

**HYDRAULIC FRACTURING TORT LITIGATION SUMMARY  
(MARCH 7, 2018)**

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**Selected Books and Articles on Fracking Contamination and Trespass Litigation**

**Summary of Tort Litigation Involving Hydraulic Fracturing  
(and Some Related Cases)**

**Selected Articles and Cases Involving “Lone Pine” Orders**

**Selected Books**

Mark S. Guralnick, *FRACKING: LAW AND POLICY* (2016)

Keith B. Hall and Hannah J. Wiseman, *HYDRAULIC FRACTURING: A GUIDE TO ENVIRONMENTAL AND REAL PROPERTY ISSUES* (2016)

Kathryn Miles, *QUAKELAND: ON THE ROAD TO AMERICA’S NEXT DEVASTATING EARTHQUAKE* (2017)

Daniel Raimi, *THE FRACKING DEBATE: THE RISKS, BENEFITS, AND UNCERTAINTIES OF THE SHALE REVOLUTION* (2017)

**Selected Articles**

Brent Allen and Lesley Lawrence-Hammer, *Hydraulic Fracking and Marcellus Shale: Drilling for Mass Torts?*, 13 No. 1 ABA Environmental Litigation and Toxic Torts Committee Newsletter 3 (Dec. 2011)

Owen L. Anderson, *Subsurface “Trespass”: A Man’s Subsurface Is Not His Castle*, 49 Washburn Law Journal 247 (Winter 2010)

Owen L. Anderson, *Lord Coke, The Restatement, and Modern Subsurface Trespass Law*, 6 Texas Journal of Oil, Gas, and Energy Law 203 (2010-2011)

Casey Ball, *An Analysis of Strict Liability as Applied to Hydraulic Fracturing*, 28 BYU Prelaw Review 17 (2014), at <https://journals.lib.byu.edu/spc/index.php/PrelawReview/article/viewFile/34165/32003>

Joseph Belza, Note, *Inverse Condemnation and Fracking Disasters: Government Liability for the Environmental Consequences of Hydraulic Fracturing under a Constitutional Takings Theory*, 44 Boston College Environmental Affairs Law Review 55 (2017)

Jacob Booher, Comment, *Fracking-Caused Earthquakes: How Alleged Threats Could Trigger the Corps of Engineers' Section 10 Jurisdiction*, 45 Environmental Law 235 (2015)

Brent Chicken, *Subsurface Trespass and Pore Space in Colorado*, Rocky Mountain Landman (Sep. 2011)

Hannah Coman, Note, *Balancing the Need for Energy and Clean Water: The Case for Applying Strict Liability in Hydraulic Fracturing Suits*, 39 Boston College Environmental Affairs Law Review 131 (2012)

Róisín Áine Costello, *Reviving Rylands: How the Doctrine Could Be Used to Claim Compensation for Environmental Damage Caused by Fracking*, 23 Review of European, Comparative and International Environmental Law Review 134 (2014)

Matt Douglas and Jamen Tyler, *Shaking it Up: Sierra Club Brings Novel RCRA Claim in an Attempt to Tighten Regulation of Fracking-Related Activities*, in Trends, ABA Section of Environment, Energy, and Resources Newsletter, Vol. 47 No. 6 (July/August 2016), available at [http://www.americanbar.org/publications/trends/2015-2016/july-august-2016/shaking\\_it\\_up.html](http://www.americanbar.org/publications/trends/2015-2016/july-august-2016/shaking_it_up.html)

Monika U. Ehrman, *Earthquakes in The Oilpatch: The Regulatory and Legal Issues Arising Out of Oil And Gas Operation Induced Seismicity*, 33 Georgia State University Law Review ?? (2017)

Hilary M. Goldberg, Melanie Stallings Williams, and Deborah Cours, *It's a Nuisance: The Future of Fracking Litigation in the Wake of Parr v. Aruba Petroleum, Inc.*, 33 Virginia Environmental Law Journal 1 (2015)

Michael Goldman, *A Survey of Typical Claims and Key Defenses Asserted in Recent Hydraulic Fracturing Litigation*, 1 Texas A&M Law Review 305 (Fall 2013)

Francis Gradijan, *State Regulations, Litigation, and Hydraulic Fracturing*, 7 Environmental & Energy Law & Policy Journal 47 (2012)

Keith B. Hall, *All Shook Up: Induced Seismicity*, in Trends, ABA Section of Environment, Energy, and Resources Newsletter, Vol. 47 No. 6 (July/August 2016), available at [http://www.americanbar.org/publications/trends/2015-2016/july-august-2016/all\\_shook\\_up\\_induced\\_seismicity.html](http://www.americanbar.org/publications/trends/2015-2016/july-august-2016/all_shook_up_induced_seismicity.html)

Keith B. Hall, *Hydraulic Fracturing: If Fractures Cross Property Lines, is There an Actionable Subsurface Trespass?*, 54 Natural Resources Journal 361 (2014)

Keith B. Hall, *Hydraulic Fracturing and the Baseline Testing of Groundwater*, 48 University of Richmond Law Review 857 (2014)

Keith B. Hall, *Hydraulic Fracturing Contamination Claims: Problems of Proof*, 74 Ohio State Law Journal Furthermore 71 (2013), at [http://moritzlaw.osu.edu/students/groups/oslj/files/2013/06/Furthermore.Hall\\_.pdf](http://moritzlaw.osu.edu/students/groups/oslj/files/2013/06/Furthermore.Hall_.pdf)

Keith B. Hall, *Hydraulic Fracturing Litigation*, For the Defense 66 (January 2012)

Alia Y. Heintz, Note, *What's the Harm in a Subsurface Trespass?*, 51 Tulsa Law Review 777 (Spring 2016)

Jeffrey C. King, Jamie Lavergne Bryan, and Meredith Clark, *Factual Causation: The Missing Link in Hydraulic Fracture-Groundwater Contamination Litigation*, 22 *Duke Environmental Law and Policy Forum* 341 (2012)

Bruce M. Kramer, *Horizontal Drilling and Trespass: A Challenge to the Norms of Property and Tort Law*, 25 *Colorado Natural Resources, Energy & Environmental Law Review* 291 (2014)

Christopher S. Kulander & R. Jordan Shaw, *Comparing Subsurface Trespass Jurisprudence - Geophysical Surveying and Hydraulic Fracturing*, 46 *New Mexico Law Review* 67 (2016)

Colleen E. Lamarre, Note, *Owning the Center of the Earth: Hydraulic Fracturing and Subsurface Trespass in the Marcellus Shale Region*, 21 *Cornell Journal of Law & Public Policy* 457 (Winter 2011)

Zachary Lees, Note, *Anticipated Harm, Precautionary Regulation and Hydraulic Fracturing*, 13 *Vermont Journal of Environmental Law* 575 (2012)

Michael R. Lieberman, *Evaluating Hydraulic Fracturing Regulation under a Theory of Strict Liability*, 22 *Buffalo Environmental Law Journal* 37 (2014-2015)

James Patrick Logan, *What's Shakin'? Ladra v. New Dominion, LLC: A Case of Consequence for the Hydraulic Fracturing Industry and Those Affected by Induced Seismicity*, 34 *Pace Environmental Law Review* 207 (2016), available at: <http://digitalcommons.pace.edu/pelr/vol34/iss1/5>

Caleb Madere, Comment, *Covert Capture: Hydraulic Fracturing and Subsurface Trespass in Louisiana*, 75 *Louisiana Law Review* 865 (2015)

David G. Mandelbaum, *Regulation of Unconventional Natural Gas Development*, 25 *Probate and Property* 44 (September/October, 2011)

Neal J. Manor, Note, *"What the Frack?" Why Hydraulic Fracturing Is Abnormally Dangerous and Whether Courts Should Allow Strict Liability Causes of Action*, 4 *Kentucky Journal of Equine, Agriculture, and Natural Resources Law* 459 (2011-2012)

Barclay Nicholson and Brian Albrecht, *Hydraulic Fracturing as a Subsurface Trespass*, ABA Energy Committees Newsletter, Vol. 9, No. 2 (May 2012)

Charles Nixon, *The Continuing Saga of FPL Farming v. Environmental Processing Systems: Will the Texas Supreme Court Set New Rules of Liability for Underground Trespass?*, 8 *Texas Journal of Oil, Gas, and Energy Law* 428 (2012-2013)

David E. Pierce, *Carol Rose Comes to the Oil Patch: Modern Property Analysis Applied to Modern Reservoir Problems*, 19 *Penn State Environmental Law Review* 241 (2011)

David E. Pierce, *Developing a Common Law of Hydraulic Fracturing*, 72 *University of Pittsburgh Law Review* 685 (2011)

Jason A. Proctor, Comment, *The Legality of Drilling Sideways: Horizontal Drilling and Its Future in West Virginia*, 115 West Virginia Law Review 491 (2012)

Danielle Quinn, *A Fracking Fragile Issue: Courts Continue to Tiptoe Around Subsurface Trespass Claims*, 27 Villanova Environmental Law Journal 1 (2016)

Emery Gullickson Richards, *Finding Fault: Induced Earthquake Liability and Regulation*, Columbia Journal of Environmental Law (April 2015), at <http://www.columbiaenvironmentallaw.org/articles/2015/04>

Terry W. Roberson, *Environmental Concerns of Hydraulically Fracturing a Natural Gas Well*, 32 Utah Environmental Law Review 67 (2012)

Leonard S. Rubin, Note, *Frack to the Future: Considering a Strict Liability Standard for Hydraulic Fracturing Activities*, 3 George Washington Journal of Energy & Environmental Law 117 (2012)

Lucas Satterleea, *Shattered Nerves: Addressing Induced Seismicity Through the Law of Nuisance*, 46 Environmental Law Reporter News & Analysis 10326 (April 2016)

Joe Schremmer, Comment, *Avoidable "Fraccident": An Argument Against Strict Liability for Hydraulic Fracturing*, 60 University of Kansas Law Review 1215 (2012)

Aaron Stemplewicz, *The Known "Unknowns" of Hydraulic Fracturing: A Case for a Traditional Subsurface Trespass Regime in Pennsylvania*, 13 Duquesne Business Law Journal 219 (Summer 2011)

Kaoru Suzuki, Note, *The Role of Nuisance in the Developing Common Law of Hydraulic Fracturing*, 41 Boston College Environmental Affairs Law Review 265 (2014)

Blake A. Watson, *Fracking and Cracking: Strict Liability for Earthquake Damage Due to Wastewater Injection and Hydraulic Fracturing*, 11 Texas Journal of Oil, Gas, and Energy Law 1 (2016)

Blake Watson, *Hydraulic Fracturing and Tort Litigation: A Survey of Landowner Lawsuits*, 31 Probate and Property Magazine, Issue 5 (Sept./Oct. 2017), available at [https://www.americanbar.org/groups/real\\_property\\_trust\\_estate/publications/probate\\_property\\_magazine\\_2012/2017/september\\_october\\_2017/ppv31-5-article-hydraulic-fracturing-and-tort-litigation-landowner-lawsuits.html](https://www.americanbar.org/groups/real_property_trust_estate/publications/probate_property_magazine_2012/2017/september_october_2017/ppv31-5-article-hydraulic-fracturing-and-tort-litigation-landowner-lawsuits.html)

Meredith A. Wegener, *Shake, Rattle, and Palsgraf: Whether an Actionable Negligence Claim Can Be Established in Earthquake Damage Litigation*, 11 Texas Journal of Oil, Gas, and Energy Law 115 (2016)

Hannah Wiseman, *Beyond Coastal Oil v. Garza: Nuisance and Trespass in Hydraulic Fracturing Litigation*, The Advocate (Texas State Bar Litigation Section Report), Vol. 57 (Winter 2011)

Travis Zeik, *Hydraulic Fracturing Goes to Court: How Texas Jurisprudence on Subsurface Trespass Will Influence West Virginia Oil and Gas Law*, 112 West Virginia Law Review 599 (2010)

**TORT LITIGATION INVOLVING HYDRAULIC FRACTURING  
(AND RELATED CASES)**

<u>Filed</u>	<u>Case</u>	<u>Status</u>	<u>State</u>
2011	03-23	Sheatsley v. Chesapeake Operating, Inc.	dismissed earthquake AR
2011	05-17	Tucker v. Southwestern Energy Co.	settled AR
2011	05-17	Berry v. Southwestern Energy Co.	settled AR
2011	05-17	Ginardi v. Frontier Gas Services	settled AR
2011	05-20	Lane v. BHP Billiton Petroleum (Arkansas) Inc.	dismissed earthquake AR
2011	05-23	Frey v. BHP Billiton Petroleum (Arkansas) Inc.	dismissed earthquake AR
2011	05-24	Palmer v. BHP Billiton Petroleum (Arkansas) Inc.	dismissed earthquake AR
2011	05-24	Hearn v. BHP Billiton Petroleum (Arkansas) Inc.	dismissed earthquake AR
2011	06-07	Hiser v. XTO Energy Inc.	decided, affirmed AR
2011	09-12	Scoggin v. Cudd Pumping Services, Inc.	dismissed AR
2011	12-23	Bartlett v. Frontier Gas Services, LLC	dismissed AR
2012	07-11	Smith v. Southwestern Energy Co.	dismissed AR
2012	08-10	Hill v. Southwestern Energy Co.	judgment for defendants; appealed AR
2012	11-02	Pruitt v. Southwestern Energy Co.	dismissed AR
2012	12-07	Scoggin v. Southwestern Energy Co.	dismissed AR
2013	01-31	Yanke v. Fayetteville Gathering	settled AR
2013	03-11	Miller v. Chesapeake Operating, Inc.	dismissed earthquake AR
2013	04-01	Sutterfield v. Chesapeake Operating, Inc.	dismissed earthquake AR
2013	04-01	Mahan v. Chesapeake Operating, Inc.	dismissed earthquake AR
2013	04-01	Thomas v. Chesapeake Operating, Inc.	dismissed earthquake AR
2013	08-12	Ramsey v. DeSoto Gathering Co., LLC	settled AR
2013	08-23	Kay v. Peak Water Systems, LLC	settled AR
2014	02-11	2010-11 Guy-Greenbrier Earthquake Victims v. Chesapeake	dismissed earthquake AR
2014	02-12	Davis v. Chesapeake Operating, Inc.	dismissed earthquake AR
2014	04-24	Ramsey v. DeSoto Gathering Co., LLC	pending AR
2014	11-14	Stratton v. Kinder Morgan Treating	closed AR
2015	05-15	Gardiner Family LLC v. Crimson Resource Mngmt.	settled CA
2011	03-23	Strudley v. Antero Resources Corp.	pending CO
2011	07-20	Evenson v. Antero Resources Corp.	dismissed CO
2011	04-15	Andre v. EXCO Resources, Inc.	settled LA
2011	04-18	Beckman v. EXCO Resources, Inc.	settled/dismissed LA
2012	01-12	Teekell v. Chesapeake Operating, Inc.	settled/dismissed LA
2009	08-27	Maring v. Nalbone	pending NY
2011	03-09	Baker v. Anschutz Exploration Corp.	closed NY
2009	08-13	Kartch v. EOG Resources	settled ND
2010	10-22	Armes v. Petro-Hunt LLC	dismissed/settled ND

<u>Filed</u>	<u>Case</u>	<u>Status</u>	<u>State</u>
2008	07-22	Siers v. John D. Oil and Gas Co.	OH
2009	01-30	Payne v. Ohio Valley Energy Systems Corp.	OH
2010	10-22	Alford v. East Gas Ohio Co.	OH
2012	03-12	Boggs v. Landmark 4 LLC	OH
2012	03-12	Mangan v. Landmark 4, LLC	OH
2016	03-18	Crothers v. Statoil USA Onshore Properties	OH
2011	10-06	Reece v. AES Corporation	OK
2014	08-04	Ladra v. New Dominion LLC	OK
2015	02-10	Cooper v. New Dominion LLC	OK
2016	01-11	Felts v. Devon Energy Corp.	OK
2016	01-12	Griggs v. Devon Energy Corp.	OK
2016	02-12	Lene v. Chesapeake Operating LLC	OK
2016	02-16	Sierra Club v. Chesapeake Operating LLC	OK
2016	02-18	West v. ABC Oil Company, Inc.	OK
2016	04-22	Almont Energy v. Newfield Exploration	OK
2016	11-17	Adams v. Eagle Road Oil, LLC	OK
2016	12-05	Reid v. White Star Petroleum, LLC	OK
2017	03-03	Pawnee Nation v. Eagle Road Oil LLC	OK
2017	07-21	Griggs v. New Dominion LLC	OK
2009	09-21	Zimmermann v. Atlas America, LLC	PA
2009	11-19	Fiorentino (Ely) v. Cabot Oil and Gas Corp.	PA
2010	05-27	Hallowich v. Range Resources Corp.	PA
2010	09-14	Berish v. Southwestern Energy Production Co.	PA
2010	10-27	Armstrong v. Chesapeake Appalachia, LLC	PA
2010	12-17	Bidlack v. Chesapeake Appalachia, LLC	PA
2010	12-17	Otis v. Chesapeake Appalachia, LLC	PA
2011	02-25	Burnett v. Chesapeake Appalachia, LLC	PA
2011	04-25	Phillips v. Chesapeake Appalachia, LLC	PA
2011	07-18	Becka v. Antero Resources	PA
2011	07-18	Dillon v. Antero Resources	PA
2011	08-03	Kamuck v. Shell Energy Holdings GP, LLC	PA
2012	03-12	Roth v. Cabot Oil & Gas Corporation	PA
2012	04-09	Manning v. WPX Energy Inc.	PA
2012	04-20	Kalp v. WPX Energy Appalachia, LLC	PA
2012	05-25	Haney v. Range Resources	PA
2012	07-10	Butts v. Southwestern Energy Production Company	PA
2013	06-18	Bezjak v. Chevron Appalachia LLC	PA
2013	06-19	Leighton v. Chesapeake Appalachia, LLC	PA
2013	09-13	Brown v. WPX Appalachia LLC	PA
2013	12-27	Russell v. Chesapeake Appalachia	PA
2014	01-22	Arbitration between J. Place and Chesapeake	PA
2014	04-09	Chaffee v. Talisman Energy USA Inc.	PA
2014	07-21	Tiongeo v. Southwestern Energy Production Co.	PA
2014	10-07	Lauff v. Range Resources - Appalachia LLC	PA
2014	10-28	Chito v. Hilcorp Energy Company	PA
2015	04-21	Dubrasky v. Hilcorp Energy Company	PA
2015	03-29	Baumgardner v. Chesapeake Appalachia	PA

<u>Filed</u>	<u>Case</u>	<u>Status</u>	<u>State</u>
2017	04-13	Kemble v. Cabot Oil & Gas Corporation	PA
2017	08-07	Cabot Oil & Gas Corporation v. Speer	PA
1997	-----	Coastal Oil and Gas Corp. v. Garza Energy Trust	TX
2006	-----	Environmental Processing Systems v. FPL Farming	TX
2008	05-08	Gardiner v. Crosstex North Texas Pipeline LP	TX
2010	07-15	Scoma v. Chesapeake Energy Corp.	TX
2010	10-18	Ruggiero v. Aruba Petroleum, Inc.	TX
2010	10-22	Knoll v. Gulftex Operating, Inc.	TX
2010	11-03	Heinkel-Wolfe v. Williams Production Co., LLC	TX
2010	11-03	Sizelove v. Williams Production Co., LLC	TX
2010	12-15	Mitchell v. Encana Oil & Gas (USA)	TX
2010	12-22	Harris v. Devon Energy Production Company, L.P.	TX
2011	01-31	Smith v. Devon Energy Production Co., LP	TX
2011	02-28	Eric Dow v. Atmos Energy Corp.	TX
2011	02-28	Town of Dish v. Atmos Energy Corp.	TX
2011	02-28	William Sciscoe v. Atmos Energy Corp.	TX
2011	03-08	Parr v. Aruba Petroleum, Inc.	TX
2011	06-20	Lipsky v. Range Resources Corp.	TX
2011	06-27	Marsden v. Titan Operating Corp.	TX
2011	11-07	Crowder v. Chesapeake Operating, Inc.	TX
2011	11-08	Mann v. Chesapeake Operating, Inc.	TX
2011	11-09	Anglim v. Chesapeake Operating, Inc.	TX
2011	11-10	Gutierrez v. Chesapeake Operating, Inc.	TX
2011	12-01	Beck v. ConocoPhillips Company	TX
2011	12-02	Strong v. ConocoPhillips Company	TX
2013	05-21	Cerny v. Marathon Oil Corp.	TX
2013	07-30	Finn v. EOG Resources, Inc.	TX
2013	10-10	Dueling v. Devon Energy Corp.	TX
2013	11-06	Nicholson v. XTO/Exxon Energy	TX
2014	02-28	Alexander v. Eagleridge Operating, LLC	TX
2015	08-06	Murray v. EOG Resources, Inc.	TX
2010	02-24	Magers v. Chesapeake Appalachia, LLC	WV
2010	10-26	Hagy v. Equitable Production Co.	WV
2010	12-08	Teel v. Chesapeake Appalachia, LLC	WV
2011	02-07	Whiteman v. Chesapeake Appalachia, LLC	WV
2011	04-10	Rine v. Chesapeake Appalachia, LLC	WV
2011	04-14	Bombardiere v. Schlumberger Technology Corp.	WV
2011	06-21	Cain v. XTO Energy Inc.	WV
2011	12-21	Perna v. Reserve Oil & Gas, Inc.	WV
2012	02-27	Dent v. Chesapeake Appalachia, LLC	WV
2013	?????	Dytko v. Chesapeake Appalachia, LLC	WV
2014	09-30	Bertrand v. Gastar Exploration	WV
2014	-----	In Re: Marcellus Shale Litigation	WV
2016	02-29	Easthom v. EQT Production Co.	WV
2014	05-21	Locker v. Encana Oil and Gas (USA) Inc.	WY

<u>Filed</u>		<u>Case</u>	<u>Status</u>	<u>State</u>
2003	-----	Ernst v. EnCana Corporation, et al.	pending	Canada
2013	-----	Daunheimer v. Angle Energy (2013)	pending	Canada
-----	-----	earthquake suit against Netherlands Petroleum Co.	pending	earthquake Netherlands



## ARKANSAS

***Sheatsley v. Chesapeake Operating, Inc. and Clarita Operating, LLC*, No. 2011-28 (Perry County Circuit Ct., Ark., Mar. 23, 2011), removed, No. 4:11-cv-353 (E.D. Ark., Apr. 4, 2011)**

On March 23, 2011, Jacob Sheatsley filed a class action lawsuit, alleging causes of action for public nuisance, private nuisance, absolute liability, negligence, and trespass. The claims were based on an alleged connection between earthquakes and other seismic activity and the disposal of hydraulic fracturing wastes at injection wells. The suit was **dismissed** on July 13, 2011, in light of the *Hearn* class actions (see below). Nicholson, *Analysis of Litigation Involving Shale & Hydraulic Fracturing* (June 1, 2014).

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***Tucker v. Southwestern Energy Co., et al.*, No 1:11-cv-0044-DPM (E.D. Ark., May 17, 2011). See 2012 WL 528253 (E.D. Ark., Feb. 17, 2012) (order on motion to dismiss). See pleadings at 2011 WL 1980530 and 2011 WL 2148645.**

***Berry v. Southwestern Energy Co.*, No 1:11-cv-0045-DPM (E.D. Ark., May 17, 2011). See pleadings at 2011 WL 2198667.**

On May 17, 2011, three class actions were filed alleging that hydraulic fracturing operations polluted the atmosphere, groundwater, and soil. *Tucker v. Southwestern Energy Co.*; *Berry v. Southwestern Energy Co.*, and *Ginardi v. Frontier Gas Services, LLC*. (see below). The *Tucker* and *Berry* cases were consolidated on July 22, 2011. Plaintiffs alleged strict liability, nuisance, trespass, and negligence. On February 17, 2012, the district court ruled on the motion to dismiss some of the claims in the consolidated *Tucker* and *Berry* cases. The court held that the plaintiffs have not yet pled enough facts to state a nuisance claim, noting that “[g]eneral statements about dangerous substances used in fracking, and conclusory statements about the migration of those substances, will not suffice.” With regard to strict liability, the court followed *Fiorentino* and *Berish* and held that the claim should not be decided on a motion to dismiss. The defendants next argued that allegations about air contamination cannot support a trespass claim, but can only support a nuisance claim. Although other states favor this view, the court did not dismiss the trespass claim, stating that “Arkansas law has not answered whether a trespass occurs when a thing passes unwanted through the air above a person's property.” The district court on July 24, 2012, granted a joint motion to dismiss all claims against one defendant, BHP Billiton Petroleum (Fayetteville) LLC, pursuant to a confidential **settlement**. Thereafter, **the parties settled and the cases were dismissed** on August 29, 2012. Nicholson, *Analysis of Litigation Involving Shale & Hydraulic Fracturing* (June 1, 2014).

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***Ginardi v. Frontier Gas Services*, No 4:11-cv-0420 BRW (E.D. Ark., May 17, 2011). See pleadings at 2011 WL 2198664.**

On May 17, 2011, a class action suit was filed on behalf of Arkansas residents who live or own property within one mile of any natural gas compressor or transmission station. Defendants use hydraulic fracturing to produce gas from the Fayetteville Shale, and plaintiffs allege such operations pollute the atmosphere, groundwater, and soil. The causes of actions alleged are strict liability, nuisance, trespass, and negligence. An order denying class certification was issued on April 19, 2012. Thereafter, **the parties settled** all their claims and cross-claims, **and the district court dismissed the case** on July 11, 2012. Nicholson, *Analysis of Litigation Involving Shale & Hydraulic Fracturing* (June 1, 2014).

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***Lane v. BHP Billiton Petroleum (Arkansas) Inc.*, No. 23CV-11-482 (Faulkner County Circuit Ct., Ark., May 20, 2011), removed, No. 4:11-cv-477 (E.D. Ark., June 9, 2011); *Frey v. BHP Billiton Petroleum (Arkansas) Inc.*, No. 23CV-11-488 (Faulkner County Circuit Ct., Ark., May 23, 2011), removed, No. 4:11-cv-475 (E.D. Ark., June 9, 2011); *Hearn v. BHP Billiton Petroleum (Arkansas) Inc.*, No. 23CV-11-492 (Faulkner County Circuit Ct., Ark., May 24, 2011), removed, No. 4:11-cv-474 (E.D. Ark., June 9, 2011); and *Palmer v. BHP Billiton Petroleum (Arkansas) Inc.*, No. 23CV-11-491 (Faulkner County Circuit Ct., Ark., May 24, 2011), removed, No. 4:11-cv-476 (E.D. Ark., June 9, 2011). Consolidated under *Hearn v. BHP Billiton Petroleum (Arkansas) Inc.*, No. 4:11-cv-00474 (E.D. Ark., Aug. 31, 2011)**

Plaintiffs assert hydraulic fracturing damaged their land by causing earthquakes and claim public nuisance, private nuisance, strict liability for ultra-hazardous activities, negligence, and trespass. An amended complaint was filed on April 9, 2013. See Nicholson, *Analysis of Litigation Involving Shale & Hydraulic Fracturing* (June 1, 2014). On August 20, 2013, the *Frey* case was severed and consolidated with *Mahan v. Chesapeake Operating, Inc.* (No. 4:13-cv-184). On August 29, 2013, the court granted the joint motion to dismiss the consolidated *Hearn*, *Palmer*, and *Lane* cases. On March 20, 2014, the consolidated *Mahan* and *Frey* cases were **dismissed** with prejudice (see below).

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***Hiser v. XTO Energy Inc.*, No. CV-11-112-1 (White County Circuit Court, Jun. 7, 2011), removed, No. 4:11-cv-517 (E.D. Ark., June 24, 2011), affirmed, 768 F.3d 773 (8<sup>th</sup> Circuit, Oct. 3, 2014.). See 2012 WL 3542009 (denying summary judgment to defendant); 2013 WL 1749731 (interim order on motion for new trial); 2013 WL 5467186 (order denying motion for new trial)**

Plaintiff Ruby Hiser alleged her home was damaged by vibrations resulting from nearby drilling activity conducted by defendant XTO Energy Inc. Ms. Hiser filed her action in Arkansas state court, and XTO removed it to federal court. XTO moved for summary judgment on Hiser's claims of negligence, nuisance, and trespass, but the court denied the motion. 2012 WL 3542009 (Aug. 14, 2012). A trial was held in September 2012 and the jury found in favor of plaintiff on her claims of negligence, private nuisance, and trespass, and awarded \$100,000 in compensatory damages and \$200,000 in punitive damages. On October 8, 2012, XTO filed a motion for judgment as a matter of law and for a new trial. XTO submitted an affidavit from a juror who stated that a fellow juror asked during deliberation whether fracking had been used, and then explained what fracking is. XTO contended it was prejudiced by the discussion of fracking because fracking has received negative attention in the press. On April 23, 2013, the district court took the motion under advisement, and stated that it would conduct hearings to determine whether the jury may have been exposed to extraneous prejudicial information. 2013 WL 1749731. On September 30, 2013, the court denied XTO's motion for judgment as a matter of law. The court rejected XTO's contention that (1) Hiser did not present any testimony that XTO breached a duty of reasonable care in support of her negligence claim; (2) there was no proof at trial that XTO's drilling operation caused vibrations that entered onto Hiser's property and proximately caused damage to her home; (3) Hiser offered no proof from which a reasonable jury could determine the reasonable expense of necessary repairs to her home and the loss of usable value during the time she was deprived of its use; and (4) there was not sufficient evidence to submit the issue of punitive damages to the jury. 2013 WL 5467186. The court also rejected the argument that the jury improperly considered extra-record evidence during deliberations, holding that the jury's verdict was not influenced by extraneous, prejudicial information. 2013 WL 5467186. On October 3, 2014, the U.S. Court of Appeals

for the Eighth Circuit **affirmed**, holding that XTO did not show a reasonable possibility that any fracking and earthquake discussions by the jury prejudiced it or altered the verdict. 768 F.3d 773.

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***Scoggin v. Cudd Pumping Services, Inc.*, No. 4:11-cv-00678-JMM (E.D. Ark., Sept. 12, 2011).**

Suit on behalf of two children for personal injury resulting from exposure to chemicals released during fracking operations conducted 250 feet from children’s residence. Plaintiffs, who assert claims based on strict liability, nuisance, trespass, and gross negligence, seek \$20 million in compensatory damages, \$50 million in punitive damages; the establishment of a monitoring fund to pay for monitoring of the plaintiffs; attorney fees; and prejudgment interest. Causes of action include strict liability, nuisance, trespass, and negligence. On June 10, 2013, the case was **dismissed** by stipulation without prejudice. Nicholson, *Analysis of Litigation Involving Shale & Hydraulic Fracturing* (June 1, 2014).

