ARNOLD & PORTER LLP

Hydraulic Fracturing Legal Update

August 7, 2014

Arnold & Porter LLP is pleased to provide this digest of judicial decisions, settlements, case filings, and other litigation- and enforcement-related documents on hydraulic fracturing and related activities around the United States. It accompanies a litigation chart that the firm has posted online and will continually update, where the cases are organized by topic and where links are found to many of the decisions and pleadings. This digest includes cases for which there have been developments since our last litigation update. Other past hydraulic fracturing advisories are available here.
To be added to the free subscription list for this update service, or to send us additional decisions, complaints, or other litigation documents for posting, please e-mail Margaret Barry.
Arnold & Porter attorneys have a long history of counseling energy companies on regulatory compliance and defending their interests in enforcement proceedings and litigation. Information about the firm's experience with hydraulic fracturing is available here.

FEATURED CASE

Colorado Oil and Gas Association v. City of Longmont, No. 13CV63 (Colo. Dist. Ct. July 24, 2014). A Colorado District Court ruled that state law preempted the City of Longmont's ban on hydraulic fracturing and the disposal and storage of waste from hydraulic fracturing. The court found that there was an "irreconcilable" operational conflict between the local interest in banning fracking activities and the State's interests in the efficient development and production of oil and gas, the prevention of waste, and the protection of mineral rights owners' correlative rights. The court declined to find that implied preemption applied in the case—which would have required a finding that the State's interest in hydraulic fracturing was so dominant as to completely occupy the regulatory field. The court stayed its order enjoining enforcement of the ban to allow time for the filing of a notice of appeal.

DECISIONS AND SETTLEMENTS

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NEW CASES AND FILINGS

- Challenges to Municipal Action
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- Government Enforcement Actions
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DECISIONS AND SETTLEMENTS

Civil Tort Actions

Ely v. Cabot Oil & Gas Corp., No. 3:09-CV-2284 (M.D. Pa. order July 22, 2014; report & recommendation Mar. 6, 2014). In this action seeking damages allegedly arising from natural gas drilling in Dimock Township in Pennsylvania, the federal district court for the Middle District of Pennsylvania granted defendants' motion for summary judgment against one of the remaining plaintiffs, Nolen Scott Ely as Executor of the Estate of Kenneth R. Ely (the Estate). The Estate sought only damages for ground contamination and unpaid royalties. The court adopted the report and recommendation of the magistrate judge, which concluded that the Estate had not provided support for its claims of breach of contract, fraudulent inducement, private nuisance, negligence and negligence per se, and violations of the Pennsylvania Hazardous Sites Cleanup Act. The court indicated that discovery, "although extensive," had not produced probative evidence of ground contamination at the Estate's 183-acre property, and that "[n]early the entire thrust" of the plaintiffs' consolidated brief had related to claims by other plaintiffs. The magistrate judge has issued reports and recommendations for these two remaining sets of plaintiffs, recommending dismissal of all but the private nuisance claim for one set and all but the private nuisance and negligence claims for the other. As of the time this was written, the district court had not yet acted on these recommendations.

Ely v. Cabot Oil & Gas Corp., No. 3:09-CV-2284 (M.D. Pa. July 21, 2014). In the same action involving claims related to natural gas drilling in Dimock Township, the district court issued an order imposing sanctions on an attorney who had formerly represented plaintiffs and who continued to ghostwrite and provide other legal assistance to plaintiffs after her representation ended even though plaintiffs represented to the court that they were pro se. The court agreed with the magistrate judge's report and recommendation that the ghostwritten submissions should not be struck from the record and that, given the "evolving" rules of ethics regarding ghostwriting, the court would not ground its sanctions order on the attorney's ghostwriting of submissions. Instead, the court cited the attorney's "unprofessional and dishonest behavior towards the Court and her adversaries," and in particular her "knowingly false statements" to the court that the plaintiffs were pro se. The court said her statements "not only violate the duty of candor, but they are breathtakingly brazen and cannot be lightly excused." The court declined to impose sanctions on a more junior attorney who had "minimal contact with the matter." The court, however, also declined to follow the magistrate judge's recommendation that the more senior attorney be required to pay the junior attorney's legal fees. The court said the junior attorney "should have had the wherewithal to understand that she was being led down a perilous road" and that she would have to bear the legal costs "as the wages of her improvident association" with the more senior lawyer. The court ordered the senior attorney to complete five hours of ethics-based continuing legal education.

