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A Survey of Typical Claims and Key Defenses Asserted in Recent Hydraulic Fracturing Litigation

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A SURVEY OF TYPICAL CLAIMS AND KEY DEFENSES ASSERTED IN RECENT HYDRAULIC FRACTURING LITIGATION

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I. INTRODUCTION

Small energy companies using hydraulic fracturing, along with horizontal drilling, are unlocking vast oil and natural gas deposits trapped in shale all over the United States. Over the past few years, several key technical, economic, and energy policy developments have spurred increased use of hydraulic fracturing for oil and gas extraction over a wider diversity of geographic regions and geologic formations.[2] However, with the expansion of hydraulic fracturing, there have been increasing concerns voiced by the public about potential impacts on drinking water resources, public health, and the environment.[3]

Due to these public concerns, oil and gas companies and service providers have experienced a significant increase in recent litigation. For instance, there have been at least fifty recent lawsuits filed in Arkansas,[4] California,[5] Colorado,[6] Louisiana,[7] New York,[8] Ohio,[9] Pennsylvania,[10] Texas,[11] and West Virginia that relate to or stem from

2. *See Hydraulic Fracturing*, U.S. ENVT'L PROT. AGENCY, http://www.epa.gov/hydraulicfracture/ (last accessed May 20, 2013).

3. *Id.*

4. Ginardi v. Frontier Gas Servs., LLC, No. 4:11-CV-0420, 2012 WL 1377052 (E.D. Ark. Apr. 19, 2012); Tucker v. Sw. Energy Co., Nos. 1:11-CV-0044, 1:11-CV-45-DPM, 2012 WL 528253 (E.D. Ark. Feb. 17, 2012); Hearn v. BHP Billiton Petroleum (Ark.), Inc., 4:11-CV-0474 (E.D. Ark. filed June 9, 2011); Scoggin v. Cudd Pumping Servs., Inc., No. 4:11-CV-00678-JMM (E.D. Ark. filed Sept. 12, 2011); Bartlett v. Frontier Gas Servs., LLC, No 4:11-CV-0910 (E.D. Ark. filed Dec. 23, 2011); Hiser v. XTO Energy, Inc., (E.D. Ark. Aug. 14, 2012).

5. Ctr. for Biology Diversity v. BLM, No. 11-CV-6174 (N.D. Cal. filed Dec. 8, 2011).

6. Strudley v. Antero Res. Corp., No. 2011-CV-22 (Denver Co. Dist. Ct. filed March 23, 2011); Evenson v. Antero Res. Corp., No. 2011-CV-5118 (Denver Co. Dist. Ct. filed July 20, 2011).

7. Andre v. EXCO Res., Inc., No. 5:11-00610 (W.D. La. filed Apr. 15, 2011); Beckman v. EXCO Res., Inc., No. 5:11-00617 (W.D. La. filed Apr. 18, 2011); Teekell v. Chesapeake Operating, Inc., No. 12-0044, 2012 WL 2049922 (W.D. La. June 6, 2012).

8. Maring v. Nalbone, No. K12009001499 (N.Y. Sup. Ct. Chautauqua Co. filed Aug. 27, 2009); Baker v. Anschutz Exploration Corp., 6:11-CV-06119 (W.D.N.Y. filed Mar. 9, 2011); State v. U.S. Army Corps of Eng'rs, 896 F. Supp. 180 (E.D.N.Y. 2012); Del. Riverkeeper Network v. U.S. Army Corps of Eng'rs, 896 F. Supp. 2d 180 (E.D.N.Y. 2012); Sierra Club v. Village of Painted Post, No. 2012-0810CV (N.Y. Sup. Ct. Steuben Co. filed June 25, 2012).

9. Mangan v. Landmark 4, LLC, No. 1:12-CV-00613, 2013 WL 950560 (N.D. Ohio Mar. 11, 2013); Boggs v. Landmark 4, LLC, No. 1:12-CV-00614, 2013 WL 944776 (N.D. Ohio March 11, 2013); Koonce v. Chesapeake Exploration, LLC, No. 4:12-CV-0736 (N.D. Ohio filed Mar. 27, 2012).

10. Fiorentino v. Cabot Oil & Gas Corp., 750 F. Supp. 2d 506 (M.D. Pa. 2010); Berish v. Sw. Energy Prod. Co., 763 F. Supp. 2d 702 (M.D. Pa. 2011); Armstrong v. Chesapeake Appalachia, LLC, No. 10-CV-000680 (Pa. Ct. Com. Pl. filed Oct. 27, 2010); Kamuck v. Shell Energy Holdings GP, LLC, No. 4:11-CV-01425-MCC, 2012 WL 1463594 (M.D. Pa. Mar. 19, 2012); Zimmerman v. Atlas Am., LLC, No. 2009-7564 (Pa. Ct. Com. Pl. filed Sept. 21, 2009); Dillon v. Antero Res., 2:11-CV-1038, 2012 WL 2899710 (W.D. Pa. July 10, 2012); Becka v. Antero Res., No. 2:11-CV-01040, 2012 WL 2899710 (W.D. Pa. July 10, 2012); Otis v. Chesapeake Appalachia, LLC, No. 3:11-CV-00115, 2012 WL 1657930 (M.D. Pa. May 11, 2012); Brockway Borough Mun.

