

INSURANCE AND REINSURANCE CASUALTY SUBCOMMITTEE

APRIL 2016

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These articles highlight two highly contentious disputes. From its beginning fracking has caused concern over its potential harmful environmental impact. The industry contends that its extraction methods are safe but a recent Pennsylvania case demonstrates that juries may not be receptive to this argument. The NFL also contends that its product, professional football, is safe and continues to get safer for its participants. A recent decision by Pop Warner to settle a difficult case, pending legislation in Indiana and an "admission" by the NFL, may make this a much more difficult argument to sustain.

Fracking and Concussion Claims Continue to Impact the Legal Landscape

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FRACKING: JURY AWARDS LANDOWNERS \$4.4 MILLION WHERE NEGLIGENT DRILLING CONTAMINATED THE WATER SUPPLY

After six and half exhausting years of disputes and uncertainty over whether their water was safe to drink, two families in northeastern Pennsylvania were awarded over \$4.2 million in damages by a federal jury after it was found that Cabot Oil & Gas Corp.'s fracking operations contaminated their ground water. Scott Ely and Monica Marta-Ely, along with their three children, and Ray and Victoria Hubert, along with their daughter, were the last of more than 40 families who had sued Cabot beginning in 2009. The verdict concludes a lengthy litigation, during which the Ely and Hubert families refused to settle, partly to bring greater awareness to the situation. The remaining families had previously settled with the company in 2012, but the settlement terms were never made public and the families were prevented from speaking out about their experiences with Cabot due to a "non-disparagement" clause in the agreement.

Throughout the litigation, Cabot vehemently denied that its fracking operations resulted in any harm to the plaintiffs or the drinking water in Dimock, a town about 50 km south of Binghamton, New York, despite a documentary on the case revealing local residents lighting their tap water on fire due to allegedly high amounts of methane. Cabot maintained its stance that the methane occurred naturally, and that while the water

may have been "aesthetically displeasing," it was nevertheless safe to drink.

While the verdict represents a major victory for the citizens of Dimock as well as local grassroots organizers who helped haul clean water from outside Dimock into the community, some believe the EPA should have taken action sooner. Regardless, the jury verdict will likely have broad implications on the debate surrounding environmental risks of nationwide fracking and shale drilling, as well as whether these activities are considered "abnormally dangerous" so as to be subject to strict liability. Additionally, with the current water crisis in Flint, Michigan, the case is incredibly timely in its analysis of the extent to which drilling companies can be liable for these activities.

A. The Initial Complaint

The case originally arose out of oil and gas leases entered into between landowners in Dimock Township, located in Susquehanna County, Pennsylvania, and Cabot Oil & Gas Corporation ("Cabot"). Under the terms of the leases, Cabot was able to engage in hydraulic fracking and drilling activities on the land for purposes of mining for oil, gas, and minerals located in and on the land. The land was especially desirable to Cabot due to a deep geological formation called the Marcellus Shale, which covers approximately sixty percent of Pennsylvania's underground land. The natural gas trapped within the Marcellus is

invaluable and could provide enough fuel to the entire country for years on end.

Hydraulic fracking is the process in which this gas is released, and involves drilling wells and then injecting fracturing fluids to break open the formations, allowing gas to be released to the surface. While the process seems simple enough, major concerns surrounding the practice involve possible contamination of groundwater, reduction in air quality, and the use of potentially dangerous chemicals during fracking.

The initial Complaint in this case, filed on November 9, 2009, was brought by 44 plaintiffs against Cabot Oil and Gas Corp. and GasSearch Drilling Services, two drilling companies. In the Complaint, the plaintiffs sought compensation for damages to their properties and bodily injuries directly resulting from Cabot and GasSearch's drilling for natural gas in the community of Dimock. The Complaint set forth eight causes of action: (1) violations of the Hazardous Sites Cleanup Act ("HSCA"); (2) negligence; (3) private nuisance; (4) strict liability; (5) breach of contract; (6) fraudulent misrepresentation; (7) medical monitoring trust funds; and (8) gross negligence. Specifically, the plaintiffs claimed that the defendants conducted hydrofracturing (commonly known as "fracking") and other extraction activities that released methane, natural gas, and other toxins onto their land and into their groundwater.

B. Strict Liability

The defendants moved to dismiss, arguing that the Complaint was deficient in several ways. Most notably, the defendants alleged that under Pennsylvania case law, "known or unknown underground storage tanks do not constitute an abnormally dangerous or ultrahazardous condition on the property." *Smith v. Weaver*, 445 Pa. Super. 461, 470-471, 665 A.2d 1215, 1219-1220 (1995). The Court ultimately held that natural gas operations, such as fracking, were not abnormally dangerous, and accordingly dismissed the strict liability claims, thereby narrowing the case to one mostly sounding in negligence.