Chesapeake Appalachia, L.L.C. v. Cameron International Corp., No. CIV-13-1118-M (W.D. Okla. July 21, 2014). The federal district court for the Western District of Oklahoma denied Cameron International Corporation's (Cameron's) motion to dismiss an action by Chesapeake Appalachia, L.L.C. (Chesapeake) alleging claims of negligence, products liability, and negligent misrepresentation. The claims arose from an alleged failure of a wellhead provided by Cameron at a well site operated by Chesapeake. Chesapeake alleged that the wellhead failure caused an uncontrollable discharge of fluids, and that Chesapeake had to cease operations at the well, as well as "all other fracturing operations in Pennsylvania and elsewhere." Chesapeake alleged it had suffered harm from the failed wellhead, including costs to "monitor, cleanup, and remedy the incident," monitoring costs, fines, and "loss of goodwill and damage of public reputation." The court held that the economic loss rule did not bar Chesapeake's claims, and that the Master Services Agreement between Chesapeake and Cameron permitted Chesapeake to bring negligence-based claims against Cameron. The court also found that Chesapeake had sufficiently pled facts to sustain its claims.

Challenges to State and Federal Law and Regulations

Robinson Township v. Commonwealth of Pennsylvania, No. 284 MD 2012 (Pa. Commw. Ct. July 17, 2014). On remand from the Pennsylvania Supreme Court's sweeping decision invalidating key provisions of the Act 13 amendments to the Oil and Gas Act, the Pennsylvania Commonwealth Court was faced with the tasks of determining whether certain remaining provisions were severable from the provisions the Supreme Court found unconstitutional, and of addressing claims that the Commonwealth Court previously had dismissed on standing grounds. Perhaps most notably, the Commonwealth Court concluded that Act 13's provisions allowing municipalities and oil and gas companies to seek review by the state Public Utility Commission (PUC) of local ordinances (or proposed local ordinances) regulating oil and gas development were not severable. The court also concluded that a provision preempting local restrictions on features of oil and gas operations regulated by Act 13 was not viable after the Supreme Court's decision. The Commonwealth Court also ruled that three Act 13 provisions were constitutional: (1) a provision requiring the Pennsylvania Department of Environmental Protection to notify public but not private drinking water facilities after receiving notification of a spill from drilling operations; (2) a provision allowing public utility corporations to use eminent domain; and (3)

provisions prohibiting health professionals from disclosing information received from drilling companies about the identities and amount of fracking additives. One judge dissented from the court's conclusion that PUC's jurisdiction over the review of local ordinances was no longer viable; he believed that because Act 13's provisions regulating the "how" of drilling were still effective, its provisions regarding PUC's jurisdiction still had "efficacy." Another judge dissented from the court's holdings regarding health professionals' obligations and spill notification requirements.

Pennsylvania Environmental Defense Foundation v. Commonwealth of Pennsylvania, No. 228 MD 2012 (Pa. Commw. Ct. July 17, 2014). The parties agreed to a stipulation under which plaintiff would withdraw its application for a preliminary injunction preventing the state from using the Oil and Gas Lease Fund to fund Department of Conservation and Natural Resources (DNCR) operations during the pendency of the action, and defendants and DNCR agreed not to execute any additional leases for gas or mineral interests in state forests and parks until the court issued a final order. The Pennsylvania Commonwealth Court issued an order cancelling a scheduled hearing on the application and set a briefing schedule. Oral argument will take place in October 2014. The DNCR secretary said that the agreement ensured that DNCR would receive critical funding for keeping state parks open and managing state forests. The Pennsylvania Environmental Defense Foundation said they were "bringing their case to support DCNR's ability to protect our Parks and Forests, not shut them down."