hydraulic fracturing operations.[12] Most of the cases involve private landowners asserting tort-related claims against the oil and gas industry. However, there have also been lawsuits brought by citizen groups under various federal environmental statutes as well as litigation on whether a municipality can ban hydraulic fracturing within its city limits.[13] Nonetheless, due to the breadth of current litigation, the scope of this paper has been limited to the typical claims and key defenses that have been asserted in cases between private landowners and oil and gas companies concerning alleged environmental contamination.[14]

Auth. v. Flatirons Dev., LLC, 2010 WL 5769162 (Pa. Com. Pl. filed Dec. 15, 2010) (No. 1141-2010); Bidlack v. Chesapeake Appalachia, LLC, No. 10-EQ-000761, 2012 WL 1657934 (M.D. Pa. May 11, 2012); Burnett v. Chesapeake Appalachia, LLC, 11-CV-80 (Ct. Common Pleas, Bradford Cty., Pa. Feb. 25, 2011), removed, No. 3:11–CV–1059 (M.D. Pa., June 1, 2011), remanded to state court (Aug. 31, 2011); Phillips v. Chesapeake Appalachia, LLC, No. 3:11-MC-00126 (M.D. Pa. Apr. 25, 2011); Manning v. WPX Energy Inc., No. 3:12-CV-00646 (M.D. Pa. filed Apr. 9, 2012); Haney v. Range Res., No. 2012-3534 (Ct. Common Pleas, Washington Cty., Pa. filed May 25, 2012); Butts v. Sw. Energy Prod. Co., No. 3:12-CV-01330 (M.D. Pa. filed July 10, 2012).

11. Scoma v. Chesapeake Energy Corp., No. 3:10-CV-1385-N (N.D. Tex. filed July 15, 2010); Ruggiero v. Aruba Petroleum, Inc., No. 10-10-801 (Dist. Ct., Wise Cnty., Tex. filed Oct. 18, 2010); Sizelove v. Williams Prod. Co., No. 2010-50355-367 (431st Dist. Ct., Denton Cnty., Tex. filed Nov. 3, 2010); Heinkel-Wolfe v. Williams Prod. Co., No. 2010-40355-362 (362nd Dist. Ct., Denton Cnty., Tex. filed Nov. 3, 2010); Mitchell v. Encana Oil & Gas (USA), Inc., No. 3:10-CV-02555-N (N.D. Tex. filed Dec. 15, 2010); Harris v. Devon Energy Prod. Co., No. 4:10-CV-00708-MHS-ALM (N.D. Tex. filed Dec. 15, 2010); Smith v. Devon Energy Prod. Co., No. 11-CV-0196 (N.D. Tex. filed Jan. 31, 2011); Town of Dish v. Atmos Energy Corp., No. 2011-40097-362 (362nd Dist. Ct., Denton Cnty., Tex. filed Feb. 28, 2011); Parr v. Aruba Petroleum, Inc., No. 11-01650-E (Cnty. Ct. at Law No. 5, Dallas, Tex. filed Mar. 8, 2011); Lipsky v. Range Prod. Co., No. CV-11-0798 (43rd Dist. Ct., Parker Cnty., Tex. filed June 20, 2011); Knoll v. XTO Energy, Inc, No. 2010-10345-16 (Denton Co. Dist. Ct. filed June 27, 2011) (water claims subsequently dropped); Beck v. ConocoPhillips Co., No. 2011-484 (123rd Dist. Ct., Panola Cnty., Tex. filed Dec. 1, 2011); Strong v. ConocoPhillips Co., No. 2011-487 (123rd Dist. Ct., Panola Cnty., Tex. filed Dec. 2, 2011).

12. Hagy v. Equitable Prod. Co., No. 2:10-CV-13722, 2012 WL 2562856 (S.D. W. Va. June 29, 2012); Teel v. Chesapeake Appalachia, LLC, No. 5:11-CV-5, 2012 WL 5336958 (N.D. W. Va. Oct. 25, 2012); Magers v. Chesapeake Appalachia, LLC, No. 12-C-36H (Cir. Ct., Marshall Cnty., W. Va. filed Feb. 24, 2010), removed, No. 5:12-CV-49 (N.D. W. Va.); Rine v. Chesapeake Appalachia, LLC, No. 5:11-0004 (N.D. W. Va. filed Jan. 1, 2011); Bombardiere, Sr. v. Schlumberger Tech. Corp., No. 1:11-CV-50 (N.D. W. Va. filed Apr. 14, 2011); Perna v. Reserve Oil & Gas, Inc., No. 11-C-2284 (Cir. Ct., Kanawha Cnty., W. Va. filed Dec. 21, 2011).

