. Plaintiffs further state that Southwestern has created and maintained a continuing nuisance by allowing the natural gas well to exist and operate in a dangerous and hazardous condition, resulting in injuries to Plaintiffs’ health, well being, and property. As for strict liability, Plaintiffs contend that “the use, processing, storage, and activity of hydro-fracturing” at the wells near their home constitute abnormally dangerous and ultra-hazardous operations, “subjecting persons coming into contact with the hazardous chemicals and combustible gases to severe personal injuries, regardless of degree of caution Defendants might have exercised.” Plaintiffs assert that Defendants are strictly liable for all of their damages and injuries proximately caused by Defendants’ spills, releases, and contamination.

\textsuperscript{6} The additional defendants provided services, equipment, and support for the drilling, casing, tubing, and fracking operations at the well site. \textit{Berish} is one of the few cases in which Plaintiffs have named support companies, and not just the operating and/or drilling company, as defendants. Including service and supply companies as defendants is likely to be a future trend. \textit{See Haney v. Range Resources}, infra.
Plaintiffs seek costs for remediation of the hazardous substances and contaminants and for the purchase of an alternative source of water. They seek compensatory damages for lost property value, damage to the natural resources around their properties, loss of quality of life, emotional distress, loss of use and enjoyment of their properties, emotional distress as to one plaintiff, inconvenience and discomfort, and personal injury. The complaint also requests punitive damages and preliminary and permanent injunctions against future contamination, as well as reasonable attorneys’ fees.


In October 2010, Plaintiff Judy Armstrong filed suit in Bradford County, Pennsylvania against Chesapeake Appalachia LLC, Chesapeake Energy Corporation, and Nomac Drilling, LLC ("Defendants"). Armstrong v. Chesapeake Appalachia, LLC, et al., No. 10-cv-000680 (Pa. Ct. Com. Pl., Oct. 27, 2010). The case was removed to the Middle District of Pennsylvania on December 6, 2010 (Case No. 3:10-cv-02453). On January 20, 2011, Plaintiff added two new plaintiffs (Carl Stiles and Angelina Fiorentino) (collectively, “Plaintiffs”) and two new defendants (Great Plains Oilfield Rental LLC and Diamond Y Enterprise, Inc.) to the lawsuit. With the addition of these new Pennsylvania corporate defendants, there was no longer a basis for the diversity jurisdiction of the federal court. Plaintiffs filed a motion for remand which was granted on July 29, 2011.

Plaintiffs own property and water wells located three miles from oil and gas wells owned and operated by Defendants. The complaint alleges that Defendants’ use of improper drilling techniques, including defective and ineffective well casings, caused methane, ethane, barium, and other harmful substances to enter into and contaminate Plaintiffs’ water supply. Plaintiffs allege that at least one family has been forced to evacuate their property.

Plaintiffs allege the same causes of action and damages as the Berish plaintiffs: negligence, negligence per se, nuisance, strict liability, trespass, medical monitoring trust funds, and violation of the Pennsylvania Hazardous Sites Cleanup Act.

In response to Plaintiffs’ suit, the Pennsylvania Department of Environmental Protection ("PDEP") initiated a joint review of possible natural gas drilling violations by Chesapeake. The results of the joint review were inconclusive and the PDEP reached a settlement agreement with Chesapeake on May 17, 2011. See Settlements Involving Hydraulic Fracturing, infra.

On November 3, 2010, the Sizelove family (“Plaintiffs”) filed suit against Williams Production Company, LLC (non-suited on April 6, 2011); Mockingbird Pipeline LP; XTO Energy, Inc. (dismissed with prejudice on March 21, 2012); Gulftex Operating, Inc. (dismissed with prejudice on May 16, 2012); Trio Consulting & Management, LLC (dismissed with prejudice on May 11, 2012); and Enexco, Inc. (non-suited on April 13, 2011) (collectively, “Defendants”) in Denton County, Texas. Williams Production-Gulf Coast Company, L.P. (n/k/a WPX Energy Gulf Coast, L.P.) and A&D Exploration Company were added as defendants on April 6, 2011 and April 13, 2011, respectively. This case was settled at mediation on November 9, 2012.

Plaintiffs initially sued for nuisance, trespass and negligence, alleging that Defendants’ compressor operations, gas drilling, and hydraulic fracturing caused Plaintiffs to suffer severe headaches and respiratory problems. Specifically, Plaintiffs claimed that Defendants’ operations were polluting the air and water surrounding Plaintiffs’ home with toxic hydrocarbons such as benzene, toluene, ethylbenzene, and xylene.

In July 2011, Plaintiffs amended their complaint, dropping their negligence claim and all allegations of water contamination. Plaintiffs continue to pursue their claims for trespass and nuisance. In their nuisance claim, Plaintiffs allege that Defendants have substantially interfered with and invaded Plaintiffs’ private interest in their land by contaminating both the surface and the air above their property with hydrocarbons and other deleterious substances. For their trespass claim, Plaintiffs state that Defendants wrongfully cut down nearly thirty trees on their property and allowed workers to use their land as a toilet.

Plaintiffs are seeking damages for the loss of market value of their land, sickness, annoyance, discomfort, bodily harm, injury to personal property, mental anguish, and additional exemplary damages.


In November 2010, Margaret Heinkel-Wolfe and her daughter, Paige Wolfe,7 (“Plaintiffs”), filed suit against Williams Production Company LLC (dismissed without prejudice on April 6, 2011); Mockingbird Pipeline LP; XTO Energy Inc. (dismissed with prejudice on March 21, 2012); Gulftex Operating Inc.; Trio Consulting & Management LLC; and Enexco, Inc. (non-suited on April 13, 2011) (collectively, “Defendants”) in Denton County, Texas. Williams Production-Gulf Coast Company, L.P. (n/k/a WPX Energy Gulf Coast, L.P.) and A&D Exploration Company were added as defendants on April 6, 2011 and April 13, 2011 respectively. Defendants filed traditional and no evidence motions for summary judgment, but these became moot when the case was settled at mediation on August 14, 2012. A final judgment was signed by the court on August 27, 2012.

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7 On August 4, 2011, the daughter non-suited all Defendants.
Plaintiffs sued Defendants for nuisance, negligence, and trespass, alleging that Defendants’ activities related to their produced water collection site, gas compressor stations, and gas drilling polluted the air and water around Plaintiffs’ property. The allegations and procedural history are similar to those in the Sizelove case. As in Sizelove, Plaintiffs voluntarily dropped their negligence claim and all allegations of water contamination.

Plaintiffs also requested damages for the loss of market value of their land, sickness, annoyance, discomfort, bodily harm, injury to personal property, mental anguish, and exemplary damages.


In their complaint, Plaintiffs claimed contamination of their property and water well located approximately 1,000 feet from Defendants’ natural gas wells. One of the Plaintiffs was alleged to suffer neurological symptoms consistent with toxic exposure to heavy metals.

Plaintiffs’ causes of action included negligence, negligence per se, nuisance, strict liability, trespass, and medical monitoring trust funds, similar to the Berish lawsuit, supra. Plaintiffs sought an injunction against further drilling activities, along with compensatory damages, punitive damages, the cost of future health monitoring, and litigation fees and costs.

On July 22, 2011, the Court dismissed Plaintiffs’ claims of strict liability and medical monitoring and dismissed the claims of nuisance and trespass for two of the Plaintiffs (the adult children who no longer lived on the property). After settling with defendants Halliburton Energy Services, Inc. and Warren Drilling Company, Inc., on May 7, 2012, the adult children voluntarily dismissed all their other claims.

On March 19, 2012, BJ Services filed a motion for summary judgment and Plaintiffs responded on March 30, 2012. On May 23, 2012, the Court ordered Plaintiffs to clarify their response to the motion and “to specify exactly what conduct by defendant BJ Services is alleged to have caused them harm…” Plaintiffs filed their response to the Court’s Order on June 29, 2012. On that same date, the Court entered its Judgment Order, dismissing the lawsuit. In its Memorandum Opinion and Order, the Court stated that Plaintiffs failed to provide evidence to prove that BJ Services acted negligently, trespassed, or created a private nuisance; or to prove a causal
connection between BJ Services and Plaintiffs’ injuries. On July 30, 2012, Plaintiffs filed a Notice of Appeal to the U.S. Court of Appeals for the Fourth Circuit (Case No. 12-1926), appealing the Court’s orders granting the motions for summary judgment filed by BJ Services Company USA and Equitable Production Company. Briefing is in progress, with a response brief due January 9, 2013.

Mitchell v. Encana Oil & Gas (USA), Inc.; Chesapeake Operating, Inc.; Chesapeake Exploration, LLC, No. 3:10-cv-02555 (N.D. Tex., Dec. 15, 2010)

On December 15, 2010, Grace Mitchell (“Plaintiff”) filed suit against Encana Oil & Gas (USA) Inc.; Chesapeake Operating, Inc.; and Chesapeake Exploration, LLC (collectively, “Defendants”) in the U.S. District Court for the Northern District of Texas. This case was dismissed with a final judgment on December 27, 2011.

Plaintiff alleged that Defendants’ hydraulic fracturing and horizontal drilling activities and associated storage of drilling wastes had contaminated the plaintiff’s water well in Johnson County, Texas. Plaintiff claimed that, after Defendants commenced hydraulic fracturing operations near her property, her well water became slick to the touch and gave off a gasoline-like odor. According to the complaint, testing results revealed that groundwater was contaminated with various chemicals, including C12-C28 hydrocarbons, similar to diesel fuel.

The original complaint alleged causes of action for nuisance, trespass, negligence, fraud, and strict liability. In the nuisance claim, Plaintiff asserted that Defendants had substantially interfered with and invaded Plaintiff’s private interests in her land by contaminating her groundwater, offending her senses, and making her enjoyment of the property uncomfortable and inconvenient. In her trespass claim, Plaintiff alleged that Defendants caused and permitted petroleum by-products to cross Plaintiff’s property boundaries and enter her land and groundwater, resulting in damage to the property and injury to Plaintiff’s right of possession. In her cause of action for negligence, Plaintiff claimed that Defendants breached their duty to not negligently and unnecessarily damage her surface and subsurface estate, including the groundwater.

The fraud claim stated that Defendants failed to warn and/or concealed the danger that Plaintiff’s groundwater would become contaminated from chemicals similar to diesel fuel. Finally, the complaint alleged that petroleum drilling and hydraulic fracturing constitute ultra-hazardous and abnormally dangerous activities; and thus, Defendants should be held strictly liable for the injuries and damages caused by their activities. Both the fraud and strict liability claims were withdrawn when Plaintiff filed her amended complaint on April 25, 2011.

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8 The Court did not consider Plaintiffs’ experts’ reports because Plaintiffs failed to identify the chemical to which they were exposed and to provide evidence of dose, exposure amount, and duration.
Plaintiff requested damages for loss of the use of groundwater, loss of market value of property, loss of the intrinsic value of well water, expenses incurred from buying water from an alternate source, medical monitoring damages, remediation, nominal damages, and exemplary damages.

 Otis v. Chesapeake Appalachia, LLC, Chesapeake Energy Corporation, and Nomac Drilling, LLC, No. 3:11-cv-00115-ARC (M.D. Pa. (Scranton), Jan. 18, 2011)


 Plaintiffs Edwin and Candy Bidlack, Jessie Northrup, and Jason and Janet Otis ("Plaintiffs") filed their lawsuits in Pennsylvania Court of Common Pleas of Bradford County, on December 17, 2010. Bidlack, et al v. Chesapeake Energy Corp., et al; No. 10-EQ-000761 (Pa. Ct. Com. Pl., Dec. 17, 2010); Otis v. Chesapeake Energy Corp., et al; No. 10-EQ-000775 (Pa. Ct. Com. Pl., Dec. 17, 2010). Both the Bidlack lawsuit and the Otis lawsuit were removed to the U.S. District Court for the Middle District of Pennsylvania (Scranton) in mid-January. The U.S. District Court has stayed both cases, requiring that the parties engage in binding arbitration of their claims. Plaintiffs’ counsel has filed motions to vacate the Court’s stay order, arguing that immediate action needs to be taken because the “harm to their residence and water supply is more extensive and more severe than originally contemplated…” Plaintiffs’ motions to vacate were denied on May 11, 2012.

 Plaintiffs state that Defendants Chesapeake Appalachia, LLC, Chesapeake Energy Corporation, and Nomac Drilling, LLC ("Defendants") located, drilled, and conducted explorations of wells within 1,000 feet of the Otis residence and water supply well and within a five mile radius of the Bidlack residence and water supply well. Plaintiffs allege that their water supplies have been contaminated and they have been exposed to hazardous chemicals and substances, including methane. They have lost the use and enjoyment of their residence and their quality of life, living in constant fear of future physical illness.

 Plaintiffs assert in their complaint causes of action for violations of the Hazardous Sites Cleanup Act, negligence, private nuisance, strict liability, trespass, and medical monitoring trust fund. For negligence, Plaintiffs accuse Defendants of failing to prevent and/or contain releases and migration of hazardous chemicals, failing to prevent contamination of the water supplies, creating a risk of explosion, and using improper drilling techniques and materials, including defective and ineffective well casings and negligent planning, training, and supervision of staff, employees and/or agents.

 Plaintiffs seek costs for remediation of the hazardous substances and contaminants and compensatory damages for medical costs, loss of use and enjoyment of the property, loss of the quality of life, emotional distress, personal injury, and future health monitoring. In addition, Plaintiffs have requested damages for the diminution of value of their residence and real property, including the debt service and cost to maintain the residence and real property. The
complaint also requests punitive damage and preliminary and permanent injunctions against future contamination, as well as litigation costs.


Plaintiffs Doug and Diana Harris ("Plaintiffs") brought action against Devon Energy Production Co., LP in the U.S. District Court for the Northern District of Texas (Case No. 3:10-cv-02554) on December 15, 2010. The case was transferred to the Eastern District of Texas on December 22, 2010.

Defendant, Devon Energy, drilled bore holes under and near Plaintiffs’ property in Denton County, Texas. Plaintiffs claimed that, after Devon Energy commenced hydraulic fracturing operations near their property, their groundwater became contaminated and polluted with a gray substance. According to the complaint, testing results showed high levels of metals including aluminum, arsenic, barium, beryllium, calcium, chromium, cobalt, copper, iron, lead, lithium, magnesium, manganese, nickel, potassium, sodium, strontium, titanium, vanadium, and zinc.

The complaint alleged causes of action identical to the claims in the Mitchell suit for nuisance, trespass, negligence, fraud, and strict liability. The Court dismissed the fraud claim on July 12, 2011. Damages sought in this case include loss of the use of land and groundwater, loss of market value of property, loss of the intrinsic value of well water, expenses related to testing contaminated water, expenses incurred from buying water from an alternate source, emotional harm and mental anguish, medical monitoring damages, remediation, nominal damages, and exemplary damages.

In an interesting turn of events, on December 6, 2011, Plaintiffs filed a motion to dismiss without prejudice, stating that “recent testing showed that the contamination is no longer at a toxic level for human consumption.” This motion was presented shortly after Defendant filed a motion for summary judgment. In their response to Defendant’s pleading, Plaintiffs stated that “[b]ecause the Plaintiffs’ groundwater has apparently purged itself of elevated levels of toxic substances, Plaintiffs cannot trace or prove that Defendant Devon was the cause of the Plaintiffs’ toxic water.” On December 21, 2011, Defendant filed its opposition and response to Plaintiffs’ dismissal motion, asking that the Court dismiss the case with prejudice and award attorneys’ fees. On January 25, 2012, the Court granted Plaintiffs’ motion and the lawsuit was dismissed without prejudice.


Range Production Company and Range Resources Corporation (collectively, “Range”) own and operate gas extraction wells in the Newark East (Barnett Shale) Field, in and around the Fort Worth, Texas area. On December 7, 2010, the EPA issued an Emergency Administrative Order (the “EAO”) pursuant to Section 1431 of the Safe Drinking Water Act, 42 U.S.C. § 300i. The EAO identified contaminants that “may present an imminent and substantial endangerment to the
health of persons,” and determined that two water wells were affected by Range’s drilling activities. The EPA also found that state and local authorities had not taken sufficient action to address the endangerment.9

The EAO required Range to: 1) notify the EPA of whether it intended to comply with the EAO within 24 hours; 2) provide replacement water supplies to the recipients of water from the affected water wells within 48 hours; 3) install explosivity meters at the affected dwellings within 48 hours; 4) submit a survey listing water wells within 3,000 feet of the gas wells at issue with a plan for EPA approval to sample those wells to see if they have been contaminated, including air and water samplings; 5) submit a plan for EPA approval to conduct soil gas surveys and indoor air analyses for all dwellings served by the affected water wells within 14 days; and 6) submit a plan to identify gas flow pathways to the affected aquifer if possible, and remediate impacted areas of the aquifer.

Range disputed the EPA’s finding and the validity of the EAO. At the request of the Administrator of the EPA, the United States filed a complaint for injunctive relief and civil penalties against Range on January 18, 2011 in the Northern District of Texas. The action by the United States alleged violations of the EAO, resulting in the presence of contaminants that may pose an imminent and substantial endangerment to the health of persons in violation of the Safe Drinking Water Act. The United States sought permanent injunctive relief to require Range to comply with the provisions of the EAO, as well as a civil penalty from Range for each day of each violation.

On January 20, 2011, Range filed a petition for review of the EAO with the Fifth Circuit Court of Appeals (Case No. 11-60040), arguing that the EAO violated its due process rights. On June 20, 2011, the U.S. District Court for the Northern District of Texas entered an order staying its action until the Fifth Circuit ruled on Range’s petition. Oral arguments in the Fifth Circuit were heard on October 3, 2011. A decision from the Fifth Circuit became moot when the EPA withdrew its EAO on March 29, 2012, after the U.S. Supreme Court’s March 21, 2012 decision in the Sackett case, infra. The Fifth Circuit dismissed its case on April 2, 2012 while the District Court action was dismissed on March 30, 2012.

Of interest, in relation to determining the validity of an EAO issued by the EPA is Sackett v. Environmental Protection Agency, 622 F.3d 1139 (9th Cir. 2010), cert. granted June 28, 2011, a recent Ninth Circuit case that was granted certiorari to the U.S. Supreme Court and decided on March 21, 2012, 2012 WL 932018, 566 U.S. ____ (Mar. 21, 2012). The Sacketts placed fill material on their Bonner County, Idaho property, which is located approximately 500 feet from Lake Priest, a navigable waterway. Claiming that the land was jurisdictional wetlands under the Clean Water Act, the EPA issued an administrative compliance order directing the Sacketts to remove the fill and restore the lot to its original condition or face civil penalties up to $32,500 per day per violation, plus administrative penalties. The Sacketts contested the EPA’s findings

9 Notably, a parallel investigation by the Texas Railroad Commission (“TRC”) concluded that Range’s operations of the gas wells did not cause or contribute to contamination of the water wells (Case No. 7B-0268629).
and filed a lawsuit asking the District Court to declare that their property was not protected wetlands. The District Court ruled, and the Ninth Circuit Court of Appeals agreed, that the Sacketts could not seek that declaration until the EPA asked a federal judge to enforce the EPA’s administrative order. The U.S. Supreme Court disagreed with both lower courts, holding that parties subject to an EAO have the right to challenge that compliance order in court before the agency brings legal action to enforce it.