Matter of Title, Ballot Title, and Submission Clause, #85, #86, #87, #89, #90, #93, Nos. 14SA116, 14SA119, 14SA121, 14SA122, 14SA124, 14SA126 (Colo. June 30, 2014). In a series of three opinions, the Colorado Supreme Court approved six ballot initiatives that could have created or authorized constitutional restrictions on oil and gas development in the state. The court affirmed actions of the Ballot Title Setting Board setting titles for the proposed ballot initiatives, which were to go before Colorado voters in November. In August, however, Governor John Hickenlooper and Congressman Jared Polis announced an agreement that reportedly would remove the initiatives from the ballot in exchange for the formation of a task force that would represent the oil and gas industry and the public and which would make recommendations to the State legislature for minimizing conflicts between oil and gas facilities and other land uses. Three of the ballot initiatives would have established new statewide setback requirements from occupied structures for new oil and gas wells. The setback requirements could be waived by property owners. Three different setback distances were proposed in the three initiatives: Ballot Initiative #85 would establish a 1,500-foot setback; #86 would establish a 2,000-foot setback; and #87 would establish a half-mile setback. Two other initiatives would have allowed local governments to adopt regulations for oil and gas drilling that are more restrictive than state requirements. The sixth initiative dealt with "the creation of the public's right to Colorado's environment" and the creation of mechanisms for carrying out this primary objective—namely, making state and local governments trustees of Colorado's environment and authorizing local governments to adopt environmental regulations that are more stringent than the State's. The court held that each of the initiatives contained one subject, and that the titles set by the Board "fairly reflect" the purposes of the initiatives and were not misleading. Among other things, the court upheld the Board's decision to remove the term "hydraulic fracturing" because it was a "catch phrase" and "politically charged," and also rejected an argument that the setback initiatives should have informed voters that they would not affect federal takings claims. The court indicated that it was not ruling on the merits of the initiatives, just on their conformity with formal requirements.

Rodriguez v. Abruzzo, No. 3:12-cv-1458 (M.D. Pa. June 30, 2014). The federal district court for the Middle District of Pennsylvania dismissed claims brought by a Pennsylvania physician alleging that state laws restricting disclosure of information about the contents of hydraulic fracturing fluids violated his rights under the First and Fourteenth Amendments of the U.S. Constitution. The physician alleged that he had treated patients who had direct contact with hydraulic fracturing fluids, and that the requirements of the law interfered with ethical obligations in the medical profession. The court ruled—as it had in an October 2013 decision (after which it allowed the physician to amend his complaint)—that the doctor did not have standing. The court said that the doctor's claims of a lack of information about the types of toxins in the water supply to which his patients were exposed did not establish an injury-in-fact because he had not sufficiently alleged a link between information about local water and the laws restricting disclosure. The court further found that the question of whether the physician needed the information restricted by the state laws to treat patients remained "factually unsubstantiated."

Challenges to Agency Action

Wallach v. New York State Department of Environmental Conservation, No. 6773-2013 (Sup. Ct. Albany Co. July 11, 2014). A New York Supreme Court dismissed the lawsuit brought by the bankruptcy trustee for Norse Energy Corp. USA (Norse)—a holder of mineral rights in New York—and an investor in Norse against the New York State Department of Environmental Conservation (DEC) in which plaintiffs-petitioners sought,

among other relief, to compel DEC to finalize its supplemental generic environmental impact statement (SGEIS) for high-volume hydraulic fracturing and horizontal drilling. Until the environmental review process is complete, a statewide moratorium on fracking is in place. The court ruled that plaintiffs did not have standing to pursue claims under the State Environmental Quality Review Act (SEQRA) because they alleged only economic injury, which was not within SEQRA's zone of interests. The court said that it was not persuaded that it should carve out an exception to the environmental injury requirement beyond the only currently recognized exception—property owners whose land is targeted for rezoning.