13. *See, e.g.*, Barclay R. Nicholson & Stephen C. Dillard, Fulbright & Jaworski L.L.P., *Analysis of Litigation Involving Shale and Hydraulic Fracturing* (Nov. 2012), http://www.fulbright.com/images/publications/20121120AnalysisofLitigationInvolvingShale1.pdf; Dae Neslin, Davis Graham & Stubbs LLP, *Hydraulic Fracturing Litigation: Recent Developments and Current Issues in Cases Involving Alleged Water Supply Impacts* (Sept. 2012), http://www.dgslaw.com/images/materials/Neslin-RMMLI-Hydraulic-Fracturing%20Litigation.pdf; *Hydraulic Fracturing*, ARNOLD & PORTER, LLP, http://www.arnoldporter.com/resources/documents/Hydraulic%20Fracturing%20Case%20Chart.pdf (summarizing different types of lawsuits).

14. Due to the long history of oil and gas development in Texas, its jurisprudence is the most developed and is often relied upon by courts from other jurisdictions.

II. Typical Claims

Although the facts of each case differ, they often share striking similarities. For the most part, the plaintiffs either own the surface estate or live on neighboring properties where recent oil and gas operations have occurred.[15] The defendant is the oil and gas operator or service provider that assisted in drilling and completing the well, and/or a midstream company that owns or operates a nearby compressor station and related equipment. Most cases are asserted on behalf of plaintiffs individually. However, at least five cases have been asserted as class actions.[16] In this regard, one court denied class certification, finding that the individual issues presented predominated over the common issues.[17] Another court determined that the defendants' motion to deny class certification was premature.[18] The plaintiffs' complaints typically arise from alleged impacts to groundwater and/or air as a result of recent oil and gas drilling operations. However, in one case the plaintiff also claimed that the defendants' subsequent injection well operations led to earthquakes.[19] Although claims concerning air impacts are on the rise, to date, most of the litigation concerns alleged groundwater impacts.

A. *Groundwater*

With respect to the groundwater claims, the plaintiffs typically reside in rural areas and rely on water wells on their property as their primary source of drinking water. Invariably, the plaintiffs claim that soon after the defendant commenced drilling and hydraulic fracturing operations, the plaintiffs' groundwater became contaminated and could no longer be used for consumption, bathing, or washing clothes.[20] For example, one plaintiff claimed that, following hydraulic fracturing activities, its water turned an orange/yellow color, now

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Accordingly, as a default, this Article will cite to Texas case law authority and, when appropriate, authority from relevant other jurisdictions is also referenced herein.

15. However, in *Bombardiere v. Schlumberger Technology Corp*., 2011 WL 2443691 (N.D. W. Va. 2011), a plaintiff employee asserted claims against his employer for alleged exposure to harmful chemicals while performing hydraulic fracturing operations.

16. Ginardi v. Frontier Gas Servs., No. 4:11-CV-00474-JLH (E.D. Ark. May 17, 2011); Hearn v. BHP Billiton Petroleum (Ark.) Inc., No. 4:11-CV-0474-JLH (E.D. Ark. June 9, 2011) (four similar class action lawsuits were consolidated into one proceeding).

17. Order at 12, Ginardi v. Frontier Gas Servs., No. 4:11-CV-00420-BRW (E.D. Ark. Apr. 19, 2012) (No. 149).

18. Order at 10, Tucker v. Sw. Energy Co., No. 1:11-CV-00044-DPM (E.D. Ark. Feb. 17, 2012) (No. 82).

19. Class Action Compl. at 2–4, Hearn v. BHP Billiton Petroleum (Ark.) Inc., No. 4:11-CV-0474-JLH (E.D. Ark. June 9, 2011) (No. 3).

20. *See, e.g.*, Pl.'s Original Compl. at 3, Harris v. Devon Energy Prod. Co., No. 4:10-CV-00708-MHS-ALM (E.D. Tex. Dec. 15, 2010) (No. 1).

tasted bad, and gave off a foul odor.[21] Those same plaintiffs also claimed that test results indicated that their water was contaminated with, among other things, harmful petroleum constituents, such as benzene, toluene, ethylbenzene, xylene, and barium.[22] In another lawsuit, the plaintiff claimed that testing results showed water contamination with high levels of metals: aluminum, arsenic, barium, beryllium, calcium, chromium, cobalt, copper, iron, lead, lithium, magnesium, manganese, nickel, potassium, sodium, strontium, titanium, vanadium, and zinc, some of which are contained in bentonite, which is used in drilling mud.[23] Plaintiffs generally allege that the groundwater contamination is caused by, among other things, negligence in drilling; construction and operation of the wells, including poor casing and cementing; as well as, releases, spills, and discharges of hazardous chemicals and industrial wastes during drilling activities in general.[24]