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***Bartlett v. Frontier Gas Services, LLC*, No 4:11-cv-0910 (E.D. Ark., Dec. 23, 2011)**

This class action 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 near Solgohacia, Arkansas. Plaintiffs seek injunctive relief to stop defendants’ operation of the station and assert causes of action for strict liability, nuisance, trespass, and negligence. After class certification was denied on April 19, 2012, in *Ginardi v. Frontier Gas Services* (see *supra*), the court granted the joint motion for voluntary **dismissal** in this case on September 17, 2012. Nicholson, *Analysis of Litigation Involving Involving Shale & Hydraulic Fracturing* (June 1, 2014).

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***Smith v. Southwestern Energy Company*, No. 4:12-cv-00423 (E.D. Ark., July 11, 2012).**

William and Margaret Smith allege that the defendant’s compressor station causes noise, vibration and emissions. They assert causes of action for strict liability, nuisance, trespass, and negligence, and seek damages for property, soil, and groundwater contamination, vibration damages, diminution in property values, personal injuries, and mental distress. On May 14, 2013, the court **dismissed** the case for lack of subject matter because the joinder of a necessary party would destroy diversity jurisdiction. Nicholson, *Analysis of Litigation Involving Involving Shale & Hydraulic Fracturing* (June 1, 2014).

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***Hill v. Southwestern Energy Company*, No. 4:12-cv-00500-DPM (E.D. Ark., Aug. 10, 2012). See 2013 WL 5423847 (Sep. 26, 2013) (order dismissing certain claims), 2015 WL 5679744 (Sept. 25, 2015) (order granting judgment to defendants on remaining claims); reversed and remanded, 858 F.3d 481 (Eighth Cir., May 22, 2017)**

Plaintiffs, Robbie and Gwenna Hill and 16 other plaintiffs, own land near Class II disposal wells and claim that injection of oilfield waste has exceeded the storage capacity of subsurface strata beneath the wells and migrated to their land. On September 26, 2013, the district court dismissed the civil RICO claim; the Arkansas Deceptive Trade Practices Act claim; the fraud claims; the civil conspiracy claim; the contract-based claims for violations of the implied lease covenants of good faith and fair dealing; and the conversion claim. The strict liability claims also failed because the injury alleged—wrongful *occupation of* (as opposed

to damage to) the subsurface “makes this case primarily, if not exclusively, a matter of trespass.” Plaintiffs stated claims for trespass and unjust enrichment. On February 14, 2014, the court dismissed the claim for intentional and reckless conduct.

On November 6, 2014, all plaintiffs were dismissed except for Dale and Kari Stroud. According to the Strouds, they were asked in 2009 to lease the right to inject fracking waste water into a plugged production well on their land. After negotiations failed, the Strouds were allegedly told that Southwestern was going to use the well on the neighbor's property "to fill up the empty gas space under [the Strouds'] property since it was all connected." However, on September 25, 2015, the court granted the defendants' motion for judgment. The court acknowledged it was "certainly possible that some of the injected waste migrated into the Strouds' subsurface property. But a jury would be speculating to return a verdict that a trespass did or did not occur." The court said "expert testimony was crucial" in determining how fluid moves underground. The plaintiffs were unable to offer "a methodologically sound expert opinion that marries geology and waste flow" and "[w]ithout that opinion, in the absence of some proof of actual contamination, a person could not reasonably decide one way or the other about this alleged underground trespass without some guesswork." 2015 U.S. Dist. LEXIS 129609.

The Strouds appealed, and the Eighth Circuit Court of Appeals reversed and remanded on May 22, 2017. The court held that the district court abused its discretion by excluding the report of Walter Dowdle, the plaintiffs' expert. 858 F.3d 481. According to the court, although Dowdle's equation and report imperfectly described where the fracking waste spread, the methodology was scientifically valid, could properly be applied to the facts, and was reliable enough to assist the trier of fact. The court of appeals also held that -- even without Dowdle's expert opinion -- the Strouds submitted evidence that could enable a jury to draw a reasonable inference that 7.6 million barrels of waste, poured into an area capable of holding no more than 1.1 million barrels, migrated 180 feet to cross the property line. A jury trial is currently scheduled for November 5, 2018. **The case is pending.**

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***Pruitt v. Southwestern Energy Company*, No. 4:12-cv-00690 (E.D. Ark., Nov. 2, 2012). See 2013 WL 588998 (order, dated Feb. 13, 2013, denying motion to dismiss).**

Plaintiffs alleged that defendant's compressor station produced noise, vibration, and emissions, and claimed damages for, *inter alia*, soil and groundwater contamination, diminution in property value, personal injuries, and severe mental distress. Claims asserted included strict liability, nuisance, trespass, and negligence. On February 13, 2013, the court denied Southwestern Energy's Motion for Partial Dismissal of Amended Complaint. With respect to Plaintiffs' claim that the compressor station activities are ultra-hazardous, the court held that dismissal of the strict liability claim was improper because the claim "may turn on evidence that has yet to be developed, such as expert testimony." 2013 WL 588998. On May 14, 2013, the court **dismissed** the case for lack of subject matter jurisdiction. The court held that the joinder of a necessary party would destroy diversity jurisdiction. See also Nicholson, *Analysis of Litigation Involving Shale & Hydraulic Fracturing* (June 1, 2014).

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***Scoggin v. Southwestern Energy Company*, No. 4:12-cv-00763 (E.D. Ark., Dec. 7, 2012).**

This class action suit on behalf of residents and property owners within 500 feet of drilling and fracturing operations by the defendant claims that such operations cause a nuisance, contamination, trespass, physical

harm and property damage. On March 15, 2013, the court denied the defendant's motion to dismiss, which in part argued that plaintiffs failed to plead the requisite elements of a strict liability claim. 2013 WL 11821470. However, on May 29, 2013, the court **dismissed** the case for lack of subject matter jurisdiction because joinder of a necessary party would destroy diversity jurisdiction. 2013 WL 12172041.

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***Yanke v. Fayetteville Gathering*, No. 23CV-13-97 (Faulkner Cty. Cir. Ct., Ark., Jan. 31, 2013)**

Paul and Ashley Yanke sued for abatement of nuisance due to a natural gas compressor station approximately 1,650 feet from their residence. The parties **settled**, and the case was **dismissed** on December 2, 2015.

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***Miller v. Chesapeake Operating, Inc.*, No. 4:13-cv-131 (E.D. Ark, Mar. 11, 2013); *Thomas v. Chesapeake Operating, Inc.*, No. 4:13-cv-182 (E.D. Ark., Apr. 1, 2013); *Sutterfield v. Chesapeake Operating, Inc.*, No. 4:13-cv-183 (E.D. Ark., Apr. 1, 2013); *Mahan v. Chesapeake Operating, Inc.*, No. 4:13-cv-184 (E.D. Ark., Apr. 1, 2013); *Frey v. BHP Billiton Petroleum (Arkansas) Inc.*, No. 23CV-11-488 (Faulkner County Circuit Ct., Ark., May 23, 2011), removed, No. 4:11-cv-475 (E.D. Ark., June 9, 2011)**

Plaintiffs Johnny Fred Miller, Jr., and Patsy Miller, and Christopher and Rebecca Krisell, are residents of Faulkner County, Arkansas. Plaintiffs Jonathan and Lindy Thomas, Thomas and Sarah Gamelin, Micheal and Celeste Phillips are residents of Faulkner County. Plaintiffs Jimmy Waco Sutterfield and Callie Sutterfield, Rodger Waldrip and Sonya Waldrip, and Russell Gillion are residents of Faulkner County, Arkansas. Plaintiffs Mark and Wendy Mahan, and Mary and Norman Mahan, are residents of Faulkner County, Arkansas. Plaintiffs allege that disposal-well operations by Chesapeake Operating, Inc., and BHP Billiton Petroleum (Fayetteville) LLC, caused thousands of earthquakes in mini-clusters in central Arkansas in 2010 and 2011 and damaged their homes. Plaintiffs assert claims for public nuisance; private nuisance; absolute liability due to ultra-hazardous activities; negligence; trespass; deceptive trade practices; and outrage. On August 20, 2013, the *Frey* case [see above] was severed and consolidated with *Mahan v. Chesapeake Operating, Inc.* (No. 4:13-cv-184). Amended complaints were filed in both the *Sutterfield* lawsuit (2014 WL 7178812 (Jan. 6, 2014) and the *Mahan* lawsuit (2014 WL 7178807 (Jan. 9, 2014)). The *Miller*, *Thomas*, *Sutterfield*, and *Mahan/Frey* lawsuits were **dismissed** with prejudice on March 20, 2014. See Nicholson, *Analysis of Litigation Involving Shale & Hydraulic Fracturing* (June 1, 2014).

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***Kay v. Peak Water Systems, LLC*, No. 4:13-cv-487 (E.D. Ark., Aug. 23, 2013)**

Plaintiffs, who own land within three miles of disposal wells operated by the Defendants, claim that fracking fluids and other oilfield wastes are migrating horizontally under their properties after being injected into vertical disposal wells. Plaintiffs claim that Defendants profit from disposal, but do not compensate Plaintiffs for such permanent trespass. The action is for trespass, theft of property, unjust enrichment, and replevin. Plaintiffs also assert that Defendants have engaged in abnormally dangerous and ultra hazardous activities and are strictly liable without regard to fault for damages proximately caused by injection of wastes into the lands of the Plaintiffs. On November 15, 2013, the court granted the defendants' motion to dismiss except for the trespass and unjust enrichment claims. The court adopted its reasoning in *Hill v. Southwestern Energy Co.*, 2013 WL 5423847 (Sep. 26, 2013), and stated that – if it is shown that defendants are using the subsurface storage capacity of plaintiffs' property permanently – Arkansas would recognize a claim either for trespass or unjust enrichment. **The parties settled and the case was closed** in July 2015.

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**2010-2011 Guy-Greenbrier Earthquake Swarm Victims v. Chesapeake Operating, Inc. and BHP Billiton Petroleum (Fayetteville) LLC, No. 23CV-14-84 (Faulkner Cty. Cir. Ct., Ark., Feb. 11, 2014)**

Landowners in Faulkner County, Arkansas, claim they incurred damages due to earthquakes caused by disposal of wastewater. Plaintiffs asserted claims of public and private nuisance, absolute (strict) liability, negligence, trespass, deceptive trade practices, and outrage. The case was **dismissed** with prejudice on March 31, 2014. See *Arkansas Frackquake Victims Commiserate With Oklahomans As Fracking Wastewater Injection Continues, Risking Deadly Earthquakes*, by Julie Dermansky, DeSmog Blog (Jan. 26, 2016), at <http://www.desmogblog.com/2016/01/26/arkansas-frackquake-victims-commiserate-oklahomans-fracking-wastewater-injection-continues-risking-deadly-earthquakes> (the **settlement** in the Guy-Greenbrier earthquake swarm class action lawsuit required people to sign a nondisclosure agreement).

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***Davis v. Chesapeake Operating, Inc.*, No. 4:14-cv-81 (E.D. Ark., Feb. 12, 2014)**

Daryl and Nicole Davis, and Joel and Terri Van Pelt are residents of Faulkner County, Arkansas, and own homes in Greenbrier, Arkansas. They claim that they suffered damages, including property damage to their respective homes, due to defendants' disposal-well operations, which allegedly caused thousands of earthquakes in mini-clusters and swarms in central Arkansas in 2010 and 2011. Claims include public and private nuisance, negligence, trespass, and deceptive trade practices. In addition plaintiffs bring an absolute liability claim, asserting that defendants' disposal well operations and actions “are ultra-hazardous activities that necessarily involve a risk of serious harm to a person or the chattels of others that cannot be eliminated by the exercise of the utmost care and is not a matter of common usage.” See Matthew Cabral, *Shale Watch, Arkansas Families Blame Fracking Operations for Earthquakes* (02/27/14), at <http://shalewatchblog.com/2014/02/27/arkansas-families-blame-fracking-operations-for-earthquakes/> (in addition to property damage, plaintiffs claim emotional distress and increased anxiety and worry of additional and possibly more severe earthquakes that could further damage their property or injure themselves or a family member in their home” and they seek punitive damages for public and private nuisance, absolute liability, trespass, negligence, deceptive trade practices, outrage and emotional distress). On March 20, 2014, about five weeks after filing, the claims were **dismissed** with prejudice pursuant to plaintiffs’ motion.

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***Ramsey v. DeSoto Gathering Co., LLC*, No. 23CV-13-624 (Faulkner Cty. Cir. Ct., Ark., Aug. 12, 2013), removed, No. 4:13-cv-626 (E.D. Ark., Nov. 4, 2013), remanded, *Ramsey v. DeSoto Gathering Co., LLC*, No. 23CV-13-624 (Faulkner Cty. Cir. Ct., Ark., Aug. 12, 2013); and *Ramsey v. DeSoto Gathering Co., LLC*, No. 23CV-14-258 (Faulkner Cty. Cir. Ct., Ark., Apr. 24, 2014)**

[See [https://caseinfo.aoc.arkansas.gov/cconnect/PROD/public/ck\\_public\\_qry\\_main.cp\\_main\\_idx](https://caseinfo.aoc.arkansas.gov/cconnect/PROD/public/ck_public_qry_main.cp_main_idx) ]

In the August 2013 lawsuit, Barbara Ramsey seeks damages for contamination and for loss and enjoyment of her land. She asserts claims for strict liability, nuisance, trespass, and negligence. On October 2, 2013, the amended complaint added new plaintiffs and defendants. The lawsuit was removed to federal district court, which on March 27, 2014, dismissed several plaintiffs and certain claims. On April 9, 2014, a second amended complaint was filed, naming the plaintiffs dismissed from the federal court action. In light of a dispute as to the validity of the second amended complaint, plaintiffs filed a new complaint, in April of 2014,

on behalf of those dismissed from the federal court action. The suit claims that DeSoto's operations cause loud noises and toxic emissions, including methane and hydrogen sulfide as well as other flammable, malodorous and noxious gases. The families also claim their residences are within blast range if the gases would catch fire and cause an explosion. They assert that when there are "equipment blowdowns" the noise sounds like explosions. Seven families assert claims of negligence and strict liability due to abnormally dangerous activity and seek \$8 million in damages and one plaintiff seeks \$20 million for injuries due to post-traumatic stress disorder. See Luke Jones, Arkansas Business, *DeSoto Gathering Co. Sued for \$76M* (Apr. 28, 2014), at <http://www.arkansasbusiness.com/article/98407/desoto-gathering-sued-for-76-million>.

On May 15, 2014, the plaintiffs moved for a default judgment in 23-cv-13-624. On May 19, 2014, the defendants argued that because 23-cv-13-624 was removed to federal court, the state court lacks jurisdiction over the suit. On July 8, 2014, the second suit (23-cv-14-258) was transferred from the 1<sup>st</sup> Division of the Circuit Court to the 5<sup>th</sup> Division of the Circuit Court, where 23-cv-13-624 was filed. On December 2, 2014, DeSoto Gathering Company's motion to dismiss or transfer for improper venue was denied in both 23 CV-14-258 and 23 CV-13-624 (Faulkner County, 20th Judicial District). On January 7, 2015, both cases were transferred to the Second Division Circuit Court. On January 26, 2015, a writ of prohibition was sought from the Arkansas Supreme Court in which DeSoto Gathering Company argues that the Faulkner County Circuit Court is not the proper venue for this case. No. CV-15-65.

No. 23CV-13-624 – On February 12, 2015, the federal district court (4:13-cv-626) remanded the case (No. 23CV-13-624) back to the Circuit Court of Faulkner County. On March 9, 2015, defendants moved to dismiss or transfer for improper venue. On July 17, 2015, the court stayed matters until the Arkansas Supreme Court ruled in the related case (23CV-14-258). The state Supreme Court issued its decision on January 28, 2016 (see below). On October 31, 2016, the court entered an order dismissing 13 plaintiffs without prejudice. The defendants waived objections to venue, and the parties agreed to file a joint status report, no later than February 6, 2017, reporting on the progress of settlement discussions and mediation. On January 30-31, 2017, the parties participated in mediation of this case and some, but not all, of the plaintiffs settled. On August 31, 2017, an order was entered stating that all claims as to Lindell and Claudia Southerland, Casey and Nita Chastain, and Thomas and Jenny Whitehurst have been resolved and should be dismissed with prejudice. The claims of William and Margaret Smith remain. On September 1, 2017, claims against Southwestern Midstream Services Company and SEECO, Inc. were dismissed with prejudice. Only the claims against Desoto Gathering Company remain.

On October 3, 2017, DeSoto Gathering Company, LLC filed a motion for summary judgment. It stated that the remaining claims are (1) strict liability based on allegations of ultra-hazardous activity; and (2) negligence. It contends that plaintiffs lack evidence of physical personal injuries; cannot recover damages for emotional distress without an attendant physical injury; lack any proof of legal causation of any type of injury; cannot meet their burden of proving that the Puma North natural gas compressor facility is an ultra-hazardous activity; and have not sustained any injury of the type associated with the alleged ultra-hazardous activities (danger of fire or explosion). On October 18, 2017, the jury trial was cancelled. The claims as to remaining plaintiffs, William E. Smith, William and Margaret Smith, were settled and the case was dismissed on November 2, 2017. **The case is closed.**

23CV-14-258 – DeSoto Gathering filed a petition for writ of prohibition with the Arkansas Supreme Court (CV-15-65) requesting that the Faulkner County Circuit Court be barred from conducting further proceedings. On January 28, 2016, the Arkansas Supreme Court denied DeSoto Gathering's petition. 480 S.W.3d 144. Thereafter, on March 2, 2016, DeSoto filed its answer. On November 2, 2016, the court in

No. 23CV-14-258 entered an order that stayed proceedings until a joint status report is filed no later than February 6, 2017. According to the order, the allegations with respect to Scotland II Compressor Station, brought by Clifford and Loveta Pruitt, Allan and Tammy Peterson, Jeffrey and Kimberly Wyborny, Virginia Mills, and Molly O. Stone, shall be assigned a new case number. On May 4, 2017, the plaintiffs informed the court they had settled and filed a motion to dismiss their claims with prejudice. On July 25, 2017, **the case was dismissed.**

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***Stratton v. Kinder Morgan Treating*, No. 4:12-cv-718 (E.D. Ark., Nov. 14, 2012)**

Roger and Marla Stratton of Conway County alleged that a nearby compressor station created a noxious and harmful nuisance. Compressor stations employ turbines to compress natural gas and filter and dehydration units to remove impurities. The units allegedly emit methane and hydrogen sulfide, and create odors and loud noises. Plaintiffs asserted a strict liability claim for abnormally dangerous activities, as well as claims for nuisance, trespass, and negligence. On February 13, 2012, the joint motion to dismiss was granted. **The case is closed.**

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## CALIFORNIA

***Gardiner Family, LLC v. Crimson Resource Management Corp.*, No. 1:15-cv-751 (E.D. Cal., May 15, 2015)**

The Gardiner family operates one of the largest almond orchards in the San Joaquin Valley. It alleges that its almond trees have been damaged by salt water pulled up during oil production. The salt water contains high concentrations of sodium, chloride, and boron. The plaintiffs allege that the defendants' oil production and waste disposal processes have damaged the Gardiner's land, crops, and trees. The wastes include salt water (also called "brine" or "produced water"); drilling mud and drill cuttings; and hydraulic flowback (fluids and chemicals used for hydraulic fracturing mixed with naturally occurring chemicals and fluids that flow back to the surface during and after the completion of hydraulic fracturing). The wastes are re-injected underground in waste disposal wells. The plaintiffs assert claims of negligence, trespass, private nuisance, public nuisance. 2016 WL 9448256 (first amended complaint). The case was settled on dismissed on October 13, 2017. **The case is closed.**

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## COLORADO

***Strudley v. Antero Resources Corp.*, No. 2011-cv-2218, 2011 WL 1156763 (Denver County Dist. Ct., Colo., Mar. 24, 2011), 2012 WL 1932470 (order granting motion to dismiss, May 9, 2012), reversed, 350 P.3d 874 (Colorado Ct. of Appeals, July 3, 2013), affirmed, 347 P.2d 149 (Colorado Sup. Ct., Apr. 20, 2015)**

On March 23, 2011, the William Strudley family sued Antero Resources and two drilling and service companies, alleging damages due to contamination from the drilling of three natural gas wells in Silt, Colorado. Plaintiffs allege negligence, negligence per se, nuisance, strict liability, trespass, and medical



monitoring trust funds, and violation of the Colorado Hazardous Waste Act and the Oil and Gas Conservation Act. 2011 WL 1156763. On May 9, 2012, the district court dismissed the case. The court noted that the central issue was whether defendants caused plaintiffs' alleged injuries. Following *Lore v. Lone Pine Corp.*, 1986 WL 637507 (N.J. Sup. Ct., Nov. 18, 1986), the Colorado court required plaintiffs -- before allowing full discovery -- to make a prima facie showing of exposure and causation. The court noted that the Colorado Oil and Gas Conservation Commission had concluded that the water supply was not affected by oil and gas operations.

Lone Pine order – Plaintiffs were instructed to establish (1) the identity of each hazardous substance from defendants' activities to which they were exposed and which caused them injury; (2) whether these substances can cause the types of disease or illness that plaintiffs claim (general causation); (3) a quantitative measurement of the concentration, timing and duration of their exposure to each substance; (4) if other than the plaintiffs' residence, the precise location of any exposure; (e) an identification, by way of reference to a medically recognized diagnosis, of the specific disease or illness from which each plaintiff allegedly suffers or for which medical monitoring is purportedly necessary; and (5) a conclusion that such illness was in fact caused by such exposure (specific causation). Plaintiffs were ordered to provide all reports that contain any finding of contamination on their property; a list of the health care providers who provided plaintiffs with health services along with a release authorizing transmittal of medical records; and identification and quantification of the contamination of the plaintiffs' real property attributable to defendants' operations.

The district court, on May 9, 2012, found that plaintiffs "failed to produce sufficient information and expert opinions upon which to establish the prima facie elements of their claims, including exposure, injury, and both general and specific causation." The court noted that the plaintiffs' doctor opined that environmental and health information exists to merit further substantive discovery," but failed to provide an opinion as to whether exposure was a contributing factor to plaintiffs' alleged injuries or illness. In the words of the court, "Plaintiffs' requested march towards discovery without some adequate proof of causation of injury is precisely what the [*Lone Pine order*] was meant to curtail." The court noted that the Colorado Oil and Gas Commission had concluded that "there is no data that would indicate the water quality in [plaintiffs'] domestic well has been impacted by nearby oil and natural gas drilling and operations." The court stated that, "[t]hough the evidence shows existence of certain gases and compounds in both the air and water of Plaintiffs' Silt home, there is neither sufficient data nor expert analysis stating with any level of probability that a causal connection does in fact exist between Plaintiffs' injuries and Plaintiffs' exposure to defendants drilling activities." The district court concluded that the plaintiffs failed to make a prima facie claim for injuries, and dismissed the claims with prejudice. Nicholson, *Analysis of Litigation Involving Shale & Hydraulic Fracturing* (June 1, 2014).

This is the first time a court dismissed a fracking case due to the non-compliance with a *Lone Pine* order. See <http://www.velaw.com/resources/FirstKnownIndustryOrderDismissingPlaintiffsCaseFailuretoComplyLonePineOrder.aspx>. [NOTE: A list of selected *Lone Pine* cases and articles about *Lone Pine* can be found at the end of this document.] Subsequent to *Strudley*, there is two known groundwater contamination cases in which a court has likewise issued a *Lone Pine* order. *Teekell v. Chesapeake Operating, Inc.*, No. 5:12-cv-00044 (W.D. La. Aug. 20, 2012) (unreported order), and *Baker v. Anschutz Exploration Corp.*, 2013 WL 3282880 (W.D. N.Y. Jun. 27, 2013) (describing *Lone Pine* order entered September 25, 2013). There have been three reported decisions in which motions for *Lone Pine* orders were denied in hydraulic fracturing cases. See *Hagy v. Equitable Production Co.*, 2012 WL 713778 (S.D. W. VA. Mar. 5, 2012); *Kamuck v. Shell Energy Holdings GP, LLC*, 2012 WL 3864954 (M.D. Pa. Sept. 5, 2012); and *Roth v. Cabot Oil & Gas Corporation*, 287 F.R.D. 293, 2012 WL 4895345 (M.D. Pa. Oct. 15, 2012). There are two known unreported

orders denying motions for *Lone Pine* orders. *Boggs v. Landmark 4 LLC*, No. 1:12-cv-00614 (N.D. Ohio, Aug. 13, 2012); and the combined cases of *Beck v. ConocoPhillips Company*, No. 2011-484; and *Strong v. ConocoPhillips Company*, No. 2011-487 (Dist. Ct. Panola County Tex. Mar. 28, 2012).

Subsequent developments – On July 3, 2013, the Colorado Court of Appeals reversed, holding that *Lone Pine* orders are prohibited under Colorado law. The court stated the issue as “whether a trial court in a toxic tort case can enter an order requiring plaintiffs to present prima facie evidence supporting their claims after initial disclosures, but before other discovery commences, or risk having their case dismissed.” The state appellate court offered several reasons for its decision. First, it noted that federal courts rely on Fed.R.Civ.P. 16(c)(2) as authority for *Lone Pine* orders, but the Colorado version of Rule 16 is different and “contains no language granting trial courts the broad discretion contemplated in the rule's federal counterpart.” Second, it noted that courts are more inclined to issue *Lone Pine* orders after extensive discovery has been conducted than early on in the litigation before plaintiffs are fully able to develop their case. In this case, “the court issued the *Lone Pine* order after initial disclosures, but before other discovery began.” Third, the present case is not a “mass tort case” but instead involves one parcel of land and four family members suing four defendants. Under such circumstances, the court saw “no reason why existing procedural mechanisms should be supplanted by ad hoc procedures not otherwise provided for under Colorado law.” 2013 WL 3427901. On August 29, 2013, the Defendants filed a Petition for Writ of Certiorari with the Colorado Supreme Court.

On April 20, 2015, the Colorado Supreme Court affirmed, holding that Colorado’s Rules of Civil Procedure 16(c) does “not allow a trial court to issue a modified case management order, such as a *Lone Pine* order, that requires a plaintiff to present prima facie evidence in support of a claim before a plaintiff can exercise its full rights of discovery under the Colorado Rules.” In support of its decision, the court noted that C.R.C.P. 16 differs from Fed. R. Civ. P. 16 insofar as the state rule “primarily addresses basic scheduling matters” and “does not contain a grant of authority for complex cases or otherwise afford trial courts the authority to require a plaintiff to make a prima facie showing before the plaintiff fully exercises discovery rights under the Colorado Rules.” The court agreed with the United States District Court for the Middle District of Pennsylvania, which stated that it is “preferable to yield to the consistency and safeguards of the [rules of civil procedure], as well as the [c]ourt’s own flexibility and discretion to address discovery disputes as they arise, as opposed to entering [a] rigid and exacting *Lone Pine* order.” *Roth v. Cabot Oil & Gas Corp.*, 287 F.R.D. 293, 299-300 (M.D. Pa. 2012). **This case is pending.**

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***Evenson v. Antero Resources Corp.*, No. 2011-cv-5118 (Denver County Dist. Ct., Colo., July 20, 2011)**

Several families filed a lawsuit alleging that drilling and exploration activities of defendant company exposed their properties to hazardous gases, chemicals, and industrial wastes. Plaintiffs are seeking class action status. The complaint includes causes of action for negligence and medical monitoring, among others. The defendants moved to dismiss, arguing among other things that plaintiffs failed to plead any injury to their property and that their claims lack ripeness, being based on speculative future drilling and operational activities. The court **dismissed** all claims on August 17, 2012. See Nicholson, *Analysis of Litigation Involving Shale & Hydraulic Fracturing* (June 1, 2014); and Jennifer Quinn-Barabanov, *Fracking Plaintiffs Can’t Anticipate a Nuisance*, Law360, Steptoe & Johnson LLP (Sept. 25, 2012) at <http://www.steptoel.com/publications-8413.html>.

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## LOUISIANA

***Andre v. EXCO Resources, Inc.*, No. 5:11-cv-00610-TS-MLH (W.D. La., Apr. 15, 2011)**  
***Beckman v. EXCO Resources, Inc.*, No. 5:11-cv-00617-TS-MLH (W.D. La., Apr. 18, 2011)**

Plaintiff David Andre brought suit on April 15, 2011, on behalf of consumers of water in Caddo Parish. Three days later, Daniel Beckman and seven other plaintiffs filed a similar suit. According to both complaints, on April 18, 2010, a natural gas well operated by EXCO contaminated the Caddo Parish aquifer and the plaintiffs' property. While the complaints do not allege that EXCO engaged in hydraulic fracturing, they seek to compel disclosure of the drilling muds and solutions used by EXCO. Both complaints allege causes of action for negligence, strict liability, nuisance, trespass, unjust enrichment, and impairment of use of property. See Nicholson, *Analysis of Litigation Involving Shale & Hydraulic Fracturing* (June 1, 2014). On May 28, 2013, the parties in the *Andre* litigation filed a joint motion for approval of a proposed **settlement**. On July 1, 2013, a Settlement Class was conditionally certified and the court granted a "Motion to Preliminarily Approve the Proposed Settlement." On October 25, 2013, the parties filed a Joint Motion for Final Approval of Proposed Settlement, Settlement Class, and Other Related Relief. The Settlement Agreement provides that EXCO be given credit for the \$420,000 previously paid out and will pay an additional sum of \$135,000, which includes payment of attorneys' fees in an amount not to exceed \$30,000. The court granted the joint motion on November 12, 2013, and entered an order of dismissal. In the *Beckman* litigation, a joint motion to **dismiss** was granted on August 14, 2014.

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***Teekell v. Chesapeake Operating, Inc.*, No. 555,703 (La. Dist. Ct., Caddo Parish, Dec. 8, 2011), removed, No. 5:12-cv-00044 (W.D. La., Jan. 12, 2012)**

Plaintiffs allege their groundwater was contaminated by gas drilling and production operations on adjacent property. The causes of action include negligence and strict liability. On August 20, 2012, the court signed an order in which the parties agreed to the entry of a "Lone Pine" order requiring plaintiffs to make a prima facie case as to causation through expert witnesses prior to full discovery. See Nicholson, *Analysis of Litigation Involving Shale & Hydraulic Fracturing* (June 1, 2014). On June 25, 2013, the court **dismissed** the claims against the defendants with prejudice.