Joint Landowners Coalition of New York, Inc. v. Cuomo, No. 843-2014 (Sup. Ct. Albany Co. July 11, 2014). As in *Wallach v. DEC*, the court ruled that plaintiffs-petitioners—a landowner with an oil and gas lease, a holder of mineral rights, and a coalition of 38 coalitions representing over 70,000 New York landowners—did not have standing to bring SEQRA claims challenging DEC's failure to complete its environmental review of the hydraulic fracturing-horizontal drilling regulations. The court found that injuries alleged were solely economic in nature. The court rejected petitioners' argument that they did not need to allege environmental harm because they raised procedural, not substantive, SEQRA challenges. In addition, the court said (as it had in *Wallach*) that plaintiffs-petitioners did not qualify for the single recognized exception to the environmental harm requirement—property owners whose land is targeted for rezoning. The court said that it recognized "the possibility that respondents' alleged actions/inactions in the SGEIS process are potentially shielded from challenges," but that it could not "discern any applicable exception in the SEQRA case law that would allow standing to be conferred upon the petitioners herein." Plaintiffs-petitioners announced they would appeal the ruling.

Alabama-Coushatta Tribe of Texas v. United States, No. 13-40644 (5th Cir. July 9, 2014). The Fifth Circuit Court of Appeals affirmed the dismissal of a suit brought by the Alabama-Coushatta Tribe of Texas against the United States and the Departments of Agriculture and the Interior. The suit claimed that defendants had breached their fiduciary duty to protect land and natural resources subject to the aboriginal title of the Tribe by, among other things, issuing drilling permits and oil and gas leases. The Fifth Circuit agreed with the district court that subject matter jurisdiction was lacking because defendants had not waived sovereign immunity. The Fifth Circuit said the only applicable waiver would have been from the Administrative Procedure Act (APA), which "waives sovereign immunity for actions against federal government agencies, seeking nonmonetary relief, if the agency conduct is otherwise subject to judicial review." The Tribe's suit, however, was a "programmatic challenge"—as opposed to a challenge to a "particular and identifiable" agency action—and was not permissible under the APA. The APA waiver of sovereign immunity therefore did not apply.

NO Gas Pipeline v. Federal Energy Regulatory Commission, Nos. 12-1470, 12-1474, 12-1475 (D.C. Cir. July 1, 2014). The D.C. Circuit Court of Appeals dismissed challenges to a Federal Energy Regulatory Commission (FERC) order granting a certificate of public convenience and necessity for construction of a natural gas pipeline connecting New Jersey and New York. The D.C. Circuit ruled that environmental groups challenging FERC's compliance with the National Environmental Policy Act did not have standing. The court said that the environmental petitioners' claimed injuries of exposure to higher levels of radon and potential cyberterrorism were speculative and that the petitioners had not demonstrated that such injuries were fairly traceable to FERC's action. The court also ruled that the challenge by the City of Jersey City—which charged that FERC could not constitutionally adjudicate pipeline issues because the pipeline industry was its source of funding—suffered from multiple infirmities, including that the City did not challenge any part of the order itself.

Schmude Oil, Inc. v. Department of Environmental Quality, No. 313475 (Mich. Ct. App. July 1, 2014). The Michigan Court of Appeals affirmed the Michigan Department of Environmental Quality's (MDEQ's) denial of drilling permits at well sites located on privately owned lands in a state forest. The court concluded that the "nondevelopment region" in the forest, where state law provided that no drilling could occur, encompassed private as well as public lands. The court also affirmed MDEQ's denial of a permit in a "limited development region" where the site was within a quarter-mile of a river. The court also rejected the claims that the permit denials were regulatory takings or violations of equal protection rights.

Matter of U.S. Energy Development Corp. v. New York State Department of Environmental Conservation, No. 266 CA 13-01416 (N.Y. App. Div. June 20, 2014). The New York Appellate Division affirmed the dismissal of an action seeking a writ of prohibition against the New York State Department of Environmental Conservation (DEC). The writ was sought by a company that conducted oil and gas operations in Pennsylvania in the Allegheny National Forest near the New York border. After personnel of the New York State Office of Parks, Recreation and Historic Preservation reported pollution in a brook in a State park that was caused by the company's operations, the company and DEC entered into two consent orders. Due to alleged continuing and ongoing violations, DEC later commenced an administrative proceeding against the company seeking penalties, as well as enforcement of the consent orders. The company filed this lawsuit,

which challenged DEC's enforcement authority over out-of-state activities. It alleged that the federal Clean Water Act preempted application of New York's laws and regulations to an out-of-state source. The appellate court ruled that as a matter of law petitioner could not meet its "heavy burden" as a party seeking a writ of prohibition of demonstrating that it had a clear right to relief and that the prohibition would be "a more complete and efficacious remedy" than the administrative proceeding and resulting judicial review. The court said the company had not demonstrated that DEC's enforcement of the consent orders would be an obstacle to full implementation of the Clean Water Act. Nor had the company demonstrated that it would suffer the irreparable injury necessary for invoking the writ of prohibition for an agency's ultra vires act when another avenue of judicial review was available.