B. *Air*

With respect to the air contamination claims, the plaintiffs likewise live near compressor stations, pipelines, and oil and gas drilling operations.[25] In one case, the plaintiffs claimed that a gas compressor station was just 990 feet from their home, a gas pipeline just 700 feet away, and that eight gas drills were within a three-quarter mile radius.[26] The plaintiffs alleged that these operations have lowered their property value because of the constant racket and toxic formaldehyde, sulfur dioxide, benzene, toluene, and xylene emissions.[27] The plaintiffs also claimed to suffer from headaches, respiratory ailments, and trouble breathing as a result of the defendants' drilling and compressing operations, which were allegedly polluting the air surrounding the plaintiffs' home.[28] In another lawsuit, the plaintiffs alleged that nearby compressor stations caused harmful levels of noise pollution and emitted large amounts of methane and hydrogen sulfide, among other flammable and noxious gases.[29] Finally, in yet another lawsuit, the plaintiffs alleged that injuries were caused from exposure

21. *See, e.g.*, Pl.'s Second Am. Compl. at 4, Scoma v. Chesapeake Energy Corp., No. 3:10-CV-01385-N, 2010 WL 3706170 (N.D. Tex. Aug. 11, 2010) (No. 9).

22. *Id.*; *see also*, Pl.'s Second Am. Compl. at 3, Boggs v. Landmark 4, LLC, No. 1:12-CV-00614-DCN, 2012 WL 7803606 (N.D. Ohio Dec. 21, 2012) (No. 1).

23. *See, e.g.*, Pl.'s Original Compl. at 4, Harris v. Devon Energy Prod. Co., No. 4:10-CV-00708 (N.D. Tex. filed Dec. 15, 2010) (No. 1).

24. *See, e.g.*, Compl. at 1, Hagy v. Equitable Prod. Co., No. 10-CV-01372 (S.D. W. Va. Dec. 10, 2010) (No. 1).

25. *See, e.g.*, Pl.'s Original Pet., Heinkel-Wolfe v. Williams Prod. Co., No. 2010-40355-362 (362nd Dist. Ct., Denton Cnty., Tex. filed Nov. 3, 2010) (No. 1).

26. *Id.*

27. *Id.*

28. *Id.*

29. *See, e.g.*, Compl. at 8, Ginardi v. Frontier Gas Servs., No 4:11-CV-00420-BRW (E.D. Ark. May 17, 2011) (No. 1).

to air contaminated by defendants' nearby operations with "hazardous gases, chemicals and industrial wastes," including "hydrogen sulfide, hexane, n-heptane, toluene, propane, isobutene, n-butane, isopentane, n-pentane and other toxic hydrocarbons, combustible gases, hazardous pollutants, and industrial and/or residual waste."[30]

III. Typical Causes of Action

The typical causes of action asserted by the plaintiffs are nuisance (private and public), trespass, negligence, negligence per se, breach of contract, strict liability for ultra-hazardous and abnormally dangerous activities, liability under state hazardous sites cleanup acts, and fraud. Plaintiffs have also asserted claims for negligent misrepresentation, unjust enrichment, impairment of use of property, deceptive trade practice act violations, premises liability, fear of developing dreaded diseases, battery, and intentional infliction of emotional distress. The success of these latter claims differs dramatically from jurisdiction to jurisdiction.

A. *Nuisance*

1. Private

Nuisance is the most common cause of action asserted against oil and gas operators related to hydraulic fracturing operations. For instance, in *Harris v. Devon Energy Production Co., L.P.*, the plaintiffs claimed that the defendant's drilling-related activities created a private nuisance on the plaintiffs' property.[31] The plaintiffs claimed that the acts and omissions of the defendant resulted in the contamination of the groundwater under plaintiffs' land, which substantially interfered with plaintiffs' use and enjoyment of their groundwater for drinking, bathing, and washing.[32] They also claimed that the contaminated well water offended plaintiffs' senses and made their enjoyment of their property uncomfortable and inconvenient.[33] In *Fiorentino v. Cabot Oil & Gas Corp.*, the plaintiffs claimed that defendants created and maintained a continuing private nuisance by allowing gas wells to exist and operate in a dangerous and hazardous condition, allowing the spills and releases to spread to surrounding areas, including plaintiffs' properties and drinking water supplies, resulting in injuries to plaintiffs' health, well-being, and property.[34]

30. Compl. at 4, Strudley v. Antero Res. Corp., No. 2011-CV-2218, 2011 WL 1156763 (Denver Co. Dist. Ct. filed Mar. 23, 2011).

31. Pl.'s Original Compl. at 4, Harris v. Devon Energy Prod. Co., L.P., No. 4:10-CV-00708 (E.D. Tex. Dec. 15, 2010) (No. 1).