Now that the U.S. Supreme Court has determined that the Sacketts had their due process rights violated and that the Sacketts and other alleged environmental violators have a right to judicial review of an EAO issued without a hearing or any proof of violation, the EPA’s use of EAOs may be curtailed.10


Smith family complained that the quality of their water deteriorated after Defendant Devon Energy Production Company began natural gas exploration, hydraulic fracturing, production, storage, and transport near their home. At first, their water supply contained sediment. The Smith installed an in-line filtration system. That system worked well until April 2010 when Defendant installed a natural gas collection infrastructure about 600 feet away from their home. Then the water became fouled with a grey clay-like substance. This was reported to Defendant, who involved the Texas Railroad Commission. Water samples were taken, and the results showed high levels of arsenic, barium, chromium, lead, and selenium. The Smiths stopped using their water supply.

The Smiths asserted causes of action for trespass, nuisance, and negligence for allowing metals, chemicals, and other substances from defendant’s drilling and fracking activities to enter their land and their only source of drinking water. They sought damages for loss of land use, loss of market value, loss of intrinsic value of the well water, loss of value of groundwater, emotional harm and mental anguish.

On May 25, 2012, this lawsuit was dismissed on plaintiffs’ motion, indicating that “water test results [provided during discovery] show that the well water no longer exhibits contamination in excess of the MCLs [maximum contaminant levels].”


In February 2011, 15 landowners (“Plaintiffs”) filed suit under Cause No. 2011-1168 in the Supreme Court of the State of New York, Chemung County, against Anschutz Exploration

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10 Parties considering a judicial challenge to an EAO should be aware that the EPA would likely file a counterclaim and face review under the Administrative Procedures Act (“APA”). The APA might provide a favorable standard for the EPA if it prepares an administrative record. *See B. Shrestha, “Sackett’s Impact on EPA Not So Dramatic, Ex-Official Says*,” Law360, April 26, 2012.
Corporation; Conrad Geoscience Corporation; and Pathfinder Energy Services, Inc. (collectively, “Defendants”). This case was transferred to the U.S. District Court for the Western District of New York, Rochester Division, on March 9, 2011. On July 13, 2012, the Court ordered the parties to mediate the case. The Mediation Certification filed on December 20, 2012 indicates that the case had settled in part. Plaintiffs have filed a motion to dismiss their claims against Conrad Geoscience.

Scheduling orders show discovery taking place through the third quarter of 2012. All depositions of experts and of Joseph Yarosz of the New York State Department of Environmental Conservation had to be taken by October 31, 2012. Currently pending before the Court are defendants’ motions to preclude plaintiffs’ expert report and plaintiffs’ motion for extension of time to complete discovery. These motions are scheduled for hearing on March 15, 2013.

Plaintiffs allege that Defendants were negligent in their drilling, construction, and operation of natural gas wells such that: (1) combustible gas was released into the headspaces of Plaintiffs’ water wells; (2) elevated levels of dissolved methane, propane, or other natural gases were caused to be present in Plaintiffs’ wells; (3) natural gas was caused to be discharged into Plaintiffs’ groundwater; (4) excessive pressures were caused to be present within gas wells near Plaintiffs’ homes and water wells; (5) pollutants including toxic sediments and industrial waste were caused to be discharged into the soil and water near Plaintiffs’ homes and water wells; and (6) drilling muds and fluids were caused or allowed to be discharged onto the surface and into the subsurface near Plaintiffs’ homes and water wells. Specifically, Plaintiffs claim that Anschutz’s improper drilling, well capping, and/or cement casing caused toxic chemicals to be discharged into Plaintiffs’ groundwater. Plaintiffs further claim that, when hired by Anschutz to investigate possible contamination, Conrad Geoscience failed to conduct a reasonable and prudent investigation, in conformity with industry standards that would have warned Plaintiffs about the contamination.

The complaint alleges many of the same causes of action as found in earlier lawsuits, namely, negligence per se, common law negligence, nuisance, strict liability, trespass, and medical monitoring. Plaintiffs also allege causes of action for premises liability, fear of developing cancer, and deceptive business acts and practices. Damages sought include the loss of market value of land, costs of repair and restoration, loss of the use of land, expenses related to testing, medical monitoring, and consequential damages, in the amount of $150,000,000 per cause of action. Plaintiffs seek exemplary or punitive damages of at least $500,000,000, as well as litigation costs and attorneys’ fees.

Plaintiffs are a married couple in Wise County, Texas, owning property close to oil and gas wells being developed by defendants Aruba Petroleum, Inc.; Ash Grove Resources LLC; Encana Oil & Gas (USA) Inc.; Halliburton Company; Republic Energy Inc. (dismissed with prejudice on November 11, 2011); Ryder Scott Company, LP;11 Ryder Scott Oil Company; Tejas Production Services, Inc. (dismissed without prejudice on July 25, 2012); and Tejas Western Corporation (collectively, “Defendants”). In their Second Amended Petition, filed on August 5, 2011, Plaintiffs added Burlington Resources Oil & Gas Company LP as a defendant. Discovery is ongoing. In their Sixth Amended Petition, filed on September 10, 2012, the Plaintiffs dropped Ash Grove Resources LLC and Tejas Western Corporation as defendants. Trial is scheduled for April 15, 2013.

Plaintiffs allege that Defendants’ natural gas drilling activities and operations, including releases, spills, emissions, and discharges of hazardous gases from vehicles, engines, construction, pits, condensate tanks, dehydrators, flaring, venting, and fracking, have exposed Plaintiffs and their property to hazardous gases, chemicals, and industrial wastes. Beginning with the Sixth Amended Petition, Plaintiffs identified 62 natural gas well sites that are located in close proximity to their property. Due to Defendants’ natural gas activities, Plaintiffs claim to have experienced serious health effects, with medical tests revealing the presence of natural gas chemicals, compounds, and metals such as ethylbenzene and xylene. The complaint further alleges that Defendants’ activities resulted in the death of household pets and chickens, and ultimately forced Plaintiffs to evacuate their home.

Plaintiffs allege claims for negligence per se,12 common law negligence, gross negligence, private nuisance,13 and trespass and subsurface trespass. Plaintiffs further allege causes of action for assault and intentional infliction of emotional distress, claiming that Defendants made physical contact with Plaintiffs through the releases, spills, emissions, and discharges of hazardous gases, chemicals, and industrial wastes. In their Fifth Amended Petition filed on June 4, 2012, Plaintiffs added a cause of action for civil conspiracy, claiming that Defendants sought to “accomplish an unlawful purpose…when Defendant[s] caused releases, spills, emissions, and discharges of Defendants’ hazardous gases, chemicals, and industrial wastes…” Damages sought include actual damages for medical expenses, loss of earning capacity, loss of consortium,

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11 Ryder Scott Company, LP was dropped as a defendant in Plaintiffs’ Second Amended Petition filed on August 5, 2011.
12 In the Sixth Amended Petition’s negligence per se claim, Plaintiffs set out ten (10) statutes allegedly violated by Defendants. These statutes include the Texas Clean Air Act, Texas Commission on Environmental Quality relating to air contaminants, Texas Administrative Code relating to water protection, leaks, and environmental quality, Texas Solid Waste Disposal Act, and the Texas Penal Code for assault and reckless damage or destruction to property.
13 In the Sixth Amended Petition, Plaintiffs add claims for negligent private nuisance, intentional private nuisance, and Per Quod private nuisance. For the per quod claim, Plaintiffs allege that, even absent negligence or intentional private nuisance, Defendants engaged in activities that were “abnormal and out of place in their surroundings.” In the Seventh Amended Petition filed on October 19, 2012, Plaintiffs refer to the “cumulative environmental contamination and polluting events caused by” the Defendants and set out a list of “Private Nuisance Activities” which include Defendants’ alleged air and subsurface trespass as well as the creation of offensive noise, odors, smells, sights and light pollution, heavy traffic, and disturbances “in the natural environment to cause wildlife to flee.”
property damage, loss of market value, replacement and repair costs, sentimental value damages, loss of use, medical monitoring, cost of remediation, unliquidated damages, attorneys’ fees, nominal damages, and exemplary damages. In addition, Plaintiffs seek a permanent injunction to preclude current and future drilling and hydraulic fracturing activities near Plaintiffs’ land.


On March 23, 2011, the Strudley family (“Plaintiffs”) sued Antero Resources Corporation; Calfrac Well Services; and Frontier Drilling LLC (collectively, “Defendants”) in Colorado state court. According to Plaintiffs, Defendants operate several natural gas wells in Garfield County, Colorado, within one mile of their residence and water supply well, which was allegedly used for drinking, bathing, cooking, washing, and other residential purposes. Plaintiffs alleged that environmental contamination from the drilling activities of Defendants caused health injuries, loss of use and value of their property, loss of quality of life, emotional distress, and other damages. Specifically, the complaint stated that Defendants’ negligence caused the presence of hydrogen sulfide, hexane, n-heptane, toluene, propane, isobutene, n-butane, isopentane, n-pentane, and other toxic hydrocarbons and hazardous pollutants to be discharged into the air, ground, and aquifer near Plaintiffs’ property.

The Strudleys alleged claims for negligence per se, common law negligence, nuisance, strict liability, trespass, and medical monitoring trust funds. On July 20, 2011, the negligence per se claim against Calfrac Well Services was dismissed by the Court, finding that fracturing fluids and other oil and gas materials used by Calfrac were not “wastes” under the Colorado Hazardous Waste Act and that Calfrac was not an operator or owner as required by the Colorado Oil and Gas Conservation Commission regulations.

Damages sought in this case included the cost of remediation, cost of future health monitoring, compensatory damages, loss of use and enjoyment of property, loss of quality of life, emotional distress, personal injury, diminution of property value, and litigation costs and fees.

In their Motion to Modify the Court’s Case Management Order filed on September 19, 2011, Defendants asserted that Plaintiffs had only provided vague allegations of injury and exposure and that Plaintiffs failed to identify any current or future disease or to allege that any treating physician or qualified scientist has connected any such disease to the chemicals or wastes used during Defendants’ operations. Because of the vagueness of the claims, Defendants argued that the Court should issue a “Lone Pine” order, requiring Plaintiffs to make a prima facie showing of contamination.

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14 See Lore v. Lone Pine Corp., No. L-33606-85 1986 WL 635707 (N.J. Sup. Ct. Nov. 18, 1986). In order to streamline the proceedings in this toxic tort case, the court entered a case management order requiring the Plaintiffs to present certain basic facts regarding their claims of contamination from a landfill. First, the court required the Plaintiffs to provide the following documentation with respect to each personal injury claim: (i) facts of each individual Plaintiff’s exposure to alleged toxic substances at or from the site; and (ii) reports from treating physicians or other experts, supporting each individual Plaintiff’s claim of injury and causation. The court then required the Plaintiffs to give the following with respect to the property damage claims: (i) location of the property;
of exposure, injury, and specific causation by providing expert affidavits. The Court agreed with the Defendants and, on November 10, 2011, ordered Plaintiffs to provide sufficient evidence of their claims by means of sworn affidavits from doctors, contamination reports, and other information relating to the identification and quantification of contamination on their property attributable to Defendants’ operations. Plaintiffs presented their evidence to the Court on February 23, 2012.

Defendants filed a Motion to Dismiss or, in the Alternative, for Summary Judgment on March 23, 2012, arguing that the Plaintiffs’ evidence was insufficient to support their claims. The Court agreed and dismissed Plaintiffs’ claims with prejudice on May 9, 2012. In particular the Court found that the doctor’s affidavit failed to establish a causal connection between Plaintiffs’ injuries and Defendants’ drilling activities. This Order is now being appealed.

Andre v. EXCO Resources, Inc. and EXCO Operating Co., No. 5:11-cv-00610-TS-MLH (W.D. La. April 15, 2011)

Beckman v. EXCO Resources, Inc. and EXCO Operating Co., 5:11-cv-00617-TS-MLH (W.D. La. April 18, 2011)

Plaintiff David Andre brought suit against EXCO Resources, Inc. and EXCO Operating Company (collectively, “EXCO”) on April 15, 2011. Andre filed suit on behalf of “consumers of water in the immediate vicinity of DeBroeck Landing, Caddo Parish, Louisiana.” The Court has granted EXCO’s motions to extend the time to file an answer. The Court has not yet scheduled a class action certification hearing.

On April 18, 2011, Daniel Beckman and seven other plaintiffs (collectively, “the Beckman Plaintiffs”) filed suit against EXCO as well. Because the Beckman Plaintiffs resided in Shreveport, Louisiana, they were not included in the Andre suit’s purported class. However, both lawsuits were filed regarding the same alleged incident and seek the same relief.

According to both complaints, on April 18, 2010, a natural gas well operated by EXCO near DeBroeck Landing “experienced problems resulting in the contamination” of the Caddo Parish aquifer and the Beckman Plaintiffs’ and Andre’s properties.

While the complaints do not allege that EXCO engaged in hydraulic fracturing, the Beckman Plaintiffs and Andre seek to compel disclosure of the formulation of the “drilling muds and solutions” allegedly used by EXCO in the natural gas well in order to allow “appropriate tests and monitoring of the aquifer [to] take place.”

Both complaints allege causes of action for negligence, strict liability, nuisance, trespass, unjust enrichment, and impairment of use of property. Andre and the Beckman Plaintiffs seek a variety of damages, including groundwater remediation costs, diminution of property value, and losses

and (ii) reports from real estate or other experts supporting property damage claims, including the timing and degree of the damage as well as causation of the same.
from property market value “stigma.” They also seek a declaratory judgment, “general and equitable relief,” economic damages, and mental anguish and emotional distress damages. Additionally, the Plaintiffs in both actions seek an order requiring remediation by EXCO of the groundwater and development of a “long-term monitoring program” near the site of the alleged well failure and the allegedly contaminated aquifer.

On August 10, 2012, counsel for EXCO reported to the Court that the “parties may now be in a position to resolve this litigation.” The Court held a status conference on August 21, 2012, and ordered a status conference for September 17, 2012 which was later re-scheduled to November 8, 2012. At the status conference, the parties reached a tentative agreement to settle these cases.


On May 17, 2011, a class action suit was filed on behalf of all Arkansas residents who live or own property within one mile of any natural gas compressor or transmission station (collectively, “Plaintiffs”). Defendants are Frontier Gas Services, LLC; Kinder Morgan Treating, LP; Chesapeake Energy Corp.; and BHP Billiton Petroleum (Fayetteville), LLC (dismissed without prejudice on August 17, 2011) (collectively, “Defendants”). On July 8, 2011, Crestwood Arkansas Pipeline LLC was added as a defendant. According to Plaintiffs, Defendants use hydraulic fracturing to produce gas from the Fayetteville Shale and own and operate related facilities across the state of Arkansas. Plaintiffs’ complaint states that Defendants’ operations pollute the atmosphere, groundwater, and soil with allegedly harmful gases, chemicals, and compounds. The complaint also claimed that shale gas production creates excessive noise levels constituting trespass, nuisance, and annoyance. The causes of actions alleged by Plaintiffs are strict liability, nuisance, trespass, and negligence.

Plaintiffs sought compensatory and punitive damages for loss of use and enjoyment of property, contamination of soil, contamination of groundwater, contamination of air and atmosphere, loss of property value, and severe mental distress. Beside punitive and compensatory damages, Plaintiffs further requested establishment of a fund for monitoring future air, soil, and groundwater contamination, costs, and pre-judgment interest. The Court dismissed Plaintiffs’ claim for attorneys’ fees on August 10, 2011.

On December 14, 2011, Plaintiffs filed a motion for partial summary judgment on their trespass cause of action, alleging that there was no disputed issue of fact that Defendants’ activities have trespassed upon Plaintiff’s property. On January 17, 2012, the Court denied this motion as being premature, advising that the class certification had to be held first. On February 6, 2012, Plaintiffs filed their Motion to Certify Class. The certification hearing was held on April 3, 2012. On April 6, 2012, the Judge issued a letter stating that “I am much inclined to deny class certification…” A formal order denying class certification was issued on April 19, 2012, with the Court ruling that “individual issues presented in this case predominate over the common issues.”
On July 11, 2012, the parties filed a Joint Motion to Dismiss With Prejudice, stating that they had “resolved and settled all their claims and cross-claims” and requesting that the case be dismissed with prejudice.


On May 17, 2011, two class action suits were filed on behalf of all Arkansas residents who live or own property within three miles of any bore holes, wellheads, or other gas extraction operations. These two cases were consolidated on July 22, 2011. Southwestern Energy Corporation; XTO Energy (dismissed July 15, 2011); Chesapeake Energy Corporation (dismissed with prejudice on May 17, 2012); and BHP Billiton Petroleum (Fayetteville), LLC (collectively, “Defendants”) are the named defendants. These cases have settled and were dismissed on August 29, 2012.

On February 17, 2012, the Court ordered Plaintiffs to amend their complaint to “plead more facts to give the companies notice of what and how each driller supposedly did wrong” because the complaints are “too thin on some critical facts.” The Court also determined that the motion to deny class certification was premature and would be considered after Plaintiffs amended their complaint. Plaintiffs filed their Combined Amended Complaint on March 23, 2012, adding more facts to support their claims for strict liability, nuisance, trespass, and negligence and adding two plaintiffs, Ronald and Frances Ann Hollars.

On July 2, 2012, Plaintiffs asked the Court for permission to file their Second Combined Amended Complaint (“Second Complaint”) in order to “remove certain parties who are no longer Defendants…and to add allegations concerning Southwestern Energy’s “Underwood experimental salt water disposal well.” The Court granted Plaintiffs’ motion and the Second Complaint was filed on July 11, 2012. This Second Complaint does not include BHP Billiton as a named defendant.

Plaintiffs claim that Defendants’ drilling operations in the Fayetteville Shale polluted their soil, groundwater, air, and water wells. Plaintiffs assert that their water wells and groundwater are contaminated with alpha methyl styrene or have emitted methane and hydrogen sulfide.

Plaintiffs seek punitive and compensatory damages for loss of use and enjoyment of their property, contamination of soil, contamination of groundwater, contamination of water wells, contamination of air and atmosphere, loss of property value, emotional and mental anguish, and physical harm and injury. Additionally, Plaintiffs request establishment of a fund for monitoring future air, soil, and groundwater contamination, costs and attorney’s fees, and pre-judgment interest.
In 2005, Steven and Shayla Lipsky (“Plaintiffs”) built their dream home in Silverado on the Brazos, a subdivision developed by Durant, Carter, Coleman LLC. In the summer of 2010, Plaintiffs discovered that their well water contained benzene, toluene, ethane, and a large amount of methane gas, making the well unusable. Plaintiffs learned that Range Production Company and Range Resources Corporation (the Range Defendants) had begun to extract gas from the Barnett Shale formation very near their home, in direct violation of the Silverado development’s covenants. Plaintiffs filed their lawsuit on June 20, 2011, in Parker County, Texas, where their home is located, seeking $6.5 million in damages.

In December of 2010, the EPA issued an emergency order against Range, finding that the hydrocarbons in the Plaintiffs’ well water were likely caused by gas drilling and posed serious health risks. Later this statement was refined to indicate that the hydrocarbons from Range’s operations may have caused or contributed to the contamination. The Texas Railroad Commission (“Commission”) stepped in to investigate the claims; and in March 2011, the Commission issued an order exonerating the Range Defendants, stating that Range’s wells were not responsible for the contamination of Plaintiffs’ water and that the methane gas in the water wells likely was naturally occurring and came from the shallow Strawn geological formation, far above the Barnett Shale.

In the lawsuit, the Range Defendants filed a plea to the Court’s jurisdiction, alleging that Parker County was not the proper venue for challenging the Commission’s order. On January 30, 2012, the Court ruled that Plaintiffs should have filed their lawsuit in Travis County, where the Commission sits. Because the statute of limitations has run on appealing the Commission’s decision, the Court’s order essentially dismissed Plaintiffs’ claims against the Range Defendants.