Government Enforcement Actions

California Division of Oil, Gas, and Geothermal Resources, Orders Shutting Down 11 Wastewater Disposal Wells (orders issued July 2, 2014; press release July 18, 2014). On July 2, the California Division of Oil, Gas, and Geothermal Resources (DOGGR) ordered seven oil companies to stop wastewater injections at 11 disposal wells operating under permits issued by DOGGR in the vicinity of Bakersfield. Officials said that the companies might have injected "produced water" and fracking fluids at depths that might contain water suitable for drinking and irrigation. The Central Valley Regional Water Quality Control Board also issued orders to the seven companies setting deadlines for submitting groundwater samples, analytical data, and technical reports. On July 18, DOGGR announced that it would review, in conjunction with the U.S. Environmental Protection Agency, the state's Underground Injection Control program to make sure that it complies with the federal Safe Drinking Water Act. DOGGR said that it became aware that the wells might be injecting into "non-exempt zones" in the course of its implementation of SB 4, the state law regulating well stimulation treatments. DOGGR said that two of the 11 wells had been authorized to resume operations.

Colorado Oil and Gas Conservation Commission, "20-Day Injection Pause" at Well Operated by NGL Water Solutions DJ LLC (press release June 24, 2014; press release July 17, 2014). On June 24, the Colorado Oil and Gas Conservation Commission (COGCC) announced that it had directed the operator of a wastewater injection well in Weld County to take a "20-day injection pause." COGCC said that the step was a precautionary measure to allow COGCC to gather and analyze information to determine whether low-level seismic activity in the general vicinity of the well was related to injections at the well. On July 17, COGCC announced that the well's operator would be required to make changes to the well and adjust its disposal activities. COGCC said that seismic data gathered after injections ceased showed continuing seismic activity, but at a lower energy level. The changes included plugging the "basement" of the well. COGCC said limited injections could resume at the well at lower pressures and volumes on July 18, and that there would be continued monitoring. COGCC also said it was reviewing a potential violation of permitted injection volumes at the well.

Oil & Gas Lease Disputes

Nolt v. TS Calkins & Associate., LP, No. 1214 MDA 2013 (Pa. Super. Ct. July 7, 2014). The Pennsylvania Superior Court affirmed the dismissal of a quiet title action brought by landowners to invalidate an oil and gas lease. The lease was for a 98-acre parcel that encompassed the property owned by plaintiffs and was signed by a man who had previously transferred title to the property to his son and daughter-in-law. The son and daughter-in-law had recorded the transfer of the property in a county in which the property was not situated. The lessee did not sign the oil and gas lease. Landowners asserted that the oil and gas lease was subject to Pennsylvania's Landlord and Tenant Act of 1951, and that the Act's statute of frauds barred enforcement of the lease. The Pennsylvania Superior Court said this argument turned a "blind eye" to caselaw rejecting the application of landlord-tenant principles to oil and gas leases. The general statute of frauds, which required only the signature of the grantor, applied to the oil and gas lease. The Superior Court also concluded that the lessee had met its obligation to conduct due diligence prior to entering into the lease. The court noted that the lessee's representative had reviewed records in the county where the property was located and had asked the possessor of the property about his title. Because plaintiffs had not raised the question of whether the lease had expired due to inactivity of drilling operations during the lease's primary term in their summary judgment motion, the Superior Court declined to consider the issue.