In coming to this conclusion, the Court first noted that the plaintiffs failed to show that hydraulic fracking was the cause of the alleged ground contamination. Despite the Ely family's claim that they began to suffer from headaches, rashes, and upset stomachs beginning around the time that the defendants began drilling, as well as testimony from a hydrology expert, the Court was unconvinced. Also, the Court found that the Elys failed to prove that they suffered any personal injuries as a direct result of the drilling.

Additionally, the Court examined existing case law and Sections 519 and 520 of the Restatement (Second) of Torts to determine whether fracking constitutes an abnormally dangerous activity, an issue of first impression. The Court noted that Pennsylvania recognizes a tort cause of

action for strict liability when an ultra-hazardous and abnormally dangerous activity is involved, and that Section 519 of the Restatement holds a person engaged in an abnormally activity subject to liability for harm resulting from that activity, regardless of the level of care used in preventing harm. Section 520 of the Restatement enumerates six factors in determining whether an activity is abnormally dangerous:

(1) the existence of a high degree of risk of some harm to the person, land or chattels of others; (2) likelihood that the harm that results from it will be great; (3) inability to eliminate the risk by the exercise of reasonable care; (4) extent to which the activity is not a matter of common usage; (5) inappropriateness of the activity to the place where it is carried on; and (6) extent to which its value to the community is outweighed by its dangerous attributes.

The Court acknowledged that Pennsylvania courts have mostly declined to label gas and oil operations as ultra-hazardous activities, so the Court here used the factors listed in the Restatement to determine whether fracking could be considered abnormally dangerous. Under the first factor, the Court determined that the plaintiffs failed to meet their burden of rebutting Cabot's evidence which showed that the risks of hydraulic fracking are minimal if performed properly. Specifically, Cabot presented reports which showed that the water chemistry in the area surrounding the gas drilling was not

substantially affected, and that the risks are lessened if the wells are constructed properly. Also, the plaintiffs focused their arguments on the potential repercussions of fracking, rather than the actual fracking process, and were found to lack sufficient evidence to support their position. Accordingly, the Court found that the plaintiffs failed to satisfy the first factor under the Restatement analysis.

As to the second factor, the plaintiffs cited a case regarding surface blasting, which the Supreme Court found to be an ultra-hazardous activity. Because the plaintiffs failed to sufficiently explain the analogy between surface blasting and fracking, the Court held that the plaintiffs failed to show that fracking would result in significant harm.

Under the third factor, the Court found that the plaintiffs failed to offer sufficient evidence that the drilling of the wells caused water contamination and affected the plaintiffs' property or water supply, or that the risks of fracking could be eliminated if due care was exercised. The Court was more convinced by evidence presented by Cabot, which indicated that economic benefits of drilling significantly outweighed potential costs to the environment, and that newer technologies had been created to diminish the possible risks.

Under the fourth factor, the Court found that fracking has become a common and important part of communities similar to Dimock, even though the plaintiffs claimed

that fracking only began in Dimock within the past ten years. Again, the Court was more convinced by the evidence supporting Cabot's position, specifically a report that showed more than 2.5 million fracture operations had been conducted worldwide since 1949. Additionally, the report indicated that over 649 wells were drilled in Susquehanna County since 2000, and that fracking was performed on approximately 99.5% of these wells since 2009. Accordingly, this factor weighed against a finding of strict liability.

Pursuant to the fifth factor, the plaintiffs claimed that even though they granted leases to Cabot to explore for natural gas within their properties, Cabot's activities were conducted too close to the plaintiffs' water sources. However, the Court reasoned that the drilling was in conformance with state requirements with regard to the distance between the gas wells and water supplies, and that the wells were drilled subject to their respective valid leases. As such, the Court found no strict liability under this factor.

Under the sixth and final factor, the Court noted that the Pennsylvania Superior Court previously held that the activity at issue may not be abnormally dangerous if its value to the community outweighs its potential danger, especially if the activity is central to the community's economic well-being. Here, the Court found that in 2009 the drilling resulted in almost 24,000 new jobs, over \$3 billion in revenue, significant increases in sales for 28% of businesses surveyed, and

royalty income that reduced economic pressure from unemployment. Thus, the Court reasoned that the economic benefits to the community outweighed the dangerous attributes of fracking. Taking all the factors into consideration together, the Court held that oil and drilling operations were not considered ultra-hazardous activities and did not subject Cabot to strict liability, but rather should be analyzed under negligence principles.

C. The Narrowing of the Case

The Court's holding that the fracking operations were not considered abnormally dangerous activities that would subject Cabot to strict liability was a huge blow for the plaintiffs, who were now forced to plead their case under much narrower principles. Over the next several years, most of the families settled with the drilling companies, and as of January 2015, only the negligence and private nuisance claims were allowed to move forward. At that time, the Court suggested that the remaining plaintiffs enter mediation with Cabot after dismissing all claims aside from the negligence and private nuisance causes of action. As of the date of the dismissal of the remaining claims, the original 44 plaintiffs had been whittled down to only 10 who had not reached settlements. According to U.S. District Judge John E. Jones III, "[t]he Elys have provided evidence indicating that Cabot's negligently conducted drilling activities may have negatively impacted the Ely's water supply, may have caused injury to the property and caused the Elys to suffer damages, and may

further have caused the Elys to resort to obtaining potable and usable water from outside vendors and sources at their own expense." However, the "somewhat limited" evidence was not enough to support the rest of the original expansive claims.