32. *Id.*

33. *Id.*

34. Compl. at 18, Fiorentino v. Cabot Oil & Gas Corp., No. 3:09-CV-02284-JEJ-MCC (M.D. Pa. Nov. 19, 2009) (No. 1).

A private nuisance is "a condition that substantially interferes with the use and enjoyment of land by causing unreasonable discomfort or annoyance to persons of ordinary sensibilities attempting to use or enjoy it."[35] "[A] condition that causes aesthetic changes to the view, scenery, landscape, or beauty of an area is not a nuisance."[36] A nuisance may arise by causing physical harm to (1) property, such as "by the encroachment of a damaging substance or by the property's destruction" or (2) to a person on his property from an assault on his senses or by other personal injury. A nuisance may also arise by emotional harm to a person from the deprivation of the enjoyment of his property through fear, apprehension, or loss of peace of mind.[37]

"For an actionable nuisance, a defendant must generally engage in one of three kinds of activity: (1) intentional invasion of another's interests; (2) negligent invasion of another's interests; or (3) other conduct, culpable because abnormal and out of place in its surroundings, that invades another's interests."[38] Accordingly, "proof of negligence is not essential to the imposition of liability for the creation and maintenance of a nuisance."[39] This makes this cause of action very attractive for plaintiffs as nuisance can have the same practical effect as strict liability.[40] Several courts have held that "one may create a private nuisance by using property in a way that causes reasonable fear in those who own, lease, or occupy property nearby."[41] Generally, proof of due care is not a defense because nuisance looks only to effect, not the culpable conduct of the defendant.[42]

The appropriate measure of damages depends on whether the nuisance causing the injury is permanent or temporary.[43] The differences between permanent and temporary injury are discussed in greater detail in Part V.C. below. Nuisance claims permit injunctive relief and

35. Holubec v. Brandenberger, 111 S.W.3d 32, 37 (Tex. 2003); Walton v. Phillips Petroleum Co., 65 S.W.3d 262, 270 (Tex. App.—El Paso 2001, no pet.), *abrogated by* In re Estate of Swanson, 130 S.W.3d 144 (Tex. App.—El Paso 2003, no pet.).

36. Rankin v. FPL Energy, LLC, 266 S.W.3d 506, 508 n.3 (Tex. App.—Eastland 2008, pet. denied).

37. *Walton*, 65 S.W.3d at 270.

38. Z.A.O., Inc. v. Yarbrough Drive Ctr. Joint Venture, 50 S.W.3d 531, 543 (Tex. App.—El Paso 2001, no pet.) (quoting Hicks v. Humble Oil & Ref. Co., 970 S.W.2d 90, 96 (Tex. App.—Houston [14th Dist.] 1998, pet. denied)).

39. Bible Baptist Church v. City of Cleburne, 848 S.W.2d 826, 829 (Tex. App.—Waco 1993, writ denied).

40. *Id.*

41. Kane v. Cameron Int'l Corp., 331 S.W.3d 145, 148 (Tex. App.—Houston [14th Dist.] 2011, no pet.) (citing Comminge v. Stevenson, 13 S.W. 556, 557 (Tex. 1890)); McMahan v. City of Abilene, 261 S.W. 455, 456 (Tex. Civ. App.—El Paso 1924, writ dism'd w.o.j.).

42. *See* Hill v. Villarreal, 362 S.W.2d 348, 349 (Tex. Civ. App.—Waco 1962, writ ref'd n.r.e.).

43. Schneider Nat'l Carriers, Inc. v. Bates, 147 S.W.3d 264, 276 (Tex. 2004).

recovery for punitive damages.[44] Nuisance claims also permit recovery of damages for sickness, annoyance, discomfort, or other substantial bodily harm caused by a nuisance that impairs the comfortable enjoyment of real property.[45]

2. Public

In *Hearn v. BHP Billiton Petroleum, (Arkansas) Inc.*, the plaintiffs asserted a public nuisance claim on the basis that defendants' conduct constituted a substantial and unreasonable interference with the rights common to the general public.[46] The plaintiffs claimed that this unreasonable interference arose from defendants' drilling operations which led to recent seismic activity in Arkansas.[47]

A public nuisance is a condition that amounts to "an unreasonable interference with a right common to the general public."[48] "A public nuisance is maintained (1) by act, or by failure to perform a legal duty, (2) intentionally causing or permitting a condition to exist, (3) which injures or endangers the public health, safety or welfare."[49] A public nuisance could also arise from the operation of business in a residential neighborhood.[50] Therefore, a public nuisance usually involves an act or condition that subverts public health or public order or that constitutes an obstruction of public rights.[51] Some courts have held that if an activity is explicitly licensed or permitted by state law it cannot be a public nuisance.[52] Conversely, as a general rule, a permit granted by an agency does not act to immunize a permit holder from private nuisance claims.[53]

B. *Trespass*

Trespass is also a very common claim asserted against oil and gas operators. With regard to hydraulic fracturing, the claims typically relate to alleged subsurface trespass. For instance, in *Scoma v. Chesapeake Energy Corp.*, the plaintiffs claimed that the defendant

44. Holubec v. Brandenberger, 214 S.W.3d 650, 655–59 (Tex. App.—Austin 2006, pet. denied).

45. Vestal v. Gulf Oil Corp., 235 S.W.2d 440, 441–42 (Tex. 1951).

46. Hearn v. BHP Billiton Petroleum (Ark.), Inc., No. 4:11-CV-0474 (E.D. Ark. June 9, 2011) (No. 2).

47. *Id.*

48. Jamail v. Stoneledge Condominium Owners Ass'n, 970 S.W.2d 673, 676 (Tex. App.—Austin 1998, no pet.).

49. Patel v. City of Everman, 179 S.W.3d 1 (Tex. App.—Tyler 2004, pet. denied).

50. Ballenger v. City of Grand Saline, 276 S.W.2d 874 (Tex. Civ. App.—Waco 1955).

51. Stoughton v. City of Fort Worth, 277 S.W.2d 150, 153 (Tex. Civ. App.—Fort Worth 1955, no writ).

52. North Carolina *ex rel.* Cooper v. Tennessee Valley Auth., 615 F.3d 291, 309 (4th Cir. 2010) (citing O'Neil v. State *ex rel.* Baker, 206 S.W.2d 780, 781 (Tenn. 1947); Fey v. Nashville Gas & Heating Co., 64 S.W.2d 61, 62 (Ten. App. 1933)).