French v. Occidental Permian Ltd., No. 12-1002 (Tex. June 27, 2014). The Texas Supreme Court affirmed an intermediate appellate court's ruling that an oil company could deduct from royalties the processing costs for removing carbon dioxide (CO_2) from "casinghead gas," the gas produced with oil recovered using the enhanced oil recovery method of CO_2 flooding. The casinghead gas produced at the wells in question, which were located in the Canyon Reef formation in the Permian Basin, was approximately 85% CO_2. Although the

parties agreed that removing contaminants "indigenous to the production field" was not part of production (meaning the costs were deductible from royalties), this case was apparently the first to address whether the "the separation of extraneous substances injected into the field" constituted production (the costs of which are not deducted from royalties). Because the agreements between the royalty owners and the working interest (the oil company) had given the working interest the right and discretion to decide whether to reinject or process the casinghead gas, the court ruled that the costs of CO_2 removal were not production expenses necessary for the continued production of oil, but postproduction expenses that made the gas marketable.

Novy v. Woolsey Energy Corp., No. 110,599 (Kan. Ct. App. June 27, 2014). In a per curiam opinion, the Kansas Court of Appeals ruled that an oil and gas leaseholder had not breached the implied covenant to prudently develop. The lessors had argued that the lease should be terminated because the leaseholder had refused to drill on their land for more than 30 years based on its determination that oil or gas would not be produced in commercial quantities. The court found that the lessors had not presented evidence of any of the factors bearing on whether there had been a breach, including whether there was the capability of producing oil or gas in paying quantities under the leased land; whether there was a local market and demand for the oil or gas; the extent and results of operations on adjacent lands; the character of the natural reservoir; the cost of drilling, equipment, and operation of any wells drilled; and the cost of transportation and storage.

Freedom of Information Lawsuits

Bell v. Pennsylvania Department of Environmental Protection, No. AP 2014-0880 (Pa. Office of Open Records July 11, 2014). The Pennsylvania Office of Open Records (OOR) issued a final determination regarding a request for records made on behalf of Delaware Riverkeeper Network under Pennsylvania's Right-to-Know Act. The request sought records related to the Pennsylvania Department of Environmental Protection's (PADEP's) study of technologically enhanced naturally occurring radioactive material (TENORM) in equipment, material, and media used in oil and gas development. PADEP denied the request for TENORM study sample data. On appeal, OOR determined that PADEP had not established that the withheld data fell within the Right-to-Know Law's exemptions for records relating to noncriminal investigations; for records for which disclosure would threaten personal security, public safety, or public security of infrastructure; or for records comprising internal predecisional PADEP deliberations.

Athens County Fracking Action Network v. Department of Natural Resources, No. 14-AP-000217 (Ohio Ct. App. June 20, 2014). The Ohio Department of Natural Resources (ODNR) settled a lawsuit brought under the State's Public Records Act by a local group that opposed waste fluid injection wells in Troy Township in Athens County. The agreement indicated that ODNR had provided records to the group since the lawsuit was commenced. ODNR agreed to pay the group $1,000. The local group has appealed the Ohio Oil and Gas Commission's June dismissal of the group's appeal of the issuance of a well permit (see below).

Contract Disputes

Eagle Oil & Gas Co. v. Travelers Property Casualty Co. of America, No. 7:12-cv-00133-O (N.D. Tex. July 14, 2014). The federal district court for the Northern District of Texas issued summary judgment rulings that largely favored the policyholder in a dispute over coverage under a well control policy issued by Travelers Property Casualty Company of America (Travelers). After an out-of-control well incident at the well owned and operated by the policyholder, Eagle Oil & Gas Co., and Eagle Oil's joint venture partners, who were additional insureds (together, Eagle Oil), Eagle Oil incurred costs and expenses: (1) in attempting to regain control of the well, including plugging and abandonment (P&A) costs; (2) in redrilling a replacement well; (3) in cleaning up pollution resulting from the blowout; and (4) in regard to oil field equipment owned by others that was damaged. One of the primary disputed issues was whether Eagle Oil violated the policy's "due care and diligence" clause because it had exceeded the maximum safe fracturing pressure. The court concluded that the clause was not a condition precedent to coverage, but a covenant enforceable as an exclusion. As a result, Travelers bore the burden of proving that Eagle Oil had not exercised due care and diligence. The court declined, however, to accept Eagle Oil's contention that a "gross negligence" standard should be read into the "due care and diligence" clause. Eagle Oil had incorrectly attempted to replace the "reasonable prudent operator" standard required by industry practice and Texas regulatory standards with the higher level of culpability specified in Eagle Oil's joint operating agreement. The court also agreed with Eagle Oil that reasonable plugging and abandonment costs were covered until the well was permanently plugged and abandoned, and that Eagle Oil did not need to demonstrate that the P&A costs were necessary to bring the well under control to trigger coverage. Finally, the court rejected Travelers's argument that it was not obligated to cover the costs of redrilling the well. The court granted Travelers's motion for summary judgment on plaintiffs' extra-contractual claims of breach of the duty of good faith and fair dealing and violations of the