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## NEW YORK

***Maring v. Nalbone*, No. K12009001499 (N.Y. Sup. Ct., Chautauqua County, Aug. 27, 2009)**

Plaintiff alleges that oil and gas companies have contaminated her water well with methane gas. The complaint alleges causes of action for trespass, nuisance, and negligence. Source: Nicholson, *Analysis of Litigation Involving Shale & Hydraulic Fracturing* (June 1, 2014). Documents were filed as recently as March 1, 2016, indicating that the **case is pending**. See <http://www.searchiqs.com/chautauqua.html>.

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***Baker v. Anschutz Exploration Corp.*, No. 2011-1168 (N.Y. Sup. Ct., Chemung County, Feb. 11, 2011), transferred, 6:11-CV-6119 (W.D. N.Y., Mar. 9, 2011). See 68 F.Supp.3d 368, 2014 WL 7215153 (summary judgment, Dec. 17, 2014)**

Landowners in Chemung County, New York, claim that improper drilling, well capping, and cement casing caused toxic chemicals to be discharged into their groundwater. The plaintiffs also claim Conrad Geoscience failed to conduct a reasonable investigation of possible contamination. The wells were horizontally drilled but not subject to hydraulic fracturing. The plaintiffs allege negligence per se, common law negligence, nuisance, strict liability, trespass, premises liability, fear of cancer, medical monitoring, and deceptive business acts and practices. On July 13, 2012, the court ordered the parties to mediate. On May 3, 2013, the court stayed discovery pending resolution of the defendants' motion to dismiss. See Nicholson, *Analysis of Litigation Involving Shale & Hydraulic Fracturing* (June 1, 2014). On September 25, 2013, the court issued a *Lone Pine* order that required plaintiffs to provide defendants with expert reports establishing the identity of hazardous substances to which plaintiffs claim exposure as a result of defendants' activities, the locations of exposures, and an explanation of causation. Plaintiffs were required to identify and quantify the contamination of their property attributable to defendants' operations. 2013 WL 3282880. On June 27, 2013, the court denied the defendants' motion to strike plaintiffs' expert reports. The court noted the reports were "far from models of clarity," but held that "they meet the essential requirements imposed by the *Lone Pine* Order." The court left the question of the admissibility of the reports "for another day." 2013 WL 3282880. Summary judgment motions were submitted on November 13, 2014. On December 1, 2014, the plaintiffs dismissed some of their claims, including the strict liability claim based on abnormally dangerous activity, fear of cancer, and future medical monitoring. On December 17, 2014, the district court disallowed the plaintiffs' expert testimony -- that a particular gas well was the cause of methane contamination -- as neither based upon sufficient facts or data nor the product of reliable principles and methods. Consequently, plaintiffs were unable to show causation and the court granted summary judgment to Anschutz. 68 F.Supp.3d 368; 2014 WL 7215153. On March 15, 2016, the court denied the plaintiffs' motion for reconsideration, reaffirming its prior determination that the testimony of plaintiff's expert would not be admissible at trial because it "would not be based upon sufficient facts or data, would not be the product of reliable principles and methods, and that, in any event, [the expert] has not applied the principles and methods reliably to the facts of the case." **The case is closed.**

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## NORTH DAKOTA

***Kartch v. EOG Resources*, No. 31-9-c-225-1 (Mountrail Coun/ty Dist. Ct., Aug. 13, 2009), removed, No. 4:10-cv-00014 (D. N.D. Mar. 4, 2010)**

Frankie and Kristin Kartch alleged that EOG Resources placed a road, a well pad, and a waste pit, and a producing well with storage tanks on their property without authorization. Plaintiffs further alleged that the waste pit was negligently constructed and toxic wastes were left in place which damaged the surface estate. Pursuant to a settlement, the case was **dismissed** on September 18, 2012. Nicholson, *Analysis of Litigation Involving Shale & Hydraulic Fracturing* (June 1, 2014).

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***Armes v. Petro-Hunt LLC*, No. 4:10-cv-00078 (D. N.D., Oct. 22, 2010). Order Granting Defendant's Motion for Partial Summary Judgment, 2012 WL 1493740 (Apr. 27, 2012)**

This lawsuit does not involve any allegations of contamination, but instead was brought by an individual injured when an explosion occurred during hydraulic fracking operations. Among other claims, plaintiffs argued that Petro-Hunt engaged in an abnormally dangerous activity and was strictly liable for injuries caused by those activities. The court in April 2012 granted **summary judgment** for the defendant on the

strict liability claim, holding that (1) plaintiffs failed to present sufficient evidence to show hydraulic fracturing is an abnormally dangerous activity; and (2) the North Dakota Supreme Court has yet to recognize a claim premised on abnormally dangerous activities. **The case was closed on June 11, 2012.**

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## OHIO

***Siers v. John D. Oil and Gas Co.*, No. 08cv2322 (Court of Common Pleas, Lake County, Ohio, July 22, 2008)**

Dawn and Carl Siers sued John D. Oil and Gas Company and Great Plains Exploration after the family was forced out of their home and the children spent the night in a hospital emergency room due to exposure to hydrogen sulfide emitted during the drilling of a gas well in Lake County, Ohio. The **case was settled** in March 2009. See <http://www.ernstversusencana.ca/ohio-bill-h-b-278-sparks-controversy> and Shalefield Stories, [http://www.environmentamericacenter.org/sites/environment/files/reports/ShalefieldStoriesnp\\_0.pdf](http://www.environmentamericacenter.org/sites/environment/files/reports/ShalefieldStoriesnp_0.pdf) (page 31).

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***Payne v. Ohio Valley Energy Systems Corp.*, No. 09P00015 (Court of Common Pleas, Geauga County, Ohio) (complaint, filed Jan. 30, 2009, available at <http://www.tddl.com/documents/Complaint.pdf>)**

This case involved allegations of insufficient cementing of production casing of a vertical gas well (rather than contamination due to horizontal fracturing). In December 2007 gas seeped into nearby water wells and caused an explosion at a residential home in Bainbridge, Ohio (near Cleveland). See *Gas-Well Ordeal Finally Ends Well*, Chagrin Valley Times, available at <http://www.chagrinvalleytimes.com/NC/0/2811.html>. Plaintiffs brought an action "in trespass, negligence, private nuisance, nuisance per se, engaging in an ultra hazardous activity, fraudulent concealment, failure to warn, and negligent infliction of emotional distress, for actions and inactions stemming from the drilling of a gas well that has caused the explosion of Richard and Thelma Payne's home ... and the contamination of Plaintiffs' properties, including but not limited to the groundwater aquifer which serves as the drinking water supply for Plaintiffs' properties." Complaint page 7. Pursuant to a **settlement** in February 2011, forty-three households received an undisclosed amount and Bainbridge Township received \$50,000 for replacement of a water well and for other expenses at its police station. In 2008, the Ohio Department of Natural Resources issued a lengthy report on the incident. See <http://www.dnr.state.oh.us/Portals/11/bainbridge/report.pdf>.

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***Alford v. East Gas Ohio Co.*, No. 2010 CT 10 1185 (Court of Common Pleas, Tuscarawas County, Ohio, Oct. 22, 2010), No. 2013 AP 030014, 2014 WL 2109320 (Court of Appeals, Fifth District, Ohio, May 12, 2014)**

Brian and Erin Alford and their children lived near Port Washington, Ohio, within 400 yards of two compressor stations. After a new engine was installed in January of 2007, the Alfords began experiencing excessive noise, fumes and vibration on their property. The Alfords brought claims against East Ohio Gas (doing business as Dominion East Ohio) for nuisance, trespass, intentional and negligent infliction of emotional distress, negligence and punitive damages. The trial court directed a verdict on the nuisance, trespass, intentional infliction of emotional distress and punitive damages claims. The jury found for the defendant on the claim for negligent infliction of emotional distress, but found in favor of the Alfords on the

negligence claim. The jury assigned \$132,000 in damages (\$32,000 for annoyance, injury; inconvenience, endangered comfort, health and safety; \$25,000 for loss of consortium; and \$75,000 for injury to real property). On May 12, 2014, the Court of Appeals for the Fifth District held that (1) the verdict on the negligence claim was supported by sufficient evidence; (2) damages for loss of consortium were improperly granted as the Alford's did not plead a loss of consortium claim; (3) the damages for property value diminution was upheld; (4) the trial court properly directed a verdict for defendant on the claims for punitive damages as there was no intentional infliction of emotional distress, and the defendant's actions were insufficient to demonstrate malice; and (5) the trial court did not err in directing a verdict as to claims for absolute nuisance as the compressor stations operated lawfully and according to certifications and permits and there was no of violations of any permit or standard regarding emissions. On remand, the judgment was modified on June 3, 2014, and reduced to \$107,000 with interest. **The case is closed.**

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***Boggs v. Landmark 4 LLC*, No. 1:12-cv-00614 (N.D. Ohio, Mar. 12, 2012). See 2012 WL 3485288 (Order on Defendant's Motion to Dismiss) (Aug. 13, 2012); *Mangan v. Landmark 4, LLC*, No. 1:12-cv-00613 (N.D. Ohio, Mar. 12, 2012)**

After filing – and then voluntarily dismissing – a state action in 2010, these suits were filed on March 12, 2012. See 2012 WL 960913 (*Boggs* complaint); and 2012 WL 924852 (*Mangan* complaint). Plaintiffs allege they suffered health injuries, loss of use and enjoyment of their property, loss of quality of life, emotional distress, and other damages due to drilling and hydraulic fracturing activities. Plaintiffs claim fracking fluids and other chemicals were discharged into the ground or into the waters near their home and water well. Plaintiffs allege the defendant failed to disclose, to the plaintiffs and to public authorities, material facts concerning the nature and extent of the contaminants. The wells are approximately 2500 feet from plaintiffs' property. Plaintiffs assert claims for negligence, strict liability, private nuisance, unjust enrichment, negligence per se, battery, intentional fraudulent concealment, and negligent misrepresentation. On August 13, 2012, Judge Donald Nugent refused to dismiss the negligence and strict liability claims on statute of limitations grounds. The battery claim, which was not raised in the state action, was held to be time barred. The fraudulent concealment claim was not pled with requisite particularity to withstand dismissal because "failure to warn of potential contamination or exposure to dangerous chemicals, without more, is not actionable as fraudulent concealment." On the same day, the court denied the defendant's request for a "Lone Pine" order. On March 11, 2013, the court dismissed the negligence per se claims, but refused to dismiss the strict liability claims, and allowed plaintiffs to assert their negligence and strict liability claims in the alternative. See *Boggs*, 2013 WL 944776, at \*2; and *Mangan*, 2013 WL 950560, at \*2. In both cases, the court held that the complaints alleged "sufficient facts and information to raise a question as to whether fracking, even in the absence of negligence, should be considered an abnormally dangerous activity." *Id.* See also *Legal Opinion: Federal Suit Could Impact Utica Drilling*, Crain's Shale Report (Dec. 11, 2012), <http://www.crainscleveland.com/article/20121211/SHALEMAGAZINE/121129868/1225/newsletter04>; and Nicholson, *Analysis of Litigation Involving Shale & Hydraulic Fracturing* (June 1, 2014). On May 23, 2014, defendant filed a motion for summary judgment on claims for negligence, nuisance, medical monitoring, unjust enrichment, and strict liability. With regard to the strict liability, the defendant pointed to a recent decision of the Middle District of Pennsylvania which rejected a similar claim. See *Fiorentino v. Cabot Oil and Gas Corp.*, No. 3:09-cv-02284, recaptioned as *Ely v. Cabot Oil and Gas Corp.*, discussed *infra*. The defendant also argued that there is no evidence that its activities caused the alleged damages. On June 30, 2014, the plaintiffs withdrew their request for medical monitoring and their claims for strict liability and unjust enrichment. Plaintiffs argue that issues of material fact exist regarding whether the defendant was negligent and caused the degradation of the water quantity and quality of their well water. On September 24,

2014, the district court granted summary judgment to Landmark on the claims for unjust enrichment, strict liability, and medical monitoring, but denied summary judgment as to the remaining claims. 2014 WL 12546488. On February 3, 2015, the court entered an order stating that the *Boggs* and *Mangan* cases have been **settled and dismissed**.

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***Crothers v. Statoil USA Onshore Properties, Inc.*, No. 2016-095 (Court of Common Pleas, Monroe County, Ohio, Mar. 18, 2016), removed, No. 2:16-cv-00261 (S.D. Ohio, Mar. 25, 2016)**

James and Linda Crothers of Monroe County allege that Statoil’s activities caused physical damage to the foundation of their home; diminution in property value; interference with their use and enjoyment of their land via alleged noise pollution, light pollution, and air pollution; and substantial inconvenience and mental anguish. On December 6, 2017, the court granted Statoil summary judgment on all of claims except the nuisance claim. The court held that, although the plaintiffs not own the property, they can pursue their nuisance allegations claiming interference with their daily use of the property because of loud noises, vibrations, dust, and light pollution. Plaintiffs state they have an oral agreement to occupy the property, and that the property will pass to them upon the owner's death, who is the father of one of the plaintiffs. 2017 WL 6035232. **The case is pending.**

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## OKLAHOMA

***Reece v. AES Corporation*, No. 11-CJ-256 (District Ct., LeFlore Cty., Okla., Oct. 6, 2011, removed, No. 6:12-cv-00457-JH (E.D. Okla., Nov. 5, 2012). See 2013 WL 11104374 (first amended complaint, dated Aug. 19, 2013); and 2014 WL 61242 (order, dated Jan. 8, 2014), affirmed on appeal, No. 14-7010 (10<sup>th</sup> Cir. Feb. 9, 2016) (638 Fed.Appx. 755; 2016 WL 521247).**

This case concerns alleged contamination caused by disposal of drilling fluids, as opposed to contamination caused by the hydraulic fracturing process. Defendants removed the case to federal court under the Class Action Fairness Act (CAFA). Plaintiffs contend companies involved in generation, transportation and disposal of coal combustion waste and oil and gas drilling waste fluids polluted the environment in LeFlore County, Oklahoma. Defendants include oil and gas companies that generated fluid wastes, and companies that transported fluid wastes to a commercial disposal pit. Plaintiffs claim the fluids contaminated the air, land, surface waters and groundwater at the disposal pit and adjacent area. Plaintiffs raise several claims, including strict liability, medical monitoring, nuisance, trespass, negligence, negligence per se and unjust enrichment. On January 8, 2014, the district court dismissed some of the claims. The district court dismissed the negligence-per se claims with prejudice because the plaintiffs failed to address defendants’ argument that the environmental statutes and regulations relied upon were intended to protect the public welfare, not support private actions. With regard to strict liability, the claims against the “oil producers” and “fluid waste” transporters were dismissed because such liability may not be imposed on parties that generate or transport materials to a disposal site from which the materials then escaped. [Oklahoma law does not “impose strict liability on any party that generated or transported materials to a disposal site from which the materials then escaped”.] With respect to other claims against the “fluid waste truckers,” the court held that there are no facts pleaded which they could be held liable for any other claim. As for the medical monitoring claim, the court noted there are no allegations of physical injury stemming from the oil and gas drilling fluids, and held that – if physical injuries are established – plaintiffs will be allowed to seek necessary future medical

expenses, which may include monitoring on an individual basis.. With respect to the “oil producers,” the plaintiffs alleged no facts showing what harms they suffered” or how the alleged contamination affected specific properties. Plaintiffs did not plead facts showing any plaintiff has come into contact with any contaminated fluids that has caused specific injury, and plaintiffs did not allege any loss in property values or other property damage resulting from the fluid waste. Plaintiffs were granted leave to amend their complaint to sufficiently plead that they personally sustained injuries as the result of the oil producers' alleged conduct. The trespass and nuisance claims were not dismissed; however, on January 28, 2014, all remaining claims were dismissed without prejudice. On February 26, 2014, a notice of appeal was filed (10th Cir. 14-7010).

On February 9, 2016, the court of appeals affirmed. It held that the case was properly removed to federal court under the Class Action Fairness Act. Under CAFA, a federal district court has subject matter jurisdiction over class actions involving at least 100 members and over \$5 million in controversy when minimal diversity is met. However, the "local-controversy exception" requires remand if greater than two-thirds of the members of all proposed plaintiff classes in the aggregate are citizens of the State in which the action was originally filed. Plaintiffs did not introduce sufficient evidence to establish the exception. Regarding the adequacy of Plaintiffs' amended complaint, the court held that a plaintiff in a toxic tort case must prove that he or she was exposed to and injured by a harmful substance, and then held that the plaintiffs' complaint "fails to state a plausible claim for strict liability, negligence, and negligence per se because it does not contain adequate factual allegations that Plaintiffs have been injured by Defendants' alleged wrongdoing." 638 Fed.Appx. 755; 2016 WL 521247 at \*17. The allegations of reasonable concern about an injury occurring in the future were not sufficient to allege an actual injury in fact. Under Oklahoma law, a cause of action does not accrue until an injury in fact occurs. The allegations of present physical harm did not satisfy the *Twombly/Iqbal* plausibility standard. Plaintiffs did not identify anyone who sustained personal injuries or property damage as a result of the allegedly contaminated water” and did not point to any specific patient whose symptoms might plausibly be linked to the actions of Defendants. **Dismissal affirmed.**

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***Ladra v. New Dominion LLC*, No. CJ-2014-00115 (District Ct., Lincoln Cty., Okla., Aug. 4, 2014), remanded, 2015 OK 53 (Oklahoma Sup. Ct., Jun. 30, 2015)**

Sandra J. Ladra of Prague County was injured in November of 2011 during an earthquake when the walls of her house shook and her chimney toppled, sending bricks down on her legs. She claims the earthquake was caused by the injection of oil and gas wastewater, and is suing more than 25 energy companies, including New Dominion and Spess Oil Company. See [http://www.eenews.net/assets/2014/08/06/document\\_ew\\_01.pdf](http://www.eenews.net/assets/2014/08/06/document_ew_01.pdf) (complaint); and Maria Gallucci, *Oklahoma Earthquake Tied To Fracking Wastewater Draws First Lawsuit*, International Business Times (Aug. 8, 2014), <http://www.ibtimes.com/oklahoma-earthquake-tied-fracking-wastewater-draws-first-lawsuit-joins-growin-g-legal-1653508>. On October 16, 2014, the court held that the case should be heard by the Oklahoma Corporation Commission. Oklahoma Judge Throws Out Lawsuit over Earthquake, Disposal Wells, at <http://www.insurancejournal.com/news/southcentral/2014/10/29/345299.htm>. On November 17, 2014, the dismissal was appealed. On June 30, 2015, the Oklahoma Supreme Court reversed and remanded, holding that "[w]hether Appellees are negligent or absolutely liable is a matter to be determined by a district court." See <http://law.justia.com/cases/oklahoma/supreme-court/2015/113396.html>. See also *id.* ("Appellees confuse the statutory grant of exclusive jurisdiction to the OCC to regulate oil and gas exploration and production activities in Oklahoma, with the jurisdiction to afford a remedy to those whose common law rights have been



infringed by either the violation of these regulations or otherwise." On December 18, 2015, the district court denied the defendants' motion to dismiss, which was based on the fact that the case was filed on August 4, 2014, more than two years after the earthquake on November 5, 2011. Judge Cynthia Ferrell Ashwood, however, held that (1) the discovery rule allows limitations in tort cases to be tolled until the injured party knows of or, in the exercise of reasonable diligence, should have known, of the injury or its cause; and (2) whether the discovery rule tolled the statute of limitations in this case is a question of fact. On August 17, 2016, the defendants moved to dismiss for failure to join Mr. Ladra as an indispensable or necessary party. However, on November 7, 2016, New Dominion withdrew its motion to dismiss. On November 14, 2016, the plaintiffs filed a first amended petition. On November 23 and 29, 2016, Spess Oil Company and New Dominion LLC filed answers and counterclaims. On January 24, 2017, the parties agreed to protocols for inspections of the plaintiff's properties. On January 30, 2017, the court filed a protective order. According to news sources, on August 15, 2017, it was determined that, pending approval by his current federal employer, former State Seismologist Austin Holland, can be deposed by plaintiffs. In addition, New Dominion must turn over communications with government officials and agencies that discuss waste water disposal and earthquakes.

On September 20, 2017, an order of dismissal was prejudice was filed after the case was settled. See <http://kfor.com/2017/10/20/settlement-reached-between-two-oklahoma-oil-and-gas-companies-and-prague-e-resident-injured-in-2011-earthquake/>. The case is **closed**.

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***Jennifer Lin Cooper v. New Dominion LLC, No. CJ-2015-0024 (District Ct., Lincoln Cty., Okla., Feb. 10, 2015)***

Jennifer Cooper of Prague County alleges New Dominion and Spess Oil Company are responsible for property damage from earthquakes in November of 2011. Cooper is seeking class-action status for people in Lincoln County and eight surrounding counties whose homes were damaged by earthquakes that have been blamed on water disposal wells. According to Cooper's attorney, she has suffered property damage and property stigma that has lowered the market value of her home. See <http://bakken.com/news/id/232502/oklahoman-sues-energy-companies-earthquake-damage/>. On November 24, 2015, defendant Spess Oil Company filed and amended answer and counterclaim. 2015 WL 9687755. Spess admits that Oklahoma has naturally occurring seismicity, but denies that its operations are causing earthquakes. It raises several affirmative defenses, including (1) that the claims are barred by the applicable statutes of limitations; (2) that Spess was permitted by the applicable authorities to operate its wells; (3) that the alleged injuries were not a foreseeable result of its actions, and its actions were not the proximate cause of Plaintiff's alleged injuries; and (4) the Prague earthquakes were not a foreseeable result of Spess' actions and its actions were not the proximate cause of the Prague earthquakes. In its counterclaim, Spess seeks a declaration that its operation of injection wells is not an ultrahazardous activity. On January 24, 2017, the parties agreed to protocols for inspections of the plaintiff's properties. On January 30, 2017, the court filed a protective order. Former state seismologist Dr. Austin Holland was deposed in October 2017 in the class action case filed in Lincoln County that involves the large earthquakes near Prague in November 2011. See <https://www.poynterlawgroup.com/single-post/2017/10/19/Former-States-Seismologist-Deposed-in-Okla-homa-Earthquake-Case>.

On October 11, 2017, former Oklahoma seismologist Austin Holland stated in a deposition that he was pressured by officials to suppress findings that link earthquakes with fracking wastewater disposal. See

[http://www.normantranscript.com/news/former-state-seismologist-testifies-officials-coerced-him-to-alter-research/article\\_d8383864-cb20-11e7-8206-2bc32ae1169a.html](http://www.normantranscript.com/news/former-state-seismologist-testifies-officials-coerced-him-to-alter-research/article_d8383864-cb20-11e7-8206-2bc32ae1169a.html).

The case is **pending**. See also <http://www.stopthequakes.com/lawsuit-information>.

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***Felts v. Devon Energy Production Company LP, No. CJ-2016-137 (District Ct., Oklahoma Cty., Okla., Jan. 11, 2016)***

Terry and Deborah Felts and twelve other residents of Oklahoma County, Oklahoma, filed a lawsuit on January 11, 2016, against Devon Energy Production Company and eleven other energy companies. The complaint alleges that the defendants injected large volumes of drilling waste in disposal wells located near the cities of Edmond and Oklahoma City under conditions that the defendants knew, or should have known, would result in the increased likelihood that earthquakes would occur. On December 29, 2015, and on January 1, 2016, earthquakes of 4.3 and 4.2 magnitude occurred and allegedly caused damage to the plaintiffs. Plaintiffs' first claim asserts that, as a result of defendants' negligent disposal of drilling waste, plaintiffs suffered damage to their property. In their second claim, plaintiffs contend that the defendants' actions in disposing of drilling waste into disposal wells is abnormally dangerous and an ultra-hazardous activity, and therefore the defendants are liable for damages they caused regardless of the amount of care exercised. The plaintiffs also seek punitive damages and injunctive relief.

In March of 2016, several defendants filed motions to dismiss. Plaintiffs filed a response on March 30, 2016. On May 19, 2016, the court granted in part, and denied in part, Devon's motion to dismiss. On June 8, 2016, New Dominion filed its answer and counterclaims. On December 9, 2016, the plaintiffs dismissed, without prejudice to refile, their causes of action against Special Energy Corporation and Devon Energy Production Company, L.P. In February and March of 2017, the defendants filed answers to the first amended petition. On August 31, 2017, the following defendants were dismissed without prejudice: Marjo Operating Mid-Continent LLC; New Dominion LLC; Pedestal Oil Company Inc.; R.C. Taylor Operating Company; Rainbo Service Co.; Sundance Energy Oklahoma LLC; TNT Operating Company; and White Operating Company. On the same day, the court entered an order on agreed protocols for inspection of the plaintiffs' property. **The case is pending.**

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***Griggs v. Chesapeake Operating LLC, No. CJ-2016-6 (District Ct., Logan Cty., Okla., Jan. 12, 2016); removed, No. 5:16-cv-138-D (W.D. Okla., Feb. 16, 2016).***

Lisa Griggs of Logan County, Oklahoma, and April Marler of Oklahoma County, Oklahoma, filed suit against Chesapeake Operating, LLC, New Dominion, LLC, Devon Energy Production Co., LP and Sandridge Exploration and Production, LLC., seeking to assert a class action on behalf of landowners who have suffered damages from earthquakes caused by the operation of wastewater disposal wells. The complaint alleges that "the causation link is inescapable" between injection and seismic activity in the state. Griggs asserts that the area around her Guthrie, Oklahoma, home has suffered over 100 earthquakes of greater than 3.0 magnitude in the past two years. Her foundation has been damaged, the chimney has separated from the home, and numerous other cracks have developed. In the same fashion, Marler states that similar seismic activity has damaged her home in Choctaw, Oklahoma. The complaint asserts claims of private nuisance; strict liability due to ultra-hazardous activities; negligence; and trespass. Punitive damages are requested.

Injunctive relief is not specifically requested, although the plaintiffs ask for "all other relief to which Plaintiffs and the Class are entitled or that the Court deems just and proper."

On February 16, 2016, Devon Energy filed a notice of removal pursuant to the Class Action Fairness Act and other federal statutes. Shortly thereafter, defendants filed motions to dismiss. On April 8, 2016, the plaintiffs moved to remand the lawsuit back to state court. On May 20, 2016, the action against Sandridge was stayed in light of its petition for bankruptcy. On June 30, 2016, the court denied the motion to remand. On July 21, 2016, the plaintiffs voluntarily dismissed all of their claims without prejudice to refile. The case is **closed**. However, the plaintiffs apparently intend to re-file their case in state court after waiting a year. See *Lawyers Blaming Earthquakes On Fracking Drop Case Rather Than Continue In Fed Court*, <http://www.forbes.com/sites/legalnewsline/2016/10/18/lawyers-blaming-earthquakes-on-fracking-drop-case-rather-than-continue-in-fed-court/#4e475162159d> (Oct. 18, 2016) (suggesting that the plaintiffs prefer state court due to less rigorous standards for pleading and expert witnesses). See also <http://www.stopthequakes.com/lawsuit-information>.

SECOND LAWSUIT: On July 21, 2017, Lisa Griggs Lisa Griggs and April Marler filed a class action lawsuit in state court against New Dominion LLC and two dozen other energy companies. On September 1, 2107, the defendants removed the case to federal district court. On September 7, 2017, the plaintiffs moved to remand the case to state court. *Griggs v. New Dominion LLC*, No. CJ-2017-174 (District Ct., Logan County, Okla., Jul. 21, 2017), removed, No. 5:17-cv-00942 (W.D. Okla, Sep. 1, 2017), remanded (Dec. 28, 2017). This case is discussed elsewhere in this document.

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***Lene v. Chesapeake Operating, LLC, No. CJ-2016-27 (District Ct., Logan County, Okla., Feb. 12, 2016)***

Brenda and Jon Darryn Lene filed suit against Chesapeake Operating, LLC; ; New Dominion, LLC; Devon Energy Production Co., LP; and Sandridge Exploration and Production, LLC; and John Does 1-100, seeking compensation for damages "due to earthquakes caused by Defendants' wastewater disposal operations." The "John Does" are other Oklahoma entities that have engaged in injection well operations in the vicinity around Plaintiffs' home, and which have also contributed to the earthquakes and resulting damages to Plaintiffs. Plaintiffs assert claims of private nuisance, ultra-hazardous activities, negligence, and trespass. Defendants' actions and operations as alleged to constitute a nuisance because they have "unlawfully and unreasonably interfered" with the plaintiffs' property rights. With respect to the claim based on ultra-hazardous activities, plaintiffs assert that the defendants engage in activities "that involve a high degree of some risk of serious harm to a person or the chattels of others," and that "the risk cannot be eliminated by exercising the utmost care, and is not a matter of common usage." Plaintiffs claim they "have sustained damages, which are the direct and proximate result of Defendants' ultra-hazardous or abnormally dangerous activities, to which Defendants are strictly liable." With regard to the negligence claim, plaintiffs state that "Defendants owed a duty to Plaintiffs to use ordinary care and not to operate or maintain their injection wells in such a way to cause or contribute to seismic activity. Defendants, experienced in these operations, knew or should have known of the connection between injection wells and seismic activity, and acted in disregard of these facts." As for trespass, plaintiffs allege that "Defendants, without the permission or consent of Plaintiffs and without legal right, intentionally engaged in activities that resulted in concussions or vibrations entering Plaintiffs' property." Such unauthorized invasion of Plaintiffs' property interests constitutes a trespass. On May 20, 2016, Sandridge and Devon Energy filed motions to dismiss. Sandridge also filed for bankruptcy on May 20, 2016. On July 20, 2016, the plaintiffs moved to voluntarily dismiss all of their claims without prejudice to refile. **The case is closed.**

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***Sierra Club. v. Chesapeake Operating LLC, 5:16-cv-00134 (W.D. Okla., Feb. 16, 2016). Motions to dismiss granted, 2017 WL 1287546 (April 4, 2017)***

This is a civil action for declaratory and injunctive relief, and costs and fees, under the citizen suit provision of the Resource Conservation and Recovery Act, 42 U.S.C. § 6972(a)(1)(B). The Sierra Club alleges that the defendants, Chesapeake Operating LLC, Devon Production Co., and New Dominion, LLC, "are placing people and the environment in Oklahoma and Kansas at significant and immediate risk from major man-made earthquakes induced by Defendants' waste disposal practices." The defendants, by their disposal activities at the injection wells throughout Oklahoma and southern Kansas, are alleged to have contributed to the increased seismicity in the area. The induced earthquakes allegedly present an imminent and substantial endangerment to health and the environment in violation of RCRA. Plaintiff request that the Defendants "reduce immediately and substantially the amounts of Production Wastes they are injecting into the ground to levels that seismologists believe will not cause or contribute to increased earthquake frequency and severity." Plaintiff also seeks an order "requiring Defendants to reinforce vulnerable structures that current forecasts indicate could be impacted by large magnitude earthquakes during the interim period." Plaintiff further seeks an order "requiring the establishment of an independent earthquake monitoring and prediction center to determine the amount of Production Wastes which may be injected into a specific well or formation before induced seismicity occurs."