53. FPL Farming v. Envtl. Processing, 351 S.W.3d 306, 310 (Tex. 2011).

trespassed upon their land because defendant's drilling-related activities resulted in contamination of plaintiffs' subsurface well water.[54] Plaintiff claimed that defendant physically, intentionally, and voluntarily caused and permitted petroleum byproducts to cross plaintiffs' property boundaries, enter into plaintiffs' land, and contaminate plaintiffs' well water.[55] In *Mitchell v. Encana Oil & Gas (USA)*, the plaintiff claimed that through horizontal drilling activities, defendants entered and invaded plaintiff's land by drilling bore holes into plaintiff's subsurface property, which contaminated their drinking water.[56]

The Texas Supreme Court has addressed subsurface trespass in oil and gas operations on at least three separate occasions. The first was *Rail Road Commission of Texas v. Manziel*, which concerned a permit granted by the Railroad Commission to inject water to flood a reservoir to recover oil.[57] In that case, the Manziels sought to set aside and cancel the permit issued by the Railroad Commission to the Whelans, who owned land adjoining the Manziel's tract, arguing that the injected water would constitute a trespass and would result in destruction of their own well.[58] In its holding, the Court specifically stated that it was "not confronted with the tort aspects" of subsurface injected water migration, nor was it deciding "whether the [Railroad] Commission's authorization of such operations throws a protective cloak around the injecting operator who might otherwise be subjected to the risks of liability . . . ."[59] Instead, the Court held only that Railroad Commission authorizations of secondary recovery projects were not subject to injunctive relief based on trespass claims.[60]

The second case was the highly publicized opinion of *Coastal Oil & Gas Corp. v. Garza Energy Trust*, which involved whether invasions caused by hydraulic fracturing operations constituted a trespass.[61] Although declining to rule on the broad issue of whether such intrusions constitute a trespass in general, the Court held that the rule of capture precludes trespass claims that claim drainage of the natural gas as the only injury.[62]

The third case was *FPL Farming Ltd. v. Environmental Processing Systems, L.C.,* which involved a subsurface trespass claim from a waste water injection well onto a neighboring property.[63] The Beau-

54. Pl.'s Second Am. Compl., *supra* note 21, at 6.

55. *Id*.

56. Br. for Pl. at 5, Mitchell v. Encana Oil & Gas (USA), No. 3:10-CV-02555, 2010 WL 5384210 (N.D. Tex. Dec. 15, 2010) (No. 1).

57. R.R. Comm'n v. Manziel, 361 S.W.2d 560, 562 (Tex. 1962).

58. *Id*. at 561, 565.

59. *Id.* at 566.

60. *Id*. at 568.

61. Coastal Oil & Gas Corp. v. Garza Energy Trust, 268 S.W.3d 1, 11–12 (Tex. 2008).

62. *Id.* at 12–13.

63. FPL Farming Ltd. v. Envtl. Processing Sys., L.C., 351 S.W.3d 306 (Tex. 2011).

mont Court of Appeals (relying on the *Garza* opinion) held that a party was shielded from civil tort liability merely because it received a permit to operate a deep subsurface wastewater injection well.[64] The court reasoned that "[w]hen a state agency authorized deep subsurface injections, no trespass occurs when fluids that were injected at deep levels are then alleged to have later migrated at those deep levels into the deep subsurface of nearby tracts."[65] The Supreme Court disagreed and held that "[a]s a general rule, a permit granted by an agency does not act to immunize the permit holder from civil tort liability . . . for actions arising out of the use of the permit."[66] The Supreme Court also distinguished wastewater injection from hydraulic fracturing, as the latter deals with the extraction of minerals, and therefore, the rule of capture would apply, which negates the element of injury to a trespass claim.[67]

On remand, the Beaumont Court of Appeals made some interesting findings. The court first held that FPL had standing to assert a trespass claim to subsurface water based upon its deeds to tracts to the surface.[68] The court then stated that although the water FPL alleged that EPS damaged was briny water and not fresh water, the owner of the surface also owns the saltwater in place beneath the surface.[69] EPS suggested that it should have the right to use the storage potential of the unexploited space below FPL's tracts, as Texas gave it permits that allowed it to dispose of the waste there.[70] In response, the court stated:

> While it is true that FPL has not sought or received a permit to store non-hazardous waste beneath its property, it presented testimony to the jury that it never consented to EPS's use of FPL's property for that purpose. And, EPS's permits merely represent the TCEQ's [Texas Commission on Environmental Quality] authorization for a landowner to exercise the rights the landowner possesses by virtue of its ownership of the fee: the permits did not give EPS an ownership interest in the formations below FPL's property that are at issue in this case. Additionally, the fact that EPS is using the deep subsurface for commercial purposes indicates that the subsurface levels at issue have economic potential for storing waste, which otherwise, absent its safe storage, has the potential to adversely affect the environment. Finally, the Legislature has not provided adjoining landowners of tracts used to inject nonhazardous waste with a right to pool their affected properties, allowing adjacent owners to obtain revenue for the commercial storage value of their subsurface. Thus,

64. *Id.* at 309.
65. *Id.*
66. *Id.* at 310–15.
67. *Id.*
68. FPL Farming Ltd. v. Envtl. Processing Sys., L.C., 383 S.W.3d 274, 279–80 (Tex. App.—Beaumont 2012, no pet.).
69. *Id*. at 281.
70. *Id*.

> without a trespass remedy, a party—in this case, a limited partnership—does not have all of the legal remedies typically available to owners to protect the owner's right to the exclusive use of its property.[71]

The court then concluded that Texas law recognizes FPL's property interest in the briny water underneath its property and that FPL has a cause of action for subsurface trespass under common law against EPS to protect its legal interest in the property.[72]

A few cases have also alleged trespass claims related to air contaminants. For instance, in *Parr v. Aruba Petroleum, Inc.*, the plaintiffs claimed that the defendants' natural gas exploration and development activities close to her home caused emissions and discharges, which exposed the plaintiffs and their property to hazardous gases.[73] In *Tucker v. Southwestern Energy Co.*, the plaintiffs made similar trespass claims related to air contaminants.[74] With respect to these claims, the court considered whether a trespass occurs when a thing passes unwanted through the air above a person's property.[75] The court noted the weight of authority from the other states favors that this scenario is a nuisance, not a trespass.[76] However, relying on the Restatement (Second) of Torts § 158, the court held that if it is an actionable trespass to "fly an advertising kite or balloon through the air above [someone's land]," then sending noxious chemicals their way is a trespass too.[77] On this basis, the court maintained the trespass claim for the time being.[78]

C. *Negligence and Negligence Per Se*

Negligence and negligence per se claims are also typically alleged. For instance, in *Boggs v. Landmark 4 LLC*, the plaintiffs alleged that carcinogenic and toxic chemicals used in the defendant's hydraulic fracturing operations were discharged into the ground or into the waters near the plaintiffs' home and water well due to the defendant's negligent planning, training, and supervision of staff, employees, and/or agents.[79] The plaintiffs further claimed that the defendant failed to disclose to the plaintiffs and to public authorities and/or agencies, material facts concerning the nature, extent, magnitude, and effects of

71. *Id.* at 281–82.
72. *Id.* at 282.
73. Parr v. Aruba Petroleum, Inc., No. 11-01650-E (Cnty. Ct. at Law No. 5, Dallas County, Tex. filed Mar. 8, 2011).
74. Tucker v. Sw. Energy Co., Nos. 1:11-CV-0044, 1:11-CV-45-DPM, 2012 WL 528253 at *3 (E.D. Ark. Feb. 17, 2012).
75. *Id*.
76. *Id*.
77. *Id*.
78. *Id*. at *4.
79. Pl.'s Original Compl. at 1–3, 7–8, 12–11, Boggs v. Landmark 4 LLC, No. 1:12-CV-00614-DCN (N.D. Ohio Dec. 21, 2012) (No. 2).

the contaminants emitted, released, stored, handled, processed, transported, and/or disposed of in and around the facility and surrounding environment, specifically with regard to their effects on plaintiffs and their property.[80] On this basis, the plaintiffs claimed that the defendant did not exercise reasonable care to protect the plaintiffs and their property but rather were negligent. As a direct, proximate, and reasonably foreseeable result of the defendant's negligence, the plaintiffs claimed they were exposed to toxic substances, toxic fumes, and/or carcinogens.[81] In addition, the plaintiffs claimed that the defendant was negligent per se for violating its duties under applicable state and federal regulations intended to ensure the public safety from toxic exposures, including the requirements of the Ohio Water Pollution Control Act.[82]

As in any negligence case, the plaintiff must show that the defendant owed a legal duty to the plaintiff, that the defendant breached the duty, and that the breach proximately caused the plaintiff's injury.[83] In this regard, the plaintiff generally claims that the defendant has a duty to conduct itself in a manner as to not contaminate the plaintiff's property. However, the standard of care can be a moving target as the appropriate standard of care will change with advancements in technology and some pollution is an unavoidable part of exploration, production, transportation, and refining of oil and gas. As one commentator stated, "spills will occur, lines and tanks will leak, and equipment upsets will happen because human action is involved."[84]