Texas Insurance Code and the Texas Deceptive Trade Practices Act. The court concluded that these claims could not survive because a reasonable juror could not find that the denial of coverage had been unreasonable or, alternatively, because Eagle Oil had not raised a triable issue of fact that the denial of coverage caused them injury independent of the nonpayment of the claim. The court granted summary judgment to a company that provided loss-adjusting services to Travelers on Eagle Oil's extra-contractual claims.

NEW CASES AND FILINGS

Challenges to Municipal Action

Geokinetics USA, Inc. v. Center Township, No. 2:14-cv-00982 (W.D. Pa., filed July 22, 2014). A company that provided seismic testing services to assist oil and gas operators in locating hydrocarbons filed a lawsuit in the federal district court for the Western District of Pennsylvania against Center Township and its board of supervisors. The township had passed an ordinance regulating seismic testing after the company—which alleged it had obtained all required state approvals—requested the township's approval to use certain local roads. The company alleged that the local ordinance "was passed without any public notice or process" and that it "effectively prevents any and all seismic testing in the Township through vague, arbitrary, and unreasonable regulations." The company further contended that the ordinance "contains onerous and arbitrary application requirements, confiscatory application fees, punitive penalty provisions, and operational regulations that are inconsistent with state regulations." The company alleged state law preemption, as well as violations of Pennsylvania's Second Class Township Code and violations of procedural and substantive due process and equal protection rights.

Western States Petroleum Association v. City of Compton, No. BC552272 (Cal. Super. Ct., filed July 21, 2014). The Western States Petroleum Association (WSPA) commenced an action in California Superior Court to challenge an ordinance adopted by the City of Compton that bans the use of hydraulic fracturing, acidizing, or any other well stimulation treatment for production or extraction of oil, gas, or other hydrocarbon from any surface location in the City or from any sites outside the City "where the subsurface bottom hole is located in the City." WSPA claimed that state law occupied the field of well stimulation treatments and therefore preempted the local ban. The complaint also alleged that the ordinance's regulation of activities outside City limits violated the California constitution because it was an ultra vires action beyond the City's police powers, and that the City's adoption of the ordinance—which WSPA said was "crammed" through City Council in one week with no notice to or testimony from affected mineral rights holders—violated the due process rights of those mineral rights holders.

Challenges to Agency Action

Athens County Fracking Action Network v. Ohio Department of Natural Resources, No. 14 CV 007132 (Ohio. Ct. Comm. Pleas, filed July 14, 2014). A local group filed a notice that it would appeal the Ohio Oil and Gas Commission's denial of its challenge to a permit issued for an injection well in Troy Township in Athens County. The Commission denied the challenge on June 12, 2014, saying that it lacked jurisdiction because the permit at issue was a drilling permit, not an injection permit. The local group has claimed that its appeal is the first-ever appeal of an injection well in Ohio. In June, the group settled a dispute under the Ohio Public Records Act (see above).

Reese River Basin Citizens Against Fracking, LLC v. Bureau of Land Management, No. 3:14-cv-00338 (D. Nev., filed June 27, 2014). In July, a group of owners of farming and ranching land, water rights, and grazing rights in Nevada filed an action in the federal district court for the District of Nevada challenging the U.S. Bureau of Land Management's (BLM's) decision to lease 230,989 acres of public lands for oil and gas development. The group alleged that BLM had not fulfilled its obligations under the National Environmental Policy Act. It said the environmental assessment prepared for the sale "ignored or downplayed" the impacts the lease sale and oil and gas development would have, including by failing to address impacts on water and air quality and seismic activity from hydraulic fracturing, which the group alleged was likely to be used to extract oil and gas in the leased areas.