The Sierra Club filed an amended complaint on April 11, 2016. Sandridge Exploration and Production, LLC, was added as a defendant. On April 25, 2016, the defendants moved to dismiss. They argue, among other things, that (1) RCRA only covers hazardous contamination; and (2) the Oklahoma Corporation Commission (OCC) has sole authority to address the issue of increased seismic activity and oil and gas operations. The response of the Sierra Club was filed on May 25, 2016. On May 20, 2016, the action against Sandridge was stayed in light of its petition for bankruptcy.

**On April 4, 2017, the district court granted the defendants' motions to dismiss.** The court first concluded that, pursuant to the abstention doctrine set forth in *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943), it should refrain from exercising federal jurisdiction. The court concluded that *Burford* abstention was appropriate because (1) the suit only requests declaratory and injunctive relief; (2) federal review would disrupt state efforts to establish a coherent policy with respect to a matter of substantial public concern; and (3) the primary relief that the Sierra Club seeks is available from the OCC. Alternatively, the court held that the action should be dismissed because primary jurisdiction to redress the harm alleged rests with the OCC. According to the court, the OCC "is better equipped than the court to resolve the seismicity issues relating to disposal well activities. In light of its ruling, the court did not address whether the Sierra Club's claims fall outside RCRA's zone of interests and/or are barred by RCRA's anti-duplication provision. 2017 WL 1287546. On April 18, 2017, the court dismissed without prejudice plaintiff's First Amended Complaint against defendant, SandRidge E&P, for the same reasons (*Burford* abstention and primary jurisdiction doctrines) stated in the April 4, 2017 order granting the motions to dismiss of defendants, Devon Energy Production Company, L.P., New Dominion, LLC, and Chesapeake Operating LLC. **The case is closed.**

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***West v. ABC Oil Company, Inc., No. CJ-2016-00049 (District Ct., Pottawatomie County, Okla., Feb. 18, 2016), removed, No. 5:16-cv-00264-F (W.D. Okla., Mar. 18, 2016)***

Lisa West and Stormy Hopson, individually and as class representatives, have sued 15 named defendants, "and a proposed defendant class of other companies operating in injection wells." Plaintiffs ask the Court "to order Defendants to pay earthquake premiums as they are incurred in the future" and also "to award back insurance premiums." They state that "relief regarding purchase of insurance policies needed because of Defendants' injection of wastewater into the Arbuckle formation has induced or triggered earthquakes and will continue to do so for some time even if injection wells were immediately stopped." The proposed class action is on behalf of "Oklahoma residents who own real property in Oklahoma for which they have either purchased earthquake insurance or for which they desire to purchase such insurance, but have been unable to afford to do so." Lisa West asserts that, while her insurance claim for earthquake damage was paid, no one has reimbursed her "for the premiums she incurred and which she will continue to incur as a result of earthquakes induced by Defendants' activities." Stormy Hopson, who resides in Pottawatomie County, "would like to purchase earthquake insurance, and she believes that it is needed based on the increased rate of earthquakes in her area. However, due to her other financial commitments, purchase of earthquake insurance has not been practical." Plaintiffs assert claims of private nuisance, ultrahazardous activity, negligence, and trespass. Plaintiffs seek the entry of a permanent injunction directing Defendants to reimburse Plaintiffs for earthquake insurance premiums incurred a directing Defendants "to reimburse Class Members for earthquake insurance premiums as they are incurred until such time as Defendant Class shows the Court by satisfactory evidence that their activities no longer present a reasonable risk of creating earthquakes or as otherwise directed by the Court." On September 19, 2016, the court noted that the plaintiffs' had withdrawn their motion to remand to state court. On October 14, 2016, the plaintiffs filed an amended complaint.

On November 18, 2016, Eastok Pipeline filed a to dismiss and presented six arguments for dismissal: (1) the claims occurred in November 2011 and are barred by a two-year statute of limitations; (2) plaintiffs have failed to allege that actions attributable to EastOK caused them injury; (3) EastOK's disposal operations do not constitute an ultrahazardous activity as a matter of law; (4) plaintiffs failed to allege facts demonstrating any duty or breach of duty by EastOK; (5) plaintiffs failed to allege facts showing that the alleged disposal operations were unlawful; and (6) plaintiffs failed to allege any physical invasion of their property by EastOK.

On December 2, 2016, Leasehold Management Corp. filed a motion to dismiss for lack of jurisdiction. Leasehold argues that the lawsuit is an improper collateral attack on a final order of the Oklahoma Corporation Commission (OCC) authorizing operation of disposal wells. Leasehold also argues that, given "the economic importance of Oklahoma's oil and gas industry in the United States" and "the enormity of the the putative class of plaintiffs," the litigation is "a matter of public interest" and is "no longer a private cause of action." According to Leasehold, "[a]lthough this litigation may appear to be a matter of private rights, the issue is so tightly intertwined with production of oil and gas in this state that it must be considered a public right and all legal matters regarding such rightfully rest in the purview of the OCC."

On December 19, 2016, several other defendants filed motions to dismiss. The defendants argue that the plaintiffs have failed to plead facts supporting the elements of their claims for private nuisance, strict liability, negligence, or trespass. In particular, the defendants contend that the amended complaint fails to allege any injuries caused by the defendants; and also argue that the underground injection of fluids in connection with oil and gas production is not an abnormally dangerous or ultrahazardous activity. The defendants further assert that the lawsuit is barred by the applicable statute of limitations; that the request for past and future earthquake insurance premiums is not an available remedy under Oklahoma law; and that

the request for an injunction is improper because it would interfere with the exclusive jurisdiction of the Oklahoma Corporation Commission to regulate the operation of disposal wells.

On January 19, 2017, the plaintiffs replied to the motions to dismiss. They argue in part that (1) their complaint plausibly alleges individual harm caused by each of the defendants' contributions to earthquakes; (2) Oklahoma law allows recovery for trespass when vibrations cause property damage; (3) strict liability should be applied because defendants' injection of wastewater is an abnormally dangerous (ultrahazardous) activity; (4) defendants have a duty to conduct their operations so they do not damage the property of others or interfere with their use and enjoyment of same, and defendants breached this duty by causing earthquakes; (5) injunctive relief is appropriate; and (6) the plaintiffs' claims are not controlled, or defined, by the Oklahoma Corporation Commission (OCC). On May 12, 2017, by minute order, the court granted the defendants' motions to dismiss "based upon lack of sufficient allegations of causation." The court granted the plaintiffs leave to amend their complaint, within 30 days, to set forth causation allegations. A second amended complaint was filed on July 18, 2017. Several motions to dismiss the second complaint have been filed. **The case is pending.**

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**Almont Energy LLC v. Newfield Exploration Mid-Continent Inc., No. CJ-16-00028 (District Ct., Oklahoma Cty., Okla., Apr. 22, 2016), removed, No. 5:16-cv-00640-M (W.D. Okla., Jun. 13, 2016)**

Almont Energy and TLS Oil and Gas sued Newfield Exploration Mid-Continent on April 22, 2016, in Kingfisher County, Oklahoma (north and west of Oklahoma City). Plaintiffs alleged that the defendant's hydraulic fracturing activities have caused contamination and have devalued the plaintiffs' oil and gas well by allowing water, frack fluids, and other substances to invade plaintiff's producing formations. Plaintiffs asserted claims of nuisance, trespass, negligent injury to real property, unjust enrichment, punitive damages, and attorney fees. However, on June 19, 2017, the plaintiffs filed a Stipulation of Dismissal With Prejudice. The case is **closed**.

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**Adams v. Eagle Road Oil, LLC, No. CJ-2016-00078 (District Ct., Pawnee County, Okla., Nov. 17, 2016), removed, No. 4:16-cv-00757 (N.D. Okla., Dec. 21, 2016), remanded (Apr. 12, 2017)**

James Adams is the lead plaintiff in a class action seeking property damages, fair market value loss, and emotional harm for individuals affected by a 5.8 magnitude earthquake that occurred on September 3, 2016, near Pawnee, Oklahoma. The earthquake is reported to be the largest ever in the state. Defendants operate wastewater disposal wells that allegedly contributed to the earthquake and aftershocks. Plaintiffs claim that defendants' actions "are ultrahazardous activities that necessarily involve a risk of serious harm to a person that cannot be eliminated by the exercise of the utmost care and is not a matter of common usage," and further assert that the defendants are strictly liable for property damages and emotional harm suffered as a direct and proximate result of defendants' activities. Plaintiffs also assert claims for negligence, private nuisance, and trespass. They seek punitive damages and trial by jury.

On December 21, 2016, defendant Cummings Oil Company removed the lawsuit to federal court. On December 27, 2016, Cummings Oil moved to dismiss the class action petition for failure to state a claim. Cummings Oil contends that the plaintiff attributes the earthquake in the Pawnee area on September 3, 2016, "to the Defendants, without alleging specific facts linking Cummings Oil or the other Defendants to such earthquake." Cummings Oil also states that joint and several liability was abrogated by the Oklahoma

legislature in 2011, and further argues that the plaintiff's "collective" liability theory is not recognized by Oklahoma law. Finally, Cummings Oil argues that the complaint contains general and conclusory allegations that fall short of required pleading standards, and fails to state a claim for strict liability for ultra-hazardous activities. On April 12, 2017, the district court remanded the action to state court. The court found that the putative class action would not necessarily include individual Indian owners of trust or restricted lands, and concluded that it consequently lacked federal question jurisdiction because "federal law governing lands held by Indians in trust or restricted status will not be applicable to the claims of any potential class member and there is no substantial issue of federal law that would support removal of this case to federal court." The court observed that defendants could "seek clarification from the state court as to whether any person owning trust or restricted lands could be a member of the class, but this must be established before the case may be removable on the basis of federal question jurisdiction." A hearing on the defendants' motion to dismiss was held in the state court on July 10, 2017. On September 11, 2017, the plaintiffs filed a second amended class action petition. On February 8, 2018, the court scheduled an evidentiary hearing for August 23, 2018, to determine if ejection disposal wells constitute an ultra-hazardous activity under the Restatement (Second) of Torts Section 520. **The case is pending.**

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***Reid v. White Star Petroleum, LLC*, No. CJ-2016-00543 (District Ct., Payne County, Okla., Dec. 5, 2016).**

David Reid is the lead plaintiff in a class action seeking property damages, fair market value loss, and emotional harm for individuals affected by a 5.0 magnitude earthquake that occurred on November 7, 2016, near Cushing, Oklahoma. Defendants operate wastewater disposal wells that allegedly contributed to the earthquake and aftershocks. Plaintiffs claim that defendants' actions "are ultrahazardous activities that necessarily involve a risk of serious harm to a person that cannot be eliminated by the exercise of the utmost care and is not a matter of common usage," and further assert that the defendants are strictly liable for property damages and emotional harm suffered as a direct and proximate result of defendants' activities. Plaintiffs also assert claims for negligence, private nuisance, and trespass. They seek punitive damages and trial by jury. See <https://www.rt.com/usa/369520-oklahoma-fracking-earthquake-lawsuit/>; and <https://www.fastcoexist.com/3066380/in-oklahoma-people-are-suing-fracking-companies-after-earthquakes-knocked-down-their-houses>.

On December 30, 2016, White Star Petroleum moved to dismiss the class action petition on three grounds: "(1) The Petition fails to plead allegations sufficient to state an actionable claim for relief against White Star, and in any event omits allegations that any Plaintiff has suffered any injury caused specifically by White Star; (2) the Petition fails to state a claim for absolute liability for harm resulting from an ultrahazardous activity; and (3) the Petition fails to state a claim for trespass." In its motion, White Star argues that Oklahoma has rejected market share liability and other forms of collective liability. It also contends that the operation of an injection well is not an ultrahazardous activity as a matter of law. Finally, noting that Oklahoma has rejected the suggestion that vibrations from the use of explosives can be an actionable trespass, White Star asserts that "if the use of explosives very near a building damaged by vibrations cannot give rise to a claim for trespass, neither can a seismic event which could have originated dozens of miles away." Defendant FHA Investments LLC filed a similar motion to dismiss on February 23, 2017. On May 31, 2017, the court denied the defendants' motions to dismiss and ordered that the case proceed with discovery. On March 1, 2018, the court stayed the case until September 6, 2018. **The case is pending.**

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***Pawnee Nation of Oklahoma v. Eagle Road Oil LLC*, No. Civ-2017-803 (Pawnee Nation District Court, Okla., Mar. 3, 2017)**

The Pawnee Nation of Oklahoma has filed a lawsuit in tribal court against oil and gas producers, claiming that wastewater injected into disposal wells triggered a 5.8-magnitude earthquake on September 3, 2016, the strongest on record in the state, that damaged several Pawnee Nation buildings. The complaint is available at <https://turtletalk.files.wordpress.com/2017/03/complaint-pawnee-v-eagle-road-oil-et-al.pdf>. Some of the defendants operate wastewater injection wells on lands within the Pawnee Nation, less than 10 miles from the epicenter of the September 2016 quake. The Tribe is seeking at least \$250,000 in damages. Among the tribal structures damaged is the former Pawnee Nation Indian School, a sandstone building on the National Register of Historic Places that houses the tribe's administrative offices. The suit claims the damage to the tribal buildings is the result of more than 53 earthquakes that took place between September and November of 2016. In particular, the complaint alleges that the defendants have engaged in "ultrahazardous activities that necessarily involve a risk of serious harm to a person that cannot be eliminated by the exercise of the utmost care and is not a matter of common usage." The plaintiffs also assert claims for negligence, private nuisance, and trespass. They seek punitive damages based on their allegation that the defendants' actions "constitute wanton or reckless disregard for public or private safety." A jury trial is requested.

The U.S. Supreme Court, in *Montana v. United States*, 450 U.S. 544 (1981), held that, as a general rule, tribes lack regulatory authority over non-Indians on non-Indian fee land within the reservation. The Court, however, set forth two exceptions. First, it stated that "the tribe may regulate ... the activities of nonmembers who enter consensual relationships with the tribe or its members." Second, it stated that tribes may regulate "the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health and welfare of the tribe." The Court later applied the Montana standard to tribal civil adjudicatory authority in *Strate v. A-1 Contractors*, 520 U.S. 438 (1997), and *Nevada v. Hicks*, 533 U.S. 353 (2001). The existence of tribal adjudicatory jurisdiction over non-members is a federal question, and it can be challenged in federal court. However, under the exhaustion of remedies doctrine, the tribal court must be allowed to address questions of its own jurisdiction. *National Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845 (1985). Exhaustion is not required in a few limited circumstances, including when the action is patently violative of express jurisdictional prohibitions.

On October 27, 2017, Judge Dianne Barker Harrold rejected arguments that the tribal court lacked jurisdiction, and ordered the suit to move forward in the discovery process. <https://www.poynterlawgroup.com/single-post/2017/10/27/Pawnee-Nations-Earthquake-Case-Moves-Forward>. **The case is pending.**

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***Griggs v. New Dominion LLC*, No. CJ-2017-174 (District Ct., Logan County, Okla., Jul. 21, 2017), removed, No. 5:17-cv-00942 (W.D. Okla., Sep. 1, 2017), remanded (Oct. 17, 2017), removed, No. 5:17-cv-01232-F (W.D. Okla., Nov. 16, 2017), remanded (Dec. 28, 2017)**

Lisa Griggs and April Marler filed a class action lawsuit against New Dominion LLC and two dozen other energy companies, claiming that "by disposing of fracking wastewater deep into the earth, Defendants introduced contaminants into the natural environment that caused an adverse change to it in the form of unnatural seismic activity." Plaintiffs claim damages were proximately caused by pollution of the environment through the disposal of fracking wastewater with injection wells. Plaintiffs seek compensation



for physical damages to real and personal property; market value losses to their real property; and for emotional distress. In addition, punitive damages are requested. The lawsuit focuses exclusively on wastewater disposal injection into Oklahoma's Arbuckle formation, and is limited to earthquakes of 4.0 magnitude or greater. Plaintiffs have identified eight clusters of earthquake swarms between February 9, 2014 and August 17, 2016. The complaint presents claims for strict liability for ultrahazardous activity; negligence; private nuisance; and trespass.

On September 1, 2017, the defendants removed the case to district court; however, on September 9, 2017, the plaintiffs moved to remand the case to state court. On October 17, 2017, the case was remanded to state court. On October 24, 2017, a first amended class action petition was filed in state court. On November 16, 2017, the case was transferred to federal court. On December 28, 2017, the case was remanded to Logan County District Court. On March 1, 2018, the court stayed the case until September 6, 2018. **The case is pending.**

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## PENNSYLVANIA

***Zimmermann v. Atlas America, LLC*, No. 2009-7564 (Ct. Common Pleas, Washington Cty., Pa., Sept. 21, 2009). See 2009 WL 3753890 (complaint); 2010 WL 4680900 (Aug. 23, 2010) (amended complaint); and 2009 WL 7120525 (Oct. 12, 2009) (answer)**

Surface owners George and Lisa Zimmermann claim Atlas America used toxic chemicals during the fracturing process that polluted the freshwater aquifers and destroyed farmland. The suit alleges trespass, nuisance, negligence, negligence per se, res ipsa loquitur, fraud and misrepresentation, breach of the settlement agreement, and violation of the casing requirements of the Pennsylvania Oil and Gas Act. On August 4, 2011, the court dismissed the res ipsa loquitur and gross negligence claims. The court also dismissed the fraud and misrepresentation claim, but held that the Zimmermanns could amend their complaint and reinstate this claim. See Nicholson, *Analysis of Litigation Involving Shale & Hydraulic Fracturing* (June 1, 2014). See also *Pennsylvania Lawsuit Says Drilling Polluted Water*, at <http://www.reuters.com/article/2009/11/09/us-fracking-suit-idUSTRE5A80PP20091109>. On April 14, 2014, **the case was settled and closed.**

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***Fiorentino v. Cabot Oil and Gas Corp.* [recaptioned *Ely v. Cabot Oil and Gas Corp.*], No. 3:09-cv-02284 (M.D. Pa., Nov. 19, 2009). See 750 F.Supp.2d 506 (M.D. Pa., Nov. 15, 2010) (opinion on motion to dismiss); 38 F.Supp.3d 518 (order holding that natural gas drilling activities, including hydraulic fracturing, are not abnormally dangerous, and imposition of strict liability for damages caused by such activities is not warranted); and 2017 WL 1196510 (opinion denying defendant's motion for judgment as a matter of law, but granting its motion for a new trial (Mar. 31, 2017)).**

Residents in Dimock and Montrose, Pennsylvania, alleged defendants conducted hydrofracturing and other extraction activities that released methane, natural gas, and other toxins onto their land and into their groundwater. See pleadings at 2010 WL 931974, 2010 WL 2070478, and 2010 WL 46220704. Plaintiffs assert claims based on negligence, gross negligence, private nuisance, strict liability, breach of contract, fraudulent misrepresentation, the Hazardous Sites Cleanup Act; and medical monitoring. [Note: the problems in Dimock were featured in the *Gasland* documentary.] The federal district court, on November 15, 2010, refused for the most part to grant defendants' motion to dismiss for failure to state a claim. With respect to

the Pennsylvania Hazardous Sites Cleanup Act, the court held that plaintiffs stated a plausible claim for relief under Section 702, which provides that a defendant who is responsible for releasing hazardous substances is strictly liable for response costs, including the cost of a health assessment or health effects study. As for common law strict liability, the court allowed the claim to proceed, noting that Pennsylvania courts have concluded that storage and transmission of gas and petroleum products are not abnormally dangerous activities, but have not decided whether gas well drilling and operation are the same. Plaintiffs also alleged plausible facts necessary to support a claim for medical monitoring. The cause of action for gross negligence, however, was dismissed since it is not recognized under Pennsylvania law. With respect to the claim for fear of future illness and emotional distress, the court noted that Pennsylvania law does not allow recovery without some manifestation of actual physical injury, but held that plaintiffs did allege physical injury. Although punitive damages is not a separate claim, because the defendants were allegedly grossly negligent, the court declined to strike the allegations regarding punitive damages. Subsequent procedural rulings: 2011 WL 4944274 (Oct. 17, 2011); 2011 WL 5239068 (Nov. 1, 2011); and 2012 WL 959392 (Mar. 19, 2012). Subsequent developments – The Pennsylvania Department of Environmental Protection also sued Cabot Oil, and reached a settlement on December 16, 2010. The affected families received \$4.1 million and Cabot paid a \$500,000 penalty to the PDEP. The settlement allowed Cabot to resume its hydraulic fracturing activities. See *Pennsylvania, Cabot Reach Settlement Over Methane Contamination*, Greenwire (Dec. 16, 2010), available at <http://www.eenews.net/Greenwire/2010/12/16/20/>. In May of 2012, the U.S. Environmental Protection Agency announced that its well water test results "did not show levels of contaminants that would give EPA reason to take further action." The test results were both praised and criticized. USA Today, *EPA: Pa. Village's Water Not Polluted by Gas Fracking* (May 11, 2012), at <http://content.usatoday.com/communities/ondeadline/post/2012/05/epa-pa-villages-drinking-water-not-polluted-by-fracking/1>. Most of the parties settled in August of 2012. See Christian Science Monitor, *Pa. Drilling Town Agrees to Settlement in Fracking Federal Lawsuit* (Aug. 15, 2012), at <http://www.csmonitor.com/USA/Latest-News-Wires/2012/0815/Pa.-drilling-town-agrees-to-settlement-in-fracking-federal-lawsuit> ("Documents indicate that residents of Dimock Township, Pa., who claim their water was poisoned by fracking, have reached a confidential **settlement**"). 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 17, 2012, the Court allowed counsel for the remaining three families to withdraw, giving these families days in which to secure new attorneys or to proceed pro se. On September 18, 2013, the case was recaptioned as *Nolen Scott Ely, et al. v. Cabot Oil & Gas Corporation and Gasearch Drilling Services Corporation*. See also Nicholson, *Analysis of Litigation Involving Shale & Hydraulic Fracturing* (June 1, 2014).

**Strict liability claims.** – On January 9, 2014, Magistrate Martin C. Carlson recommended (in a 37 page order) that defendants' summary judgment motion on plaintiffs' strict liability claim should be granted. See 38 F.Supp.3d 518. The Magistrate declined "to become the first court in this or any other jurisdiction to conclude that such natural gas drilling operations constitute abnormally dangerous activities," and instead found as a matter of law "that natural gas drilling operations and hydraulic fracturing are not abnormally hazardous activities on the basis of the record developed in this case ...." The Magistrate applied Restatement (Second) of Torts § 520 and considered the following six factors: (a) existence of a high degree of risk of some harm to the person, land or chattels of others; (b) likelihood that the harm that results from it will be great; (c) inability to eliminate the risk by the exercise of reasonable care; (d) extent to which the activity is not a matter of common usage; (e) inappropriateness of the activity to the place where it is carried on; and (f) extent to which its value to the community is outweighed by its dangerous attributes.

With regard to factor (a), the Magistrate concluded that drilling operations do not present a high degree of risk of harm, but found that properly drilled, cased and hydraulically fractured gas wells create, at most, relatively low risk to water supplies. With regard to factor (b), the Magistrate concluded that plaintiffs have not shown a sufficient likelihood that harm resulting from the defendants' gas drilling operations will be great, noting that "there is substantial evidence offered in support of the Defendants' view that proper gas drilling techniques mitigate risks, and such risks while already low will continue to be mitigated as the industry develops further safety precautions."

With respect to whether the exercise of due care can eliminate risks posed by drilling operations (factor c), the Magistrate held that although he could not conclude that all risk of harm is absolutely foreclosed by the exercise of due care, "the great weight of the evidence that the parties have submitted indicates that such risks are substantially mitigated when due care is exercised." On this point the Magistrate noted that the report of Cornell University Professor Anthony Ingraffea focused "on improper well completion and faulty casing, or other negligent failings," but did not "contain any explanation of, or identify any examples where a gas well was properly constructed and completed, and nevertheless fluid migration or water contamination occurred." [Subsequent to his report and recommendation, the Magistrate on March 27, 2014, denied the defendant's motion to strike the plaintiffs' experts' affidavits and supplemental reports. 2014 WL 1276487.]

With regard to factor (d), the Magistrate rejected the plaintiffs' contention that natural gas drilling, and hydraulic fracturing, is a "novel" activity in the area and thus not a matter of common usage. As for factor (e), the Magistrate noted that the wells were drilled pursuant to permits and in compliance with legal requirements with respect to setback limits, and held that the activities were not conducted in inappropriate locations. Finally, with respect to the last factor – whether the economic value to the community outweighs any dangers posed by gas drilling operations – the Magistrate found that "this industrial activity has benefits that extend throughout the Commonwealth, affecting individuals, businesses, local communities, and government." In its conclusion the Magistrate found that "strict liability should not apply" and that plaintiffs' claims for property damage and personal injury "should be considered under traditional and longstanding negligence principles, and not under a strict liability standard."

On April 23, 2014, the district court (without further elaboration) adopted "in its entirety" the magistrate's recommendation of January 9, 2014, and granted the defendants' summary judgment motion on the plaintiffs' strict liability claims. 38 F.Supp.3d 518.

**Claims other than strict liability.** – On July 22, 2014, the district court granted the defendants' summary judgment motion on the claims of Nolen Scott Ely, as the executor of the Estate of Kenneth R. Ely. On July 29, 2014, the court likewise granted summary judgment against Hubert family (with the exception of their private nuisance claim) and also dismissed with prejudice claims of plaintiffs Jeanette Carter and Todd Carter, as well as all related counterclaims. See 2014 WL 12479991 (Magistrate Report and Recommendation). On August 26, 2014, Nolen S. Ely filed a notice of appeal (No. 14-3698). On November 19, 2014, the appeal was dismissed for lack of appellate jurisdiction because the July 22, 2014, order is not yet appealable in light of pending claims.

On January 12, 2015, the court denied summary judgment on the private nuisance and negligence claims. However, it granted summary judgment on claims of breach of contract; lost royalties; fraudulent inducement; negligence per se; medical monitoring; violations of Pennsylvania environmental statutes; and the negligence claim brought by the Ely children. The court suggested that the Ely family and a handful of

other landowners remaining in the litigation should enter mediation with Cabot Oil. See *Drilling contamination case narrowed against Cabot in Susquehanna County*, Legal Intelligencer (Jan. 20, 2015), <http://www.post-gazette.com/business/legal/2015/01/20/Drilling-contamination-case-narrowed-against-Cabot-in-Susquehanna-County/stories/201501200019>. An appeal was filed on February 13, 2015 (No. 15-1439). On May 1, 2015, the court denied a motion to certify the order denying the Ely estate claims as final pursuant to Rule 54(b). 2015 WL 1963108. On May 8, 2015, Judge Carlson granted the defendants' motion to amend their answer to include the affirmative defenses of recoupment and mitigation of damages.

**Trial and Jury Verdict on March 10, 2016** – On February 17, 2016, the ruled on the defendant's motion to exclude the testimony of one of the plaintiff's expert witnesses, Paul A. Rubin, finding "narrow areas ... where this witness may testify." 2016 WL 4169220. Trial began on February 22, 2016, with regard to the negligence and private nuisance claims. The plaintiffs were represented by Leslie Lewis. Magistrate Carlson on March 8 dismissed the negligence claim, holding that Nolen Scott Ely and his wife, Monica-Marta Ely, cannot recover any monetary damages for the alleged loss in value of their Susquehanna County property because they had not presented evidence that could establish the pre-injury value of their property. The court limited the potential damages in the remaining private nuisance claim to "inconvenience and discomfort" caused by the nuisance, which does not include mental and emotional discomfort or the cost to replace water.

The case proceeded on nuisance claims by the Elys and their co-plaintiffs, Raymond and Victory Hubert. On March 10 the jury awarded \$4.24 million. Forty-four plaintiffs initially claimed property damage and injuries, but after settlements and court rulings, only four plaintiffs remained. Jurors were asked to determine whether Cabot was negligent in drilling or completing two wells and whether the work on the wells created a nuisance by contaminating the water wells on the Ely's 8.8 acre property. The jury awarded Mr. and Mrs. Ely \$2.6 million and their three minor children \$50,000 each. Mr. and Mrs. Hubert were awarded \$1.4 million, while another family member was awarded \$50,000. Cabot stated it would file a motion to set aside the verdict and/or grant a new trial based on Ms. Lewis' conduct during the trial.

**The District Court, on March 31, 2017, denied defendant's Motion for Judgment as a Matter of Law but granted its Motion for a New Trial granted.** On April 7, 2016, Cabot Oil & Gas filed a motion for a Judgment as a Matter of Law, a motion for New Trial, a Motion to Set Aside Verdict, and a Motion for Damages Remittitur. On March 31, 2017, the district court denied Cabot's motion for judgment as a matter of law. Cabot argued it was entitled to judgment in part because plaintiffs' admissions established that water problems existed before Cabot began drilling. The court acknowledged that the evidence showed one of the plaintiffs had been able to light his water on fire before drilling operations commenced. The Court, however, observed that Cabot must meet "exacting standards" to have judgment entered as a matter of law, and found that plaintiffs had submitted sufficient evidence as to whether Cabot's activity was negligent and had contributed to the interference with the plaintiffs' use of their water and enjoyment of their property.

On the other hand, the Court granted Cabot's motion for a new trial, holding that "the weaknesses in the plaintiffs' case and proof, coupled with serious and troubling irregularities in the testimony and presentation of the plaintiffs' case – including repeated and regrettable missteps by counsel in the jury's presence – combined so thoroughly to undermine faith in the jury's verdict that it must be vacated ...." The court described in detail "manifold instances of improper conduct at trial, and repeated testimony and argument by counsel that was prejudicial to Cabot." It also stated that "the plaintiffs' expert witnesses offered opinion testimony that came perilously close speculation and at best were inferences that had weak factual support."

The court also observed that "the jury's award of more than \$4 million in damages for private nuisance bore no discernible relationship to the evidence." The case had been narrowed to a remaining nuisance claim, and

the court held that jury's award of \$4.24 million "bore no relationship to the facts of the case, the plaintiffs' own testimony, or the Court's instructions on the law." 2017 WL 1196510.

On September 21, 2017, a one-page order was entered dismissing the case without prejudice, with the right to reinstate with 60 days if the settlement is not consummated.

See <http://www.pahomepage.com/news/cabot-oil-gas-and-dimock-families-settle-civil-lawsuit/818382810>.