Evenson v. Antero Resources Corporation, Antero Resources Piceance Corporation, and John Doe Well Service Providers; No. 2011-cv-5118 (Denver County Dist. Ct., July 20, 2011)
This lawsuit was filed by several families (“Plaintiffs”) residing in Battlement Mesa, Garfield County, Colorado, who claim that the drilling and exploration activities of Antero Resources Corporation, Antero Resources Piceance Corporation, and John Doe Well Service Providers (collectively “Defendants”) are exposing their properties and persons to hazardous gases, chemicals, and industrial wastes. Plaintiffs want class action status for more than 1,000 property owners and 5,000 past and present residents of the community. Plaintiffs’ Complaint alleges one incident in which petroleum odors emanated from one well pad near Battlement Mesa.

Based on the anticipated effects of future natural gas drilling, Plaintiffs sought equitable relief requiring Defendants to use unspecified practices to prevent releases, spills, and discharges; compensation for diminution in property value resulting from a “stigma” that has attached to the property; and creation of a medical monitoring fund to cover the costs arising from the alleged intentional, knowing, reckless and negligent acts and omissions of the Defendants in connection with their releases, spills, and discharges of hazardous chemicals used in their drilling activities.

The Antero Defendants filed a motion to dismiss arguing that Plaintiffs have not asserted any legal claims for relief, but only request remedies based on conduct that has not yet occurred. Further the Antero Defendants asserted that Plaintiffs have failed to plead any injury to their property; that Plaintiffs are attempting to usurp the jurisdiction of the Colorado Oil and Gas Conservation Commission by imposing additional drilling and operational requirements on the Antero Defendants; and that medical monitoring is not a recognized cause of action in Colorado. Moreover, the Antero Defendants argued that all of Plaintiff’s claims lack ripeness, being based on speculative future drilling and operational activities. The Court ruled in favor of the Antero Defendants on August 17, 2012 and dismissed the claims.

*Kamuck v. Shell Energy Holdings GP, LLC, Shell Energy Holdings LP, LLC, and SWEPI, LP (d/b/a Shell Western Exploration and Production, LP); No. 4:11-cv-01425-MCC (M.D. Pa., August 3, 2011)*

Edward Kamuck (“Plaintiff”) brought this lawsuit claiming damages from hydraulic fracturing activities on his 93-acre tract of land, which was under an oil and gas lease at the time of his purchase in 2009. Plaintiff complains that fracking fluid contains significant amounts of hazardous, toxic and carcinogenic chemicals which remain in the well and come to the surface and which harm his property and his health. He further complains that 100 to 150 vehicles a day go directly past his residence (within 45 feet) on an unpaved, dusty road, creating noise and dust. In addition, Plaintiff claims that Defendants spray an unidentified fluid on the dirt roads which drains into the ditches and seeps into the ground.

Plaintiff has brought the following causes of action relating to hydraulic fracturing: injunctive relief (prohibiting all fracking operations and related activities), anticipatory trespass, private

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17 Plaintiff is also suing to correct an alleged improper unitization under the oil and gas lease as well as to stop Defendants from drilling into the Marcellus Shale because the lease only allowed unitization for drilling in the Onondaga or Oriskany formations or below. The Marcellus Shale is located above these formations.
nuisance, negligence, negligence per se, gross negligence, and strict liability. On April 27, 2012, upon Defendants’ motion, the Court dismissed the claims for anticipatory trespass, negligence per se, and gross negligence. The Judge indicated that he would entertain motions for summary judgment on the remaining claims of negligence, strict liability, and private nuisance after discovery was completed. Trial is now scheduled for January 7, 2013.

On June 21, 2012, Defendants’ filed a Motion for A Modified Case Management Order, requesting that the Court enter a “Lone Pine” order\textsuperscript{19} as in the \textit{Strudley} case, \textit{supra}. Plaintiff has responded, arguing that the order is not warranted because this is not a mass tort case, there is only one plaintiff, and the motion seeks to circumvent the standing discovery orders. On September 5, 2012, the Court denied this motion, finding that it was not currently warranted “despite what appear to be arguable shortcomings on the part of Plaintiff’s allegations and evidentiary production to date.” After a telephone conference with the parties on September 20, 2012, the Court ordered the parties to file all motions to compel production of discovery and all motions for protective orders on or before October 5, 2012, with responses due on or before October 19, 2012. On November 7, 2012, the Court ordered all fact discovery completed by December 10, 2012, with a revised joint management plan due on December 14, 2012.

Plaintiff seeks damages for the reasonable and necessary costs of remediation of the hazardous substances and contaminants on his property, the cost of future water and health monitoring, loss of property value, damage to natural resources, medical costs, loss of use and enjoyment of property, loss of quality of life, emotional distress, and other reasonable damages.

\textit{Dillon v. Antero Resources a/k/a Antero Resources Appalachain [sic] Corp. s/k/a Antero Resources Appalacia [sic], LLC; No. 2:11-cv-01038 (W.D. Pa. August 11, 2011)}

\textit{Becka v. Antero Resources a/k/a Antero Resources Appalachain [sic] Corp. s/k/a Antero Resources Appalacia [sic], LLC; No. 2:11-cv-01040 (W.D. Pa. August 12, 2011)}

The Dillon and Becka families (collectively, “Plaintiffs”) filed their two lawsuits in the Court of Common Pleas of Washington County, Pennsylvania on July 18, 2011 (Case Nos. 4813 of 2011 G.D. and 4812 of 2011 G.D., respectively). These cases were then removed to federal court on August 12, 2011. Court-ordered mediation took place in each case on December 15, 2011, ending with no resolution. The Court consolidated both cases on April 25, 2012 and set a discovery deadline of May 31, 2012. On July 9, 2012, the Court entered an order setting a settlement conference for July 31, 2012. Both cases have now settled, \textit{Dillon} on August 9, 2012 and \textit{Becka} on September 24, 2012.

According to the complaints, in early 2010, Defendant Antero Resources began drilling activities on property within 400 to 580 feet of Plaintiffs’ well water supplies. Plaintiffs claim that Antero

\textsuperscript{18} See 2012 WL 1466490.

\textsuperscript{19} See footnote 11, \textit{supra}. 
used hazardous chemicals during its hydraulic fracturing activities and that the use of such chemicals contaminated Plaintiffs’ groundwater.

Plaintiffs asserted claims for negligence, absolute liability, and trespass; and seek injunctive relief to stop the drilling. In their negligence claim, the Plaintiffs set out 31 alleged negligent acts and omissions of the Defendants. These include: (1) injecting hazardous chemicals, compounds, or fluids into the earth in such a fashion as to damage Plaintiffs’ water supplies, the soil, and the environment; (2) failing to properly safeguard the groundwater and spring water; (3) failing to report or warn of spills and releases; (4) failing to prevent drilling mud and other contaminants from being discharged into erosion ditches near Plaintiffs’ homes and water wells; (5) failing to prevent run-off through Plaintiffs’ driveways and residence areas; (6) failing to comply with state statutes relating to safe drinking water and drilling activities; (7) failing to hire, train, manage, and supervise qualified professionals; and (8) failing to properly monitor the work being performed.

Plaintiffs sought damages for personal and property damage. Plaintiffs wanted compensation for their fear that their health has been compromised and that they may contract cancer or other serious illnesses. Plaintiffs also sought reimbursement for increased medical expenses, testing and monitoring of water and soil quality, emotional distress and inconvenience, contamination of their water and land, loss of property value, and loss of enjoyment and use of their land.


This is a lawsuit brought on behalf of two minor children, B. and H. Scoggin, by and through their next friend, Tina J. Scoggin (“Plaintiffs”) against Cudd Pumping Services, Inc., RPC Inc., and Cudd Energy Services (collectively, “Defendants”). Defendant Cudd Energy Services was dismissed without prejudice from the lawsuit on December 9, 2011. Discovery is scheduled to end on June 28, 2013, with trial set for the week of October 7, 2013.

In August of 2011, Defendants hydraulically fractured three natural gas wells which were located approximately 250 feet from the Plaintiffs’ home. Plaintiffs allege that, during the fracking process, large amounts of benzene, toluene, and methylene chloride were released into the environment, causing “dense clouds of a toxic mixture of atomized chemicals…” Air quality measurements taken in the Plaintiffs’ home revealed toxic levels of the chemicals.

Plaintiffs set out causes of action for strict liability, nuisance, trespass, and negligence, claiming that Defendants did not exercise reasonable care in their operations by allowing hazardous chemicals to migrate from the well sites without warning. As a result of Defendants’ activities, Plaintiffs have “suffered severe and life threatening exposure to carcinogenic substances, as well as other toxic pollutants” that can cause Acute Myeloid Leukemia. Plaintiffs allege that, because Acute Myeloid Leukemia can take up to ten years to fully manifest itself, the minors need bi-annual monitoring for signs and symptoms. Plaintiffs want $20,000,000 in
compensatory damages, $50,000,000 in punitive damages, and the establishment of a medical monitoring fund.


There are now approximately 69 named Plaintiffs between these two lawsuits which were filed in Panola County, Texas in early December of 2011. Plaintiffs allege that Defendant ConocoPhillips has contaminated their water wells through its use of hydraulic fracturing to extract gas from the Haynesville Shale formation and by disposing of fracturing waste near Plaintiffs’ properties. Plaintiffs claim that their water wells intermittently smell bad, taste bad, and “give off a gas that they believe to be methane gas.” Upon receiving notice of the water problems, Defendant began providing potable water to the Plaintiffs, but Defendant has advised Plaintiffs that this practice will be stopped at some point in the future.

Plaintiffs set out causes of action for nuisance, trespass, and negligence. Plaintiffs claim that “Defendant failed to use a reasonable alternative means of recovering the minerals pursuant to the accommodation doctrine.” They seek damages of $5,000,000 for loss of use of their land, loss of market value of their land, and loss of the intrinsic value of their well water. They also want damages for their “emotional harm and mental anguish from deprivation of enjoyment, loss of peace of mind, annoyance, inconvenience, and anxiety about the contaminated well water.” In addition, Plaintiffs have asked the Court for a permanent injunction precluding future drilling and fracking activities near Plaintiffs’ land.

On March 28, 2012, the Court denied Defendant’s request for a “Lone Pine” order. Currently the parties are in the midst of contentious discovery, which includes motions to compel depositions, discovery responses, and inspection of documents. Motions for summary judgment in both cases were denied.

Perna v. Reserve Oil & Gas, Inc., No. 11-c-2284 (Circuit Court of Kanawha County, West Virginia, Dec. 21, 2011)

Louis Perna (“Plaintiff”) owns forty acres on which Reserve Oil & Gas, Inc. (“Defendant”) operates a natural gas well. Plaintiff complains that the well was placed within 1,000 feet of his water well and that Defendant destroyed timber on his property when it constructed a road and installed a culvert. Plaintiff was forced to install a fence to prevent Defendant from using his

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20 Plaintiffs’ Fourth Amended Complaint in the Beck case was filed on September 28, 2012, adding 10 plaintiffs and removing one (for a total of 67 plaintiffs).
21 In the Third Amended Complaint in the Beck case, Plaintiff Ada Smith alleges a cause action for fraud, claiming that she signed a release, releasing any damages caused to her water well. She alleges that she signed the release due to duress and coercion from Defendants’ agents who allegedly advised that the delivered water would be stopped if she did not sign.
22 See footnote 11, supra.
property as a staging area and from depositing fracking fluid on his property. In addition, the fracking fluid was kept in two pits, one of which did not have a synthetic liner, and the pit waste was not fully reclaimed after completion of the well.

Plaintiff wants the well leases to be declared unenforceable and asserts claims for negligence, prima facie negligence, trespass, unreasonable use, and nuisance. Plaintiff seeks property damages under the West Virginia Oil and Gas Production Damage Compensation Act as well as damages for mental anguish, emotional distress, annoyance and inconvenience, and economic loss.


This class action with 10 named plaintiffs is brought on behalf of all citizens, residents, and property owners who live or own property within a one mile radius of defendants’ Point Remove Compressor Station. Plaintiffs seek injunctive relief to stop defendants’ operation of the station which is causing pollution or contamination of the air, groundwater, and soil as well as creating “incessant and constant noise pollution.” Plaintiffs plead causes of action for strict liability, nuisance, trespass, and negligence. Each plaintiff seeks compensatory damages of $1,000,000 and punitive damages of $5,000,000.

On March 5, 2012, the Court stayed this lawsuit pending a decision on class certification in the *Ginardi* case, supra. With the *Ginardi* court denying class certification on April 19, 2012, this lawsuit was re-opened and the Court entered a Scheduling Order showing a proposed trial date of January 15, 2013. The parties filed a joint motion and stipulation of voluntary dismissal which was signed by the Court on September 17, 2012.


Scott and Patricia Teekell (“Plaintiffs”) filed their Petition for Injunctive Relief and Damages in the First Judicial District Court of Caddo Parish, Louisiana (Cause No. 555,703) on December 6, 2011. On the basis of diversity, the case was removed to federal court on January 12, 2012, by Defendant Chesapeake Operating, Inc. (the unit operator), with allegations that the other defendants (Crow Horizons Company, JPD Energy, Inc., and Chesapeake Louisiana, L.P.) were fraudulently joined. Answers have been filed by defendants Chesapeake Operating, Inc., JPD Energy, Inc., and Chesapeake Louisiana L.P.

On February 9, 2012, Plaintiffs filed their motion to remand; and on February 24, 2012, Defendants Chesapeake Louisiana and JPD Energy (both lessees) filed a motion to dismiss for failure to state a claim, arguing only the unit operator can be held liable for activities conducted pursuant to a unitization order of the Louisiana Commissioner of Conservation. On June 6, 2012, the Court denied the motion to remand and dismissed all claims against Chesapeake
Louisiana, JPD Energy, and Crow Horizons stating that these defendants were not properly joined to the lawsuit.

Plaintiffs allege that the groundwater beneath their property has been contaminated as a result of Defendant Chesapeake Operating, Inc.’s natural gas drilling and production operations on adjacent property. Plaintiffs have two water wells on their property. The first water well was replaced with a new well in 2010. In January of 2011, after noticing a bad taste in the water from the new well, Plaintiffs had the water tested. The water was found to have high concentrations of sodium salts and iron, as well as dissolved solids at over twice the suggested maximum contaminant level set by the EPA. At that point, Plaintiffs went back to using their original well. In November of 2011, the water from this well began to smell and Plaintiffs determined that the well was holding hydrogen sulfide gas.

Plaintiffs assert that “Defendants are liable under a number of theories including general negligence…and the obligations of neighborhood.” They intend to bring further claims under various Louisiana statutes relating to oil field permits, remediation, and closing of waste wells, including a citizen’s suit under the enforcement provisions of those statutes. Plaintiffs seek damages for the loss of use of their water wells, loss of usable water, costs to obtain a usable water supply, inconvenience, and mental anguish. In addition, Plaintiffs have asked the Court for an injunction to stop Defendants’ activities.

On August 20, 2012, the Court signed an order in which the parties agreed to the entry of a “Lone Pine” order whereby Plaintiffs “will attempt to make a prima facie case as to causation through expert witnesses prior to engaging in full discovery.” Discovery relating to causation issues is due in August 2012 (Plaintiffs) and September 2012 (Defendants) with sworn affidavits from qualified experts due by January 18, 2013. Depositions of both sides’ causation experts will take place from January through April. A status conference is scheduled for May 22, 2013.

_Mangan v. Landmark 4, LLC, No. 1:12-cv-00613 (N.D. Ohio, March 12, 2012)_

_Boggs v. Landmark 4, LLC, No. 1:12-cv-00614 (N.D. Ohio, March 12, 2012)_

Plaintiffs Mark and Sandra Mangan and William and Stephanie Boggs (“Plaintiffs”) filed their Complaints on March 12, 2012, alleging that Defendant Landmark 4, LLC (“Landmark”) had contaminated their properties and persons with toxic, carcinogenic, and ultra-hazardous materials by releasing, spilling, or discharging these materials during hydraulic fracturing on wells located within 2,502 feet of Plaintiffs’ property, homes, and water well supplies. Seeking injunctive relief to prevent continuing and future contamination, Plaintiff’s assert causes of action for medical monitoring, negligence, strict liability, private nuisance, unjust enrichment, negligence per se, battery, intentional fraudulent concealment, and negligent misrepresentation.

Plaintiffs’ causes of action for unjust enrichment, battery, and intentional fraudulent concealment contain interesting allegations. In their unjust enrichment claim, Plaintiffs state that Landmark has been unjustly enriched by its acts and omissions in causing contaminants to enter their
properties. “These acts and omissions allowed Defendant to save millions of dollars in costs they should have been expended to properly contain and control the substances emanating from their facility.”

The claim for battery is based on Landmark’s alleged intentional and willful generation, discharge, and transport of contaminants, its concealment of discharges, and its failure to remediate causing “direct, harmful and/or offensive contact with Plaintiffs.

As for intentional fraudulent concealment, Landmark is accused of knowingly failing to disclose to Plaintiffs and public authorities the “nature, extent, magnitude, and effects of” Plaintiffs’ exposure to the contaminants allegedly released by Landmark. Had Plaintiffs known the information concealed by Landmark, they would not have consented to be exposed to the contaminants. “Plaintiffs reasonably believed that” Landmark’s activities did not pose any potential health hazard to the groundwater, air, soil, and natural resources in and around the facility.

In each case, on April 10, 2012, Defendant filed a motion to dismiss Plaintiffs’ claims of negligence, strict liability, battery, and intentional fraudulent concealment. Plaintiffs responded to the motion on May 8, 2012, with a reply by Defendant on May 22, 2012. On August 13, 2012, the Court dismissed Plaintiffs’ claims for battery and intentional fraudulent concealment. Also on August 13, 2012, the Court denied Defendants’ request for a “Lone Pine” Order, stating that “at this stage of the proceedings...there are no extraordinary circumstances that would render the normal discovery and motion practice procedures insufficient in this case.”

In the Mangan case, the Court issued a scheduling order on October 19, 2012. Fact discovery must be completed by April 30, 2013, with expert reports due from Plaintiffs on June 30, 2013 and from Defendants on August 31, 2013. A status conference is scheduled for May 7, 2013. In the Boggs case, the Court has not yet ruled on the parties’ proposed scheduling orders.


Tammy Manning, Matthew Manning, Bryanne Burton, Amada Grondin, and Robert Lee, Jr. (“Plaintiffs”) filed their complaint on April 9, 2012. The Court immediately issued an order requiring Plaintiffs to amend their complaint to properly allege diversity jurisdiction. An amended complaint was filed on May 3, 2012, but again the Court ordered Plaintiffs to properly allege diversity jurisdiction. The Second Amended Complaint filed on May 17, 2012 was accepted by the Court.

Plaintiffs complain that, beginning in March 2011, Defendants engaged in drilling and hydraulic fracturing at 15 wells, with well pads within 1,000 to 7,390 feet of Plaintiffs’ property, home, and water supply. They argue that, because their water supply is contaminated, they are exposed

23 Defendant is seeking a “Lone Pine” order. See footnote #11 supra.
to hazardous chemicals, their property has diminished in value, and they have lost the use and enjoyment of their property. On April 10, 2012, the Pennsylvania Department of Environmental Protection advised the Manning plaintiffs that their water supply contained barium above the maximum level allowed along with methane.

Causes of action include violations of the Hazardous Sites Cleanup Act, negligence, private nuisance, strict liability, trespass, and medical monitoring trust funds. In the negligence claim, Plaintiffs accuse Defendants of failing to prevent and/or contain releases and migration of hazardous chemicals and combustible gases, and failing to prevent contamination of the water supplies. Plaintiffs seek compensatory and punitive damages for remediation, loss of property value, loss of use and enjoyment of their property, loss of quality of life, emotional distress, inconvenience, and discomfort in an unspecified amount.