Following the settlement of the vast majority of the plaintiffs, the two remaining families, the Huberts and the Elys, were forced to represent themselves after being unable to find legal counsel. Over the years, the families also found themselves left with no other option but to haul their water by truck, a task made even more difficult in the winter when freezing pipes and other issues further impeded their access to clean water.

D. The Jury Verdict

In the end, after a 14-day trial and 8.5 hours of jury deliberations, the Huberts and the Elys were awarded \$4.24 million. The jury ultimately found that the Huberts and the Elys proved by a preponderance of the evidence that Cabot was negligent in drilling of the wells, thereby contaminating the wells and creating a private nuisance that significantly harmed the families in the use and enjoyment of their properties. The verdict represented a major win, as the town has made international headlines for its flammable and toxic drinking water. Additionally, despite not being able to pursue Cabot for harms done to their health, the families were still awarded an incredible amount of damages solely on property damage and injury, showing the underlying

severity of the possible implications associated with fracking.

E. Conclusion

While the verdict will not bring back clean water to the community, the decision will likely have a significant impact on the regulation and litigation of fracking activities. A state investigation showed that Cabot had allowed gas to escape into the region's groundwater supplies, contaminating at least 18 wells. Cabot is currently banned from drilling within a 9-mile radius of Dimock and has accumulated more than 130 drilling violations at its Dimock wells. Cabot plans to appeal the decision, and continues to insist that any methane migration into the drinking water is naturally occurring. It is important to note that while this case stands for the proposition that landowners with contaminated water supplies have limited legal remedies, especially since the Court expressly found that the plaintiffs were unable to prove strict liability despite the evidence they set forth, the potential damages awarded can be great.

FROM POP WARNER TO THE NFL, CONCUSSION CLAIMS SPUR GREATER SCRUTINY

A. Pop Warner Settlement

Although the primary focus has been on the NFL, concussion claims continue to have a wider impact. Recently, Pop Warner, the nation's largest youth football league settled

a lawsuit with a family whose son played in the league and later committed suicide. His autopsy revealed that he was suffering from chronic traumatic encephalopathy (CTE), a disease that has been linked to repeated hits to the head and has been found in athletes and soldiers.

The decedent was only twenty-five when he committed suicide. After playing Pop Warner football, the evidence showed that the decedent also played high school football, wrestled and was a pole vaulter on the track and field team. Despite the apparent difficult causation issues the decedent's estate would have had linking his Pop Warner football playing days with his CTE and cognitive issues, Pop Warner chose to resolve the case.

The amount of the settlement was not disclosed. The decedent's mother, Debra Pyka had initially demanded \$5,000,000 from Pop Warner on behalf of her son's (Joseph Chernach) estate. Settlements like this one could result in increasing claims against leagues like Pop Warner. Youth sports in the United States involve millions of children who are exposed to less rigorous training and medical care than athletes at the high school, college and professional levels. As claims like this one continue to increase, it will be interesting to determine whether they will have an impact on football's level of participation and popularity.

B. Indiana Moving Towards Enacting Concussion Legislation

The Indiana General Assembly approved language change to extend concussion protections to all student athletes. The proposed legislation provides concussion protocols to all sports, including cheerleading, from fifth to twelfth grades. Currently, the protocols only extend to high school football players.

Head and assistant coaches will be required to complete a certified player safety education course before coaching student athletes in any sport. The coaches will be required to be certified every two years.

The Indiana Department of Education shall establish guidelines for these concussion protection classes. In addition, the Indiana Department of Education is charged with developing concussion protocol guidelines with the assistance of a licensed health care provider with expertise in concussions to assist in developing the protocols.

C. Did the NFL Admit the Link Between Sports and CTE??

Recently, Jeff Miller, the NFL's senior vice-president for health and safety policy at a Capitol Hill roundtable discussion admitted that there was a link between football and degenerative brain disorders like CTE. Mr. Miller also raised concerns with the prevalence of the brain disorders. Sensing the possible impact of that statement by Mr. Miller on the pending litigation, NFL

Commissioner Roger Goodell and other league spokesmen reiterated the NFL's standard position that it would let the medical community determine the connection between football and CTE.

However, Mr. Miller's statement has already been cited in the U.S. Court of Appeals for the Third Circuit. This case involves an appeal challenging Judge Brody's decision in the District Court to approve an NFL settlement. An attorney representing some of the players appealing the decision argued that the NFL's admission of a direct link between football and CTE highlights the inadequacy of the settlement because of its failure to compensate present and future players who develop CTE. There is no timetable for the Court of Appeals decision.

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