On October 3, 2017, a sealed order was filed settling the minors' actions. **The case is closed.**

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***Hallowich v. Range Resources Corp., No. C-63-CV-201003954 (Ct. Common Pleas, Washington Cty., Pa., May 27, 2010) (praecipe to issue a writ of summons; no complaint was filed). See also Hallowich v. Range Resources Corp., No. 234 WDA 2012 and 235 WDA 2012 (Pa. Superior Court, Dec. 7, 2012)***

Plaintiffs claim that gas wells and gas processing facilities caused their health to deteriorate. **The parties settled in July 2011.** On August 23, 2011, the Court of Common Pleas closed proceedings to the public, approved a confidential settlement, and entered an order sealing the record. On January 31, 2012, the court denied as untimely motions by newspapers to intervene and unseal the record. The decision was appealed, and an environmental group, doctors, and several medical organizations filed a joint amicus brief in April of 2012. See [http://www.rcfp.org/sites/default/files/docs/20120208\\_165629\\_jt\\_court\\_rev1.pdf](http://www.rcfp.org/sites/default/files/docs/20120208_165629_jt_court_rev1.pdf); and <http://blogs.artvoice.com/avdaily/2012/05/01/pennsylvania-doctors-newspapers-sue-frack-companies-over-secrecy/>. On December 7, 2012, the Pennsylvania Superior Court held that the Court of Common Pleas should have considered the petitions to intervene and unseal the record. Consequently, the appellate court vacated the lower court order and remanded for the court to rule on the merits of the newspapers' petitions. On March 20, 2013, the court ordered the terms of the settlement unsealed. Pursuant to the terms of the settlement, Range Resources paid \$750,000 to Stephanie and Chris Hallowich, who in turn agreed that there was no medical evidence that drilling harmed their health or their children's health. See <http://earthjustice.org/documents/legal-document/pdf/hallowich-appeal-ruling> (decision); *Judges Rule That Fracking Secrecy Court Case Must Be Heard, Press Release*, Earthjustice (Dec. 7, 2012), at <http://ohiocitizen.org/wp-content/uploads/2012/12/Harrisburg.pdf>; and Rob Wile, *Unsealed Settlement Shows A Shale Driller Paid Family \$750,000 Over Health Claims*, Business Insider (Mar. 21, 2103), at <http://www.businessinsider.com/hallowich-range-drilling-settlement-ppg-2013-3>. The settlement agreement prohibits the plaintiffs – and also their children – from talking about the litigation. See Don Hopey, *Pittsburgh-area shale settlement 'gag' questioned*, Pittsburgh Post-Gazette (Aug. 1, 2013), at <http://www.post-gazette.com/stories/local/washington/confidential-agreement-should-have-been-part-of-washington-county-marcellus-shale-case-record-697530>. **The case is closed.**

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***Berish v. Southwestern Energy Production Co., No. 2010-1882 (Ct. Common Pleas, Susquehanna Cty., Pa., Sept. 14, 2010), removed, No. 3:10-cv-01981 (M.D. Pa., Sept. 29, 2010). See 763 F.Supp.2d 702 (M.D. Pa., Feb. 03, 2011) (opinion on motion to dismiss)***

The lawsuit was first filed in September 2010 in Susquehanna County, Pennsylvania, but was removed to federal district court. The complaint alleges that improper casing of fracking wells allowed chemicals to migrate and contaminate water wells. Plaintiffs assert claims for violation of the Hazardous Sites Cleanup Act, negligence, private nuisance, strict liability, trespass, and medical monitoring. See pleadings at 2010 WL 3627011 and 2010 WL 4230599. The federal district court held on February 3, 2011, that the plaintiffs stated a claim for strict liability, but failed to state a claim for emotional distress (except as to one plaintiff).

With respect to the strict liability claim, the court noted that Pennsylvania cases have held that oil and gas extraction activities are not abnormally dangerous, but nevertheless declined to grant the motion to dismiss because the determination of whether a particular activity is abnormally dangerous is a fact intensive inquiry. In Pennsylvania, claims for emotional distress require that the plaintiff allege an attendant physical injury. Pennsylvania, however, does recognize a cause of action for inconvenience and discomfort caused by interference with another's peaceful possession of his or her real estate. Subsequent developments -- On May 3, 2012, the district court allowed the plaintiffs to file a third amended complaint and add four additional defendants. The court, however, reserved the right to determine whether the claims against the new defendants are barred by the statute of limitations. See 2012 WL 1569592. On May 17, 2012, plaintiffs filed their third amended complaint in order to add four new defendants. On August 21, 2012 and August 31, 2012, the court dismissed all personal injury claims (except for a 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. See Nicholson, *Analysis of Litigation Involving Shale & Hydraulic Fracturing* (June 1, 2014). On August 10, 2015, the court approved the stipulated dismissal of plaintiffs' claims for medical monitoring, strict liability, and all claims under the Pennsylvania Hazardous Sites Cleanup Act.

On March 7, 2016, the court was informed that the parties "are progressing forward with the settlement of this matter" and that "all but two (2) individual plaintiffs have yet to execute the settlement." On April 26, 2016, an order was entered dismissing the "Minor Plaintiffs" claims. On September 6, 2016, the court entered an order dismissing the case with prejudice. **The case is closed.**

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***Armstrong v. Chesapeake Appalachia, LLC*, No. 10-cv-000681 (Ct. Common Pleas, Bradford County, Pa., Oct. 27, 2010), removed, No. 3:10-cv-002453 (M.D. Pa., Nov. 29, 2010), remanded to state court (July 29, 2011), denial of motion to compel arbitration (Jun. 27, 2012), affirmed, 2014 WL 10919559, No. 1346 MDA 2012 (Superior Court of Pennsylvania, Jun. 17, 2014)**

Judy Armstrong, Carl Stiles, and Angelina Fiorentino allege that drilling caused substances to contaminate their water. Causes of action include negligence, strict liability, trespass, medical monitoring, and violation of the Pennsylvania Hazardous Sites Cleanup Act. The action was removed to federal court in 2010, but was remanded in July 2011. Prior to remand, on May 17, 2011, Chesapeake settled an action by the Pennsylvania Department of Environmental Protection. See *Chesapeake Fined \$1 Million*, Tulsa World, at [http://www.tulsaworld.com/site/printerfriendlystory.aspx?articleid=20110518\\_49\\_E1\\_HARRIS80433&PrintComments=1](http://www.tulsaworld.com/site/printerfriendlystory.aspx?articleid=20110518_49_E1_HARRIS80433&PrintComments=1) ("the action stems from Chesapeake's contamination of private water supplies with methane in northern Pennsylvania's Bradford County and a February tank fire at a drilling site in southwestern Pennsylvania's Washington County.").

After the case was remanded to state court Chesapeake, filed a motion on September 14, 2011, to compel arbitration and to stay further proceedings. Carl Stiles died in 2012. See Randy LoBasso, *Fracking Unbelievable*, Phila. Weekly (Jly. 31, 2012), at <http://www.philadelphiaweekly.com/news-and-opinion/164465496.html> ("Late anti-fracking activist Carl Stiles of Bradford County, Pa., died earlier this year after living with illnesses he believed were brought on by shale gas drilling near his home. Stiles, who had intestinal cancer, abandoned his property last year after a toxicologist found barium, arsenic and other volatile organic chemicals in his blood. The radioactivity in his home was nearly seven times the EPA standard limit. And still, no one can say for sure if hydraulic fracturing chemicals were the cause of Stiles' death.").

The Court of Common Pleas denied the 2011 motion and, on June 17, 2014, the Superior Court affirmed, holding that the gas lease – which stated that arbitration could be compelled as to a disagreement over the operations of Chesapeake on the property – did not compel arbitration regarding damages resulting from operations on another person’s property. See *Estate of Stiles v. Chesapeake Appalachia, LLC*, 2014 WL 10919559. On November 18, 2015, the state court granted the plaintiffs’ motion to amend their complaint to include a wrongful death action, but dismissed their claim for negligent infliction of emotional distress. Judy Armstrong, as representative of the Estate of Carl Stiles, was permitted to continue to pursue the claims of Carl Stiles. **The case is apparently pending.**

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***Bidlack v. Chesapeake Appalachia, LLC*, No. 10-EQ-000761 (Ct. Common Pleas, Bradford Cty., Pa., Dec. 17, 2010), removed, No. 3:11-cv-00129-ARC (M.D. Pa. (Scranton), Jan. 19, 2011). See 2012 WL 1657934 (denial of Plaintiffs' motion for relief from the Arbitration Order) (May 11, 2012)**

***Otis v. Chesapeake Appalachia, LLC*, No. 10-EQ-000775 (Ct. Common Pleas, Bradford Cty., Pa., Dec. 17, 2010), removed, No. 3:11-cv-00115-ARC (M.D. Pa. (Scranton), Jan. 18, 2011). See 2012 WL 1657930 (denial of Plaintiffs' motion for relief from the Arbitration Order) (May 11, 2012)**

Plaintiffs’ suits, which allege that defendants operated natural gas wells in a manner that contaminated their groundwater supplies, were both filed in the Court of Common Pleas of Bradford County, Pennsylvania. After defendants removed the actions to federal district court, the parties in both cases filed a joint motion for a stay pending arbitration. Claims asserted include negligence, private nuisance, strict liability, and trespass. The court granted the motions and directed the parties to engage in binding arbitration. However, before the parties engaged in binding arbitration, the plaintiffs filed the present motions seeking relief from the court's order. On May 11, 2012, the district court held in both cases that plaintiffs failed to articulate a sufficient basis to set aside the parties' stipulation to arbitrate, and ordered the case stayed until arbitration is completed. See Nicholson, *Analysis of Litigation Involving Shale & Hydraulic Fracturing* (June 1, 2014). On August 21, 2015, the court denied the defendants' motion to dismiss, but stated that the defendants may renew their request for dismissal if the parties cease settlement negotiations and plaintiffs fail to commence arbitration proceedings.

*Bidlack* – On September 11, 2017, the *Bidlack* case was dismissed with prejudice. **This case is closed.**

*Otis* – On May 25, 2017, the defendants moved to dismiss, but on June 12, 2017, the motion to dismiss was withdrawn. On September 28, 2017, the court granted the parties' motion to dismiss with prejudice all claims. **This case is closed.**

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***Burnett v. Chesapeake Appalachia, LLC*, 11-CV-80 (Ct. Common Pleas, Bradford Cty., Pa., Feb. 25, 2011), removed, No. 3:11-cv-01059 (M.D. Pa., June 1, 2011), remanded to state court (Aug. 31, 2011). See 2011 WL 3876412 (memorandum ordering remand)**

Truman and Bonnie Burnett of Grandville Summit, Pennsylvania, claim they were falsely told their lands would not be damaged by the drilling and operating of gas wells, but in fact suffered injuries when toxic materials were released onto the property and into the water supply. Plaintiffs sued in the Court of Common Pleas of Bradford County, asserting nine causes of actions: Hazardous Sites Cleanup Act, negligence, negligence per se, private nuisance, strict liability, trespass, medical monitoring trust funds, breach of

contract, and fraudulent inducement. Chesapeake removed the action to federal court, but on August 31, 2011, the court **remanded** the case back to state court. The court disagreed with defendants that one of the defendants was included in the suit solely to defeat diversity jurisdiction. A notice of discontinuance was filed on January 28, 2013. **The case is closed.**

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**Phillips v. Chesapeake Appalachia, LLC, No. 3:11-mc-00126 (M.D. Pa., Apr. 25, 2011). See 2011 WL 8153167 (M.D. Pa., Apr. 25, 2011) (Petition to Compel Arbitration); 2011 WL 8153165 (Response to Petition to Compel Arbitration) (May 13, 2011); and 2011 WL 8153166 (Petitioners' Reply in Support of Petition to Compel Arbitration) (May 27, 2011)**

Three couples from Wyalusing, Pennsylvania (Bradford County), who leased their oil and gas rights, alleged that drilling activities caused releases, spills, and discharges that contaminated their land and water supplies. Plaintiffs asserted claims for negligence, gross negligence, trespass, nuisance, strict liability, and breach of contract. On April 25, 2011, defendants petitioned to compel arbitration. On June 21, 2012, it was reported that defendants agreed to pay \$1.6 million in damages. **The settlement agreement was filed on December 10, 2012.** The three families agreed to convey their properties (on Paradise Road, Terry Township) to Chesapeake Appalachia on or before December 31, 2012. The case may be the first Marcellus contamination lawsuit to be resolved without a nondisclosure agreement. In a written statement, Chesapeake Energy noted no pre-drill water tests were conducted at these homes, and that pre-drill testing done in other homes in the area showed methane contamination. See *Chesapeake Pays Another \$1.6 million for Bad Marcellus Wells*, at <http://www.platts.com/RSSFeedDetailedNews/RSSFeed/NaturalGas/6413043> (Jun. 22, 2012).

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**Becka v. Antero Resources, No. 11:4812 (Ct. Common Pleas, Washington Cty., Pa., July 18, 2011), removed, No. 2:11-cv-01040 (W.D. Pa., Aug. 12, 2011)**

Paul and Yvonne Becka claim drilling operations contaminated their drinking water. Defendant moved for protective order governing discovery on April 2, 2012. **The case was settled on September 24, 2012.** Sources: Earthjustice, *Fracking Damage Cases and Industry Secrecy*; and Nicholson, *Analysis of Litigation Involving Shale & Hydraulic Fracturing* (June 1, 2014).

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**Dillon v. Antero Resources, No. 11:4813 (Ct. Common Pleas, Washington Cty., Pa., July 18, 2011), removed, No. 2:11-cv-01040 (W.D. Pa., Aug. 12, 2011). See 2012 WL 2899710 (W.D. Pa., Jul. 10, 2012) (opinion regarding discovery process)**

Two families claim various harms to their personal and property interests arising from hydraulic fracturing activities adjacent to their land. Causes of action include negligence, strict liability, and trespass. Defendant moved for a "Confidentiality Order" regulating the discovery process. The court noted that a protective order was appropriate for discovery of information such as plaintiffs' medical records, private property appraisals, business methods and gas recovery processes used by defendant, and the terms of business arrangements between the defendant and vendors. The court placed the burden of demonstrating the need for confidentiality on the party asserting it, and reserved to the court the decision as to whether any specific information is to be treated as confidential in whole or in part. **The case was settled on August 9, 2012.** Nicholson, *Analysis of Litigation Involving Shale & Hydraulic Fracturing* (June 1, 2014).



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***Kamuck v. Shell Energy Holdings GP, LLC*, No. 4:11-cv-01425-MCC (M.D. Pa., August 3, 2011). See 2012 WL 1463594 (Magistrate's Recommendation on Motions to Dismiss and Strike Claims) (Mar. 19, 2012); 2012 WL 1466490 (District Court Memorandum on Magistrate's Recommendation) (Apr. 27, 2012); and 2012 WL 3864954 (order denying "*Lone Pine*" motion) (Sept. 5, 2012) [Tioga County]**

The surface owner alleges that fracking activities harmed him and his property. Edward Kamuck asserts claims for anticipatory trespass, private nuisance, negligence and strict liability. On March 19, 2012, the U.S. Magistrate recommended dismissal of the anticipatory trespass claim, which does not allege an actual intrusion. The Magistrate recommended that the gross negligence and negligence per se claims should be dismissed, but the "simple" negligence claim should not be dismissed. Gross negligence in Pennsylvania is not a separate cause of action, but is instead a factor which may support a claim for punitive damages. Negligence per se was not properly pled because the complaint did not identify any breaches of statutes designed to protect persons like the plaintiff, and did not identify any statutory violation which was the proximate cause of some injury to the plaintiff. As for strict liability, the Magistrate followed prior cases holding that whether a specific activity is abnormally dangerous is a question of law for the court to resolve, typically after discovery is complete. As for private nuisance, the Magistrate stated that the complaint alleges actions which could support a private nuisance claim. The district court adopted the recommendations on April 27, 2012. See 2012 WL 1466490. On June 21, 2012, defendants requested that the court enter a "*Lone Pine*" order (see, e.g., *Strudley v. Antero Resources Corp.*, 2012 WL 1932470). On September 5, 2012, the court denied this motion. 2012 WL 3864954. In March of 2013 plaintiff's counsel withdrew from the case. Plaintiff is proceeding pro se. See also Nicholson, *Analysis of Litigation Involving Shale & Hydraulic Fracturing* (June 1, 2014).

On March 25, 2015, the court granted the defendants' motion to strike and motion for **summary judgment**. The court ordered that judgment be entered in favor of the defendants and the case be closed. With respect to the strict liability claim, the court found that "the natural gas drilling activities challenged in this particular case are not abnormally dangerous, and strict liability should not apply." The private nuisance claim and negligence claims were held to be "unadorned by any competent evidence." **The case is closed.**

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***Roth v. Cabot Oil & Gas Corporation*, No. 2012-324CP (Ct. Common Pleas, Susquehanna Cty., Mar. 19, 2012), removed, No. 3:12-cv-00898 (M.D. Pa. May 14, 2012). See 287 F.R.D. 293, 2012 WL 4895345 (M.D. Pa., Oct. 15, 2012) (decision denying *Lone Pine* case management order); and 919 F.Supp.2d 476 (M.D. Pa., Jan. 30, 2013) (granting in part and denying in part motion to dismiss)**

Frederick and Debra Roth owns property in Springville, Pennsylvania, about 1,000 feet from defendants' gas wells. Plaintiffs had their groundwater tested before commencement of drilling operations, and those tests revealed that the groundwater did not contain detectable levels of methane gas. In August 2010 the Plaintiffs noticed their groundwater supply had become sediment-laden and malodorous. An inspection of Well #2 in April of 2010 revealed the waste pit liner was riddled with holes. Other problems occurred, such as the failure to properly cement Well #3. Plaintiffs' claimed violation of the Pennsylvania Hazardous Sites Cleanup Act; negligence; negligence per se; private nuisance; strict liability; trespass; inconvenience and discomfort; breach of contract; and fraudulent misrepresentation and inducement. On October 15, 2012, the district court denied defendants' motion for a *Lone Pine* order, thus rejecting the defendants' contention that the Court should forego traditional discovery in favor of requiring Plaintiffs to make a prima facie showing of exposure, injury, and causation in support of their claims. See 2012 WL 4895345. On September 4, 2012,

defendants moved to dismiss all claims. On January 30, 2013, the district court granted the motion in part, dismissing the trespass, inconvenience and discomfort, and fraudulent misrepresentation claims. With respect to the strict liability claim, the court followed the *Fiorentino* precedent and deferred ruling on the issue to the summary judgment stage, where a more fully developed factual record would better inform its decision. 919 F.Supp.2d 476. **In November of 2013 the parties settled the dispute, and on December 12, 2013, the case was closed with prejudice pursuant to a joint motion.**

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***Manning v. WPX Energy Inc.*, No. 3:12-cv-00646 (M.D. Pa., April 9, 2012) [Susquehanna County]**

Plaintiffs assert that hydraulic fracturing at fifteen wells near their home contaminated their water supply and diminished property values. See Lauren Petracca, *Fracking's Real-Life Victims - Meet the Pennsylvania residents who say their lives have been changed by gas drilling*, Rolling Stone Magazine (Jan. 2013), at <http://www.rollingstone.com/politics/pictures/frackings-real-life-victims-20130123>. Causes of action include violations of the Hazardous Sites Cleanup Act, negligence, private nuisance, strict liability, trespass, and medical monitoring trust funds. On April 10, 2012, the Pennsylvania Department of Environmental Protection advised plaintiffs that their water supply contained methane and contained barium above maximum allowable levels. In April 2013, the Pennsylvania Department of Environmental Protection released the results of its study, which concluded that the methane in the private water wells was not production gas from the gas wells drilled by WPX Energy Inc. Ben Wolfgang, *Methane study, EPA debunk claims of water pollution, climate change from fracking*, The Washington Times (Apr. 29, 2013), at <http://www.washingtontimes.com/news/2013/apr/29/pa-environment-agency-debunks-fracking-water-claim/print/>. Tammy Manning appealed this determination on May 29, 2013, and has declared that her lawsuit will continue. She notes that the methane contamination only began after the fracking activities commenced. Mark Drajem, *Fracking Ruled Out by Pennsylvania in Town's Water Case*, Bloomberg (Apr. 30, 2013), at <http://www.bloomberg.com/news/2013-04-29/fracking-ruled-out-by-pennsylvania-in-town-s-water-case.html>. See also Nicholson, *Analysis of Litigation Involving Shale & Hydraulic Fracturing* (June 1, 2014).

After the defendants moved for summary judgment on April 15, 2015, the plaintiffs withdrew their Hazardous Sites Cleanup Act; strict liability; and medical monitoring claims, and stated that they are not claiming intentional trespass. On June 30, 2015, the court granted summary judgment for the defendants on the remaining claims (negligence, private nuisance, and negligent trespass) with regard to some, but not all, of the plaintiffs. 2015 WL 3972609. Jury selection was set for April 11, 2016, but on March 22, 2016, the court was informed that **the case had been settled**, and the court dismissed the action without prejudice to reinstate the action with 45 days if the settlement is not consummated.

On Sept. 21, 2016, Tammy Hadlick and the Mannings filed a brief arguing that they were misinformed as to the terms of the settlement, and that the settlement agreement should have included mutual releases in order to protect "against any retaliations or countersuits." On September 30, 2016, the defendants submitted a revised settlement agreement which pertains to all types of litigation, "whether in tort or contract, known or unknown, direct or indirect, suspected or unsuspected, foreseen or unforeseen, real or imaginary, actual or potential, at law or in equity, under the common law, state law, federal law, or any other law."

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***Kalp v. WPX Energy Appalachia, LLC*, No. 2460 (Ct. Common Pleas, Westmoreland Cty., Pa., Apr. 20, 2012), removed, No. 2:12-cv-00662-LPL (W.D. Pa., May 16, 2012)**

Two couples, Galen and Virginia Kalp and Glenlyn and Audrey Kalp, leased their farm in 2006 prior to advent of horizontal hydraulic fracturing. In 2011, WPX constructed a 27 acre drilling site to extract gas from 1,300 acres of adjoining lands. The Kalps argued that this use of their land was unlawful and a breach of contract. **On November 21, 2013, an order was entered closing the case due to a settlement.**

Related regulatory action. – On July 2, 2015, the Pennsylvania Department of Environmental Protection ordered WPX Energy Appalachia LLC to restore or replace the water supply of Virginia and Glen Kalp after determining that WPX's fracking activities were responsible for contamination of the water. On August 3, 2015, WPX filed a notice of appeal with the Pennsylvania Environmental Hearing Board (EHB). See *In the Matter of WPX Energy Appalachia LLC*, No. 2015-110, Pa. EHB). WPX, however, withdrew its appeal, and the EHB terminated the appeal on March 4, 2016. See [http://ehb.courtapps.com/public/update\\_info\\_pub.php](http://ehb.courtapps.com/public/update_info_pub.php). **The regulatory proceeding is closed.**

2017 fine – According to news sources, the Pennsylvania Department of Environmental Protection on February 27, 2017, fined WPX Energy Appalachia \$1.2 million for contaminating drinking water. The penalty comes nearly four years after WPX's wastewater leaked from an on-site fracking impoundment pond, contaminating the drinking water of five Westmoreland County families. WPX will also remediate soil, groundwater and surface water.

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***Haney v. Range Resources*, No. C-63-CV-201203534 (Ct. Common Pleas, Washington Cty., Pa., May 25, 2012)**

Washington County landowners claim their water was contaminated from fracking flowback, that they and their farm animals became ill, and that they face a risk of cancer due to exposure to spills, leaks and air pollutants. The Plaintiffs (Stacey Haney, Beth, John and Ashley Voyles, Loren and Grace Kiskadden) also allege that Range Resources intentionally hid test results, and asserted several claims, including strict liability, negligence, negligent and intentional infliction of emotional distress, battery, private nuisance, and trespass. Defendants include Range Resources, 12 drilling company subcontractors or suppliers, two individuals, and two water testing laboratories.

On November 16, 2012, January 18, 2013, and July 8, 2015, the court denied Range Resources's motions for a (Lone Pine?) case management order. On November 5, 2013, the trial court directed all third-party manufacturers of products used at the Yeager Drilling Site to disclose the constituent ingredients of their products. On June 11, 2014, the court issued an order placing the burden on Range Resources to secure and provide the desired information. Range Resources filed an appeal, but the Superior Court held that the trial court's 2014 order was interlocutory and not immediately appealable. *Haney v. Range Resources-Appalachia Inc.*, No. 1130 WDA 2014 (Apr. 14, 2015).

On February 5, 2015, the trial court quashed Range's objection to service of a subpoena on URS Corporation, an engineering firm retained by Range. Plaintiffs seek information related to air and water monitoring and testing by URS. Range appealed, but the Superior Court held that "Range has no grounds for objecting to Residents' request for relevant information possessed by URS in its capacity as an engineering consultant that was not retained in anticipation of litigation." See No. 257 WDA 2015 (Jan. 29, 2016), at <http://www.pacourts.us/assets/opinions/Superior/out/j-a35021-15m%20-%201025251956056506.pdf>.

Summary judgment motions were pending as of February 2017. **The case is pending.**

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Related regulatory action. – *Haney, et al v. Pennsylvania DEP, Case No. 2013-112.* – The Pennsylvania Department of Environmental Protection issued permits to Range Resources on June 26, 2013, authorizing hydraulic fracturing operations. Plaintiffs appealed the decision to the Pennsylvania Environmental Hearing Board on July 26, 2013. However, on June 11, 2014, the **appeal was withdrawn** by stipulation. See [http://ehb.courtapps.com/public/document\\_shower\\_pub.php?csNameID=4694](http://ehb.courtapps.com/public/document_shower_pub.php?csNameID=4694).

Related regulatory action and litigation. – *Kiskadden v. PA DEP and Range Resources, PA Environmental Hearing Board Case No. 2011-149-R; petition for review filed, No. 1167 CD 2015 (Commonwealth Court, July 9, 2015), opinion, 149 A.3d 380, 2016 WL 6242604 (Oct. 26, 2016)* – Loren Kiskadden also filed a complaint with the Pennsylvania Department of Environment Protection. The DEP, after sampling his well in June 2011, found dissolved methane gas, chloroform, butyl alcohol, acetone, and high levels of sodium and total dissolved solids, but determined that the well was not contaminated by nearby Marcellus Shale gas drilling by Range Resources. When Kiskadden sought to appeal this determination, the DEP argued he had no right to appeal because the "discretionary" report did not direct or require drilling companies to do anything. On May 16, 2012, the Environmental Hearing Board held Kiskadden may appeal and argue the investigation was inaccurate and incomplete. According to the Pittsburgh Post-Gazette article, Kiskadden's appeal of the DEP's determination that his well was not contaminated by Range Resources is the first administrative appeal in Pennsylvania to challenge a DEP water supply determination denying contamination. On June 12, 2015, the Board dismissed the claim, holding that Kiskadden failed to show by a preponderance of the evidence that any pollution to the water well was caused by the drilling operations.. Noting that there were no pre-drilling samples of water quality, the Board stated that "[s]imply because there are problems on a drilling site ... does not mean that a water well located approximately one half mile away was impacted by those drilling operations." See [http://ehb.courtapps.com/public/document\\_shower\\_pub.php?csNameID=4351](http://ehb.courtapps.com/public/document_shower_pub.php?csNameID=4351).

On July 9, 2015, Kiskadden filed a petition for review in the Commonwealth Court, contending that the Board erred in rejecting the conclusion that constituents from the Yeager Impoundment migrated to petitioner's well water. [Cmwlth. Ct. No. 1167 CD 2015]. On December 7, 2015, the court denied Kiskadden's application to vacate and remand to the EPB.

On October 26, 2016, the Commonwealth Court issued its decision. 149 A.3d 380. The court affirmed the Board's determination that Kiskadden did not meet his burden of proving that the drilling operations at the Yeager Site contaminated his well water. In particular, the Court rejected Kiskadden's contentions that (1) substantial evidence does not support the Board's factual findings; (2) that the Board capriciously disregarded material competent evidence demonstrating a hydrogeological connection between his well and the natural gas operations at the Yeager Site; and (3) that the Board erred by relying on speculative evidence to support its finding that a hydrogeological connection did not exist. The majority decried "Range's reckless business practices" as "irresponsible in the extreme, bordering on reprehensible," but noted that the issue in the case was not whether the activities at the Yeager Site impacted the environment and contaminated the soil and adjacent springs, but was instead "whether Range's activities impacted Kiskadden's water well." Id. at 403. The Court held that "Kiskadden's evidence did not outweigh strong, conflicting evidence that the contaminants in his well water, particularly in the ratios and concentrations detected, were naturally occurring and not unique to oil and gas activities. Moreover, his evidence did not prevail over other credible evidence refuting the existence or likelihood of a physical pathway between his well and the Yeager Site." Id. Judge Patricia McCullough dissented. She relied on the fact that the Board had granted a rebuttable evidentiary presumption to Kiskadden that the chemicals in his well water were contained in products used at the Yeager Site, and noted that the Board did not find that this presumption was rebutted.

On May 2, 2017, the Pennsylvania Supreme Court denied the Petition for Allowance of Appeal. **The case is closed.**

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***Butts v. Southwestern Energy Production Company*, No. 3:12-cv-01330 (M.D. Pa., July 10, 2012)**

Plaintiffs own vacation homes on Round Pond, a lake in Susquehanna County, Pennsylvania. They assert causes of action for private nuisance (noise, light, deforestation, and excessive traffic) and negligence, and claim their well water is no longer safe and property values have decreased. Nicholson, *Analysis of Litigation Involving Shale & Hydraulic Fracturing* (June 1, 2014). On April 26, 2013, the magistrate found that, “given the proximity of plaintiffs’ Round Pond properties to SEPCO’s gas and drilling activities, coupled with the fact that plaintiffs aver that such activities have impacted the use and enjoyment of their land, a private nuisance cause of action has been stated.” 2013 WL 12177102. The magistrate’s report, adopted on May 14, 2013, also rejected the arguments that the complaint fails to state a plausible claim for contamination of water wells, and that the claims are subject to dismissal under Pennsylvania’s economic-loss doctrine. On August 12, 2014, the court denied Defendant’s summary judgment motion. With respect to the claim of water contamination, the court that that – since the defendant did not produce expert testimony to negate Plaintiffs’ firsthand observations that their water was contaminated -- the only evidence regarding causation of record (Plaintiffs’ testimony that their water turned black right after the drilling operations) is sufficient to survive summary judgment. **The suit was apparently settled, and on November 12, 2014, all parties stipulated to the dismissal of this action** with prejudice pursuant to Federal Rule of Civil Procedure 41.