The 180+ page complaint was filed by three families against 17 defendants, including the drilling operator, the manufacturers of the impoundment pond liners, the suppliers of fracking fluids, the engineers who constructed the well sites, the companies that tested the drinking water supplies, and the trucking companies who transported water to and waste water away from the wells. This case is one of the first to name as defendants the operator and/or driller and the supporting supply and service companies for the well and hydraulic fracturing activities.

The causes of action include strict liability, negligence, negligent and intentional infliction of emotional distress, battery, private nuisance, trespass, Medical Monitoring Trust Fund, violations of Hazardous Sites Clean Up Act, professional liability against the engineering companies and individuals, civil conspiracy, and fraud. The last two claims of civil conspiracy and fraud are against Range Resources Appalachia, LLC and the two companies that were taking water samples at Plaintiffs’ homes. Plaintiffs allege that the water reports were modified to intentionally provide incomplete information so that Range Resources could continue its fracking operations.


Three families brought this lawsuit, complaining that the use and enjoyment of their vacation homes in Susquehanna County, Pennsylvania have been destroyed by defendant Southwestern Energy Production Company’s (“Southwestern Energy”) drilling and hydraulic fracturing

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activities. The Plaintiffs assert causes of action for private nuisance and for negligence and seek a permanent injunction to stop unreasonable drilling activities. These unreasonable drilling activities include mobilizing heavy equipment, maintaining a constant flow of truck traffic day and night, using large flood lights, drilling, fracking, blasting, and flying low-level helicopters over their homes. These activities have created deforestation, dust, high decibel noises, high pressure venting noises, and loud gas flaring that emits air pollutants. Plaintiffs’ well water is no longer safe for drinking, cooking, and other residential uses. They can no longer enjoy the peace and serenity of their vacation homes and have seen the value of their homes decrease.

Southwestern Energy filed a motion to dismiss on September 10, 2012, asserting that each of Plaintiffs’ claims are flawed and barred by Pennsylvania’s economic loss rule. In particular, Southwestern Energy asserts that Plaintiffs have not alleged a cause of action for private nuisance and have not properly plead causation.

On November 6, 2012, the Court held a Case Management Conference. All fact discovery must be completed by May 1, 2013. All dispositive motions must be filed by May 22, 2013. The case has been assigned to the “standard” case management track.

Litigation Involving Earthquakes and Hydraulic Fracturing

On March 23, 2011, Jacob Sheatsley 25 filed a class action lawsuit claiming that “Central Arkansas has seen an unprecedented increase in seismic activity, occurring in the vicinity of” wastewater disposal injection wells 26 which are part of hydraulic fracturing operations. According to the Arkansas Geological Survey, there had been 599 seismic events in Guy, Arkansas between September 20, 2010 and the date of the lawsuit. The largest earthquake in 35 years occurred on February 28, 2011, and measured 4.7 in magnitude. On that same day, the U.S. Geological Survey recorded as many as 29 earthquakes around Greenbrier and Guy, Arkansas, that ranged in magnitude from 1.7 to 4.7.27 Mr. Sheatsley alleged causes of action for public nuisance, private nuisance, absolute liability, negligence, and trespass, all based on the interference with the use and enjoyment of property and on the risk of serious personal harm and property damage from the earthquakes.

Four additional class actions complaints quickly followed, with the same allegations. All were originally filed in state court and removed to federal court.28 On August 31, 2011, all four

25 Sheatsley v. Chesapeake Operating, Inc. and Clarita Operating, LLC, Cause No. 2011-28, In the Circuit Court of Perry County, Arkansas 16th Division, removed to the U.S. District Court for the Eastern District of Arkansas, Western Division, Case No. 4:11-cv-00353-JLH, on April 4, 2011.
27 This earthquake information is referenced in the Sheatsley Class Action Complaint. See also Arkansas Geological Survey’s Earthquake Master List, found at www.geology.arkansas.gov/xl/Earthquake_Archive.xls and U.S. Geological Survey found at http://earthquake.usgs.gov/earthquakes/recentequsgs/.
28 Frey v. BHP Billion Petroleum (Arkansas) Inc., et al., Case No. 23CV-11-488, In the Circuit Court of Faulkner County, Arkansas, 2nd Division (May 23, 2011), removed to the U.S. District Court for the Eastern District of Arkansas, Western Division, Case No, 4:11-cv-0475-JLH, on June 9, 2011.
lawsuits were consolidated under Case No. 4:11-cv-00474, *Hearn v. BHP Billiton Petroleum (Arkansas) Inc., et al.* With the filing of these additional class actions, on July 13, 2011, Mr. Sheatsley voluntarily dismissed his lawsuit, in “an effort to streamline these cases and further judicial economy.”

The *Hearn* class action continues forward with changes to both Plaintiffs and Defendants. On September 15, 2011 and on November 1, 2011 respectively, defendants Clarita Operating LLC and BHP Billiton Petroleum (Arkansas) Inc. were dismissed. Plaintiffs Sam and April Lane and plaintiffs Randy and Joyce Palmer dismissed their claims on November 18, 2011; and Peggy Freeman, Tony and Karen Davis, and Jason and Misty Spiller were added as plaintiffs.

On December 15, 2011, Plaintiffs filed their First Amended and Consolidated Class Action Complaint, adding Deep Six Water Disposal Services, LLC as a defendant and expanding their claims to include damages for (1) physical damage to their homes and commercial real estate; (2) losses attributable to the purchase of earthquake insurance; (3) losses in the fair market value of their real estate; (4) economic loss due to temporary stoppage of business operations; and (5) emotional distress. A stipulated Order regarding expert discovery was signed on January 10, 2012. On February 28, 2012, the Court issued an Amended Final Scheduling Order, scheduling a class certification hearing for March 15, 2013 and setting trial for March 24, 2014.

On May 4, 2012, Defendant Deep Six filed a motion for summary judgment, arguing Plaintiffs’ inability to sustain their burden of proof regarding causation. Deep Six points to testimony from seismologist Dr. Haydar Al-Shukri before the Arkansas Oil & Gas Commission who stated that the seismic events were not caused by hydraulic fracturing.\(^{29}\) On June 25, 2012, the Court granted a Joint Motion for the Voluntary Dismissal of Deep Six and denied the motion for summary judgment as moot. On August 23, 2012, the Court granted a joint motion for mediation and extended all deadlines. After mediation, on October 9, 2012, the parties filed a joint motion to stay, indicating that they had made progress in resolving the case. The Court granted a three-month stay to allow time for discussions among the parties. If the case is not resolved by January 16, 2013, the parties must file a Scheduling Order within five days of that deadline.

**Studies Concerning Possible Connections Between Earthquakes and Fracking**

Before the lawsuits were filed, in December 2010, the Arkansas Oil & Gas Commission (“AOG Commission”) Staff was concerned about a possible connection between hydraulic fracturing...
and the unusual seismic activity in Arkansas. The Staff requested that the Commission establish an immediate moratorium on any new or additional disposal wells in certain counties.\footnote{Letter dated December 2010 from director Lawrence Bengal to the Commissioners of the Arkansas Oil & Gas Commission regarding amended request for an immediate moratorium on any new or additional Class II disposal well or Class II disposal well in certain areas (Faulkner, Conway, Van Buren, Cleburne and White counties).}

Shortly after the large earthquakes in February 2011, the Commission had a special hearing and ordered the cessation of disposal wells operated by Clarita and Chesapeake.\footnote{Order No. 602A-2010-12, February 8, 2011, Class II Commercial Disposal Well or Class II Disposal Moratorium, \url{available at http://www.aogc.state.ar.us/Hearing%20Orders/2011/Jan/602A-2010-12.pdf}; see also Edward McAllister, Avoiding Fracking Earthquakes May Prove Expensive, Scientific American (Jan. 3, 2012), \url{available at http://www.scientificamerican.com/article.cfm?id=avoiding-fracking-earthquakes-expensive}.} In July 2011, the Commission held a hearing and determined that there was sufficient documentary and expert witness\footnote{Researchers with the Arkansas Geological Survey say that, while there is no discernible link between earthquakes and gas production, there is “strong temporal and spatial” evidence for a relationship between the Arkansas earthquakes and the injection wells. Campbell “A Dot on the Map, Until the Earth Started Shaking,” N.Y. Times, Feb. 5, 2011. Dr. Haydar al-Shukri, director of the Arkansas Earthquake Center at the University of Arkansas testified before the Commission that, because only 280 of the more than 10,000 small seismic events occurred within three miles of the well, these events were not caused by hydraulic fracturing.} proof to order a moratorium on drilling disposal wells in the earthquake area.\footnote{“Natural Gas: Arkansas Commission Votes to Shut Down Wells,” HuffPost Green, July 27, 2011; Order No. 180A-2-2011-07, August 2, 2011, Class II Commercial Disposal Well or Class II Disposal Moratorium, \url{available at http://www.aogc.state.ar.us/Hearing%20Orders/2011/July/180A-2-2011-07.pdf}.}

Other organizations besides the AOG Commission have been studying the possible connections between drilling and earthquakes. In August 2011, the Oklahoma Geological Survey ("OGS") drafted an Open-File Report entitled “Examination of Possibly Induced Seismicity from Hydraulic Fracturing in the Eola Field, Garvin County, Oklahoma.”\footnote{Holland, “Examination of Possibly Induced Seismicity from Hydraulic Fracturing in the Eola Field, Garvin County, Oklahoma,” Oklahoma Geological Survey, Open File Report OF-1 2011, \url{available at http://www.ogs.ou.edu/pubscanned/openfile/OF1_2011.pdf}. This report examined 43 earthquakes occurring in the Eola Field of southern Garvin County, Oklahoma, in mid-January 2011. Allegedly the earthquakes began to occur about seven hours after the first and deepest hydraulic fracturing stage at Picket Unit B well 4-18.} This group concluded that

[D]etermining whether or not earthquakes have been induced [by drilling] …is problematic, because of our poor knowledge of historical earthquakes, earthquake processes and the long recurrence intervals in the stable continent. In addition, understanding fluid flow and pressure diffusion in the unique geology and structures of an area poses real and significant challenges. The strong spatial and temporal correlations to the hydraulic-fracturing in the Picket Unit B Well 4-18 certainly suggest that the earthquakes observed in the Eola Field could have possibly been triggered by this activity… The number of historical earthquakes in the area and uncertainties in hypocenter locations make it impossible to determine with a high degree of certainty whether or not hydraulic fracturing induced these earthquakes.\footnote{Id.}
A study was commissioned by Cuadrilla Resources Ltd. to evaluate the relationship between Cuadrilla’s operations and two small earthquakes that occurred in Lancashire, United Kingdom, in April 2011. 36 The group concluded that the probability of a single factor, such as hydraulic fracturing, inducing a seismic event “with similar magnitude is quite low.” 37 Many factors need to coincide to create a seismic event. Cuadrilla stated that the “seismic events [in Lancashire] were due to an unusual combination of geology at the well site coupled with the pressure exerted by water injection as part of operations.” 38 This combination of geological factors was extremely rare and would be unlikely to occur together again at future well sites. In response, the company modified the amount of fluid used and installed a seismic early warning system. 39

The UK Department of Energy and Climate Change (“DECC”) commissioned three independent experts to review Cuadrilla’s study and other information and to make appropriate recommendations for the mitigation of seismic risks in the conduct of future hydraulic fracturing operations. The report 40 which was published on April 17, 2012, agreed with Cuadrilla’s conclusion that the earthquakes in Lancashire were induced by the hydraulic fracture treatments. Nevertheless, the authors of the DECC study concluded that fracking in Lancashire could continue as long as a new set of recommended safety measures were followed. 41

Pre-dating the Arkansas, Oklahoma, and United Kingdom studies, the U.S. Geological Survey prepared a 1990 report entitled “Earthquake Hazard Associated With Deep Well Injection – A Report to the U.S. Environmental Protection Agency.” 42 This report evaluates the “probable physical mechanism for the triggering and of the criteria for predicting whether earthquakes will be triggered that depend on the local state of stress in the Earth’s crust, the injection pressure, and the physical and the hydrologic properties of the rocks into which the fluid is being injected.” The report recommends care in selecting the locations of deep injection wells, namely “the desirability of high permeability and porosity in the injection zone and a site situated away

37 Id.
38 Id.
39 Id.
41 Id. Recommendations for continued hydraulic fracturing in Lancashire included the following: (1) pre-injection and monitoring before the main injection; (2) monitoring of fracturing growth and direction during the injection; (3) seismic monitoring; and (4) operations must be halted if events of magnitude of 0.5 or above are detected. Recommendations for all future fracturing activities include: (1) assessment of seismic hazards before injection begins; (2) establish baseline seismic monitoring; (3) locate any possible active faults in the region; and (4) apply suitable ground motion prediction models to assess the potential impact of any induced earthquakes.
from known fault structures,” which would make the possibility of “induced earthquakes…less likely.”

The U.S. Geological Survey has continued its research into earthquakes and hydraulic fracturing, and it presented a report to the Seismological Society of America (“SSA”) in mid-April 2012. The study, led by USGS geophysicist William Ellsworth, found that, since 2001, the frequency of 3.0+ magnitude earthquakes has increased from 50 in 2009, to 87 in 2010, and to 134 in 2011. The scientists stated that “the acceleration in activity that began in 2009 appears to involve a combination of source regions of oil and gas production, including the Guy, Arkansas region, and in central and southern Oklahoma…A naturally-occurring rate change of this magnitude is unprecedented outside of volcanic settings or in the absence of a main shock, of which there were neither in this region. While the seismicity rate changes described here are almost certainly manmade, it remains to be determined how they are related to either changes in extraction methodologies of the rate of oil and gas production.”

At the same SSA meeting, University of Memphis’ seismologist Steve Horton presented his paper entitled “Deep Fluid Injection Near the M5.6 Oklahoma Earthquake of November 2011,” in which he opined that the build-up of seismic activity in Oklahoma was triggered by fluid injection into the subsurface. He concluded that, “based on the previous injection history, proximity of the wells to the earthquakes and the previous seismic activity [in Oklahoma], the M5.6 earthquake was possibly triggered by fluid injection at these wells.”

Dr. Horton has also studied the earthquake swarms in Arkansas, and observed that the geological fault line is a danger independent of any injection well. What Dr. Horton suggests is that a
reasonable seismic risk strategy is needed to monitor earthquake activity and to reduce or stop the injection rate/pressure when seismic activity warrants.50

From March through November 2011, there were nine microearthquakes near Youngstown, Ohio,51 within an eight-kilometer radius of a waste water injection well.52 Because earthquakes are rare in the Youngstown area, the Ohio Department of Natural Resources asked scientists with Columbia University Lamont-Doherty Earth Observatory ("LDEO") to place mobile seismographs in the vicinity to better determine what was occurring. Four seismographs were installed on November 30, 2011.53 Two earthquakes measuring 2.7 and 4.0 on the Richter scale hit Youngstown on December 24, 2011, and December 31, 2011, respectively.54 Scientific American55 reported that, “[b]y triangulating the arrival time of shock waves at the four stations, [the LDEO] determined with 95% certainty that the epicenters of the two holiday quakes were within 100 meters of each other, and within 0.8 kilometer of the injection well. The team also determined that the quakes were caused by slippage along a fault at about the same depth as the injection site, almost three kilometers down.”56 The LDEO scientists did not go so far as to say that the pumping caused the quakes, but indicated that “fluids can act as lubricants between two abutting rock faces, helping them to suddenly slip along the boundary.”57 Nevertheless, on December 31, 2011, Ohio Governor John Kasich shut down five storage well in the vicinity pending additional investigation.58 As requested by the Governor, the Ohio Department of Natural Resources (“ONDR”) researched and issued in March 2012, “A Preliminary Report on the Northstar 1 Class II Injection Well and the Seismic Events in the Youngstown, Ohio, Area.”59 This preliminary report recommends reforms to carefully monitor and stringently regulate Class II deep injection wells60 and recommends that an outside expert with experience in

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53 Id.
54 Id.
56 Id.
60 Id. Some of the required reforms sought by the ODNR are the following: a review of existing geologic data for known faulted areas; a complete suite of geophysical logs to be run on newly drilled Class II disposal wells; operators must plug back with cement, prior to injection; a measurement of original downhole reservoir pressure prior to initial injection; installation of an automatic shut-off system set to operate if the fluid injection pressure exceeds a maximum pressure set by the ODNR; and installation of an electronic data recording system to track all fluids brought by a brine transporter for injection.
seismicity, induced seismicity and Class II injection wells conduct an independent review of all technical information available relating to earthquakes and injection wells.

A similar situation has arisen in West Virginia, which experienced 10 quakes in 2010 and another one in January 2012. After the initial quakes in 2010, the West Virginia Department of Environmental Protection (“WVDEP”) worked with Chesapeake Energy Corporation to reduce the amount of fluid being injected into its disposal wells in the area. The WVDEP claimed that Chesapeake Energy had begun to slowly increase the amount of injected fluid when the latest earthquake struck. While the WVDEP believes that there is a link between the earthquake and Chesapeake Energy’s alleged increased volume of fluid, there is no evidence to prove this conclusion because no seismic monitors were present at the site. Chesapeake Energy denies increasing the volume of underground injections and has stated that it is skeptical that any link exists given that the earthquake occurred six miles from the disposal well, nearly three miles below the well’s disposal zone, and 25 earthquakes have been reported within 100 miles of the current seismic activity since 2000, one of which struck before the injection well was even drilled.

Seismologist Arthur McGarr at the U.S. Geological Survey has presented a model for calculating the highest magnitude earthquake that an operation injecting fluid deep underground, (i.e., hydraulic fracturing) could induce. Dr. McGarr and his team studied seven cases of quakes induced by fluid and uncovered a link between the volume of injected fluid and an earthquake’s magnitude. They found that every time the volume of fluids doubles, the magnitude increases by about 0.4. While the model cannot determine the likelihood of a quake occurring, it does assist engineers in knowing what to expect.

On June 15, 2012, the National Research Council issued its report concerning the scale, scope and consequences of induced seismicity (earthquakes attributable to human activities) relating to energy technologies that involve fluid injection or withdrawal from the earth’s subsurface, including activities such as shale gas recovery, the use of hydraulic fracturing, and the disposal of waste water. The main findings of this study are: (1) the process of hydraulic fracturing as

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62 Id.
63 Id.
64 Id.
67 Id.
68 Id.
69 Id.
presently implemented does not pose a high risk for inducing seismic events; and (2) injection for disposal of waste water into the subsurface does “pose some risk for induced seismicity, but very few events have been documented over the past several decades relative to the large number of disposal wells in operation…” 71

Studies attempting to link earthquakes to underground injection are ongoing. The U.S. Environmental Protection Agency has not yet weighed in on this issue, but as the news media continues to focus on the issue and public concerns continue to rise, that may change. Unless more studies reveal a clear-cut relationship, the causal connection may not be resolved for many years. With the Arkansas class action cases in the early stages of litigation, a court’s decision regarding the connection is also several years away.

Litigation Concerning Municipal Bans of Hydraulic Fracturing

*Northeast Natural Energy, LLC and Enrout Properties, LLC v. The City of Morgantown, West Virginia, Civil Action No. 11-C-411; In the Circuit Court of Monongalia County, West Virginia (June 23, 2011)*

Northeast Natural Energy, LLC (“Northeast”) had signed several lease agreements with landowners in the Morgantown area, including one lease with Enrout Properties, LLC. (“Enrout”) (collectively, Northeast and Enrout, “Plaintiffs”). In March 2011, Northeast obtained permits with the West Virginia Department of Environmental Protection. In May 2011, the Morgantown Utility Board questioned certain aspects of the permits as to the wells’ impact on the Monongahela River, specifically as to spill containment, spill prevention, well integrity, waste disposal, and fracking fluid containment. Northeast agreed to comply with the Board’s requests for additional safeguards. On June 7, 2011, the City of Morgantown began the process of enacting an Ordinance completely prohibiting “drilling a well for the purpose of extracting or storing oil or gas using horizontal drilling with fracturing or fracking methods within the limits of the City…or within one mile of the corporate limits of the City…”

Plaintiffs challenged the Ordinance, claiming that the City violated their constitutional rights by adopting a regulation in derogation of state laws promulgated by the West Virginia Department of Environmental Protection (“WVDEP”) which regulate natural gas extraction. Plaintiffs contended that the WVDEP regulations preempted and precluded enforcement of the City’s Ordinance. The City argued that it had the authority to enact and enforce the Ordinance under the “Home Rule” provision in the West Virginia Constitution by characterizing the hydraulic fracturing process as a nuisance.