Government Enforcement Actions

State of Florida, Department of Environmental Protection v. Dan A. Hughes Co., L.P., OGC Case No. 14-0400 (Fla. Dep't of Envtl. Prot., notice of revocation July 18, 2014); ***State of Florida, Department of Environmental Protection v. Dan A. Hughes Co., L.P.***, No. 112014CA0016430001XX (Fla. Cir. Ct., filed July

18, 2014). On July 18, the Florida Department of Environmental Protection (FDEP) took two enforcement steps against Dan A. Hughes Co., L.P. (Hughes), the operator of an oil well at the Hogan Island Farm in Collier County. FDEP (1) issued a notice of its revocation of permits issued for the well and (2) commenced an enforcement action in Florida state court. The notice of revocation said Hughes had violated the terms of an April 2014 consent order that addressed Hughes's refusal to comply with a December 2013 order by FDEP to stop a workover operation Hughes was conducting. Alleged violations of the consent order included failure to submit an adequate Interim Spill Prevention and Cleanup Plan, failure to retain an independent third-party expert to assess the likelihood of Hughes's workover operation at the well site causing or contributing to a violation of groundwater quality standards, and failure to submit a groundwater monitoring plan. Among other allegations in the notice was that Hughes disposed of flowback material from the workover operation without conducting required sampling that was essential to the development of the monitoring plan. The notice also alleged violations of environmental regulations requiring Hughes to provide manifests for flowback material transported off site and to post certain signs at the well site. The notice further alleged that Hughes maintained an unpermitted "stationary installation" (a dumpster in which FDEP observed waste materials covered in oil). The complaint in the enforcement action contained the same allegations regarding the violations of the consent order and state statutory and regulatory requirements. FDEP sought injunctive relief, including an order requiring Hughes to permanently plug and abandon the well and remediate the site, authorizing FDEP to retain an expert at Hughes's expense to conduct the water quality risk assessment, and requiring Hughes to conduct a contamination assessment at the well site. FDEP also sought penalties of more than $100,000 and investigative costs and expenses for maintaining the enforcement action. FDEP's actions came two weeks after it sent Hughes a letter outlining steps the company needed to take to avoid regulatory and enforcement action.

Oil & Gas Lease Disputes

Harrison v. Cabot Oil & Gas Corp., No. 61 MM 2014 (Pa. July 16, 2014). The Pennsylvania Supreme Court granted a petition for certification of question of law from the United States Third Circuit Court of Appeals. The Supreme Court will consider the following issue: "When an oil and gas lessor files an unsuccessful lawsuit to invalidate a lease, is the lessee entitled to an equitable extension of the primary lease term equal to the length of time the lawsuit was pending?" A federal district court said in August 2012 that it would not find that a lessor's filing of a lawsuit repudiated a lease warranting extension "[u]ntil the Pennsylvania courts say otherwise."

Apache Deepwater, LLC v. McDaniel Partners, Ltd., No. 14-0546 (Tex. petition for review filed, July 14, 2014). Apache Deepwater, LLC (Apache) filed a petition seeking the Texas Supreme Court's review of an appellate court decision that held that "production payments" must continue after an oil and gas lease expires. Production payments are "a share of the oil or other minerals 'produced from the described premises, free of costs of production, terminating when a given volume of production has been paid over, or when a specified sum from the sale of such oil has been realized.'" The obligation to make the production payments in this case arose from the 1953 assignment of four oil and gas leases to Apache's predecessor. The assignment reserved a substantial production payment to the assignor. The court concluded that if the parties to the assignment had intended to provide for adjustment of the production payment upon expiration of the leases, the assignment would have included terms providing for such an adjustment. In the petition for review, Apache said the appellate court decision "gets Texas law backwards," and that because production payments are "substantially identical" to royalties, they should terminate when the lease does, absent language to the contrary.

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Arnold & Porter attorneys have a long history of counseling energy companies on regulatory compliance and defending their interests in enforcement proceedings and litigation. Information about the firm's experience with hydraulic fracturing is available here.

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