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***Bezjak v. Chevron Appalachia LLC*, No. GD-13-011271 ( Ct. Common Pleas, Allegheny Cty., Pa., Jun. 13, 2013)**

Joseph and Mildred Bezjak, David and Linda Headley, and eleven other individuals in the Pittsburgh area sued eleven companies, claiming noise and odors associated with nearby gas wells constituted a nuisance. See <http://www.cnsenvironmentallaw.com/2013/06/18/neighbors.pdf> (complaint). See also See <http://www.cnsenvironmentallaw.com/2013/06/18/neighbors.pdf> (complaint) and Jim Efstathiou Jr., et al., *Missouri Lawyer Brings Nuisance Claims to Fracking Arena*, at <http://www.bloomberg.com/news/2013-06-11/missouri-lawyer-brings-nuisance-claims-to-fracking-arena.html> (Jun. 11, 2013). On August 14, 2013, the nine defendants were dismissed, leaving Laurel Mountain Midstream Operating LLC and Atlas Resources LLC. On July 25, 2014, the court dismissed Counts II, IV, and VI, raising claims of "negligence/recklessness" on the ground that the "duties and remedies for nontresspassorial invasions are those set forth in the law governing nuisances." The court declined to dismiss the plaintiffs' private nuisance claims and punitive damage claims. On December 1, 2017, a scheduling order was filed setting July 31, 2018, as the date for filing motions for summary judgment. **The case is pending.**

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***Leighton v. Chesapeake Appalachia, LLC*, No. 2013-cv-0169 ( Ct. Common Pleas, Bradford Cty., Pa., Jun. 19, 2013), removed, No. 1:13-cv-02018 (M.D. Pa., Jul. 26, 2013). See 2013 WL 6191739 (M.D. Pa., 11-26-13) (order on duty to arbitrate)**

Michael and Nancy Leighton signed a lease with Chesapeake Appalachia with an arbitration clause. In 2011 their water supply was found to be of good quality. Chesapeake Appalachia, Chesapeake Energy, Nomac

Drilling, and Schlumberger Technology engaged in fracking operations near the property and contaminants escaped. The groundwater had increases in methane, ethane, propane, iron, and manganese, changes in clarity, foul odor, noticeable levels of natural gas, and was flammable. Creek water on the property began bubbling. Plaintiffs allege seven causes of action against all defendants: (1) violation of the Pennsylvania Hazardous Sites Cleanup Act; (2) negligence; (3) negligence per se; (4) private nuisance; (5) strict liability for abnormally dangerous and ultra-hazardous activities; (6) trespass; and (7)“inconvenience and discomfort.” The eighth cause of action is for breach of contract and names only their lessee, Chesapeake Appalachia. On November 26, 2013, the district court held that the claims were within the scope of the arbitration agreement even though the damages did not arise from activities performed on the property. In *Armstrong v. Chesapeake Appalachia, LLC*, No. 10–CV–0681, (Bradford County Common Pleas, Jun. 27, 2012) (unpublished), the court held that arbitration could not be compelled under similar circumstances; however, the district court distinguished *Armstrong* because it involved only tort claims, whereas in the present case the plaintiffs alleged their lease applies to activities on adjoining land by bringing a claim for breach of the lease in addition to tort claims. The court ordered the plaintiffs to arbitrate their claims against Chesapeake Appalachia, Chesapeake Energy, and Nomac, and held that the claims against Schlumberger should also be arbitrated if it is shown that Schlumberger was an agent of Chesapeake Appalachia. **On February 12, 2014, the case was dismissed pursuant to a settlement.**

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***Brown v. WPX Appalachia, LLC*, No. 13CI04923 (Ct. Common Pleas, Westmoreland Cty., Pa., Sept. 16, 2013)**

Ralph Brown filed a complaint with the Pennsylvania DEP in September 2012, stating that his 600-foot-deep well was contaminated by fracking wastewater that had leaked from the 3 million gallon impoundment. In June 2013 the DEP determined that his well had been contaminated and ordered the drilling company to permanently replace his water supply. See Don Hopey, Pittsburgh Post-Gazette, *Families' well water disrupted near Ligonier* (July 4, 2014). On September 16, 2013, Brown filed a lawsuit asserting a claim of nuisance. The suit alleged that the contamination reduced the value of his property and interfered with his family's ability to use and enjoy the land. On April 1, 2016, the suit was settled and discontinued.

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***Russell v. Chesapeake Appalachia, LLC*, No. 2013-cv-11291 (Ct. Common Pleas, Dauphin Cty., Pa., Dec. 27, 2013), removed, No. 4:14-cv-00148 (M.D. Pa. ). See 2014 WL 7935781 (First Amended Complaint, Dec. 12, 2014); and 305 F.R.D. 78 (M.D. Pa. 2015) (Lone Pine order)**

Sheila Russell and twelve other residents and/or landowners in Bradford County, Pennsylvania, sued Chesapeake and Nabors Completion and Production Services for private, temporary, continuing, abatable nuisance, and negligence/recklessness, seeking recovery of damages arising from defendants' natural gas exploration, extraction, transportation, and associated activities. Plaintiffs complain of wells that intermittently leak natural gas and other toxic and/or radioactive substances into the air, ground, and nearby waterways; daily discharges of toxic and/or radioactive substances and other emissions into the air by manually venting and/or flaring wells; excessive noise; discharges and improper disposal of radioactive materials on or around Plaintiffs' properties; methane migration; excessive lights and offensive odors; excessive dust and silica sand, diesel fumes, or other airborne particulate matter; and excessive unpermitted or unauthorized truck and heavy machinery transportation and traffic.

On March 2, 2015, the court denied the defendants' motion to sever and motion for a *Lone Pine* case management order. With regard to the *Lone Pine* motion, the plaintiffs argued that the request "is akin to a pseudo-summary judgment order requiring that Plaintiffs, without the benefit of discovery, prove facts with specificity beyond what is required by the Federal Rules and ordinary federal practice at this juncture in the litigation." 305 F.R.D. at 85. The court agreed, and found that "[r]equiring Plaintiffs to prove their *prima facie* case with the specific evidence the Defendants request at this juncture is effectively imposing a summary judgment standard on the Plaintiffs without the benefit of discovery." *Id.* The court also noted that "the Defendants did not challenge the substantive sufficiency of the Plaintiffs' claims in their First Amended Complaint by a Rule 12 motion, and instead filed an answer." *Id.* Jury selection is set for November 7, 2016. The case is **pending**.

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***In the Matter of Arbitration between Jacqueline Place and Chesapeake Appalachia, LLC, 14 115 00299 12 (American Arbitration Assn.), at <https://dl.dropboxusercontent.com/u/48182083/Award.pdf> (Jan. 22, 2014)***

Jacqueline Place conducted baseline tests of her well water prior to entering into a 2008 lease. In 2010 her water had become "reddish brown" and "oily," and new tests found dissolved methane levels 1,300 to 2,000 times higher than the baseline tests. Pursuant to her lease, she filed a claim with an arbitrator, and stated that she "lived for ten months deprived totally of the use of her well, and even after its 'restoration,' has been burdened with a water supply with chronic contamination, requiring constant vigilance and ongoing monitoring." **The arbitrator in January 2014 ordered Chesapeake to pay \$59,381.42 for contaminating her water well with methane.** See Brendan Gibbons, *Bradford County woman wins arbitration case with Chesapeake over well contamination*, *Scranton Times-Tribune* (02/19/14) , at <http://thetimes-tribune.com/news/bradford-county-woman-wins-arbitration-case-with-chesapeake-over-well-contamination-1.1637029>

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***Chaffee v. Talisman Energy USA Inc., No. 3:14-cv-00690 (M.D. Pa. Apr. 9, 2014)***

Residents or owners of property in Bradford County, Pennsylvania, seek damages from Talisman Energy USA Inc. and Central New York Oil and Gas Company, L.L.C. for private, temporary, continuing, abatable nuisance, and negligence/recklessness arising from natural gas exploration, extraction, transportation, storage, and other associated activities. Among other things, the plaintiffs allege that (1) drilling and hydraulic fracturing activities caused unpleasant noises; (2) flaring released toxic or hazardous smoke into the air and ground of the surrounding areas; (3) construction and operation of well pads caused and continues to cause a dangerous amount of large truck and heavy machinery traffic and excessive amount of dust, silica sand, or particulate matter to enter the air; (4) immediately after hydraulic fracturing occurred, water from water wells frequently turned milky white in color with an oily sheen and contained methane. **On September 5, 2014, the court entered an order dismissing the case** in light of the parties' stipulation of dismissal without prejudice for lack of subject matter jurisdiction.

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***Tiongco v. Southwestern Energy Production Co., No. 3:14-cv-01405 (M.D. Pa., Jly. 21, 2014). See 214 F.Supp.3d 279 (order, dated Oct. 14, 2016, denying defendant's motion for summary judgment with respect to the private nuisance claim)***

Stephanie Tiongco raises alpacas in Susquehanna County and creates dolls from alpaca fiber on her land. She leased her land to the defendant. She alleges that defendant's operations have caused her home to vibrate and structural beams to shift and sag. She complains of excessive light, noise, dust, and truck traffic. She initially asserted claims for private nuisance and negligence, and sought to enjoin unreasonable drilling activities, but subsequently dropped her negligence claim and her request for injunctive relief. On October 14, 2016, the court denied the defendant's motion for summary judgment with respect to the private nuisance claim. 214 F.Supp.3d 279. The court held that the plaintiff produced sufficient evidence demonstrating that the defendant was the legal cause of the private nuisance, and plaintiff has produced sufficient evidence for a reasonable juror to conclude defendant acted intentionally. However, by agreement of the parties, the court dismissed the case with prejudice on January 20, 2017. **The case is closed.**

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***Lauff v. Range Resources - Appalachia, LLC*, No. GD-14-018458 (Ct. Common Pleas, Allegheny Cty., Pa., Oct. 7, 2014)**

Christopher Lauff and his family sued Range Resources and others for damages arising from oil and gas drilling and extraction activities. The plaintiffs assert a claim for nuisance based on releases, spills, emissions, and discharges of hazardous gases, chemicals, and wastes into the air; contamination of surface waters and groundwater supplies; and excessive noises, odors, lights and truck traffic. The plaintiffs also assert claims for negligence and trespass. On January 7, 2016, certain negligence claims were withdrawn, as well as all strict liability and negligence per se allegations. A second amended complaint was filed on November 17, 2016. On February 22, 2017, the court overruled the defendants' preliminary objections, holding that the allegations, if proven, are adequate to permit a jury to draw a reasonable inference that the defendants "were aware of the nature of the operations to be performed by their lessees on their land so as to charge them with sufficient knowledge of the specific nuisance created on their land and complained of by the Plaintiffs in their Second Amended Complaint. Moreover, the plaintiffs allege that the defendants "entered into additional leases with the natural gas operators even after having actual knowledge of the specific allegations of nuisance set forth in Plaintiffs' Complaint." **The case is pending.**

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***Chito v. Hilcorp Energy Company*, No. 11091/14 (Ct. Common Pleas, Lawrence Cty., Pa., Oct. 28, 2014), removed, No. 2:14-cv-01576-TFM (W.D. Pa., Nov. 17, 2014), and *Dubrasky v. Hilcorp Energy Company*, No. 10411/15 (Ct. Common Pleas, Lawrence Cty, Pa., Apr. 21, 2015), removed, No. 2:15-cv-00664-TFM (W.D. Pa., May 20, 2015)**

Timothy Chito and Elizabeth Kesner own property in Pulaski, Pennsylvania, and Kathy and Ivan Dubrasky own property in New Wilmington, Pennsylvania. The plaintiffs in both cases assert claims for private nuisance, negligence, recklessness, and strict liability for abnormally dangerous activity. They allege drilling activities have rendered their land unenjoyable due to "excessive noise, odors, blinding light, tremors, and twenty-four hour operation of heavy industrial equipment." On August 27, 2015, the court consolidated the two cases (under 2:14-cv-01576) and denied the plaintiffs' motion to remand to state court. On August 19, 2016, Hilcorp Energy filed a motion for summary judgment. On October 4, 2016, the court granted the plaintiffs' motion to discontinue and to dismiss the case without prejudice. **The case is closed.**

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***Baumgardner v. Chesapeake Appalachia LLC*, No. GD-15-004224 (Ct. Common Pleas, Allegheny Cty., Pa., Mar. 19, 2015)**



Gary Baumgardner and other homeowners sued Chesapeake Appalachia and other defendants for damages based on allegations that their homes and quality of life have been negatively impacted by problems with air quality, emissions, noises, vibrations, and odors. They assert claims of nuisance, negligence, and fraudulent inducement. An amended complaint was filed on December 14, 2016. **The case is pending.**

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***Kemble v. Cabot Oil and Gas Corporation*, No. 3:17-CV-00665 (M.D. Pa., Apr. 13, 2017)**

Raymond Kemble has filed suit against Cabot Oil and Gas Corp. and GasSearch Drilling Services Corp. (natural gas producers), and Williams Field Services Company, LLC (compressor station owner) with respect to natural gas drilling and fracking activities and operations near his property in Dimock Township, Montrose, Susquehanna County. The action asserts claims for private temporary continuing nuisance and negligence/recklessness. Allegation of impairment of use and enjoyment of property include contamination of water supply; loud noises, bright lights, excessive dust, silica, and particulate matter, disruptive truck and heavy machinery traffic on rural roads. Plaintiff also alleges that a nearby Teel Compressor Station emits toxic substances and produces "horrific odors" and frequent "high decibel screeching and high pressure venting noises. On June 5, 2017, the defendants moved to dismiss based on the absence of federal question and federal diversity jurisdiction. On June 9, 2017, the court dismissed the complaint without prejudice. **The case is closed.**

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***Cabot Oil & Gas Corporation v. Speer*, No. 2017-936 (Ct. Common Pleas, Susquehanna Cty., Pa., Aug. 7, 2017)**

Cabot Oil & Gas Corp. and GasSearch Drilling Services Corp. (GDS) have sued Raymond Kemble and attorneys Charles F. Speer, Edward Ciarimboli, and Clancy Boylan, as well as the Speer Law Firm and Fellerman & Ciarimboli. Plaintiffs seek \$5 million in punitive damages for "tortious, malicious, wrongful, and improper use of the legal process" related to what they call "frivolous litigation." Cabot and GDS allege that defendants knew Kemble had settled his claims against the companies, yet filed a complaint in the U.S. District Court for the Middle District of Pennsylvania without probable cause. The plaintiffs assert claims for wrongful use of civil proceedings; breach of contract; and tortious interference with contract. The plaintiffs also contend that Kemble breached a settlement agreement when he filed another lawsuit against Cabot and GDS in April 2017. See *supra*, *Kemble v. Cabot Oil and Gas Corporation*, No. 3:17-CV-00665 (M.D. Pa., Apr. 13, 2017). The settlement was reached in July 2012 in *Fiorentino v. Cabot Oil and Gas Corp.* [recaptioned *Ely v. Cabot Oil and Gas Corp.*], No. 3:09-cv-02284, *supra*.

On December 11, 2017, the court heard arguments. *Gas driller: Make homeowner pay for disparaging us*, (Dec. 11, 2017), at [http://m.apnews.com/ap/db\\_268748/contentdetail.htm?contentguid=E7QoB1Jj](http://m.apnews.com/ap/db_268748/contentdetail.htm?contentguid=E7QoB1Jj). **The case is pending.**

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## TEXAS

***Coastal Oil and Gas Corp. v. Garza Energy Trust*, (206th District Court, Hidalgo County, Tex., 1997). See 268 S.W.3d 1 (Tex. Sup. Ct. 2008)**

Plaintiff argued that drainage caused by hydraulic fracturing was analogous to trespass by a slant or deviated well. The **Texas Supreme Court held** that drainage caused by hydraulic fracturing is not a form of trespass, but is sanctioned by the rule of capture. 268 S.W.3d at 14 ("the rule of capture determines title to gas that drains from property owned by one person onto property owned by another."). See, e.g., Owen L. Anderson, *Subsurface "Trespass": A Man's Subsurface Is Not His Castle*, 49 Washburn Law Journal 247 (2010); Travis Zeik, *Hydraulic Fracturing Goes to Court: How Texas Jurisprudence on Subsurface Trespass Will Influence West Virginia Oil and Gas Law*, 112 West Virginia Law Review 599 (2010); Aaron Stemplewicz, *The Known "Unknowns" of Hydraulic Fracturing: a Case for a Traditional Subsurface Trespass Regime in Pennsylvania*, 13 Duquesne Business Law Journal 219 (2011); Owen Anderson, *Lord Coke, the Restatement, and Modern Subsurface Trespass Law*, 6 Texas Journal of Oil, Gas, and Energy Law 203 (2010-2011).

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**Environmental Processing Systems, L.C. v. FPL Farming Ltd., No. CV71974 (75th District Court, Liberty County, Tex., 2006), on appeal, 305 S.W.3d 739 (9th Court of Appeals, 2009), remanded, 351 S.W.3d 306 (Tex. S.Ct. 2011), on remand, 383 S.W.3d 274 (9th Court of Appeals, 2011), reversed, No. 12-0905, 457 S.W.3d 414 (Tex. Sup. Ct., Feb. 6, 2015)**

This is a dispute between a rice farmer (FPL) and an injection well operator (EPS) over the leaching of injected fluids into the subsurface of FPL's property. After prior administrative and judicial proceedings, FPL brought suit in Liberty County in 2006, alleging that EPS's injectate leached into its property, and seeking damages based on trespass, nuisance, and unjust enrichment. After an adverse jury verdict, FPL appealed to the Beaumont Court of Appeals. The court of appeals held it could not review the merits of FPL's trespass claims. 305 S.W.3d 739, 744 (2009), but the Texas Supreme Court remanded the trespass issue. 351 S.W.3d 306 (2011) (possession of an injection well permit does not insulate the operator against trespass or other tort liability). On remand, the court of appeals held that Texas law recognizes a trespass action to protect possessory rights in the deep subsurface. 383 S.W.3d at 282 (2012) ("We conclude that Texas law recognizes FPL's property interest in the briny water underneath its property. We do not agree with EPS that no trespass action exists under Texas law to protect FPL's legal interest in its property.").

On February 6, 2015, the **Texas Supreme Court reversed** the court of appeals' judgment and reinstated the trial court's judgment "that FPL Farming take nothing." 457 S.W.3d 414. The court did not clarify the distinctions between traditional trespass and subsurface trespass and declined to answer the question of whether Texas recognizes a cause of action for subsurface trespass. Instead, the court focused on whether lack of consent is an element of the trespass cause of action on which the plaintiff bears the burden of proof, or whether consent is instead an affirmative defense on which the defendant bears the burden. The court held that "lack of consent as an element of a trespass action that a plaintiff must prove." In light of its holding, the court concluded that it "need not address whether Texas law recognizes a trespass cause of action for deep subsurface wastewater migration because the jury found in EPS's favor on all of FPL Farming's claims and any error would be harmless." FPL failed to prove that it did not consent to EPS's alleged entry.

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**Gardiner v. Crosstex North Texas Pipeline LP, No. 2008-40133-362 (442<sup>nd</sup> District Court, Denton County, Tex., May 5, 2008; transferred to 431<sup>st</sup> District Court, Denton County, Tex.), on appeal, 305 S.W.3d 739 (9th Court of Appeals, 2009), on appeal, 451 S.W.3d 150 (Court of Appeals of Texas, Fort Worth, Nov. 13, 2014), on appeal, 505 S.W.3d 580 (Tex. S.Ct. Jun. 24, 2016) (affirming remand to trial court)**

Andrew and Shannon Gardiner, who own a 95-acre ranch in Denton County, sued Crosstex North Texas Pipeline LP after its compressor station began operating in May 2007. The compressor station includes four diesel engines that are "bigger than mobile homes" and produce a "constant roar." Crosstex implemented a series of mitigation efforts to eliminate unreasonable noise levels, but in 2008 the Gardiners told Crosstex the mitigation efforts were inadequate. The Gardiners asserted claims for private nuisance, ordinary negligence, and gross negligence. They amended their petition to allege that Crosstex had both intentionally and negligently created a nuisance. After the trial court granted a directed verdict to Crosstex on the negligence cause of action, the jury found Crosstex liable for negligent nuisance and awarded the Gardiners \$2,042,500 in damages. See 451 S.W.3d at 154. Crosstex appealed, and the court of appeals held that the evidence was legally sufficient (to state a claim), but not factually sufficient to support the jury's finding of a negligently created nuisance. 451 S.W.3d at 176. It also held that the trial court erred by denying the Gardiners' request for a trial amendment and should have submitted a jury question on whether Crosstex created a nuisance through conduct that was "abnormal and out of place." Id. at 177, 179. The court remanded the case "for a new trial and to allow the Gardiners to add the abnormal and out-of-place variation of their nuisance claim." Id. at 179. Both parties filed petitions with the Texas Supreme Court for review.

The Texas Supreme Court affirmed on June 24, 2016. It held "that the term 'nuisance' refers not to a defendant's conduct or to a legal claim or cause of action but to a type of legal injury involving interference with the use and enjoyment of real property." 505 S.W.3d at 588. According to the court, "a defendant can be liable for causing a nuisance if the defendant intentionally causes it, negligently causes it, or — in limited circumstances — causes it by engaging in abnormally dangerous or ultra-hazardous activities." Id. The Court affirmed the court of appeals' judgment remanding this case to the trial court for a new trial. On May 30, 2017, the lawsuit was dismissed with prejudice. **The case is closed.**

The *Crosstex* decision will guide Texas courts in the future in nuisance claims. The decision clarifies that whether a defendant may be held liable for causing a nuisance depends not only on proof that the interference is a nuisance, but also on proof of the culpability of the defendant's conduct. A defendant can be liable for causing a nuisance if the defendant intentionally causes it, negligently causes it, or causes it by engaging in abnormally dangerous or ultra-hazardous activities. The mere fact that the defendant's use of its land is "abnormal and out of place in its surroundings" will not support a claim alleging a nuisance. In the absence of evidence that the defendant intentionally or negligently caused the nuisance, the abnormal and out of place conduct must be "abnormally dangerous" conduct that creates a high degree of risk of serious injury to be actionable.

In a prior decision of the Texas Supreme Court, also involving a compressor station, the Court held that (1) evidence that the homeowners were harmed by noise and gas was sufficient to support finding that homeowners were harmed, but (2) a remand of the permanent nuisance claim for a new trial on liability and damages was warranted because the evidentiary standard concerning valuation of property had changed since the time of the trial. *Natural Gas Pipeline Company of America v. Justiss*, 397 S.W.3d 150 (Texas 2012).

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***Scoma v. Chesapeake Energy Corp.*, No. 3:10-cv-01385 (N.D. Tex., July 15, 2010). See also 2010 WL 3706170 (Aug. 11, 2010) (Second Amended Complaint)**

Property owners in Johnson County, Texas, allege their water well is contaminated due to hydraulic fracturing actions, including storage of drilling waste and disposal of fracturing waste in injection wells. Plaintiffs claim negligence, nuisance, and trespass, and seek the cost of testing, loss of use of land, loss of

market value of land, loss of intrinsic value of well water, emotional harm, nominal damages, exemplary damages, and injunctive relief. **The case was dismissed on December 9, 2011, pursuant to a settlement agreement.** Nicholson, *Analysis of Litigation Involving Shale & Hydraulic Fracturing* (June 1, 2014).

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***Ruggiero v. Aruba Petroleum, Inc.*, No. 10-10-801 (District Court, Wise County, Tex., Oct. 18, 2010)**

The Ruggieros, who only owned the surface, learned in 2009 that their ten acres were part of a lease held by Aruba Petroleum, who drilled two gas wells within 300 feet of their home. According to the Ruggieros, thousands of gallons of drilling mud were negligently discharged, the ground was saturated when a frac tank valve was not shut properly, and another tank overflowed and gushed out condensate for more than twelve hours. See <http://shalegasoutrage.org/wp-content/uploads/2011/09/Tim-Christine-Ruggieros-Story.pdf>. **An out of court confidential settlement was reached in 2011.** See also Sixty Minutes, Gas drilling horror story (Nov. 14, 2010), at <http://www.cbsnews.com/video/watch/?id=7054281n>.

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***Knoll v. GulfTex Operating, Inc.*, No. 2010-10345-16 (431<sup>st</sup> Dist. Ct., Denton County, Tex., Oct. 22, 2010)**

Michael and Susan Knoll are surface owners who lived near a well and a compressor station. The Knolls allege that drilling and hydraulic fracturing operations created odors, contaminated water in their well, and caused headaches and nosebleeds. S.C. Gwynne, Elizabeth Souder and Gary Jacobson, Dallas Morning News, *In Midst of Gas Boom, Anti-Drilling Movement Gains Ground*, Dallas Morning News (May 15, 2011), <http://www.dallasnews.com/business/energy/20110515-in-midst-of-gas-boom-anti-drilling-movement-gains-ground.ece>. In March and April of 2012, the district court dismissed several of the defendants. **On May 7, 2012, the remaining parties settled, and the case was closed on May 16, 2012.** See <http://justice1.dentoncounty.com/PublicAccess/CaseDetail.aspx?CaseID=1201683> (docket sheet).

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***Heinkel-Wolfe v. Williams Production Co., LLC*, No. 2010-40355-362 (362<sup>nd</sup> Dist. Ct., Denton County, Tex., Nov. 3, 2010)**

Margaret and Paige Heinkel-Wolfe claim drilling operations contaminated the water and air on and surrounding their property. In their amended complaint, plaintiffs dropped their negligence claims and allegations of water contamination, but retained causes of action for nuisance and trespass. **The case was settled at mediation on August 14, 2012, and a final judgment entered on August 27, 2012.** Nicholson, *Analysis of Litigation Involving Shale & Hydraulic Fracturing* (June 1, 2014).

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***Sizelove v. Williams Production Co., LLC*, No. 2010-50355-367 (367<sup>th</sup> Dist. Ct., Denton County, Tex., Nov. 3, 2010) (transferred to 431<sup>st</sup> Dist. Ct., Denton County, Tex., Jan 1, 2011)**

John and Jayme Sizelove claim drilling operations and gas compressor stations harmed their health. Plaintiffs allege claims for nuisance and trespass, and seek property damages, damages for mental anguish, and exemplary damages. **This case was settled at mediation on November 9, 2012.** Nicholson, *Analysis of Litigation Involving Shale & Hydraulic Fracturing* (June 1, 2014).

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***Mitchell v. Encana Oil & Gas (USA)*, No. 3:10-cv-02555 (N.D. Tex., Dec. 15, 2010). See 2010 WL 5384210 (complaint)**

Grace Mitchell, a property owner in Johnson County, Texas, alleged her water well was contaminated due to hydraulic fracturing and associated storage of drilling wastes, and brought claims of nuisance, negligence, fraud, trespass, and strict liability. See *Resident Files Lawsuit Against Encana, Chesapeake*, available at <http://www.cleburnetimesreview.com/local/x1112342972/Resident-files-lawsuit-against-Encana-Chesapeake> (Dec. 21, 2010). The fraud and strict liability claims were not included in the plaintiff's amended complaint filed on April 25, 2011. **The case was dismissed on December 27, 2011, pursuant to a settlement agreement.** Nicholson, *Analysis of Litigation Involving Shale & Hydraulic Fracturing* (June 1, 2014).

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***Harris v. Devon Energy Production Company, L.P.*, No. 4:10-cv-00708 (E.D. Tex., Dec. 22, 2010). See 2011 WL 2729242 (Magistrate Recommendation to grant Motion for Partial Dismissal for Failure to State a Claim) (Jun. 14, 2011)**

Doug and Diana Harris sued Devon Energy Production Company in December 2010 for negligence, strict liability, nuisance, and trespass. See pleadings 2010 WL 5384209. Plaintiffs allege that hydraulic fracturing operations near their property caused groundwater contamination, and assert claims of nuisance, trespass, negligence, strict liability, and fraudulent concealment. With respect to fraud, plaintiffs argued that, by concealing the fact that the gray substance in the well water contained chemicals typically found in drilling mud, defendant intended to induce plaintiffs to drill a new well. On June 14, 2011, the U.S. Magistrate recommended that the fraud claim be dismissed because plaintiffs failed to identify any damages which resulted from the alleged false representation. [Plaintiffs did not ask for damages related to the costs of constructing and maintaining the well.] On July 12, 2011, the district court dismissed the fraud claim. **On January 25, 2012, the court dismissed all claims** "on the basis that recent testing of the plaintiffs' groundwater wells showed no contamination present at levels that are toxic for human consumption." Margaret A. Hill, Mary Ann Mullaney, and Heather L. Demirjian, Blank Rome LLP, *United States: Shale Development and Fracking Litigation Trends* (Aug. 7, 2012), at <http://www.law.com/jsp/pa/PubArticlePA.jsp?id=1202564505201&slreturn=20130004165637>.

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***Smith v. Devon Energy Production Co., LP*, No. 3:11-cv-00196 (N.D. Tex., Jan. 31, 2011), transferred, No. 4:11-cv-00104 (E.D. Tex., Mar. 7, 2011). See 2011 WL 474901 (complaint) (Jan. 31, 2011); and 2011 WL 2936737 (amended complaint) (Mar. 21, 2011)**

Damon and Amber Smith of Denton County, Texas, allege that fracturing fluids and associated drilling wastes contaminated their water well. The case was transferred to the Eastern District of Texas on March 3, 2011, and the Plaintiffs' first amended complaint was filed on March 21, 2011, asserting trespass, nuisance, and negligence. **On May 25, 2012, the lawsuit was dismissed on plaintiffs' motion.** See Nicholson, *Analysis of Litigation Involving Shale & Hydraulic Fracturing* (June 1, 2014).

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***Eric Dow v. Atmos Energy Corp.*, No. 2011-30097-211 (211th Dist. Ct., Denton County, Tex., Feb. 28, 2011); *Town of Dish v. Atmos Energy Corp.*, No. 2011-40097-362 (362nd Dist. Ct., Denton County, Tex., Feb. 28, 2011); *William Sciscoe v. Atmos Energy Corp.*, No. 2011-70084-431 (431st Dist. Ct., Denton**

**County, Tex., Feb. 28, 2011); transferred and consolidated as *William Sciscoe v. Enbridge Gathering (North Texas), L.P.*, No. 96-254364-11 (96th Dist. Ct., Tarrant County, Tex.). Decision remanding case to trial court, 519 S.W.3d 171 (Court of Appeals, Amarillo, No. 07-13-00391, June 1, 2015), reversed, No. 15-0613 (Tex. Sup. Ct., May 19, 2017).**

Appellants, eighteen homeowners and the Town of DISH, filed three separate lawsuits against six energy production companies alleging that noise, light, odors, and chemical particulates emanating from Appellees' facilities caused a nuisance and constituted a trespass, thereby entitling them to recover monetary damages. The three lawsuits were transferred to Tarrant County and consolidated into one lawsuit in the 96th District Court bearing cause number 96–254364–11. The Town of DISH sought recovery of damages occasioned by the erosion of its tax base due to declining property values, together with recovery of “damages” of \$1,000 per day for trespass and exemplary damages. The remaining Appellants sought recovery of damages for (1) the loss of market value of their properties, (2) annoyance and discomfort, (3) injury to personal property, (4) mental anguish, and (5) exemplary damages. None of Appellants sought injunctive relief. The trial court dismissed the complaints.