The Court found that the State legislatures have given the WVDEP the “primary responsibility for protecting the environment; other governmental entities, public and private organizations and our citizens have the primary responsibility of supporting the state in its role as protector of the environment.” W.Va. Code § 22-1-1(a)(2) (1994). Additionally, the WVDEP is to “consolidate

71 *Id.*
environmental regulatory programs in a single state agency, while also providing a comprehensive program for the conservation, protection, exploration, development, enjoyment and use of the natural resources of the state of West Virginia.” W.Va. Code § 22-1-1(b)(2)-(3) (1994). The WVDEP controls the development of oil and gas in the state, including the issuance of permits. While acknowledging that the City has an interest in the control of its land, on August 12, 2011, the Court held that, in light of the state’s interest in oil and gas development and operations throughout the state and the all-inclusive authority given to the WVDEP, the City’s Ordinance is preempted by state legislation and is invalid. This decision of the Court was not appealed.72


The Weiden Property Owners Association, Inc. (“Plaintiff”) was formed in 1999 to oversee and manage the subdivision and to maintain Weiden Lake and Dam. In May 2008, Plaintiff affirmed that the Protective Covenants it established prohibited commercial uses of the properties. The Covenants included provisions restricting the premises to single family homes, agricultural and/or recreational use.

In June 2007, Jeff A Klansky (“Klansky”) purchased one of the lots in the subdivision. In July 2008, he entered into a lease that granted Cabot Oil & Gas Corporation (“Cabot”) the exclusive right to “explore for, drill for, produce and market oil, gas and other hydrocarbons” from Klansky’s lot for five years. Klansky received $99,255 as a signing bonus. The lease provided that Klansky made no representation as to the “permitted use(s) of the subject property and/or the legality of the use(s) contemplated” in the lease agreement.

Upon hearing of Klansky’s lease, Plaintiff filed this lawsuit and sought summary judgment that the activities under the lease were prohibited by the Protective Covenants. The Court agreed with Plaintiff and ruled that the Covenants unambiguously restricted the use of land in the community to single family residential, agricultural or recreational use. The Court also determined that Klansky did not have to return the signing bonus because of the “no representation” clause and because Cabot was a sophisticated business entity and knowingly decided to enter into the lease, approve title and pay the signing bonus with full knowledge of the Protective Covenants and Plaintiff’s position.


The Town of Dryden amended its Zoning Ordinance on August 2, 2011 to ban all activities related to the exploration for, and production or storage of, natural gas and petroleum within the town’s limits. Section 2104[5] of the Ordinance provided that “[n]o permit issued by any local,

72 The City of Wellsburg, West Virginia which had enacted a similar ban in May 2011, rescinded its ordinance following the Court’s decision in the Northeast Natural Gas case.
state or federal agency, commission or board for a use which would violate the prohibitions shall be deemed valid within the Town.”

Prior to the Amended Zoning Ordinance, Anschutz Exploration Corporation (“Anschutz”) had acquired gas leases covering approximately 22,000 acres in Dryden and had already invested approximately $5.1 million in activities within the town. On September 6, 2011, Anschutz filed its lawsuit, requesting the Court to nullify Dryden’s Ordinance under New York Environmental Conservation Law § 23-0303(2) (ECL).73

On February 21, 2012, after a careful and detailed analysis of the legislative history of ECL § 23-0303(2), the Court determined that generally the Town of Dryden’s Amended Zoning Ordinance was not preempted by the State laws, but ordered Section 2104[5] to be severed and stricken from the Ordinance. This ruling is now on appeal, with the record and briefs filed on October 15, 2012.


The Town of Middlefield, Otsego County, New York, enacted a zoning law on June 14, 2011, which effectively banned oil and gas drilling within the geographical borders of the township by stating that “heavy industry and all oil, gas or solution mining and drilling are prohibited uses…” of property within the Town. Cooperstown Holstein Corporation (“Plaintiff”) had signed two leases with Elexco Land Services, Inc. in 2007 with respect to property Plaintiff owned in Middlefield. Plaintiff asserted that the purposes of those leases would be frustrated by the new zoning law.

As in the Anschutz v. Town of Dryden case, Plaintiff brought a lawsuit to have Middlefield’s zoning law overturned, claiming that New York Environmental Conservation Law § 23-0303(2) (ECL) preempted any regulations emanating from local authorities with respect to the regulation of gas, oil, and solution drilling or mining. On February 24, 2012, after examining the legislative history of ECL § 23-0303(2), the Court ruled that this clause did not “preempt a local municipality…from enacting land use regulation within the confines of its geographical jurisdiction and, as such, local municipalities are permitted to permit or prohibit oil, gas and solution mining or drilling in conformity with such constitutional and statutory authority.” This ruling is now on appeal, with the record and briefs filed on October 15, 2012.


73 “The provisions of this article shall supersede all local laws or ordinances relating to the regulation of the oil, gas and solution mining industries; but shall not supersede local government jurisdiction over local roads or the rights of local governments under the real property law.” New York State ECL § 23-0303(2).
On December 22, 2011, the Mayor of the City of Binghamton, New York signed Local Law No. 6, prohibiting all natural gas exploration and extraction activities and all natural gas support activities within the city limits and at all sites within 500 feet of any city boundary. The Plaintiffs (an individual landowner, an owner of an 11-acre industrial site, two unincorporated associations of landowners, and the owner of a Holiday Inn) filed a lawsuit in late May 2012, alleging that the Mayor signed this law without the required approval of the Broome County Department of Planning and Economic Development and that New York law prohibits the City from banning or regulating any oil and gas exploration and extraction activities. The Plaintiffs claim that this ban adversely affects their opportunities to lease their land for natural gas exploration and extraction as well as their business opportunities. They seek a court order that Local Law No. 6 be declared jurisdictionally defective and therefore null and void because the City did not obtain the mandatory approval of the Broome County Department of Planning and Economic Development; because New York’s Oil, Gas and Solution Mining Law, ECL § 23-303[2] prohibits local governments from directly regulating the mining industry or its activities; and because neither New York’s Municipal Home Rule Charter nor the City’s general police power authorizes the City to adopt a moratorium banning otherwise permissible land-use and development activities.

A motion to dismiss and a motion for summary judgment were filed on July 27, 2012. On October 2, 2012, the Supreme Court determined that the “City cannot just invoke its police power solely as a means to satisfy certain segments of the community.” The local law failed to meet the criteria for a properly enacted moratorium because there was “no showing of dire need since the New York State Department of Environmental Conservation has not yet published the new regulations that are required before any natural gas exploration or drilling can occur in this state.” Without actual drilling, there is no emergency and, therefore, no need for a moratorium. The Court invalidated the local ban.

Litigation Concerning State vs. Municipal Zoning Regulation of Hydraulic Fracturing


Seven municipalities in three counties, the Delaware Riverkeeper Network, and Dr. Mehernosh Kahn (“Plaintiffs”) filed a lawsuit against the Commonwealth of Pennsylvania and three state

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74 For example, the owners of the Holiday Inn and the industrial site had anticipated renting rooms and/or storage space to the oil field companies and their workers.

75 Robinson Township, Peters Township, Cecil Township, and Mount Pleasant Township in Washington County; Yardley Borough and Nockamixon Township in Bucks County; and South Fayette Township in Allegheny County.

76 Dr. Kahn questions a section of Act 13 (the legislation that is under scrutiny in this lawsuit) which provides that, except in an emergency, a physician who needs proprietary information about chemicals used in natural gas drilling to assess a patient must provide “a written statement” to a company and must sign a confidentiality agreement. 58 Pa. C.S. §3222.1(b)(11).
departments\textsuperscript{77} seeking an injunction to prevent the state from putting into effect the Act of February 14, 2012, P.L. \textsuperscript{ }\textsuperscript{ }\textsuperscript{78} 58 Pa. C.S. §§2301-3504 (“Act 13”).\textsuperscript{78}  Plaintiffs challenge whether the state is authorized to supersede local regulation of gas drilling by restricting the municipalities’ ability to zone natural gas drilling and barring them from keeping natural gas wells out of residential zones, except for dense neighborhoods.

Act 13 is a substantial re-write of the Commonwealth’s Oil and Gas Act and applies to unconventional natural gas operations involving either hydraulic fracturing or the use of multilateral well bores or techniques that expose more of the geological formation to the well bore. Act 13 imposes statewide standards that dictate where wells, compressor stations and other drilling-related structures can be built. It requires all local drilling regulations to be reasonable and that any questions of reasonableness would be determined by the Public Utility Commission.

Section 3309 provides that Act 13 applies to all ordinances existing on April 14, 2012 (the effective date of the Act) and that municipalities had 120 days from the effective date to “review and amend an ordinance in order to comply with” the Act. 58 Pa. C.S. §3309 (a) - (b). In their motion for preliminary injunction, the municipalities argued that due to the requirements of the Municipalities Planning Code 53 P.S. § 10101 \textit{et seq.}, 120 days was insufficient time to amend their ordinances and that “the oil and gas industry has taken the position that it has free reign for the installation of any and all of its infrastructure as of April 14, 2012.”\textsuperscript{79}  The Court agreed with Plaintiffs and issued a preliminary injunction on April 12, 2012, stating:

\begin{quote}
While the ultimate determination on the constitutionality of Act 13 is not presently before the Court, the Court is of the view that municipalities must have an adequate opportunity to pass zoning laws that comply with Act 13 without the fear or risk that development of oil and gas operations under Act 13 will be inconsistent with later validly passed local zoning ordinances. For that reason, pre-existing ordinances must remain in effect until or unless challenged pursuant to Act 13 and are found to be invalid… [T]he Court agrees with petitioners that 120 days is not sufficient time to allow for amendments of local ordinances and, therefore, will preliminarily enjoin the effect date of Section 3309 for a period of 120 days.
\end{quote}

This ruling has been appealed to the Supreme Court of Pennsylvania, Middle District. Oral arguments were heard on October 17, 2012.

\textsuperscript{77} Pennsylvania Public Utility Commission, Office of the Attorney General of Pennsylvania, and Pennsylvania Department of Environmental Protection.


\textsuperscript{79} Motion for Preliminary Injunction ¶19.
Lenape Resources, Inc. v. Town of Avon, Town of Avon Board, and New York State Department of Environmental Conservation, Index No. __________, In the Superior Court of the State of New York, County of Livingston (November 13, 2012)

In the summer of 2012, the town of Avon passed Local Law T-A-5-2012 entitled “Moratorium on and Prohibition of Gas and Petroleum Exploration and Extraction Activities Underground Storage of Natural Gas and Disposal of Natural Gas or Petroleum Extraction Exploration and Production Wastes.” The one-year moratorium on natural gas extraction and underground storage began in June 2012 and includes a “grandfather clause” for existing wells. Lenape Resources, Inc. (“Lenape”) who operates 16 to 20 wells in the Avon area on about 5,000 acres seeks to overturn the moratorium, asserting that the local law is preempted by state law, invalid, unreasonable, arbitrary, oppressive, and unconstitutional. Lenape requests an injunction to stop enforcement of the law and seeks actual and compensatory damages of no less than $50 million.

Colorado Oil and Gas Conservation Commission v. City of Longmont, Colorado, Case No. ______, In the District Court, Boulder County, Colorado; July 30, 2012

Colorado Oil & Gas Association v. City of Longmont, Colorado, Case No. ______, In the District Court, Weld County, Colorado; December 17, 2012

The City Council of Longmont, Colorado passed several ordinances relating to banning and/or restricting hydraulic fracturing activities in the area around the city. The ordinances include provisions that the city would decide whether directional and horizontal drilling were “possible and appropriate,” what set-backs would be used, how to protect wildlife and their habitat, and where drilling could take place as well as requiring chemical reporting, visual mitigation methods, and water quality testing and monitoring. In November 2012, the City amended its charter to prohibit hydraulic fracturing and the disposal of fracking wastes anywhere within the city limits.

The Colorado Oil and Gas Conservation Commission sued the city, arguing that only the Commission had the authority to establish regulations concerning hydraulic fracturing and the city’s ordinances were preempted by Commission requirements. The Colorado Oil & Gas Commission has presented the same arguments, stating that the city ordinances constitute an “illegal ban on oil and gas drilling, it denies private mineral owners the right to develop their property, it attempts to prohibit operations that the state laws permit, and it purports to regulate technical aspects of oil and gas operations in a manner that is preempted by the Colorado Oil and Gas Conservation Act and its implementing regulations.”

Litigation Involving Oil and Gas Lease Disputes

Coastal Oil and Gas Corp. v. Garza Energy Trust, 268 S.W.3d 1 (Tex. 2008)

In this case, the Plaintiff attempted to recover damages from an operator using hydraulic fracturing on a neighboring mineral lease by alleging that the hydraulic fracturing fluids
unlawfully drained the Plaintiff’s mineral lease. The Plaintiff’s case was based on the theory that hydraulic fracturing fluids entered the property and caused damage in the form of enhanced drainage of hydrocarbons from the Plaintiff’s property to the Defendant’s property.

In previous cases, Texas courts established that if an operator drills a well that originates on the Defendant’s land but crosses underneath the surface into another person’s mineral rights (a “slant well”), the neighboring landowner has a cause of action against the operator. However, the court distinguished hydraulic fracturing from slant drilling because hydraulic fracturing merely enhances the flow of hydrocarbons from one mineral lease to another where it is lawfully extracted. In contrast, a slant well actually crosses into the neighbor’s property, extracting the minerals directly from the neighbor.

Ultimately, the court ruled that drainage caused by hydraulic fracturing is not a form of trespass, but rather is permitted by the rule of capture, which under the common law allows a mineral leaseholder to collect all of the oil that it can through a well drilled on its own lease, even if the result is to drain hydrocarbons out from under another’s lease. As noted above, a claim for trespass in Texas requires the claimant to establish that he has been injured by the Defendant’s actions. Here, the Plaintiff could not show injury because damages for drainage were barred by the rule of capture. Thus, the court did not have the opportunity to rule on whether the entry of hydraulic fracturing fluid into another’s land that causes injury is a trespass.

Because the Court left this issue open, it is likely that property owners who believe that they have been injured by hydraulic fracturing will continue to attempt to bring claims for trespass. If a Court were to rule that pumping hydraulic fracturing fluid into another’s land is actionable, potential damage claims could include damages for injury to (1) groundwater/well water, (2) the subsurface mineral interest, or (3) in very unusual cases, the surface estate. The practice of horizontal drilling increases the length of the bore hole and thereby increases the area potentially affected by hydraulic fracturing. In this regard, the practice of horizontal drilling may increase the sphere of potential plaintiffs who may bring an action for trespass.


Between 1999-2000, numerous property owners entered into 10-year oil and gas lease agreements with EnerVest Operating LLC and Belden & Blake Corporation (“Defendants”).

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80 In Garza, the parties agreed that hydraulic fracturing fluids and proppants had crossed the property line. Garza, 268 S.W.3d at 7. The parties disagreed on whether the “effective length,” which is the area where the hydraulic fracturing cracks are actually increasing production at the well, crossed the property line. Id. However, the distinction did not factor into the court’s ruling.
81 Id. at 14.
82 Id.
83 Id. at 13.
84 Id. at 12.
85 Id. at 13.
Landowners were paid $3.00 per acre to sign and offered 12.5% royalty payments.86 The leases were subject to an indefinite extension should drilling occur, and Defendants were required to pay annual delay rentals.

**RENTAL PAYMENT** – This lease is made on the condition that it will become null and void and all rights hereunder shall cease and terminate unless work for the drilling of a well is commenced on the leased premises or lands pooled herewith within ninety (90) days from the date of this lease..., or unless the Lessee shall pay to the Lessor, in advance, every twelve (12) months until work for the drilling of a well is commenced, the sum of $______ [calculated on the basis of number of acres] for each twelve (12) months during which the commencement of such work is delayed.

During the 10-year term, Defendants did not develop the land nor did they drill or have any operations on the properties. Seeking to extend the leases, Defendants asserted claims to the land under the “force majeure” clause of the lease. The alleged “force majeure” is New York Governor David Paterson’s 2008 moratorium on drilling, which Defendants argue exempted them from paying the delay rentals and would keep the leases open until the end of the moratorium.

On March 22, 2011, the U.S. District Court ruled for the Plaintiffs, declaring that the leases were null and void for non-payment of delay rentals under the “unless” leases.


Richard L. Cain (“Plaintiff”) filed a lawsuit in West Virginia state court on June 21, 2011 against XTO Energy Inc. (“XTO”) and Waco Oil & Gas Co. Inc. (dismissed on March 29, 2012). *Cain v. XTO Energy Inc. and Waco Oil & Gas Co. Inc.,* No. 11-c-165 (Circuit Court of Marion County, West Virginia, June 21, 2011). The case was removed to federal court on July 22, 2011. On March 29, 2012, the Plaintiff’s Motion to Remand was denied.

On April 26, 2012, the Plaintiff filed his First Amended Complaint where he asserts causes of action for trespass, excess user, acts and omissions beyond the contemplation of the parties, unjust enrichment, and quantum meruit, as well as seeking injunctive relief. For trespass, the Plaintiff claims that XTO has no right to (1) enter his property for any purpose relating to oil and gas exploration and production, (2) drill well bores horizontally into neighboring oil and gas tracts, (3) frac geological formations on neighboring tracts from his land, (4) pipe gas from neighboring tracts across his land, and (5) build or alter roads for any oil and gas activities.

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86 Plaintiffs alleged that, at the time of the filing of the complaint, land in the Marcellus Shale was being leased at a rate of $5,700 to $7,000 per acre in bonus payments and between 20% and 25% royalty payments.
Plaintiff’s excess user and acts and omissions beyond the contemplation of the parties claims rest on a severance deed signed in 1907. According to the Plaintiff, XTO’s use of his property exceeds any rights granted under the 1907 deed and that “XTO’s activities are beyond those in usage and custom of the natural gas industry at the time of the 1907 deed.” The Plaintiff also claims that XTO’s activities will disturb more acreage, destroy more property, create more hazards, take more time, and cause more traffic with heavy equipment than was contemplated by the parties to the 1907 deed.

For unjust enrichment, the Plaintiff seeks all of XTO’s “profits and monies obtained in contravention of Plaintiff’s rights.” Under quantum meruit, the Plaintiff “expects to be paid for the properties which XTO used and continues to use for its exclusive financial benefit.”

Currently pending before the Court is XTO’s Motion to Dismiss in which XTO argues that damages alleged by Plaintiff in his unjust enrichment and quantum meruit claims are not allowed under West Virginia law and that the excess user and contemplation claims are not recognized as independent causes of action under West Virginia law. On July 2, 2012, the Plaintiff filed a Motion to Certify Questions of Law to the Supreme Court of Appeals of West Virginia. The questions that Plaintiff seeks to certify are:

- Is a person who obtains a benefit by an act of trespass or conversion, by comparable interference with other protected interests in tangible property, or in the consequence of such an act by another, liable in restitution to the victim of the wrong?

- May a defendant be liable for interference with real property in an amount that exceeds quantifiable injury to the property owner on the principle that restitution is justified because the advantage acquired by the wrongdoer is one that should properly have been the subject of negotiation and payment?

In addition, on that same date, the Plaintiff filed a Motion to Certify Question or In the Alternative for Partial Summary Judgment and Permanent Injunctive Relief, with the question being whether XTO “has the right to use Mr. Cain’s surface for well pads, access roads, and other disturbance and operations to drill gas well bore holes into neighboring mineral tracts that did not underlie his surface at the time of the severance of his surface from the minerals, where those severance deeds expressly limit the Defendant’s rights to gas within and underlying the tract.” XTO filed its opposition to each of Plaintiff’s motions on July 16, 2012 and August 6, 2012 respectively.

The Court issued an order on August 10, 2012, staying all discovery and suspending all deadlines until ruling on the pending motions. On December 5, 2012, the Plaintiff submitted “additional recent authority” to the Court relating to XTO’s Motion to Dismiss and to the Plaintiff’s Motion to Certify Question or In the Alternative for Partial Summary Judgment. This additional authority is a West Virginia Law Review article entitled “The Legality of Drilling Sideways: Horizontal Drilling and Its Future in West Virginia,” 115 W.Va. L. Rev. 491 (Fall
2012). XTO opposes this submission, arguing that the article is a student publication with no references to decisions “published after the relevant briefing period.”


More than 250 Plaintiffs sued Chesapeake Appalachia LLC (“Chesapeake”) and Statoilhydro USA Onshore Properties, Inc. (“Statoilhydro”) (collectively, “Defendants”), complaining that the Defendants violated New York’s deceptive trade practices statutes concerning extension of the terms of approximately 200 oil and gas leases in Broome, Tioga, Chemung, and Cortland Counties, New York. One group of leases was executed in 1999 or 2000 and had a 10-year term, paying $3.00 per acre/year and other leases were executed in 2004 and 2005 with a five-year term, paying $5.00 per acre/year. All of the leases expired. No wells were drilled on any of the properties. No oil and gas in paying quantities were ever extracted. No royalties were paid to the Plaintiffs.

As each lease expired, the Defendants filed notices and affidavits of extension of the leases claiming that continued tender of delay rentals under a “Delay in Marketing” clause maintained the leases in full force and effect. Alternatively, the Defendants claim that under a “covenants” or “force majeure” clause, the leases were not subject to termination “due to failure to comply with obligations if compliance is prevented by federal, state, local law, regulation, or decree.” The Defendants assert that a suspension of the granting of generic permits to use high-volume hydrofracking with horizontal drilling in the Marcellus Shale is a force majeure event which extends the leases. The Plaintiffs object to these extensions, but encumbrances remain against their property. The Plaintiffs are seeking the termination of their leases and compensatory damages.

In the *Alexander* case, on March 20, 2012, the Court ordered that all Plaintiffs with arbitration clauses in their lease contracts must arbitrate their claims and that the claims of all other Plaintiffs are stayed pending the arbitration. The *Aukema* case is on-going with a motion and a cross-motion for summary judgment pending.


This lawsuit was originally filed in the Court of Common Pleas, Columbiana County, Lisbon, Ohio, Cause No. 2012CV00136 on March 7, 2012, and then removed to the U.S. District Court for the Northern District of Ohio on March 27, 2012 (Case No. 4:12-cv-00736-BYP). The

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In their petition, Plaintiffs allege that in November 2008, Statoilhydro paid about $5,800 per net acre for 32.5% of Chesapeake’s interests in the leases. Based on this, the Plaintiffs assert that the true market value of their leaseholds was approximately $17,400 per acre.
parties filed a Stipulation to Remand on April 9, 2012, sending the case back to state court. Since returning to state court, the parties have been busy filing and responding to motions to dismiss and motions for summary judgment.

In the Second Amended Complaint filed on October 10, 2012, a group of approximately 50 landowners ("Plaintiffs") seek to void their oil and gas leases with Chesapeake Exploration, LLC, CHK Utica, LLC, and Total E&P U.S.A., Inc. (collectively all three referred to as "Defendant Companies"), four land agents, five notary publics, and the Columbiana County Recorder. The Plaintiffs allege that the Defendant Companies misrepresented environmental disruptions caused by hydraulic fracturing and concealed the land rights’ true profit potential. The Plaintiffs claim that the land agents failed to present "truthful and accurate information" about the leases, resulting in many landowners receiving less than 1% of the fair market value for signing bonus payments. The Plaintiffs also claim that they were tricked into signing leases without appropriate lease clauses to protect them from the risks and disruptions associated with horizontal drilling and hydraulic fracturing. As for the notary publics, the Plaintiffs claim that they did not appear nor execute the leases before these officials, making the leases null and void; and then the Columbiana County Recorder incorrectly filed these void leases in the county’s deed records.

The Plaintiffs’ original leases with Anschutz Exploration Corporation were executed between 2008 and 2010. These leases have a “fair value right” clause (or “Preferential Right to Renew” clause) and a primary term of three to five years, continuing in effect if the Defendants are conducting operations or have an active well on the land. This clause allowed landowners to seek fair value from a third-party offeror for the leases, with the leaseholder having the chance to match or better that third-party offer. After acquiring the leases in 2010, the Plaintiffs contend that the Defendants intentionally modified this clause in order to prevent landowners from receiving third-party offers and that the Defendants publicly stated they would not honor the fair value clause in the original leases. The Plaintiffs allege that they relied on this clause when signing the leases and the Defendants’ action constitute a material breach and repudiation of the leases.

This “fair value right” provision is the subject of a separate declaratory judgment action filed by the Defendants on January 25, 2012 against numerous landowners who threaten to terminate the leases unless Chesapeake Energy matches or “betrers” third-party offers that they have received.88 The Defendants seek a declaration that the lease does not allow a landowner to terminate the lease during the primary term if the Defendants do not exercise their right to match the third-party offer.

Lawsuits Brought by Citizens, States, and Environmental Groups


The Plaintiffs consist of individual citizens residing in Arkansas and several not-for-profit organizations established for “enjoyment, protection, and preservation of the environment and natural resources,” including the Ozark-St. Francis National Forest and Greers Ferry Lake in Arkansas. Seeking an injunction to prevent any additional wells from being drilled in the forest and lake area, the Plaintiffs assert that the United States Forest Service, the Bureau of Land Management, United States Army Corps of Engineers, United States Department of Agriculture, United States Department of the Interior, and their directors and managers (“collectively “Defendants”) failed to comply with the National Forest Management Act, the Mineral Leasing Act for Acquired Lands, the National Environmental Policy Act (“NEPA”), and the rules and regulations implementing NEPA issued by the White House Council on Environmental Quality when the Defendants approved oil and gas exploration activities in or under the lake on September 21, 2010, in a Supplemental Information Report (“SIR”).

Ruling on the Plaintiffs’ motion, the Court ordered Defendants to produce the administrative record of documents and information leading to the SIR. Defendants filed the record on December 14, 2012. A scheduling order requires Plaintiffs to request additional documents by January 18, 2013 and to file a response to Defendants’ motion to dismiss by February 1, 2013.


In all three lawsuits (which have been consolidated for pre-trial purposes and are being briefed together), the Plaintiffs seek to compel the Defendants to comply with the National

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89 In the first _State of New York_ case, the Plaintiff is the State of New York. In the second _State of New York_ lawsuit, the Plaintiffs are the State of New York and Damascus Citizens for Sustainability, Inc. In the _Delaware Riverkeeper Network_ case, the Plaintiffs are Delaware Riverkeeper Network, Inc., Delaware Riverkeeper, Inc., the Hudson Riverkeeper, and National Parks Conservation Associations.

90 In both _State of New York_ cases, the Defendants are the United States Army Corps of Engineers; Colonel Christopher Larsen, in his official capacity as Division Engineer, North Atlantic Division of the United States Army Corps of Engineers; United States Fish and Wildlife Service; Rowan W. Gould, in his official capacity as Acting Director of the United States Fish and Wildlife Service; United States National Park Service; Jonathan B. Jarvis, in his official capacity as Director of the United States National Park Service; United States Department of the Interior; Kenneth Salazar, in his official capacity as Secretary of the United States Department of the Interior; United States
Environmental Policy Act of 1969 (“NEPA”) by requiring them to prepare and make available for public comment a draft environmental impact statement (“EIS”) before proceeding to adopt federal regulations to be administered by the Delaware River Basin Commission (“DRBC”) that would authorize natural gas development within the Basin.91 The DRBC anticipates between 15,000 and 18,000 natural gas wells to be developed using hydraulic fracturing within the Basin. The Delaware River Basin comprises 13,539 square miles, draining parts of New Jersey, New York, Pennsylvania, and Delaware. The Upper Delaware River within the Basin serves as the primary source of clean unfiltered drinking water for 9,000,000 New Yorkers each day and is federally designated as a scenic and recreational river by the United States Park Service.

On June 4, 2012, the Defendants filed motions to dismiss arguing lack of subject matter jurisdiction, Plaintiffs’ lack of standing, actions not ripe for adjudication, and inapplicability of NEPA to these Defendants. The Court granted these motions on September 24, 2012 and dismissed all three lawsuits.

San Juan Citizens Alliance; Colorado Environmental Coalition, Colorado Wild; Oil and Gas Accountability Project, and The Wilderness Society v. Mark Stiles, in his official capacity as San Juan National Forest Supervisor and BLM Center Manager of the San Juan Public Lands Center; et al.92; 654 F.3d 1038 (10th Cir. 2011)

The lawsuit filed by several environmental groups (“Plaintiffs”) concerns the Northern San Juan Coal Bed Methane Project (“Project”), which was approved by the federal government Defendants. The Project contemplates the construction of numerous gas wells within the San Juan National Forest and other federal lands. The Plaintiffs claim that the 2007 Record of Decision (“ROD”) approving the Project was unlawful, that the ROD-approved wells violated the Forest’s standards and guidelines protecting riparian areas, and that the environmental impact statement (“EIS”) assessing the Project’s environmental consequences was not adequate under the National Environmental Policy Act.

The Plaintiffs appealed the District Court’s ruling in favor of the Defendants. The 10th Circuit Court of Appeals ruled the Plaintiffs’ claims that the Project was inconsistent with the Forest’s plan and guidelines were not ripe and that their NEPA claims were rejected on the merits.

91 In addition to the Plaintiffs and Defendants, numerous groups have intervened on behalf of defendants (American Petroleum Institute, the Independent Petroleum Association of America, and the US Oil & Gas Association) and/or have filed amicus briefs (the City of New York, Chesapeake Bay Foundation, and Susquehanna River Basin Commission).

92 Other defendants are Rick Cables, in his official capacity as Regional Forester of the Rocky Mountain Region of the United States Forest Service; United States Forest Service; Thomas Vilsack, in his official capacity as Secretary of the Department of Agriculture; United States Bureau of Land Management; and Kenneth Salazar, in his official capacity as Secretary of the Department of Interior.

Citizens for Pennsylvania’s Future (“Plaintiff”) seeks declaratory and injunctive relief from Ultra Resources, Inc.’s (“Defendant”) alleged violations of the Clean Air Act (“CAA”) (42 U.S.C. § 7604(a)(3)), Pennsylvania’s Implementation Plan (“SIP”), and Pennsylvania’s New Source Review Regulations, 25 Pa. Code Chapter 127, Subchapter E. The Plaintiff alleges that since 2008 the Defendant has operated an extensive network of natural gas wells, pipelines, compressor stations, and associated equipment without obtaining all the necessary permits and without achieving the lowest achievable emissions rate as required by Pennsylvania’s regulations. The Plaintiff claims that the environment has been and is being damaged by large amounts of nitrogen oxides and related pollution that create fine particulate matter in the atmosphere. Arguing that it obtained all the appropriate permits from the Pennsylvania Department of Environmental Protection, the Defendant has filed a motion to dismiss for lack of jurisdiction, asserting that the Plaintiff’s claims should be heard by the Pennsylvania Environmental Hearing Board. The Pennsylvania Department of Environmental Protection has filed an amicus curiae brief in support of the Defendant’s motion. The motion to dismiss was denied on September 24, 2012. A status/scheduling conference scheduled for November 27, 2012, was deferred due to the possibility of settlement. The Court has given the parties until January 31, 2013 to settle before it will issue a new scheduling order.

The Ozark Society v. United States Forest Service; Judith Henry, Supervisor of the Ozark-St. Francis National Forest; the Bureau of Land Management; John Lyon, Eastern States Director, Bureau of Land Management; and Bruce Dawson, Eastern States Field Manager, Bureau of Land Management; No. 4:11-cv-00782 (E.D. Ark., October 31, 2011)

The Ozark Society (“Plaintiff”), a non-profit corporation with over 850 dues-paying members, describes its mission as conservation, education, and recreation. In the complaint, the Plaintiff states that its members utilize the Ozark National Forest’s wilderness areas and wild and scenic rivers for hiking, boating, and other outdoor activities. The Plaintiff asserts that the United States Forest Service, the Bureau of Land Management, and their directors and managers (“collectively “Defendants”) failed to comply with the National Environmental Policy Act (“NEPA”) and other federal environmental and procedural statutes in approving gas leases for exploration and development in the Ozark National Forest. More than 60 gas wells have been drilled in the forests, with many more anticipated, creating a number of environmental impacts including the construction of roads, increased traffic, storage of drilling fluids, noise, venting gas, storm water runoff, and increased water usage for hydraulic fracturing use.

The Plaintiff sought an injunction stopping all natural gas exploration and development in the Ozark-St. Francis National Forests. On March 1, 2012, the Court heard arguments on the preliminary injunction request and made its ruling on March 23, 2012, denying the request. The Court found the Plaintiff failed to establish that it is likely to succeed on the merits or that it likely will suffer irreparable harm absent preliminary relief. Pending before the Court is the
Defendants’ Motion to Dismiss, in which the Defendants argue that the Court lacks jurisdiction and that the Plaintiff fails to state a claim based on the federal statutes upon which relief can be granted. Also pending is the Plaintiff’s motion for discovery on the jurisdictional issue and request for an evidentiary hearing, or alternatively requesting that this case be consolidated with or reassigned to the Court handling the *Ouachita Watch League* lawsuit, *supra*. The reassignment was granted on November 2, 2012.

*Center for Biological Diversity and Sierra Club v. The Bureau of Land Management and Ken Salazar, Secretary of the Department of the Interior, No. CV-11-06174 (N.D. Cal., December 8, 2011)*

Center for Biological Diversity and the Sierra Club (“Plaintiffs”) filed this lawsuit to overturn the Bureau of Land Management’s “illegal and unwise lease sale” to allow oil and gas development on sensitive California lands without analyzing the full environmental effects of such development. The Plaintiffs claim violations of the National Environmental Policy Act (“NEPA”) and the Mineral Leasing Act of 1920 (“MLA”). NEPA requires the preparation of an environmental impact statement to consider the effects of each activity on the properties while the MLA requires the lessee to conduct its operations using all reasonable precautions to prevent waste of oil or gas developed in the land. Expressing concern about endangered species living in the area (San Joaquin kit fox, blunt-nosed leopard lizard, steelhead trout, and the California condor), the “highly controversial and dangerous drilling method” of hydraulic fracturing, and the impacts of oil spills, habitat contamination, and methane leaks, the Plaintiffs argue in their motion for summary judgment that the Defendants failed to consider and fully analyze the impacts of oil and gas development on the area. The Plaintiffs want the leases set aside. Motions and cross-motions for summary judgment, as well as an amicus brief filed by the California Independent Petroleum Association, are currently pending.


Environmentalists have sued the U.S. Bureau of Land Management (and affiliated government officials) over the approval of a resource management plan that they claim will endanger elk and other wildlife in Wyoming’s Powder River Basin area which contains more than 100,000 acres of remote and steep terrain called the Fortification Creek Planning Area. They request the Court to void and suspend all approved and future natural gas drilling activities in the Powder River Basin area until the Bureau is brought into compliance with the National Energy Protection Act. According to the complaint for declaratory and injunctive relief, the Bureau failed to “take a hard look at direct, indirect, and cumulative impacts to the environment” of its oil and gas
development plan; failed to prepare an Environmental Impact Statement (EIS) or to justify its
decision to forego an EIS; failed to provide a reasonable basis for comparatively analyzing and
choosing between alternatives; and failed to comply with its duty to take a hard look at
potentially significant new circumstances and information and to prepare a supplemental NEPA
analysis. The State of Wyoming and Lance Oil & Gas Company (who holds federal leases) have
intervened in the lawsuit.

On October 26, 2012, the Court ordered the Federal Defendants, the State of Wyoming, and
Lance Oil to notify all parties of “any ground-disturbing activity (spudding)” that will take place
on certain well sites. The Court also issued a scheduling order, providing deadlines for motions
for summary judgment through July 2013.

_Center for Biological Diversity, Earthworks, Environmental Working Group, and Sierra Club
v. California Department of Conservation, Division of Oil, Gas, and Geothermal Resources,
and DOES I through X, Case No. RG12652054, In the Superior Court for the State of
California for the City and County of Alameda (October 16, 2012)_

The Plaintiffs who are several well-known environmental groups want a declaratory judgment
and an injunction prohibiting any new oil and gas permit approvals until the California
Department of Conservation, Division of Oil, Gas, and Geothermal Resources (“DOGGR”)
“complies with its legal requirements to evaluate and mitigate the significant environmental and
public health impacts caused by hydraulic fracturing.” The Plaintiffs claim that the DOGGR has
issued permits “without any environmental analysis” of “contamination of domestic and
agricultural water supplies, the use of massive amounts of water, the emission of hazardous air
pollutants, and the potential for induced seismic activity” allegedly created by hydraulic
fracturing. The Court has scheduled a case management conference for February 28, 2013.

_Litigation Involving Enforcement_

_In Re U.S. Energy Development Corp., File No. 11-57 (New York Department of
Environmental Conservation, filed Jan. 24, 2012)_

U.S. Energy Development Corporation (“EDC”) is a privately owned oil and natural gas
exploration and development company with oil and gas drilling operations in McKean County,
Pennsylvania and in a watershed that contains Yeager Brook which flows into New York. The
New York Department of Environmental Conservation (“NYDEC”) filed a complaint against
EDC, seeking an order requiring EDC to pay $187,500 for water quality violations associated
with fracking activities These violations include contamination problems associated with poor
storm water controls around the roads used to access the wells. NYDEC seeks the maximum
penalty because of EDP’s failure to comply with two previous consent orders from August and
November 2010.
Litigation Challenging Government Regulations


The Independent Petroleum Association of America and U.S. Oil & Gas Association (“Plaintiffs”) filed this lawsuit against the United States Environmental Protection Agency (“EPA”), seeking review of a statement made on the EPA’s website that any service company performing hydraulic fracturing using diesel fuel must receive prior authorization from the Underground Injection Control (“UIC”) program and that injection wells receiving diesel fuel as a hydraulic fracturing additive are Class II wells under the UIC program.

The parties settled on February 23, 2012, when the EPA agreed to modify its on-line statement to read that “[a]ny service company that performs hydraulic fracturing using diesel fuel must receive prior authorization through a permit under the applicable UIC program. For more information on how the UIC regulations apply to hydraulic fracturing using diesel fuels, please see EPA’s Guidance issued for public comment…” It was agreed that another paragraph on the website would read: “State oil and gas agencies may have additional regulations for hydraulic fracturing. In addition, states or EPA have authority under the Clean Water Act to regulate discharge of produced waters from hydraulic fracturing operations.” This lawsuit was voluntarily dismissed on May 10, 2012.