Court of Appeals – On June 1, 2015, the court of appeals reversed in part. 519 S.W.3d 171. It rejected the argument of the defendants-appellees that the cause of action for trespass by airborne particulates requires both a physical entry and a significant deposit of particulate materials on the properties. The court held that the migration of airborne particulates can constitute an actionable trespass, but noted that, to establish an actionable trespass, appellants on remand must establish that the particulates emanated from the activities of Appellees and that Appellants sustained some compensable injury as a result thereof. The court of appeals also rejected the arguments that the trespass and nuisance claims are (1) pre-empted by regulatory statutes; and (2) are non-justiciable under the political question doctrine. According to the court, the arguments fail "because Appellants simply do not seek to alter or change the emission standards under which Appellees operate. Instead, Appellants seek to compel Appellees to compensate them for actual damages they have sustained as a result of the lawful operations of Appellees. Just because Appellees are operating their natural gas compression facilities within the applicable regulatory guidelines does not mean that Appellants have not suffered compensable injuries as a result of those operations. Nor does it mean that Appellees are somehow immune from liability for damages they may have caused just because they have a regulatory permit. Stated another way, just because you are allowed by law to do something, does not mean that you are free from the consequences of your action. While the appropriateness of Appellees' conduct according to applicable regulations may affect by the nature and extent of Appellants' compensation (e.g., the inability to recover exemplary damages), regulation is not a substitute for prudent operation." The court reversed the lower court and allowed claims for monetary compensation limited to the past diminution in the value of their properties to proceed. The court affirmed the trial court's order granting summary judgment as to claims seeking recovery of monetary damages for prospective injuries, mental anguish, or \$1,000 per day for trespass, and to the extent the claims seek to abate an alleged nuisance or ongoing trespass. 2015 WL 3463490 (June 1, 2015).

Texas Supreme Court – On May 19, 2017, the Texas Supreme Court reversed. It held that, because the plaintiffs began complaining about the noise and odor emanating as early as 2006, but did not sue until 2011, the two-year statute of limitations barred their claims alleging trespass and nuisance injuries. According to the court, the defendants "have proven that any legal injury the residents suffered commenced, at the latest, in May 2008. There is no objective evidence showing that the complained-of conditions worsened in the summer of 2009. Even if they did, the residents' claims had already accrued more than two years before they sued." The court also held that summary judgment should have been granted to Enterprise because it

presented evidence showing its metering station was not be a source of the residents' complaints, and "no evidence rebuts Enterprise's contention it is not one of the alleged offenders." See No. 15-0613. **The matter is closed.**

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***Parr v. Aruba Petroleum, Inc.*, No. CC-11-01650-E (Dallas County Ct., Tex., Mar. 8, 2011), jury verdict overturned, 2017 WL 462340, 05-14-01285-CV (Tex. Fifth Court of Appeal, Feb. 1, 2017)**

Robert and Lisa Parr claim natural gas drilling operations in Wise County, Texas, including releases, spills, emissions, and discharges of hazardous gases, exposed their family and their property to hazardous gases, chemicals, and industrial wastes. Plaintiffs alleged gross negligence, negligence per se, common law negligence, private nuisance, and trespass. They contended that numerous wells within two miles of their home put contaminants in the air that caused extensive health problems like memory loss, sores and bleeding while also killing pets and causing livestock to give birth to newborns with birth defects. Air quality tests by a specialist the family hired found benzene, toluene, ethylbenzene and xylene, toxic chemicals found in petroleum products. The Parrs sued Aruba Petroleum and eight other companies involved with drilling in the area for a total of \$66 million in damages. Some companies were dropped from the suit, while others reached undisclosed settlements with the family. Aruba was the remaining defendant.

**Jury verdict** – On April 22, 2014, after a trial of two and a half weeks, **a jury awarded \$2.925 million to the plaintiffs.** The jury returned its 5-1 verdict confirming that Aruba Petroleum “intentionally created a private nuisance” through its drilling, fracking and production activities at 21 gas wells near the Parrs' Wise County home over a three-year period between 2008-2011. The verdict included \$275,000 for the Parr's property loss of market value and \$2 million for past physical pain and suffering by Robert and Lisa Parr and their daughter, \$250,000 for future physical pain and suffering, \$400,000 for past mental anguish. The jury did not find actual malice in Aruba's actions, but found that the energy company's activities were “intentional” thereby creating a “private nuisance” under Texas law. This has been called the first anti-fracking verdict in the United States, although the complaint concerned not just fracking but all gas production operations. Aruba noted that it is in compliance with Texas air quality rules, but a nuisance claim, as noted by Florida State law professor Hannah Wisemen, “is specifically in addition to the public law.” The case is also notable because it concerned air emissions, whereas much of the debate around fracking has focused on its potential to pollute groundwater.

**Trial court** – The trial court denied Aruba Petroleum's motion for judgment notwithstanding verdict on June 19, 2014. Final judgment was filed July 9, 2014. On August 5, 2014, Aruba filed a motion for a new trial, arguing that one of the jurors was statutorily disqualified; the damages awarded by the jury are excessive; and the evidence is legally and factually insufficient to support the judgment. The motion was denied on September 11, 2014.

**Court of Appeals overturns jury verdict** – On February 1, 2017, the Fifth Court of Appeals in Dallas threw out a \$2.9 million judgment, agreeing with Aruba (which filed for bankruptcy protection in November 2016) that there is no legally sufficient evidence of intent that would support the jury's finding that Aruba intentionally created a private nuisance. According to the court, "None of the evidence cited by the Parrs of the noise, light, odors, and other claimed effects of Aruba's operations established that Aruba actually intended or desired to create an interference on the Parrs' land that they claim was a nuisance or actually knew or believed that an interference would result." The panel

issued a "take-nothing judgment" after finding that the family's claims did not meet the standards for a private nuisance claim. 2017 WL 462340.

Citing the Texas Supreme Court's 2016 ruling in *Crosstex v. Gardiner*, 505 S.W.3d 580, which set a new standard for nuisance claims, the appellate court found the Parrs had not proved Aruba intended to create problems for the family. "None of the evidence cited by the Parrs of the noise, light, odors and other claimed effects of Aruba's operations established that Aruba actually intended or desired to create an interference on the Parrs' land that they claim was a nuisance or actually knew or believed that an interference would result," the court said. Aruba successfully argued that generalized grievances about its drilling activity near the Parr property, including some anonymous complaints from plaintiff Lisa Parr that did not specifically identify their property, were not enough to alert the company to problems specific to the Parr family or its land.

The Parrs had argued Aruba need not have intended to specifically harm them, citing evidence Aruba was aware that its operations at well sites resulted in noise, odors, ground vibrations and bright gas flaring. They also pointed to testimony from Aruba's corporate representative that the drilling was "probably" "a nuisance to people living in the community close to that drill site." But the appellate court held none of the Parrs' evidence established Aruba actually intended to create an interference on their specific land, or that Aruba believed such an interference would result from its drilling activity. The court entered a take-nothing judgment against the Parrs.

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***Lipsky v. Range Resources Corp.*, CV11-0798 (District Court, Parker County, Tex., June 20, 2011), 2012 WL 3600014 (Court of Appeals of Texas, Fort Worth, Aug. 23, 2012) (dismissing interlocutory appeal), 411 S.W.3d 530 (Court of Appeals of Texas, Fort Worth, Apr. 22, 2013) (opinion); on appeal, 460 S.W.3d 579 (Texas Supreme Court, Apr. 24, 2015)**

In the summer of 2010, Shyla and Steven Lipsky became upset after Range Production Company and Range Resources Corporation had begun to extract gas from the Barnett Shale formation near their home. Plaintiffs, who created a YouTube video of a Steven Lipsky holding a flaming hose connected to his well, believed Range contaminated their water well. In December of 2010, the EPA issued an emergency order against Range, stating that the hydrocarbons from Range's operations may have caused or contributed to the contamination. The Texas Railroad Commission in March 2011 issued an order 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 a shallow geological formation. In June of 2011, plaintiffs filed a lawsuit in Parker County District Court, alleged that the fracking operations were negligent, grossly negligent, and a nuisance. Range moved to dismiss all claims as an improper collateral attack on the Railroad Commission's ruling, and filed a counterclaim against the Lipskys and environmental consultant Alisa Rich, alleging defamation, business disparagement, and a civil conspiracy.

On January 30, 2012, the Parker County court granted Range's motion to dismiss, agreeing that the Lipskys' claims were an improper collateral attack on the Commission's determination. The court also declined to dismiss Range's claims against the Lipskys and Rich by denying their motions to dismiss under the Texas Citizens Participation ("Anti-Slapp") Act, which protects citizens who petition or speak on matters of public concern from retaliatory lawsuits. While this matter was on appeal, the EPA in March 2012 withdrew its administrative order against Range. See Joint Stipulation of Dismissal Without Prejudice, *United States v.*



Range Prod. Co., No. 3:11–CV–00116–F (N.D.Tex. Mar. 30, 2012). On August 23, 2012, the Texas Court of Appeals dismissed the interlocutory appeal of the Lipskys and Rich for want of jurisdiction. The court, however, allowed the challenge to proceed as an original proceeding. 411 S.W.3d at 536. The Texas Supreme Court declined to review this decision in December 2012.

On April 22, 2013, the Court of Appeals determined that the Texas Citizens Participation Act (TCPA) required the dismissal of Range’s claims against Shyla Lipsky and Alisa Rich. 411 S.W.3d at 554. The court also set aside two claims against Steven Lipsky (aiding and abetting and civil conspiracy), but let stand two other claims: defamation and business disparagement. 411 S.W.3d at 556. Both Range and Steven Lipsky appealed. While their appeals were pending, the Texas Railroad Commission in February 2014 investigated nine new water contamination complaints filed from residents in Steven Lipsky's neighborhood, including one from Lipsky. Mike Soraghan, E&E Energywire, *Texas regulators to finish latest Range investigation this month* (Feb. 6, 2014), at <http://www.eenews.net/energywire/2014/02/06/stories/1059994116>.

On April 24, 2015, the Texas Supreme Court affirmed, denying both petitions. 460 S.W.3d 579; 2015 WL 1870073. With respect to Range’s business disparagement claim, the court did disagree with the court of appeals “that general averments of direct economic losses and lost profits, without more, satisfy the minimum requirements of the TCPA.” With regard to Range’s defamation claim, the court agreed with the court of appeals that “there was some evidence of a defamatory statement concerning Range sufficient to defeat Lipsky’s TCPA motion to dismiss.” Turning to Range’s cross-appeal, the Texas Supreme Court affirmed that determination that “the TCPA required the dismissal of Range’s claims against Steven Lipsky’s wife and environmental consultant and Range’s conspiracy claim against all parties.”

**Subsequent proceedings in the Lipsky case** – On March 8, 2017, the court granted the parties' Joint Motion to Dismiss with Prejudice, having been advised that the parties reached a mutually satisfactory agreement to resolve this litigation. **The case is settled.**

**Subsequent proceedings in the Rich case** – On remand, the trial court dismissed Range’s claims against Alisa Rich and awarded \$470,012.41 in attorney’s fees pursuant to the TCPA. The trial court denied Rich’s motion for \$30 million in sanctions against Range. On November 22, 2017, the court of appeals held that the trial court did not abuse its discretion by denying the motion for sanctions. *Rich v. Range Resources Corp.*, No. 02-17-00090-CV (Court of Appeals of Texas, Fort Worth, Nov. 22, 2017).

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***Marsden v. Titan Operating, LLC*, No. CV-11-0842 (415th Dist. Ct., Parker County, Tex, Jun. 27, 2011), appeal, No. 02–14–00303–CV (Court of Appeals of Texas, Fort Worth, Sept. 17, 2014), reversed, 2015 WL 5727573 (Aug. 27, 2015)**

After signing an oil and gas lease in 2004, Marcus C. Marsden, Jr. and Laura B. Marsden brought an intentional nuisance claim in June 2011, alleging that Titan’s drilling activities were substantially interfering with the use and enjoyment of their property. The drilling site for the first well is 176 feet from the house, and the well is about 300 feet away. The Marsdens alleged that Titan’s drilling activities had caused constant compressor noise, truck traffic, and truck pump noises. A jury found that Titan had intentionally created a temporary private nuisance and that the Marsdens were not estopped from complaining about the nuisance based on their acceptance of benefits. The jury awarded \$18,000 separately to Marcus and Laura. The trial court entered a final judgment that, in accordance with the jury’s verdict, awarded Marcus and Laura \$18,000 each. On August 27, 2015, the **court of appeals reversed**, finding as a matter of law that quasi-estoppel

principles preclude the Marsdens from negotiating and signing an oil and gas lease, accepting benefits under that lease and under a related transaction, and later maintaining a nuisance suit against Titan for acts that the lease and the related transaction contemplated or authorized. The lease allowed Titan to drill within 200 feet of any residence or barn.

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***Crowder v. Chesapeake Operating, Inc.*, No. 2011-008169-3 (County Court at Law No. 3, Tarrant County, Texas, Nov. 7, 2011), on appeal, 02-14-00323-CV (Texas Second Court of Appeals); *Mann v. Chesapeake Operating, Inc.*, No. 2011-008232-3 (County Court at Law No. 3, Tarrant County, Texas, Nov. 8, 2011); *Anglim v. Chesapeake Operating, Inc.*, No. 2011-008256-1 (County Court at Law No. 3, Tarrant County, Texas, Nov. 9, 2011), on appeal, 02-14-00218-CV (Texas Second Court of Appeals); *Gutierrez v. Chesapeake Operating, Inc.*, No. 2011-008274-3 (County Court at Law No. 3, Tarrant County, Texas, Nov. 10, 2011) [ search at <https://odyssey.tarrantcounty.com/default.aspx> ]**

Samuel Crowder and Jane Crowder of Tarrant County sued Chesapeake Operating, complaining that the noise, odors and truck traffic 165 feet from their backyard fence from a well site were a nuisance. On May 23, 2014, a Tarrant County jury awarded \$20,000 after finding that the three wells at the site constituted a nuisance. The six-person county court jury found that Chesapeake intentionally created a nuisance with its well site, and that the facility was abnormal and out of place for its environment. The couple asked for \$108,000 in past and future damages, but the jury found the site was a temporary nuisance, rather than permanent, and did not award future damages. **Chesapeake's appeal was dismissed on December 4, 2014, pursuant to the settlement agreement in the Crowder case** reached by the litigants.

A jury found for the defendant in the *Anglim* lawsuit on April 21, 2014. See *Tarrant jury awards \$20,000 to homeowners in nuisance suit against Chesapeake*, Fort Worth Star-Telegram (May 24, 2014), at <http://www.star-telegram.com/2014/05/23/5843320/tarrant-jury-awards-20000-to-homeowners.html>. *Anglim* appealed, but **on December 4, 2014, the appellate court remanded the Anglim case pursuant to the settlement agreement** reached by the litigants.

**The Gutierrez lawsuit was settled in November 2014.**

**On December 10, 2014, an order of dismissal with prejudice was entered in the Mann lawsuit.**

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***Beck v. ConocoPhillips Company*, No. 2011-484 (123<sup>rd</sup> Dist. Ct. Panola County, Tex., Dec. 1, 2011)  
*Strong v. ConocoPhillips Company*, No. 2011-487 (123<sup>rd</sup> Dist. Ct. Panola County, Tex., Dec. 2, 2011)**

Carroll Beck, Bobby Strong, and others allege ConocoPhillips contaminated their water wells by hydraulic fracturing and by disposing fracking waste near their properties. Causes of action are for nuisance, trespass, and negligence. Plaintiffs claim that defendant failed to use a reasonable alternative means of recovering the minerals. Plaintiffs have asked the court for an injunction precluding future drilling and fracking activities near their land. On March 28, 2012, the court denied defendant's request for a "Lone Pine" order in the *Beck* case and a motion to dismiss in the *Strong* case. Motions for summary judgment in both cases were subsequently denied. See Nicholson, *Analysis of Litigation Involving Shale & Hydraulic Fracturing* (June 1, 2014). On February 22, 2015, the two cases were consolidated. **The cases were dismissed with prejudice on May 27, 2015.** See <http://odysseypa.tylerhost.net/Panola/CaseDetail.aspx?CaseID=67140>.

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***Cerny v. Marathon Oil Corp.* No. 13-00005-00118-CVK (218<sup>th</sup> Dist. Ct. Karnes County, Tex., May 21, 2013), removed, No. 5:13-cv-562-XR (W.D. Tex. June 28, 2013); remanded; on appeal, 480 S.W.3d 612 (Texas Fourth Court of Appeals, October 7, 2015, affirming judgment for defendants).**

Michael and Myra Cerny bring causes of action for private nuisance, negligence, and negligence per se, alleging that hydraulic fracturing is causing foundation damage and sinkholes, and that Defendants have released strong odors and noxious chemicals into the environment causing injury. See <http://s3.documentcloud.org/documents/1017919/cernys-lawsuit.pdf>. On August 6, 2013, the federal district court concluded that the negligence claim – that defendants are allowing odors and chemical compounds onto the plaintiffs’ property – is preempted by the Clean Air Act inasmuch as that claim would prohibit emissions in contravention of that allowed by the Clean Air Act and implementing regulations. On October 7, 2013, the court vacated an earlier order and remanded the case to state court. On or about August 15, 2014, the District Court granted motions to strike the majority of the Cernys’ summary judgment evidence as inadmissible hearsay, unqualified lay opinions, and unreliable, speculative, and conclusory expert opinions. The trial court then granted both the defendants' no-evidence summary judgment motions and traditional summary judgment motions.

On October 7, 2015, the **Texas Court of Appeals**, San Antonio, **affirmed** the trial court’s judgment. See 480 S.W.3d 612. The appellate court held that the Cernys’ nuisance and negligence claims are in the nature of toxic tort claims which fall outside a lay person’s general knowledge and experience, and must therefore be proven with expert testimony. The court noted that "each of the Cernys suffered from multiple chronic health conditions that existed prior to the defendants’ commencement of oilfield operations" and that "the Cerny’s home had foundation damage prior to the defendants’ operations." The court also held that "other companies’ emissions are plausible potential causes of the Cernys’ personal injuries and property damage." The Cernys failed "to present more than a scintilla of expert evidence that emissions from a Marathon and/or Plains facility caused their injuries and property damage." As to the portion of the Cernys’ nuisance claim, the court likewise concluded that they failed to raise "more than a scintilla of probative evidence that Marathon and Plains were the proximate cause of the dust, noise, traffic, and foul odors experienced by the Cernys." Justice Luz Elena D. Chapa, Justice, dissented in part to the majority’s judgment. To the extent that the nuisance claims were not based on the migration of hazardous chemicals and wastes onto their property, but also alleged excessive noise, foul odors, dust pollution, and abnormal traffic, Justice Chapa stated that the latter types of nuisance claims are within common knowledge and experience, and that the record contains some admissible evidence connecting the alleged foul odors to the conduct of one of the defendants.

On January 6, 2016, the petition for review was filed with the Texas Supreme Court. No. 16-0011. On December 2, 2016, the Court denied the petition for review. **The case is closed.**

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***Finn v. EOG Resources, Inc.*, No. C201300343 (18<sup>th</sup> Dist. Ct. Johnson County, Tex., July 30, 2013)**

Dan and Jan Marie Finn and Ed and Norma Specht of Alvarado, Texas (south of Forth Worth) claim fracking damaged their real estate and homes. The defendants are EOG Resources Inc., Shell Trading Co., Sunoco Partners Marketing and Terminals, L.P., and Enterprise Crude Oil LLC. The plaintiffs assert that hydraulic fracturing triggered earthquakes that caused significant structural damage. The case, which asserts claims

of negligence, nuisance and strict liability, may become a class-action lawsuit. See Nicholas Sakelaris, *Quakes Caused by Frack Water Disposal Damaged Homes*, <http://www.bizjournals.com/dallas/news/2013/08/02/lawsuit-says-quakes-caused-by-frack.html>; and Tammye Nash, *Property owners sue for fracking damages*, Cleburne (TX) Times-Review (09/01/13), at <http://www.cleburnetimesreview.com/local/x1664875143/Property-owners-sue-for-fracking-damages/print>; and Jordan Fletcher, *The fracking-earthquake connection*, The Dallas Morning News (Dec. 8, 2013), at <http://www.dallasnews.com/opinion/sunday-commentary/20131206-the-fracking-earthquake-connection.ece>.

**On April 13, 2015, the case was dismissed. It is not known if a settlement was reached.** See <http://pa.johnsoncountytexas.org/PublicAccess/Search.aspx?ID=200&NodeID=200%2c210%2c220%2c230&NodeDesc=All+District+Courts>.

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***Dueling v. Devon Energy Corp.*, CV12-0843 (43rd District Court, Parker County, Tex., Oct. 10, 2013), removed, No. 4:14-cv-00325-Y (N.D. Tex., May 9, 2014), dismissed (Oct. 2, 2014), appealed, No. 14-11177 ( U.S. Court of Appeals, Fifth Circuit, Oct. 27, 2014), remanded, 623 Fed.Appx. 127 (Aug. 14, 2015)**

Plaintiffs assert that Devon Energy’s oil and gas drilling site, across the street from their homes in a residential area, is noisy and disruptive, and interferes with their use and enjoyment of their properties. The plaintiffs filed their lawsuit in state court within the two-year statute of limitations for nuisance claims, but named Devon Energy Corporation instead of Devon Energy Production Co. LP. After being added as a defendant, DEPCO removed the case to federal court and was granted judgment on the pleadings based on failure to file within the statute of limitations. On appeal the plaintiffs successfully argued that the district court abused its discretion in denying leave to amend the complaint. 623 Fed.Appx. 127 (Aug. 14, 2015). The parties settled on November 7, 2016, and the case was dismissed on November 30, 2016. **The case is closed.**

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***Nicholson v. XTO/Exxon Energy, Inc.*, No. 4:13–CV–00899 (N.D. Tex., Nov. 6, 2013). See 2015 WL 1005338 (order dismissing case for lack of jurisdiction, Mar. 4, 2015)**

Pro se plaintiff Daniel Nicholson seeks damages, claiming that his mother’s death was due to the cumulative effects of exposure to chemicals and silica used during hydraulic fracturing drilling, as well as the venting of compressed gas in close proximity to his mother’s house. Nicholson also claimed such operations caused property damage and injured other family members living in the house, and contributed to the deaths of four other neighbors. **On March 4, 2015, the district court dismissed the case** for lack of subject matter jurisdiction due to lack of diversity of citizenship.

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***Alexander v. Eagleridge Operating, LLC*, No. 14-01430-393 (393rd Dist. Ct., Denton County, Tex., Feb. 28, 2014)**

John and Linda Alexander and forty-one other residents of Denton, Texas, seek up to \$25 million in damages against Eagleridge Operating, LLC, and Eagleridge Energy, LLC, for drilling operations within a few hundred feet of their homes. The residents complain of offensive air emissions and loud and constant noises

from drilling and operation of wells. In addition to claiming the sites are private nuisances, the suit accuses the company of trespassing by contaminating the air. EagleRidge says the permitted wells existed prior to any homes being built in the nearby housing developments. The pad sites are within 300 feet of residences. See Dianna Hunt, Denton Record-Chronicle, *Homeowners Seek up to \$25 Million in Damages from EagleRidge*, (March 9, 2014) at <http://www.dentonrc.com/local-news/local-news-headlines/20140309-lawsuit-filed-against-company.ece>; and <http://justice1.dentoncounty.com/PublicAccess/default.aspx> (court docket). **On May 28, 2014, the court granted the plaintiffs' nonsuit without prejudice against all defendants.**

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***Murray v. EOG Resources, et al.*, No. DC-15-08865 (95th Dist. Ct., Dallas County, Tex., Aug. 6, 2015); transferred to Tarrant County**

Cody Murray claims EOG Resources, Fairway Resources LLC, and three subsidiaries of Fairway, are responsible for burns from a methane explosion near his house that burned himself and members of his family, and allegedly caused permanent damage. The petition alleges that the high-level methane contamination of the Murrays' water well resulted from natural gas drilling and extraction activities. The Texas Railroad Commission is investigating the accident. See <http://thinkprogress.org/climate/2015/08/12/3690730/texas-lawsuit-methane-explosion-fracking/>; and <http://www.eenews.net/stories/1060038097> (Jun. 1, 2016 article on Commission's investigation).

On March 22, 2016, the court granted the plaintiffs' notice of partial nonsuit and dismissed CDM Resource Management, Regency Gas Services, and The Goldman Sachs Group. On March 25, 2016, pursuant to an unopposed motion, the Court transferred the case to Tarrant County. According to one source, after EOG Resources settled, the Murrays' attorneys turned their attention to Fairway Resources, a subsidiary of Goldman Sachs, claiming the company's well was the source of the gas that ignited. See <https://www.texastribune.org/2017/03/06/years-after-well-explosion-texas-family-still-waiting-answers-railroad/> According to another source, trial is set for October 12, 2017. See *Experts link gas well to explosion that injured family*, at <http://www.eenews.net/stories/1060049835> (Feb. 14, 2017). **The case is pending.**

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## WEST VIRGINIA

***Magers v. Chesapeake Appalachia, LLC*, No. 12-C-36H (Circuit Ct., Marshall County, W. Va., Feb. 24, 2010), removed, No. 5:12-CV-49 (N.D. W. Va.). See 2012 WL 1202801 (Notice of Removal) (Mar. 30, 2012); 2013 WL 4099925 (Order granting CNX Gas Company's motion to dismiss); and 2014 WL 4352084 (Sept. 2, 2014, order granting summary judgment to Chesapeake on negligence claim)**

Plaintiffs allege that the drilling activities by Chesapeake Appalachia on neighboring lands contaminated their well water. Plaintiffs later amended their complaint and added CNX Gas Company and Columbia Gas Transmission, arguing that CNX's shallow gas wells and Columbia's gas storage field also caused methane contamination of their well water. On April 10, 2013, the district court denied Columbia Gas Transmission's motion to dismiss, but granted its motion for a more definite statement. See opinion and order at [http://www.arnoldporter.com/resources/documents/Magers%20v%20Chesapeake%20Appalachia%20\(Apr%202013%20order\).pdf](http://www.arnoldporter.com/resources/documents/Magers%20v%20Chesapeake%20Appalachia%20(Apr%202013%20order).pdf). On August 13, 2013, the court granted CNX's motion to dismiss. The court held that Plaintiffs cannot rely on West Virginia statutes intended to protect surface owners but not adjacent

owners. Another West Virginia statute, controlling the reclamation of drilling sites, does not provide a private cause of action, and the court refused to imply any causes of action. In addition, Plaintiffs failed to sufficiently plead the breach of a duty owed by CNX, and thus failed to state a common law negligence claim. On September 2, 2014, Columbia Gas Transmission, L.L.C., was granted summary judgment. Columbia's expert opined that the gas in the water well was from a biogenic source, that Columbia's storage well was not the source of the gas in the well, and that the plaintiffs had no explanation as to how Columbia's operations could have been the cause of the gas in those areas. The court agreed. The court noted that, in a multi-defendant negligence action, although a plaintiff has the burden of proving that a defendant's breach of a particular duty of care was a proximate cause of his or her injuries, the plaintiff does not have to show that such breach was the sole proximate cause of the injury. However, a mere possibility of causation is not sufficient to allow a reasonable jury to find causation. The court held that, in the present case, "it has not been shown that there is more than a mere possibility that Columbia was the source of the methane gas in the plaintiffs' well." 2014 WL 4352084. **On October 7, 2014, the action was dismissed pursuant to a settlement agreement.**

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***Hagy v. Equitable Production Co., No. 10-c-163 (Circuit Ct., Jackson County, W. Va., Oct. 26, 2010), removed, No. 2:10-cv-01372 (S.D. W. Va., Dec. 10, 2010). See 2012 WL 713778 (denial of motion for a Lone Pine order) (Mar. 5, 2012); 2012 WL 1813066 (granting Halliburton's summary judgment motion) (May 17, 2012); and 2012 WL 2562856 (granting BJ Services Company's summary judgment motion) (Jun. 29, 2012), affirmed, 2013 WL 5529753 (4<sup>th</sup> Cir., Oct. 8, 2013).***

The Hagy family filed suit in state court in October 2010, alleging contamination of the family's property and water well due to defendants' natural gas wells. The case was removed to federal district court. Plaintiffs' causes of action include negligence, nuisance, strict liability, trespass, and medical monitoring trust funds. See 2010 WL 8767305. 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 individuals who no longer live 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. The court on May 17, 2012, granted Halliburton's motion for summary judgment. See 2012 WL 713778. On June 29, 2012, the court granted summary judgment to BJ Services Company, USA, the remaining defendant at that time. See 2012 WL 2562856. Plaintiffs claim BJ Services negligently cemented shale-gas wells, but the court held the plaintiffs failed to provide evidence of any wrongful act. As for trespass, no support was offered for the assertion that fracturing fluids and other chemicals intruded upon plaintiffs' aquifer. Plaintiffs also failed to provide sufficient evidence to avoid summary judgment on their private nuisance claim. On July 23, 2013, pending claims were dismissed and plaintiffs appealed to the U.S. Court of Appeals for the Fourth Circuit (No. 12-1926), seeking review of the orders granting summary judgment to BJ Services Company USA and Equitable Production Company. Nicholson, *Analysis of Litigation Involving Shale & Hydraulic Fracturing* (June 1, 2014). On October 8, 2013, the Fourth Circuit affirmed in an unpublished opinion. 2013 WL 5529753. The court of appeals held that **summary judgment was proper** on the negligence and trespass claims against BJ Services, and the release agreement with EQT covered the claims and was not obtained by fraud. **The case is closed.**

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***Teel v. Chesapeake Appalachia, LLC, No. 10-C-94DH (Circuit Ct., Wetzel County, W. Va., Dec. 8, 2010), removed, No. 5:11CV5 (N.D. W. Va., Jan. 6, 2011). See 906 F.Supp.2d 519 (partial summary judgment to defendant) (Oct. 25, 2012), affirmed, 2013 WL 5647638 (4<sup>th</sup> Cir., Oct. 17, 2013)***

Although there is no mention of hydraulic fracturing, the surface owners claimed Chesapeake caused damage to their land by depositing drilling waste and other material in pits. Plaintiffs raised claims of nuisance, trespass, negligence, strict liability, intentional infliction of emotional distress, and negligent infliction of emotional distress. On October 25, 2012, the defendant's motion for partial summary judgment was granted in part and denied in part, the defendant's motion to strike was denied; and the parties joint stipulation of dismissal was approved. The issue presented was whether Chesapeake's use of the plaintiffs' land was fairly necessary to the extraction of gas. The lease executed by the mineral interest owner did not provide Chesapeake with the explicit right to dispose of drill cuttings and other materials within in waste pits on the land. The court nevertheless held that the placement of drill cuttings in pits on the property was suitable and reasonable to the natural gas operations. The court rejected the argument that the use of the pits was unreasonable because a closed-loop system existed as an alternative, noting that cases cited by plaintiffs dealt with other minerals and practices, and consequently did not discuss drill cutting pits created in connection with natural gas wells.