The Coalition for Responsible Growth and Resource Conservation, Damascus Citizens for Sustainability, and the Sierra Club (“Plaintiffs”) sought to overturn the Federal Energy Regulatory Commission’s (“FERC”) approval of Central New York Oil and Gas Company LLC’s proposal to construct and operate a 39 mile long pipeline with related facilities, including compressors, to transport gas from Pennsylvania’s Marcellus Shale formation. The Plaintiffs asserted that FERC did not properly consider the environmental impact and ecological damage that the pipeline would have on the areas where the pipeline would be constructed and operated.93 The Plaintiffs petitioned the Second Circuit Court of Appeals to review FERC’s order and to stay any construction pending a hearing. The Second Circuit denied the request for a stay but agreed to an expedited briefing and argument schedule for the Plaintiffs’ petition for review. On June 12, 2012, the Second Circuit denied the petition for review, stating that FERC’s 296-page environmental assessment thoroughly considered the issues and that FERC reasonably concluded that the cumulative impacts of development in the Marcellus Shale region were not sufficiently causally related to the project to warrant a more in-depth analysis.

93 The Pennsylvania Game Commissioner has described the area through which the pipeline would be built as undisturbed forest habitat “where the abundance and species richness of various area-sensitive forest bird species are among the highest in the state.”
Litigation Challenging Disclosure Regulations


The Plaintiffs in this lawsuit, four environmental groups, assert that the Wyoming Oil and Gas Conservation Commission has unlawfully withheld the identification of hydraulic fracturing chemicals used by various oil and gas producers, including Baker Hughes, BJ Services Company, CESI Chemical, Champion Technologies, Core Laboratories, Halliburton Energy Services, Inc., NALCO Company, SNF, Inc., and Weatherford international. The Wyoming Commission withheld certain information under the trade secret exception of its disclosure rules. The Plaintiffs complain that the oil and gas producers did not provide sufficient factual support to uphold their claim of trade secret and want all the chemicals publicly disclosed.

*Dr. Alfonso Rodriguez v. Michael L. Krancer, in his official capacity as Secretary of the Pennsylvania Department of Environmental Protection; Robert F. Powelson, in his official capacity as Chairman of the Public Utility Commission; and Linda L. Kelly, in her official capacity as Attorney General of the Commonwealth of Pennsylvania*, Case No. 3:12-cv-01458, In the United States District Court for the Middle District of Pennsylvania; July 27, 2012

On February 14, 2012, the Pennsylvania Governor signed into law Act 13 of 2012 which regulates the disclosure of hydraulic fracturing chemical components. Section 3222.1(b)(10) of the Act requires that companies engaged in hydraulic fracturing disclose information regarding chemicals used in the process to medical providers contingent on the medical provider agreeing to keep certain proprietary information confidential.

A vendor, service company or operator shall identify the specific identity and amount of any chemicals claimed to be a trade secret or confidential proprietary information to any health professional who requests the information in writing if the health professional executes a confidentiality agreement and provides a written statement of need for the information indicating all of the following: (i) The information is needed for the purpose of diagnosis or treatment of an individual; (ii) the individual being diagnosed or treated may have been exposed to a hazardous chemical; and (iii) knowledge of information assist in the diagnosis or treatment of an individual.

Section 3222.1(b)(11) imposes similar disclosure requirements on the oil and gas industry in emergency situations contingent on oral representations of the medical provider where it is not feasible to obtain immediate written agreement to Act 13’s confidentiality provisions.

In his lawsuit, Dr. Alfonso Rodriguez (“Plaintiff”), a licensed medical physician “who has treated patients that have been exposed to toxic fluids and/or environmental contamination...
caused by oil and gas operations,” complains that the “medical gag” provisions of Pennsylvania’s Act 13 of 2012 improperly restricts his First Amendment freedom of speech rights. He argues that the “practice of medicine requires a free and open exchange of questions, answers and information between” the doctor and the patient, medical community, researchers and insurance companies, among others. Plaintiff seeks an injunction from requiring him to sign any confidentiality agreement. Currently motions to dismiss are pending before the Court.

Settlements Involving Hydraulic Fracturing and Shale Drilling

Settlement with Cabot Oil and Gas Corporation (related to Fiorentino case)

A settlement related to the Fiorentino matter was reported on December 16, 2010, when the Pennsylvania Department of Environmental Protection (“PDEP”) announced a resolution of its action against Cabot Oil and Gas Corporation. The action by PDEP was related to claims that 19 resident families’ water wells were allegedly affected by methane contamination as a result of nearby drilling activities. The families collectively were entitled to receive $4.1 million in compensation and other concessions, and a $500,000 penalty was to be paid to the PDEP. The settlement allows Cabot to continue its hydraulic fracturing operations, and the families were allowed to maintain their individual tort claims against the company, which allege claims for health and property damage.94

Settlement with Chesapeake Energy Corporation (related to Armstrong case)

Similarly, on May 17, 2011, the PDEP and Chesapeake Energy Corporation reached a settlement agreement regarding the Armstrong matter. The PDEP began investigating Chesapeake in response to Plaintiffs’ allegations. A joint review between Chesapeake and the PDEP to study possible natural gas drilling violations produced inconclusive results. Under the settlement, Chesapeake agreed to pay a $900,000 penalty for alleged contamination of the water supply and an additional $188,000 for violations regarding unrelated tank fires. Chesapeake may continue operations and drilling subject to obtaining approval from the PDEP for a condensate management plan for each well site. The settlement does not affect the Plaintiffs in Armstrong, whose case against Chesapeake continues.95

Brockway Borough Municipal Authority Settlement

In another unique action, the Brockway Borough Municipal Authority (“Brockway”) sued Flatiron Development Force, Inc. and New Growth Resources (collectively, “Defendants”) in November 2010 in Pennsylvania State Court. Brockway owns reservoirs, groundwater wells,

and surface rights in the watershed area for the purpose of providing drinking water to the Borough. The Defendants own the mineral rights and planned to clear timber from 23 acres in preparation for drilling activities. The Defendants also planned to construct a 10 million gallon impoundment to store resultant wastewater. Brockway requested an injunction against further site preparation or drilling, claiming that the Defendants did not have a proper easement for the drilling activities and that the activities constituted a public nuisance.96

After winning a temporary injunction, Brockway settled the case. The terms of settlement require the Defendants to provide drinking water to the Borough’s residents within 24 hours if drilling activities pollute ground or surface waters. If groundwater is polluted, the Defendants must drill a new water well for the Borough within 45 days. If surface water is polluted, the Defendants must provide filtration systems to remedy the pollution. Additionally, the Defendant companies are prohibited from disposing of drill cuttings or other wastes on the property. Hydraulic fracturing fluids cannot be stored on-site, and the Defendants must maintain insurance policies to ensure that they can meet their financial obligations to the Borough if contamination occurs.97

**Regulatory Investigations**

In addition to civil lawsuits, government regulatory investigations have been spawned by environmental concerns about hydraulic fracturing. The Securities and Exchange Commission (“SEC”) recently asked shale companies to provide detailed information regarding the chemicals used in hydraulic fracturing.98 While the SEC is requesting that companies provide this information privately in light of proprietary concerns over fracturing techniques and chemical formulas, it is expected that the SEC will require shale companies to disclose at least some additional information publicly.99 Recent letters to shale companies have sought information about the chemicals being injected into the ground and efforts to mitigate environmental impacts and reduce water usage.100 The current SEC Enforcement inquiry is in its early stages, and it is difficult to predict how long or widespread the investigation will be or whether the SEC will ultimately bring an enforcement action against any company in the industry.

In June 2011, the New York Attorney General issued subpoenas to five shale operators for documents relating to the companies’ public disclosures about the environmental risks of hydraulic fracturing.101 The New York Attorney General also sued the Environmental Protection

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100 Id.
Agency and several other federal agencies in May 2011 in an effort to force a full environmental review of hydraulic fracturing under the National Environmental Policy Act before the Delaware River Basin Commission approves new regulations for natural gas extraction.102

**Potential for Shareholder Litigation**

Shale operators and other publicly traded companies involved in the production of shale gas and shale oil could also face the potential risk of private shareholder litigation arising from issues relating to reserve reporting, financial projections, or environmental issues.103

**Conclusion**

As detailed above, hydraulic fracturing and shale drilling litigation has rapidly increased since 2009. While merely speculation, the rise in such litigation evidenced by the cases discussed may be attributed, at least in part, to increased drilling in proximity to populated areas and heightened media scrutiny of the process. With most cases in the early stages of litigation, it likely will be a number of years before they are resolved. It will be interesting to see whether courts ultimately address the issue of the alleged water contamination before the final results of pending environmental studies and congressional investigations.

**About the Authors**

Barclay R. Nicholson is a partner in Fulbright & Jaworski L.L.P.’s Houston Office and is a member of Fulbright’s Shale and Hydraulic Fracturing Task Force. Barclay serves as Editor of [www.frackingblog.com](http://www.frackingblog.com), the firm’s blog devoted to hydraulic fracturing and shale development issues. His complete biography can be found at [www.fulbright.com/bnicholson](http://www.fulbright.com/bnicholson) or (713) 651-3662. Stephen C. Dillard is a partner in Fulbright’s Houston Office, a member of Fulbright’s Shale and Hydraulic Fracturing Task Force, and former head of Fulbright’s firm-wide Litigation Department. He can reached at [sdillard@fulbright.com](mailto:sdillard@fulbright.com) or (713) 651-5507.

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# Appendix A

Table of Cases Listed Alphabetically
<table>
<thead>
<tr>
<th>Case Name</th>
<th>Pages</th>
<th>State</th>
</tr>
</thead>
<tbody>
<tr>
<td>Andre v. EXCO Resources, Inc. and EXCO Operating Co., No. 5:11-cv-00610-TS-MLH (W.D. La. April 15, 2011)</td>
<td>18-19</td>
<td>LA</td>
</tr>
<tr>
<td>Becka v. Antero Resources a/k/a Antero Resources Appalachia [sic] Corp. s/k/a Antero Resources Appalachia [sic], LLC; No. 2:11-cv-01040 (W.D. Pa. August 12, 2011)</td>
<td>23-24</td>
<td>PA</td>
</tr>
<tr>
<td>Bidlack v. Chesapeake Appalachia, LLC, Chesapeake Energy Corporation, and Nomac Drilling, LLC, No. 3:11-cv-00129-ARC (M.D. Pa. (Scranton), Jan. 19, 2011)</td>
<td>11-12</td>
<td>PA</td>
</tr>
<tr>
<td>Boggs v. Landmark 4, LLC, No. 1:12-cv-00614 (N.D. Ohio, March 12, 2012)</td>
<td>27-28</td>
<td>OH</td>
</tr>
<tr>
<td>Center for Biological Diversity and Sierra Club v. The Bureau of Land Management and Ken Salazar, Secretary of the Department of the Interior, No. CV-11-06174 (N.D. Cal., December 8, 2011)</td>
<td>51</td>
<td>CA</td>
</tr>
<tr>
<td>Case Name</td>
<td>Pages</td>
<td>State</td>
</tr>
<tr>
<td>---------------------------------------------------------------------------</td>
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</tr>
<tr>
<td>Center for Biological Diversity, et al v. California Department of Conservation, et al, Case No. RG12652054, In the Superior Court for the State of California for the City and County of Alameda (October 16, 2012)</td>
<td>52</td>
<td>CA</td>
</tr>
<tr>
<td>Coastal Oil and Gas Corp. v. Garza Energy Trust, 268 S.W.3d 1 (Tex. 2008)</td>
<td>42-43</td>
<td>TX</td>
</tr>
<tr>
<td>Colorado Oil and Gas Association v. City of Longmont, Colorado, Case No. 12-566, In the District Court of Weld County, Colorado (Dec. 17, 2012)</td>
<td>42</td>
<td>CO</td>
</tr>
<tr>
<td>Colorado Oil and Gas Conservation Commission v. City of Longmont, Colorado, Case No. 12-566, In the District Court of Boulder County, Colorado (July 30, 2012)</td>
<td>42</td>
<td>CO</td>
</tr>
<tr>
<td>Dillon v. Antero Resources a/k/a Antero Resources Appalachian Corp. s/k/a Anero Resources Appalachia LLC; No. 2:11-cv-01038 (W.D. Pa. August 11, 2011)</td>
<td>23-24</td>
<td>PA</td>
</tr>
<tr>
<td>Eveson v. Antero Resources Corporation, Antero Resources Piceance Corporation, and John Doe Well Service Providers; No. 2011-cv-5118 (Denver County Dist. Ct., July 20, 2011)</td>
<td>21-22</td>
<td>CO</td>
</tr>
<tr>
<td>Fiorentino v. Cabot Oil &amp; Gas Corp. and Gas Search Drilling Services Corp., No. 3:09-cv-02284 (M.D. Pa., Nov. 19, 2009)</td>
<td>4-5</td>
<td>PA</td>
</tr>
<tr>
<td>Case Name</td>
<td>Pages</td>
<td>State</td>
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<td>-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------</td>
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</tr>
<tr>
<td><strong>In Re U.S. Energy Development Corp., File No. 11-57</strong> (New York Department of Environmental Protection, filed Jan. 24, 2012)</td>
<td>52</td>
<td>NY</td>
</tr>
<tr>
<td><strong>Kamuck v. Shell Energy Holdings GP, LLC, Shell Energy Holdings LP, LLC and SWEPI, LP (d/b/a Shell Western Exploration and Production, LP); No. 4:11-cv-01425-MCC (M.D. Pa. August 3, 2011)</strong></td>
<td>22-23</td>
<td>PA</td>
</tr>
<tr>
<td><strong>Koonce v. Chesapeake Exploration, LLC and CHK Utica, LLC, No. 4:12-cv-00736-BYP (N.D. Ohio, March 27, 2012)</strong></td>
<td>46-47</td>
<td>OH</td>
</tr>
<tr>
<td><strong>Lane v. BHP Billiton Petroleum (Arkansas) Inc., et al, Cause No. 4:11-cv-00477</strong> (E.D. Ark., June 9, 2011)</td>
<td>30-31</td>
<td>AR</td>
</tr>
<tr>
<td><strong>Lenape Resources, Inc. v. Town of Avon, Town of Avon Board, and New York State Department of Environmental Conservation, Index No. _____, In the Superior Court of the State of New York, County of Livingston (November 13, 2012)</strong></td>
<td>42</td>
<td>NY</td>
</tr>
<tr>
<td><strong>Lipsky v. Durant, Carter, Coleman LLC, Silverado on the Brazos Development Company #1 Ltd., Jerry V. Durant, James T. Coleman, Estate of Preston Carter, Range Production Company, and Range Resources Corp., Cause No. CV11-0798</strong> (Parker County Dist. Ct., June 20, 2011); on appeal Case No. 02-12-00098-CV, Second Court of Appeals, Fort Worth, Texas.</td>
<td>21</td>
<td>TX</td>
</tr>
<tr>
<td><strong>Mangan v. Landmark 4, LLC, No. 1:12-cv-00613</strong> (N.D. Ohio, March 12, 2012)</td>
<td>27-28</td>
<td>OH</td>
</tr>
<tr>
<td><strong>Mitchell v. EnCana Oil &amp; Gas (USA), Inc., Chesapeake Operating, Inc., and Chesapeake Exploration, LLC, No. 3:10-cv-02555</strong> (N.D. Tex., Dec. 15, 2010)</td>
<td>10-11</td>
<td>TX</td>
</tr>
<tr>
<td><strong>Northeast Natural Energy, LLC and Enrout Properties, LLC v. The City of Morgantown, West Virginia</strong>, Civil Action No. 11-C-411; In the Circuit Court of Monongalia County, West Virginia (June 23, 2011)</td>
<td>37-38</td>
<td>WV</td>
</tr>
<tr>
<td>Case Name</td>
<td>Pages</td>
<td>State</td>
</tr>
<tr>
<td>--------------------------------------------------------------------------</td>
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<tr>
<td><em>Otis v. Chesapeake Appalachia, LLC, Chesapeake Energy Corporation, and</em></td>
<td>11-12</td>
<td>PA</td>
</tr>
<tr>
<td><em>Nomac Drilling, LLC</em>, No. 3:11-cv-00115-ARC (M.D. Pa. (Scranton), Jan. 18</td>
<td></td>
<td></td>
</tr>
<tr>
<td><em>2011)</em>)</td>
<td></td>
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<tr>
<td><em>Ozark-St. Francis National Forests; United States Forest Service,</em> et al</td>
<td></td>
<td></td>
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<tr>
<td><em>No. 4:11-cv-425 (E.D. Ark., May 19, 2011)</em></td>
<td></td>
<td></td>
</tr>
<tr>
<td><em>Palmer v. BHP Billiton Petroleum (Arkansas) Inc., et al</em>, Cause No. 4:11-</td>
<td>30-31</td>
<td>AR</td>
</tr>
<tr>
<td><em>cv-00476 (E.D. Ark., June 9, 2011)</em></td>
<td></td>
<td></td>
</tr>
<tr>
<td><em>Parr v. Aruba Petroleum, Inc., Ash Grove Resources, LLC, Encana Oil &amp;</em></td>
<td>15-17</td>
<td>TX</td>
</tr>
<tr>
<td><em>Gas (USA), Inc., Halliburton Co., Republic Energy, Inc., Ryder Scott</em> Co.,*</td>
<td></td>
<td></td>
</tr>
<tr>
<td><em>LP, Ryder Scott Oil Co., Tejas Production Services, Inc., and Tejas</em> Western Corp., No. 11-01650 (Dallas County Ct. at Law, Mar. 8, 2011)*</td>
<td></td>
<td></td>
</tr>
<tr>
<td><em>Perna v. Reserve Oil &amp; Gas, Inc., No. 11-c-2284 (Circuit Court of</em> Kanawha</td>
<td></td>
<td></td>
</tr>
<tr>
<td><em>County, West Virginia, Dec. 21, 2011)</em></td>
<td>25-26</td>
<td>WV</td>
</tr>
<tr>
<td><em>Powder River Basin Resource Council, Wyoming Outdoor Council, and</em></td>
<td>51-52</td>
<td>DC</td>
</tr>
<tr>
<td><em>National Wildlife Federation v. U.S. Bureau of Land Management,</em> Kenneth*</td>
<td></td>
<td></td>
</tr>
<tr>
<td><em>Salazar in his official capacity as Secretary of the Interior,</em> Mike* Pool*</td>
<td></td>
<td></td>
</tr>
<tr>
<td><em>in his official capacity as Acting Director of the Bureau of Land</em> Management,* Donald Simpson in his official capacity as Wyoming State Director of the Bureau of Land Management,* and Duane Spencer in his official capacity as the Buffalo Field Office Manager of the Bureau of Land Management,* Case No. 1:12-cv-00996 (D.C. June 19, 2012)*</td>
<td></td>
<td></td>
</tr>
<tr>
<td><em>Powder River Basin Resource Council, Wyoming Outdoor Council, Earthworks,</em></td>
<td></td>
<td></td>
</tr>
<tr>
<td><em>and OMB Watch v. Wyoming Oil and Gas Conservation Commission</em>, Case No.* 94650, In the 7th Judicial District Court of the State of Wyoming, in and for the County of Natrona*</td>
<td></td>
<td></td>
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<tr>
<td><em>Robinson Township, et al v. Commonwealth of Pennsylvania,</em> et al,* No. 284*</td>
<td></td>
<td></td>
</tr>
<tr>
<td><em>M.D. 2012 (Commonwealth Court of Pennsylvania, March 29, 2012)</em></td>
<td>40-41</td>
<td>PA</td>
</tr>
<tr>
<td><em>Rodriguez, Dr. Alfonso v. Michael L. Krancer,</em> in his official capacity* as</td>
<td></td>
<td></td>
</tr>
<tr>
<td><em>Secretary of the Pennsylvania Department of Environmental Protection,</em> et al, Case No. 3:12-cv-01458 (M.D. Pa. July 27, 2012)*</td>
<td></td>
<td></td>
</tr>
<tr>
<td><em>San Juan Citizens Alliance, et al v. Mark Stiles,</em> in his official capacity as* San Juan National Forest Supervisor and BLM Center Manager of the San Juan Public Lands Center; et al, 654 F.3d 1038 (10th Cir. 2011)*</td>
<td></td>
<td></td>
</tr>
<tr>
<td><em>Scoma v. Chesapeake Energy Corp., Chesapeake Operating, Inc., and</em> Chandt* Exploration, LLC*, No. 3:10-cv-01385 (N.D. Tex., July 15, 2010)*</td>
<td></td>
<td></td>
</tr>
<tr>
<td><em>Sheatsley v. Chesapeake Operating, Inc. and Clarita Operating, LLC,</em> Case No.* 4:11-cv-00353-JLH (E.D. Ark., April 4, 2011)*</td>
<td>30-31</td>
<td>AR</td>
</tr>
</tbody>
</table>
### TABLE OF CASES
#### ALPHABETICAL ORDER

<table>
<thead>
<tr>
<th>Case Name</th>
<th>Pages</th>
<th>State</th>
</tr>
</thead>
<tbody>
<tr>
<td>The Ozark Society v. United States Forest Service; et al; No. 4:11-cv-00782 (E.D. Ark., October 31, 2011)</td>
<td>50-51</td>
<td>AR</td>
</tr>
</tbody>
</table>
Appendix B

Resume of Barclay R. Nicholson
Resume of Stephen C. Dillard
BIOGRAPHY: Barclay Richard Nicholson

Barclay Richard Nicholson
Partner

AREAS OF CONCENTRATION
- Energy Litigation
- Shale and Hydraulic Fracturing Task Force
- Commercial Litigation
- Arbitration and ADR
- International Litigation
- Construction
- Insurance
- Environmental
- Patent Litigation

EXPERIENCE
Barclay Nicholson is a partner in Fulbright & Jaworski L.L.P.’s Houston office, where he focuses his practice on energy and business disputes. He has represented a broad range of clients from among the largest of the Fortune 500 Companies to individual business owners. He has significant experience in handling energy related litigation and has represented some of the world's major oil and gas producing and refining companies as well as some of the nation's biggest drilling and E&P companies. Chambers USA noted Barclay is, "intelligent, good natured and more than capable of handling a large-scale case."

Barclay serves on the firm's Shale and Hydraulic Fracturing Task Force and recently has authored numerous articles and given speeches both across the nation and internationally on this topic. Barclay also serves as the Editor of www.frackingblog.com, a blog devoted to hydraulic fracturing.

Barclay has handled commercial cases that involve amounts exceeding one billion dollars. He has represented clients in numerous proceedings both in the United States (in federal and state courts) and abroad (in the LCIA, ICC, UNCITRAL and ICDR). Additionally, he has represented clients before various administrative and congressional oversight boards.

Prior to joining the firm, Barclay served as Briefing Attorney for Justice Alberto Gonzales of the Texas Supreme Court, who later served as the United States Attorney General. Barclay also served as Briefing Clerk for Chief Justice Thomas R. Phillips of the Texas Supreme Court.

REPRESENTATIVE EXPERIENCE
Recent, significant litigation and arbitration activities include:

Energy Related Representations include:
- Litigation arising from multiple oil & gas leases and related service contracts
- Counseled companies regarding the disclosure of hydraulic fracturing fluids
**BIOGRAPHY: Barclay Richard Nicholson**

- Dispute regarding Joint Operating Agreement between oil and gas operators
- Lawsuits involving claims of groundwater contamination due to hydraulic fracturing operations
- Major oil and gas drilling company in dispute regarding drilling operations
- British LNG provider in commercial dispute concerning multiple multinational JOA and PSA contracts pending before LCIA
- Major oil producer in ICC arbitration involving a failed merger
- Canadian oil and gas company in ICC arbitration dispute concerning West African offshore oil fields
- Major multinational producer and refiner in $500 million dispute with government over offshore oil rights
- Multinational oil producer and refiner over government related claims in ICC arbitration
- International gas company in multiple take-or-pay contract disputes
- Regional drilling and exploration company in well damage case in Texas State Court
- Local oil and gas exploration company regarding a deceptive trade practices action pending in Federal Court in Houston

**Commercial Litigation Representations include:**

- Served as lead trial counsel for national newspaper in complex breach of contract and breach of fiduciary duty case in state court
- Small manufacturing business owner in a state court dispute regarding a buy-sell agreement
- Lead attorney for oil field equipment manufacturer in contractual business dispute regarding a buy-out agreement
- International law firm in a malpractice action
- Major media company in a wrongful death case
- Premises owner in a suit that involved catastrophic personal injury
- Prosecuted over 20 lawsuits on behalf of the City of Houston, as first chair attorney

**Construction Related Representations include:**

- One of the world's largest oil and gas companies in construction dispute involving multinational EPC contract
- Regional pipeline company in AAA arbitration involving construction delay
dispute, served as lead plaintiffs' attorney

- National manufacturing company in bench trial in South Texas that resulted in a take nothing judgment and recovery on counter-claim

Intellectual Property Representations include:

- *Fortune 500* Energy Company in a week long complex patent infringement jury trial in Federal Court for the Eastern District of Texas
- Major media company as defendant in TV related technology matter in Federal Court for the Eastern District of Texas
- International consumer electronics company in patent case involving MP3 players in Federal Court in Southern District of Texas
- International medical device manufacturing company in patent case involving surgical devices in Federal Court for the Eastern District of Texas

First Party Insurance and Bad-Faith Representations include:

- *Fortune 500* Insurance Company in coverage and bad-faith lawsuits in state and federal court with exposure totaling over $250 million
- One of the world's leading insurance companies in a bad-faith trial lasting over four weeks in Jefferson Parrish, State Court in Louisiana
- Multinational insurance company against bad-faith claims brought in Federal Court in Missouri
- International insurance carrier in first party litigation case involving bad-faith claims arising out of excess insurance policy
- National insurance company in appeal involving contractual dispute between companies which resulted widely cited published court of appeals decision
- National insurance company in case of first impression that involved bad-faith; case was won at summary judgment and subsequently upheld at appellate level and published opinion has become widely cited as precedent

PROFESSIONAL ACTIVITIES AND MEMBERSHIPS

- **American Bar Association**
  - [International Energy & Natural Resources Committee](#), Vice-Chair (2011 - 2013)
  - [Business Torts Litigation Committee](#), Committee Leadership (2011 - 2012)
  - [Environment, Energy and Resources Section](#)
  - [Litigation Section](#)
  - Tort and Insurance Practice Section, Former Co-Chair
<table>
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<tr>
<th>BIOGRAPHY: Barclay Richard Nicholson</th>
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<tbody>
<tr>
<td>• Continuing Legal Education Committee, Standing Committee Member</td>
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<tr>
<td>• Advisory Panel</td>
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<tr>
<td>• <strong>State Bar of Texas</strong></td>
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<td>• Litigation Section</td>
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<td>• Oil, Gas &amp; Energy Resources Section</td>
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<td>• Construction Section</td>
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<td>• Professional Liability Section</td>
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<td>• <strong>Federal Bar Association</strong></td>
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<td>• <strong>College of the State Bar of Texas</strong> (2006 - 2012)</td>
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<tr>
<td>• <strong>Pro Bono College of the State Bar of Texas</strong> (2006 - 2012)</td>
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<tr>
<td>• <strong>Houston Bar Foundation</strong>, Fellow</td>
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<tr>
<td>• <strong>Texas Bar Foundation</strong>, Fellow</td>
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<tr>
<td>• <strong>Houston Bar Association</strong></td>
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<tr>
<td>• Chair Elect of the Litigation Committee (2012-2013)</td>
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<td>• Continuing Legal Education Committee (2011 - 2012)</td>
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<td>• Membership Committee (2011 - 2012)</td>
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<td>• Dispute Resolution Committee, Board of Director (2008 - 2010)</td>
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<td>• Speakers Bureau Committee (2008 - 2009, 2011 - 2012)</td>
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<td>• Professionalism Committee (2007 - 2009)</td>
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<td>• Fee Disputes Committee (2006 - 2008)</td>
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<td>• <strong>Houston Young Lawyers Association</strong></td>
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<td>• Bench Book Committee, Chairman and Editor-in-Chief (2005 - 2007)</td>
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<td>• <strong>World Affairs Council of Houston</strong></td>
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<td>• <strong>Association of International Petroleum Negotiators</strong></td>
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<td>• <strong>The Institute for Energy Law</strong></td>
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<td>• Member of the Advisory Board</td>
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<td>• <strong>Independent Petroleum Association of America</strong></td>
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<td>• <strong>Energy &amp; Mineral Law Foundation</strong></td>
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<td>• <strong>Rocky Mountain Mineral Law Foundation</strong></td>
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<td>• <strong>Texas Association of Defense Counsel</strong></td>
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</table>
BIOGRAPHY: Barclay Richard Nicholson

- Texas Supreme Court Historical Society
- New York State Bar Association
- Colorado State Bar Association

PROFESSIONAL HONORS
- Chambers USA (2011, 2012)
- Strauss Fellow, Next Generation Project Texas, LBJ School of Public Affairs, The University of Texas
- Martindale-Hubbell rated as "AV Preeminent" with a rating of 4.8 out of a possible 5

PUBLICATIONS
Barclay has authored a number of articles on hydraulic fracturing litigation. He has also authored articles on other topics including: breach of contract damage issues, construction litigation issues, insurance coverage disputes, insurance bad faith and causation issues and international arbitration case studies. Barclay also has authored several articles for in-house legal departments.

Other publications include:
- "Fracking's Alleged Links to Water Contamination and Earthquakes," ABA Section of Litigation Energy Litigation Committee, May 9, 2012
- "Courts Unclear when Fracturing is Subsurface Trespass," The American Oil & Gas Reporter, February 2012
- "Fracing Focus Shifts to Water," Oil & Gas Investor, February 2012
- "Fracing Focus Shifts to Water," Unconventional Oil & Gas Center, February
8, 2012
• Co-author, "Department of Interior Releases Draft Rule of Well Stimulation," International Law Office, February 27, 2012
• "States on Standby for Frack Rules," Energy Bisnow, February 24, 2012
• Co-author, "Department of Interior Releases Draft Rule of Well Stimulation," Fulbright Briefing, February 10, 2012
• Interviewed, "Analysis: Green Groups Find Success Fighting Shale Oil Boom," Reuters, December 27, 2011 also published on Yahoo! News, MSNBC
• "Trends Emerge on Hydraulic Fracturing Litigation," Oil & Gas Journal, December 5, 2011 Issue
• Co-author, "Texas, Other States Move Forward With Hydraulic Fracturing Disclosure Regulations," Fulbright Briefing, October 13, 2011
• Co-author, "Texas Supreme Court Issues Three Key Energy Opinions in August," Fulbright Briefing, September 15, 2011
• Co-author, "U.K. House of Commons Committee Urges Support for Shale
BIOGRAPHY: Barclay Richard Nicholson

**Gas Extraction**, "Fulbright Briefing," June 6, 2011

- Co-author, "FracFocus Website Launched As Hydraulic Fracturing Chemical Disclosure Registry," *Fulbright Alert - Shale and Hydraulic Fracturing Task Force*, April 12, 2011
- "Fracking and the Courts," *Oil and Gas Investor*, July 2010
- *Harris County Bench Book*
  - Editor in Chief, 2007
  - Editor, 2004 - 2006

**SPEECHES**

Barclay has given speeches on various topics at seminars and conventions as well as in the continuing legal education setting. Barclay has also given in-house presentations to oil and gas companies, construction companies and insurance companies in Houston, New York, London and Chicago on a number of topics including electronic discovery and attorney-client privilege issues in major companies.

- Upcoming Program Co-Chair, *Hydraulic Fracturing Conference*, The Seminar Group, Bacara Resort & Spa, Santa Monica, California, February 8, 2013
- Upcoming Speech, "Where New Hydraulic Fracturing Techniques in Various
<table>
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<tr>
<th>Event</th>
<th>Date and Location</th>
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<tr>
<td>Shale Plays Embrace New Regulations</td>
<td>Texas Alliance, October 17-18, 2012</td>
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<tr>
<td>&quot;Water Trading Markets for Oil and Gas,&quot; Water &amp; Energy Upstream</td>
<td>&quot;Overview of Current Developments Concerning Shale Gas and Hydraulic Fracturing,&quot;</td>
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<tr>
<td>&amp; Demand Management Strategies, Houston, Texas, October 4-5, 2012</td>
<td>HAPL (Houston Association of Professional Landmen), Houston, Texas October 4, 2012</td>
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<tr>
<td>&quot;Hydraulic Fracturing Litigation,&quot; In-House Presentation to ExxonMobil, Houston, Texas September 11, 2012</td>
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<tr>
<td>Attorneys and Landmen Co-Sponsored with AAPL (American Association of Professional Landmen), AIPN (Association of International Petroleum Negotiators), HAPL (Houston Association of Professional Landmen), South Texas College of Law, Houston, Texas August 29-30, 2012</td>
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<tr>
<td>&quot;Hydraulic Fracturing Litigation,&quot; In-House Presentation to ExxonMobil, Fairfax, Virginia August 22, 2012</td>
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<tr>
<td>&quot;What Estate Planners Need to Know About Oil and Gas Leasing&quot; Amarillo Area Estate Planning Council, Twenty-First Annual Institute on Estate Planning, Amarillo College of Business &amp; Industry, May 3-4, 2012</td>
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<tr>
<td>&quot;Hydraulic Fracturing – Are the Regulators Coming or Not?&quot; Young Professionals in Energy International Summit, Las Vegas, Nevada, April 23-25, 2012</td>
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<tr>
<td>&quot;Hydraulic Fracking and Other Current Issues Impacting Oil &amp; Gas Leases,&quot; 2012 Oil &amp; Gas Conference of Texas Bankers Association, San Antonio,</td>
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<tr>
<td>Hydraulic Fracturing and Shale Gas Update, Breakfast Club of Houston</td>
<td>January 11, 2012</td>
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<tr>
<td>Oil and Gas Leasing Disputes &amp; Solutions: Best Practices for Avoiding Common Issues Arising from Hydraulic Fracturing (Fracking) Extraction Agreements, LexisNexis® Webinar</td>
<td>December 20, 2011</td>
</tr>
<tr>
<td>Shale Gas Plays: The Hotbeds, Gas Drilling Operations Conference, HB Litigation Conference</td>
<td>Dallas, Texas, December 13, 2011</td>
</tr>
<tr>
<td>Program Chair and Speech, &quot;Litigation Arising from Various Lease Contacts and Oil and Gas Related Contracts,&quot; 13th Annual Energy Contract Management in Oil and Gas</td>
<td>Houston, Texas, December 5-6, 2011</td>
</tr>
<tr>
<td>Ten Things Everyone Should Know About a Current Oil &amp; Gas Lease, Society of Louisiana Certified Public Accountants Oil &amp; Gas Workshop</td>
<td>Lafayette, Louisiana, November 29-30, 2011</td>
</tr>
<tr>
<td>EPA Announces Plans to Regulate 'Fracking,' Marketplace - American Public Media Radio Interview by Scott Tong</td>
<td>October 21, 2011</td>
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<tr>
<td>Shale Gas: the Plays and the Playing Field, Fulbright Seminar, New York</td>
<td>New York, October 18, 2011</td>
</tr>
<tr>
<td>Ten Things Everybody Should Know About an Oil and Gas Lease, National Oil &amp; Gas Royalty Conference</td>
<td>Houston, Texas, October 17, 2011</td>
</tr>
<tr>
<td>Overview of Fracking Law: a U.S. Perspective, Fraser Milner Casgrain Fracking Seminar</td>
<td>Calgary, Alberta, October 12, 2011</td>
</tr>
<tr>
<td>Gulf Oil Spill: Developments &amp; Economic Losses for Claims, Property Loss</td>
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</tbody>
</table>
BIOGRAPHY: Barclay Richard Nicholson

Research Bureau, 2011 Claims Conference, Nashville, Tennessee, April 3-6, 2011

• "Case Law Update on Bad Faith Topics from Texas, Louisiana, Mississippi and Florida," 12th Annual Windstorm Insurance Conference, Houston, Texas, January 24-27, 2011

• "Effective Depositions," given at request of client, Vancouver, B.C., May 7, 2009

• "Update on Texas Bad Faith Law," given to client group attending State Bar of Texas Annual Meeting, Houston, Texas, June 26, 2008


• "Construction Contracts Short Course for Board Members and Administrators," Texas Association of School Boards/Texas Association of School Administrators, Dallas, Texas, September 30, 2007


• "Update on Recent Developments in Texas Regarding Construction Contracts," given at request of client, Vancouver, B.C., March 13, 2007

EDUCATIONAL BACKGROUND
1999 - J.D., magna cum laude, University of Houston
1995 - B.A., honors, The University of Texas

While in law school Barclay was Associate Editor of the Houston Law Review. He was also selected to be a member of the Order of the Coif and is also a member of the Order of the Barons. He is licensed to practice law in the State of Texas, the State of New York, the State of Colorado, and in the United States District Courts for the Southern, Northern, Western and Eastern Districts of Texas, as well as the Fifth Circuit Court of Appeals.

INTERESTS
In his time away from the office, Barclay enjoys spending time with his wife and their three year old son. As a native Houstonian, he enjoys all outdoor activities. He especially enjoys bird hunting and fishing in Texas and Louisiana. Barclay is also an avid UT football fan and tries to make as many UT games as possible. Barclay is an amateur cook and wine collector and enjoys going out to eat and spending time with his friends and family.
CIVIC INVOLVEMENT

Barclay happily serves as a Wish Grantor for the Make-A-Wish Foundation. In this capacity he tries to help pool resources to grant special requests or "wishes" to children with life threatening illnesses. Also, he is active with the Hobby Center and its Broadway Across America series and with Houston's Theater Under the Stars. Barclay also leads the firm's participation in the Houston Bar Association's Veterans Clinic. During these monthly clinics, held at the Houston VA Hospital, lawyers assist veterans with various legal issues on a pro bono basis. Because of these, and other efforts, for 2012 Fulbright was chosen for the Outstanding Large Firm Contribution to the Houston Volunteer Lawyers Programs. Barclay is also a member of the Rotary Club of West U and is a Paul Harris Fellow.
Experience
• Brings over 35 years of experience to the table
• Tried to verdict over 125 cases in both state and federal courts
• Tried to verdict numerous complex cases in both state and federal courts
• Successfully defended corporations in chemical exposure, toxic tort, mass tort and environmental cases
• Class actions

Industries
• Energy and Utilities
• Chemicals
• Construction and Building Materials

PROFESSIONAL HONORS
• Chambers USA, Litigation: General Commercial, Texas (2005 - 2012)
• Who's Who in America
• The Best Lawyers in America
• Who's Who in American Law
**BIOGRAPHY: Stephen C. Dillard**

- *Super Lawyers*, Thomson Reuters
  - "Texas Super Lawyer" (2003 - 2012)
  - "Top 100 Lawyers in Houston" (2007 - 2012)
  - "Top 100 Lawyers in Texas" (2012)

**PUBLICATIONS**

Steve's most recent publications include:


**EDUCATIONAL BACKGROUND**

1971 - J.D., cum laude, Baylor University  
1968 - B.A., Baylor University

While in law school, Steve served as Editor-in-Chief of the *Baylor Law Review*. He was admitted in 1971 to practice law in Texas.

*A list of specific experience and client references are available upon request.*