On October 17, 2013, the **Fourth Circuit affirmed** in an unpublished opinion. 2013 WL 5647638. The court of appeals relied on *Whiteman v. Chesapeake Appalachia, LLC*, 729 F.3d 381 (4th Cir. Sept. 4, 2013), which held that "a claim for trespass under West Virginia common law can only lie if one's entry upon the land of another – or one's leaving a thing upon the land of another – is without lawful authority." When the surface owner claims trespass based on the mineral estate owner's activities, the burden is on the surface owner to show a lack of reasonable necessity or a substantial burden. The generalized evidence regarding mining operations did not satisfy the fact-intensive inquiry into the reasonable necessity of Chesapeake's actions on the Teels' property. The Teels also failed to produce evidence plausibly suggesting that Chesapeake's operations impose a substantial burden on their property. **The case is closed.**

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***Whiteman v. Chesapeake Appalachia, LLC*, No. 10-C-101K (Circuit Ct., Wetzel County, W. Va., Feb. 7, 2011), removed, No. 5:11-cv-00031 (N.D. W.Va. Feb. 23, 2011). See 873 F.Supp.2d 767 (N.D. W. Va., Jun. 7, 2012) (Plaintiffs' motion for partial summary judgment denied, defendant's motion for summary judgment granted in part and denied in part); affirmed, 729 F.3d 381 (4th Cir., Sep 04, 2013)**

Martin and Lisa Whiteman, owners of surface rights to land, brought a state-court action against the holder of subsurface mineral rights in land, asserting nuisance, trespass, strict liability, negligence, and other claims arising from holder's construction and use of drill cutting pits on land. After removal, the district court held, on June 7, 2012, that (1) the construction and use of drill cutting pits did not constitute trespass; (2) the parties' damage release agreement did not bar owners' claims against holder; (3) the West Virginia Oil and Gas Production Damage Compensation Act did not prevent surface owners from recovering damages against holder under common law; and (4) the owners stated common-law damages claims against holder. 873 F.Supp.2d 767. On September 4, 2013, **the Fourth Circuit affirmed**. 729 F.3d 381. The court of appeals concluded that "the district court was correct to hold that creating drill waste pits was reasonably necessary for recovery of natural gas and did not impose a substantial burden on the Whitemans' surface property ...." Id. at 394. **The case is closed.**

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***Rine v. Chesapeake Appalachia, LLC*, No. 11-cv-00004 (N.D. W. Va., Apr. 10, 2011)**

Larry and Jane Rine claim gas wells and associated waste ponds led to various chemicals contaminating their property and causing emotional distress. **An out of court settlement was reached, and the case was dismissed on July 7, 2011.** Source: Earthjustice, *Fracking Damage Cases and Industry Secrecy*.

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***Bombardiere, Sr. v. Schlumberger Technology Corp.*, No. 1:11-cv-00050 (N.D. W. Va., Apr. 14, 2011). See 2011 WL 2443691 (N.D. W. Va., Jun. 14, 2011) (Order Denying Motion to Transfer Venue); and 934 F.Supp.2d 843, 2013 WL 588940 (N.D. W. Va., Feb. 13, 2013) (excluding testimony of plaintiff's medical expert and dismissed medical monitoring claim)**

This is a lawsuit brought by a worker who was exposed to chemicals while performing hydraulic fracturing near Waynesburg, Pennsylvania. The plaintiff claims he handled fracking chemicals without training or protective gear and developed an increased risk of cancer, psychological trauma, and other disorders. After defendants removed the action to federal district court, a motion was filed to transfer venue to the Western District of Pennsylvania. The court agreed that Pennsylvania tort law applied, but held that "the balance of the factors for transfer are strongly in favor of not transferring this action." In April 2012, the district court vacated a protective order by a federal magistrate regarding the dissemination of Schlumberger's trade secrets in three of its fracking chemicals. On January 31, 2013, the district court ruled on Schlumberger's motions for summary judgment. 2013 WL 12143886. Summary judgment was granted on Count One (negligence, willful, wanton and reckless misconduct); Court Four (agency); and Count Eight (punitive damages). Plaintiff withdrew Count Five (strict liability/ultrahazardous activity; Count Six (preparation and use of proprietary chemical fracking fluids ); and Count Seven (wrongful interference with employment and wrongful interference with protected property interests). The district court declined to grant summary judgment on Count Two (alter ego). See

[http://www.arnoldporter.com/resources/documents/Bombardiere%20v%20Schlumberger%20Tech%20Corp%20\(STC%20SJ%20Jan%2031%202013\).pdf](http://www.arnoldporter.com/resources/documents/Bombardiere%20v%20Schlumberger%20Tech%20Corp%20(STC%20SJ%20Jan%2031%202013).pdf). On February 1, 2013, the court issued an order granting in part, and denying as moot in part, CNX Gas Company's motion for summary judgment. 2013 WL 12143887. On February 13, 2013, the Court dismissed the medical monitoring claim. 934 F.Supp.2d 843. On February 21, 2013, the Court granted a defendant's summary judgment on Count Two. 2013 WL 12143831. As to the remaining counts, the jury on March 7, 2013, found for defendant Schlumberger Technology Corporation. **The case was dismissed on April 16, 2013.**

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***Cain v. XTO Energy Inc.*, No. 11-c-165 (Circuit Ct., Marion County, W. Va., June 21, 2011), removed, No. 1:11-cv-000111 (N.D. W. Va., July 22, 2011)**

Although this is not a groundwater contamination case, it concerns the right to drill horizontally. Richard Cain asserts several causes of action, including trespass, unjust enrichment, and quantum meruit. He claims XTO had no right to enter his land and drill well bores horizontally into neighboring lands, and may not pipe gas from neighboring tracts across his land, and build roads on his property. On March 28, 2013, the district court agreed to certify to the West Virginia Supreme Court of Appeals the question of whether a severance deed gives the legal right to drill horizontal wells on a landowner's property in order to extract oil and gas resources from a shared pool of oil and gas estates. See

[http://www.arnoldporter.com/resources/documents/Cain%20v%20XTO%20Energy%20\(Mar%202013\).pdf](http://www.arnoldporter.com/resources/documents/Cain%20v%20XTO%20Energy%20(Mar%202013).pdf) (order); Nicholson, *Analysis of Litigation Involving Shale & Hydraulic Fracturing* (June 1, 2014); and *WV court to consider rights of surface owner*, Hydraulic Fracturing Blog (Apr. 5, 2013), at <http://fracking.fulbright.com/2013/04/WestVirginiaCourtToConsiderRightsOfSurfaceOwner.html>. However,



on May 16, 2013, the court determined that certification was premature. The case was settled in November 2013, and on December 23, 2013, the case was dismissed by joint stipulation.

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***Perna v. Reserve Oil & Gas, Inc.*, No. 11-c-2284 (Circuit Ct., Kanawha County, W. Va., Dec. 21, 2011)**

Louis Perna is a surface owner who asserts that his timber has been destroyed and that fracking fluids were deposited in unlined pits. Causes of action include negligence, trespass, and nuisance. Plaintiff also seeks property damages under the West Virginia Oil and Gas Production Damage Compensation Act. Nicholson, *Analysis of Litigation Involving Shale & Hydraulic Fracturing* (June 1, 2014). On January 9, 2015, an order was entered dismissing the case. **The case is closed.**

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***Dent v. Chesapeake Appalachia, LLC*, No. 12-C-82 (Circuit Ct., Ohio Cty., W. Va., Feb. 27, 2012), removed, No. 5:12CV53 (N.D. W. Va., Apr. 6, 2012), remanded (Feb. 6, 2013). See 2013 WL 461255 (N.D. W. Va., Feb. 5, 2013) (order granting motion to remand and denying motion to dismiss without prejudice)**

David and Sarah Dent claim defendants are liable for damage to their property resulting from natural gas hydraulic fracturing and drilling-related activities performed on a neighbor's property. Plaintiffs sued in state court, raising state law claims of negligence, private nuisance, trespass, the tort of outrage, and invasion of privacy. The case was removed, but the district court, on February 5, 2013, held that it lacked diversity jurisdiction and thus remanded the case to state court. **The case was settled.**

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***Dytko v. Chesapeake Appalachia, LLC*, No. 13-C-14 (Circuit Ct., Ohio Cty., W. Va., ???, 2013), removed, No. 5:13CV150 (N.D. W. VA. Oct. 28, 2013)**

Brian Dytko, the owner of 41 acres in Ohio County, West Virginia, filed suit in 2013 in state court, on behalf of himself and his family, against lessee Chesapeake Appalachia, LLC, asserting claims of fraudulent inducement, private nuisance, negligence/intentional tort, and breach of contract. The case was removed. The amended complaint alleges in part that Brian Dytko has suffered breathing difficulties and problems as a direct result of the dust, dirt and other contaminants being kicked up and/or released into the air and/or surrounding land. On May 30, 2014, the court ordered arbitration of lessor Brian Dytko's claims. After the arbitrator determined the oil and gas lease and the surface use agreement were valid, the defendant moved to dismiss the remaining plaintiffs' claims. On July 25, 2016, the court granted the defendant's motions. With regard to the negligence/intentional tort claim, the complaint only alleged injury to Brian Dytko and not to the remaining plaintiffs. The court further held that the arbitrator's ruling as to the private nuisance claim also is binding on the remaining plaintiffs. The remaining plaintiffs' interests were adequately represented by Brian Dytko in the prior arbitration proceeding in which the arbitrator denied all claims. 2016 WL 3983657. **This case is closed.**

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***Charles E. Bertrand v. Gastar Exploration Inc., No. 14-C-158 (Circuit Court of Marshall County, W. Va., Sept. 30, 2014), removed, No. 5:14-00147 (N.D. W. Va. Nov. 4, 2014), remanded (Mar. 20, 2015)***

Charles E. Bertrand and Debra K. Bertrand complain that oil and gas operations by Gastar on adjacent land have caused fumes and odors, noise, and air pollution. They claim the operations caused contaminated water to flow onto their land and erode their hay fields, and caused dust, dirt, and debris to travel onto their land. In support of their request for compensatory and punitive damages, they allege that Gastar has substantially and unreasonably interfered with their use and enjoyment of their land, and that its actions have been intentional, unreasonable, negligent, and/or reckless. On March 20, 2015, the court remanded the case to the Circuit Court of Marshall County. On May 3, 2016, Gastar moved for summary judgment. **The case is pending.**

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***In Re: Marcellus Shale Litigation, Civil Action No. 14-C-3000 (Circuit Court of Ohio County, WV)***

Several suits, first filed in October 2013, focus on noise, dust, excessive traffic, bright lights and a variety of other effects of the boom in the natural gas industry in northern West Virginia. Cases are pending in Doddridge, Harrison, Kanawha, Marion, Monongalia, Pleasants and Ritchie counties. Antero and Hall Drilling, which operate as partners at many sites, are the defendants in almost all of the cases. On November 7, 2014, the state Supreme Court referred the cases to West Virginia's Mass Litigation Panel, which often is used to handle complex lawsuits that involve common issues of law and fact, but also involve large numbers of plaintiffs or multiple defendants. The consolidated action is called In Re: Marcellus Shale Litigation, Civil Action No. 14-C-3000, in the Circuit Court of Ohio County, West Virginia. Additional cases were added in 2015 and 2016.

Orders related to the litigation pending before the Mass Litigation Panel can be found at <http://www.courts.wv.gov/lower-courts/mlp/marcellus-shale.html>. See <http://wvpublic.org/post/after-living-next-drilling-activity-100-wva-residents-sue-companies> (Dec. 18, 2014); and <http://www.eenews.net/stories/1060024357> (Sep. 9, 2015).

On January 15, 2016, Antero filed its summary judgment memorandum in cases under the docket 13-C-434. See <https://www.documentcloud.org/documents/2720318-Antero-Memo-of-Law-in-Support-of-MSJ.html>. With respect to the negligence claims, Antero argues that the plaintiffs cannot establish water, soil, or air contamination. Antero claims the nuisance claims are barred by the statute of limitations, and argues alternatively that the it has not substantially and unreasonably interfered with plaintiffs' use and enjoyment of their lands. Antero argues that it has the right to do whatever is "reasonably necessary" to get to the minerals. It also suggests that the social value of its oil and gas operations outweigh the harms allegedly suffered by the plaintiffs.

On February 26, 2016, the litigants appeared before the three-judge Mass Litigation Panel. The plaintiffs dropped their negligence claims. The panel ordered the parties to take part in another mediation session. The parties agreed to meet again with McDowell Circuit Judge Booker Stephens, who led a previous mediation session. On July 11, 2016, an order was entered scheduling mediation of all cases in the Marcellus Shale Litigation (except cases filed against Williams Ohio Valley Midstream, LLC), on October 6, 2016, in Charleston.

On **October 11, 2016**, the court granted summary judgment to Antero Resources and Hall Drilling, LLC, in several cases arising from Harrison County (the "Harrison County Cherry Camp Trial Group"). See <http://www.courtswv.gov/lower-courts/mlp/mlp-orders/marcellus-shale/final-summary-judgment.pdf>. According to the order, the lawsuits were actions "by residents and/or owners of property in Harrison County, West Virginia for private temporary continuing abatable nuisance and negligence/recklessness arising from oil and/or natural gas drilling, exploration, extraction, pipeline construction, water processing, and related acts and/or omissions." The Court entered summary judgment based upon Antero's contractual and property rights, and therefore "reaches no conclusion regarding whether Antero's actions or its employees' or contractors' actions would 'otherwise meet the legal definition of a nuisance.'" Specifically, the Court held that "Antero and Hall were operating within the scope of Antero's leasehold rights" and that the "noise, traffic, dust, lights, and odors of which Plaintiffs complain are reasonable and necessarily incident to mineral development." The Court found that "the activities complained of were reasonably necessary to the production of the mineral estate and did not exceed the fairly necessary use thereof or invade the rights of the surface owner under the standards outlined in *Adkins v. United Fuel Gas Co.*, 134 W. Va. 719, 61 S.E.2d 633 (1950)." On January 11, 2017, the panel denied the plaintiffs' motion to amend, alter or reargue. See <http://www.courtswv.gov/lower-courts/mlp/mlp-orders/marcellus-shale/alter-amend-final-order.pdf>. **The cases are pending.**

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***Easthom v. EQT Production Co.*, No. 16-C-23 (Circuit Ct., Wetzel County, W. Va., Feb. 29, 2016), removed, No. 5:16-cv-00042 (N.D. W. Va., Mar. 30, 2016)**

James and Mary Easthom allege that defendant's operations have caused fumes, dust, noise, bright lights, and constant truck traffic. They assert negligence and nuisance claims and seek damages and injunctive relief. On January 6, 2017, the parties submitted a notice of settlement. The parties settled the case and, on March 2, 2017, the case was dismissed. **The case is closed.**

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## WYOMING

***Locker v. Encana Oil & Gas (USA) Inc.*, No. 39970 (Dist. Ct. for Fremont Cty., Ninth Jud. Dist., May 21, 2014), removed, No. 1:14-cv-00131 (D. Wyo., Jly. 2, 2014)**

Jeff and Rhonda Locker live on a farm near Pavillion, Wyoming. They assert claims of negligence, private nuisance, strict liability, fraud, and medical monitoring, and argue that Encana's gas wells are responsible for Rhonda's deteriorating health. They claim that Encana Oil and Gas (1) negligently contaminated their ground water, (2) intentionally made misrepresentations during a settlement agreement in 2003, (3) fraudulently convinced plaintiffs to consume unsafe water, (4) persuaded plaintiffs to resume consuming contaminated ground water, and (5) concealed and prevented investigation of the contaminated ground water. and that the company tried to cover up evidence linking its operations to the pollution. The drilling at issue took place prior to the development of hydraulic fracturing. Water tests conducted in 1988 showed the water in the Locker's well was clean. In 1992, the well water turned black when a nearby gas well was reworked by Tom Brown Inc., and a test in 2001 revealed the presence of toluene. The Lockers allege they were not told about the 2001 test results, and assert that when they settled with Tom Brown Inc. in 2002 the company falsely said it had found no evidence of pollution. In 2004 Tom Brown Inc. was purchased by Encana Oil and Gas. On December 21, 2016, the federal district court denied Encana's motion for summary judgment.

The court held that issues of disputed fact remain as to whether the Lockers were fraudulently induced to enter into the 2002 settlement agreement. With regard to the defendant's statute of limitations defense, the court held that issues of disputed fact remain as to when the Lockers knew, or had reason to know, of the existence of their causes of action. The case was settled, and an order dismissing the action was entered on February 27, 2018. **The case is closed.**

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## CANADA

***Ernst v. EnCana Corp.* 0702 00120 (Ct. of Queen's Bench of Alberta). 2014 ABQB 672 (Nov. 7, 2014), affirmed, 2017 SCC 1 (Supreme Court of Canada, Jan. 13, 2017), at <http://scc-csc.lexum.com/scc-csc/scc-csc/en/item/16325/index.do>**

Jessica Ernst sued Alberta Environment, the Energy Resources Conservation Board (now known as Alberta Energy Regulator, or AER), and Encana over the contamination of her well water in Rosebud, Alberta. The 2003 lawsuit claims the contamination was from hazardous and toxic chemicals used for hydraulic fracturing from 2001 to 2006, and asserts that Encana was negligent in the fracking of shallow coal seams. Ernst also alleges that Alberta Environment's investigation into the contamination of her well was negligent.

The AER (the energy regulator) was dismissed in 2013 on the basis of statutory immunity, a decision affirmed by the Supreme Court of Canada on January 13, 2017. The Court held that a provincial provision shielding the Alberta Energy Regulator from legal action was constitutional. Ernst had sought damages of \$50,000 in claiming the regulator breached her constitutional right to free speech. The Supreme Court disagreed that the immunity clause in the Energy Resources Conservation Act was unconstitutional because it barred her claim for charter damages. It observed that Ernst could have asked a court to set aside the regulator's directive instead of seeking damages.

On November 7, 2014, Alberta Chief Justice Neil Wittmann held that Ernst could proceed with her \$30 million lawsuit against Alberta's Ministry of Environment, finding "a reasonable prospect Ernst will succeed in establishing that Alberta owed her a prima facie duty of care." The court held that neither the provincial Water Act nor the Environmental Enhancement and Protection Act conferred statutory immunity, and that government regulators and agencies can be sued if they engage in negligent investigations. See *Judge Rules Landowner May Sue Gov't in Landmark Fracking Case* (Nov. 11, 2014), at <http://theyee.ca/News/2014/11/11/Ernst-Fracking-Update/>; and *Canadian Claiming Fracking Contaminated Water Can Sue Government, Court Rules* (Nov. 19, 2014), at <http://www.bna.com/canadian-claiming-fracking-n17179912027/>. On January 12, 2016, the **Supreme Court of Canada heard argument** on whether immunity bars Ernst from suing AER for infringing her right of expression.

On January 13, 2017, the Supreme Court of Canada ruled that Ernst cannot sue the Alberta Energy Regulator over alleged violations of her right to freedom of expression under the Canadian Charter of Rights and Freedoms. See <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/16325/index.do>. The 5-4 majority upheld an immunity clause passed by the legislature that protects the Alberta Energy Regulator from any Charter claims or lawsuits. Although her claim against the Alberta Energy Regulator has been dismissed, Ernst has stated that she will continue her case against Alberta Environment and Encana. **The case is pending.**

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### **Dunheimer v. Angle Energy (2013)**

In 2013 Diana Dunheimer of south-central Alberta sued Angle Energy, now owned by Bellatrix Exploration, for \$13 million. Her claim alleges that the company did not exercise reasonable care while fracking its oil and gas wells near her home between 2008 and 2012. According to an article about her lawsuit, in 2008 Angle Energy drilled and fracked wells near her family's farm west of Didsbury, Alberta. Thereafter, in August 2010, the company drilled and fracked a sour gas well south of her family's property. One of the wells was primarily fracked with diesel fuel, light aromatic solvent naphtha, and kerosene. See <https://theyee.ca/News/2014/02/28/Alberta-Mother-Fights-Fracked-Wells/> (Feb. 28, 2014); and <https://www.youtube.com/watch?v=cGtv2La40ec> (Diana Dunheimer Lawsuit, Sept. 18, 2015).

Dunheimer alleges air, water, and noise pollution. Air pollution is alleged to have affected farm animals and given the family headaches, spells of dizziness, and chronic respiratory infections. Angle's drilling activity is also alleged to have damaged property, killed livestock, contaminated well water, and caused a tumour on Dunheimer's daughter's neck. The noise pollution allegation focuses on a "roaring" compressor station.

Angle Energy (now Bellatrix Exploration), in its statement of defence filed in February 2014, asserts that "None of these instances of non-compliance resulted in the escape of toxic chemicals, drilling waste, flare gases, or other noxious substances onto the Dunheimer Property." The company "denies that its oil and gas operations contributed to or caused the injuries and damages alleged in [Dunheimer's] Statement of Claim."

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## **NETHERLANDS**

A Dutch court ruled on March 1, 2017, that an energy company jointly owned by Shell and ExxonMobil is liable for the psychological suffering of residents in the north of the country whose homes have been damaged by small earthquakes caused by gas drilling. The court, in the northern city of Assen, found that the Netherlands Petroleum Company (NAM) breached the fundamental right "to the undisturbed enjoyment of living." NAM had previously acknowledged its responsibility for earthquake-related damages. The case was filed by residents near the northern city of Groningen who claimed they suffered emotionally because of the earthquakes, which have for years rattled homes - and their nerves. While earthquakes caused by the gas drilling are relatively minor, they have caused serious cracks and structural damage to thousands of buildings in the region. NAM already is paying to repair that damage. The court said the Dutch state ignored advice to order NAM to cut the amount of gas it pumped from the Groningen gas field, but stopped short of declaring the government liable for damages. See *Dutch Court Finds Energy Firm Liable for Emotional Suffering*, Associated Press (Mar. 1, 2017).

On April 20, 2017, the Arnhem-Leeuwarden court ruled that the Public Prosecutor must investigate whether NAM violated Article 170 of the Criminal Code by damaging housing and possibly creating life threatening situations. Based on that investigation, a decision could be made to prosecute the Dutch company. See *Court Orders Criminal Investigation Against NAM over Fracking Earthquake Damage* (April 20, 2017), at <http://nltimes.nl/2017/04/20/court-orders-criminal-investigation-nam-fracking-earthquake-damage>.



## SELECTED “LONE PINE” ARTICLES

John T. Burnett, *Lone Pine Orders: A Wolf in Sheep's Clothing for Environmental and Toxic Tort Litigation*, 14 *Journal of Land Use & Environmental Law* 53 (1996) (also at <http://www.law.fsu.edu/journals/landuse/Vol141/burn.htm>)

William A. Ruskin, *Prove it or Lose It: Defending Against Mass Tort Claims Using Lone Pine Orders*, 26 *American Journal of Trial Advocacy* 599 (Spring 2003)

James P. Muehlberger and Boyd S. Hoekel, *An Overview of Lone Pine Orders in Toxic Tort Litigation*, 71 *Defense Counsel Journal* 366 (October 2004)

David R. Erickson and Justin W. Howard, *Fighting For a Lone Pine Order in Complex Toxic Tort Litigation*, at <http://www.thefederation.org/documents/V57N4-Erickson.pdf> (Summer 2007).

Paul D. Rheingold and Laura Pitter, *Lone Pine Orders: An Abused Remedy?*, American Bar Association Section of Litigation, Mass Torts Litigation Committee, 8 *Mass Torts* 1 (Fall 2009)

David B. Weinstein and Christopher Torres, *An Art of War Lesson Applied to Mass Torts: The Lone Pine Strategy*, 12 No. 1 *ABA Environmental Enforcement and Crimes Committee Newsletter* 19 (Mar. 2011)

Heather Draper, *Hogan Lovells' 'Lone Pine' Strategy Ends Fracking Suit*, *Denver Bus. Journal* (Jun. 1, 2012) <http://www.bizjournals.com/denver/print-edition/2012/06/01/hogan-lovells-lone-pine-strategy.html?page=all>

Daniel J. Dunn, Andrew C. Lillie, and Anna K. Edgar, *Lone Pine Procedure Successful in Hydraulic Fracking Case*, dritoday [Defense Research Institute], posted on Aug. 1, 2012, at <http://dritoday.org/feature.aspx?id=391>

Dialogue, *Litigation Environment for Drilling and Hydraulic Fracturing*, 43 *Environmental Law Reporter News & Analysis* 10221 (March 2013) (Westlaw)

Michael Goldman, *A Survey of Typical Claims and Key Defenses Asserted in Recent Hydraulic Fracturing Litigation*, 1 *Texas A&M Law Review* 305, 323-326 (Fall 2013)

*Western Colorado drilling lawsuit can proceed after all*, *Denver Journal* (July 9, 2013), at <http://www.denverijournal.com/article.php?id=9089>

Colo. Lone Pine Case Is Setback For Fracking, by Carl J. Pernicone, *Law360* (May 19, 2015), at [http://www.law360.com/energy/articles/655508?nl\\_pk=dba52b1e-e8f0-4d7b-8bcc-25fa566776d8&utm\\_source=newsletter&utm\\_medium=email&utm\\_campaign=energy](http://www.law360.com/energy/articles/655508?nl_pk=dba52b1e-e8f0-4d7b-8bcc-25fa566776d8&utm_source=newsletter&utm_medium=email&utm_campaign=energy)

## **“LONE PINE” CASES & HYDRAULIC FRACTURING**

Hagy v. Equitable Production Co., 2012 WL 713778 (S.D. W. Va., Mar. 5, 2012)  
Beck v. ConocoPhillips Co., No. 2011-484 (123<sup>rd</sup> Dist. Ct. Panola County Tex., Mar. 28, 2012) (unreported)  
Strong v. ConocoPhillips Co., No. 2011-487 (123<sup>rd</sup> Dist. Ct. Panola County Tex., Mar. 28, 2012) (unreported)  
Strudley v. Antero Resources Corp., 2012 WL 1932470 (Denver Cty. Dist. Ct., Colo., May 9, 2012) (rev'd)  
Boggs v. Landmark 4 LLC, No. 1:12-cv-00614 (N.D. Ohio, Aug. 13, 2012) (unreported order)  
Teekell v. Chesapeake Operating, Inc., No. 5:12-cv-00044 (W.D. La., Aug. 20, 2012) (unreported)  
Kamuck v. Shell Energy Holdings GP, LLC, 2012 WL 3864954 (M.D. Pa., Sep. 5, 2012)  
Roth v. Cabot Oil & Gas Corp., 287 F.R.D. 293, 2012 WL 4895345 (M.D. Pa., Oct. 15, 2012)  
Baker v. Anschutz Exploration Corp., 2013 WL 3282880 (W.D. N.Y. Jun. 27, 2013)  
Strudley v. Antero Resources Corp., 350 P.3d 874 (Colo. App., July 03, 2013) (aff'd on appeal)  
Strudley v. Antero Resources Corp., 347 P.3d 149 (Colo. Sup. Ct., Apr. 20, 2015)

### **SELECTED “LONE PINE” CASES - IN GENERAL**

Lore v. Lone Pine Corporation, 1986 WL 637507 (N.J. Super. L. Nov. 18, 1986)  
In re Love Canal Actions, 145 Misc.2d 1076, 547 N.Y.S.2d 174 (N.Y. Sup. Ct. 1989)  
Kinnick v. Schierl, Inc., 197 Wis.2d 855, 541 N.W.2d 803 (Wis. App. 1995)  
In re Mohawk Rubber Co., 982 S.W.2d 494 (Tex. App. 1998)  
Acuna v. Brown & Root Inc., 200 F.3d 335 (5th Cir. 2000)  
Martinez v. City of San Antonio, 40 S.W.3d 587 (Tex. App. 2001)  
In re 1994 Exxon Chemical Plant Fire, 2005 WL 6252312 (M.D. La. Apr. 7, 2005)  
Bell v. Exxonmobil Corp., Not Reported in S.W.3d, 2005 WL 497295 (Tex. App. Mar. 3, 2005)  
Estate of Mancini v. Lexington Ins. Co., 2006 WL 3359429 (N.J. Super. A.D. Nov. 21, 2006)  
Morgan v. Ford Motor Co., Not Reported in F.Supp.2d, 2007 WL 1456154 (D. N.J. May 17, 2007)  
Simeone v. Girard City Bd. of Edn., 171 Ohio App.3d 633, 872 N.E.2d 344 (Ohio App. 2007)  
In re Vioxx Products Liability Litigation, 557 F.Supp.2d 741 (E.D. La. 2008)  
McManaway v. KBR, Inc., 265 F.R.D. 384 (S.D. Ind. 2009)  
In re Vioxx Products Liability Litigation, 388 Fed.Appx. 391, 2010 WL 2802352 (5th Cir. 2010)  
Ramirez v. E.I. Dupont De Nemours & Co., 2010 WL 144866 (M.D. Fla. Jan. 8, 2010)  
In re Digitek Product Liability Litigation, 264 F.R.D. 249 (S.D. W.Va. 2010)  
Avila v. Willits Environmental Remediation Trust, 633 F.3d 828 (9th Cir. 2011)  
Pinares v. United Technologies Corp., 2011 WL 240512 (S.D. Fla. Jan. 19, 2011)  
In re Vioxx Products Liability Litigation, 2012 WL 1398622 (E.D. La. Apr. 23, 2012)  
In re Fosamax Products Liability Litigation, 2012 WL 5877418 (S.D. N.Y. Nov. 20, 2012)  
McMunn v. Babcock & Wilcox Power Gen. Grp., Inc., 896 F.Supp.2d 347 (W.D. Pa. 2012)  
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