Related to negligence is the theory of negligence per se. Negligence per se is a concept in which a legislatively imposed standard of conduct is adopted by the civil courts as defining the conduct of a reasonable and prudent person.[85] In such a case, the jury is not asked to decide whether the defendant acted as a reasonable, prudent person would have acted under the same or similar circumstances.[86] The statute itself states what a reasonable, prudent person would have done.[87] If an excuse is not raised, the only inquiry for the jury is whether the defendant violated the statute or regulation and, if so, whether the violation was a proximate cause of the accident.[88] For example, in

80. *Id.*
81. *Id.*
82. *Id.*
83. Nabors Drilling, U.S.A., Inc. v. Escoto, 288 S.W.3d 401, 404 (Tex. 2009).
84. William R. Keffer, *Drilling for Damages: Common Law Relief in Oilfield Pollution Cases*, 47 SMU L. Rev. 523, 527 (1994).
85. Mieth v. Ranchquest, Inc., 177 S.W.3d 296, 305 (Tex. App.—Houston [1st Dist.] 2005, no pet.) (citing Carter v. Willliam Sommerville & Son, Inc., 584 S.W.2d 274, 278 (Tex. 1979)).
86. *Id.*
87. *Id.*
88. *Id.*

Texas, Statewide Rule 8 could potentially serve as the basis for a negligence per se claim related to oilfield contamination.[89]

D. *Breach of Contract*

Breach of contract claims usually relate to breach of a mineral lease agreement between the mineral interest owner and the operator or breach of a surface use agreement between the operator and the surface estate owner. Such agreements might contain clauses that require the operator to restore the property to pre-drilling condition following operations.[90] Contamination might be a breach of such agreements as well as a breach of an implied covenant to manage and administer the lease as a reasonably prudent operator.[91] For instance, in *Fiorentino v. Cabot Oil & Gas Corp.*, the plaintiffs claimed that the gas leases required the operator to test the plaintiffs' water supplies following commencement of drilling operations in order to ensure that the water supplies would not be adversely affected by its operations.[92] In addition, the plaintiffs claimed that the gas leases required the operator to take all steps necessary to return the plaintiffs' water supplies to pre-drilling conditions.[93] The plaintiffs also claimed that the operator expressly warranted to the plaintiffs that their land would remain safe and undisturbed despite its drilling activities.[94]

Note that in *Kamuck v. Shell Energy Holdings GP, LLC*, the court found that the plaintiff could not maintain a breach of contract action against the defendants for their natural gas extraction activities on adjoining properties since the plaintiff had no current contractual relationship with the defendants and could not maintain a claim based upon their former lease agreements.[95] Since the breach of contract claim was barred, the plaintiff's claim of a breach of duty of good faith, which was wholly dependent upon the existence of a contractual relationship, also failed.[96]

E. *Strict Liability*

Plaintiffs have had mixed results in claiming that hydraulic fracturing is an ultra-hazardous and abnormally dangerous activity for pur-

89. *Id.*

90. Corbello v. Iowa Prod., 850 So. 2d 686, 692 (La. 2003).

91. *In re* Exxon Mobil Prod. Co., 340 S.W.3d 852, 855 (Tex. App.—San Antonio 2011, original proceeding).

92. Br. in Opp'n at 25–27, Fiorentino v. Cabot Oil & Gas Corp., No. 3:09-CV-02284 (M.D. Pa. Nov. 19, 2009) (No. 19).

93. *Id.*

94. *Id.*

95. Kamuck v. Shell Energy Holdings GP, LLC, 2012 WL 1463594, at *5–6 (M.D. Pa. 2012).

96. *Id.*

poses of strict liability.[97] For instance, in *Tucker v. Southwestern Energy Co.*, the Arkansas court determined that the record lacked sufficient information for it to determine whether hydraulic fracturing is an ultra-hazardous activity.[98] The court then followed two Pennsylvania cases, *Fiorentino v. Cabot Oil & Gas Corp*.[99] and *Berish v. Southwestern Energy Production Co*.,[100] and withheld such determination until a full record had been established at the summary-judgment stage.[101] Texas, on the other hand, does not recognize a cause of action for strict liability for ultra-hazardous or abnormally dangerous activities.[102]

F. *Liability Under State Hazardous Sites Cleanup Acts*

In *Fiorentino v. Cabot Oil & Gas Corp*., the plaintiffs also asserted a claim against the defendants pursuant to the Pennsylvania Hazardous Sites Cleanup Act (HSCA).[103] The plaintiffs claimed that at all relevant times, the defendants owned and/or operated the sites, and/or the defendants owned or possessed and arranged for the disposal, treatment or transport for disposal or treatment of the hazardous substances, under the HSCA.[104] The plaintiffs further claimed that the defendants have caused, and continue to cause, releases or substantial threats of releases, of hazardous substances or contaminants which present a substantial danger to the public health or safety or the environment, under HSCA.[105] Pursuant to section 702 of the HSCA, the plaintiffs claimed that the defendants were strictly liable for costs incurred by the plaintiffs to respond to the defendants' releases or threatened releases of hazardous substances and contaminants, including but not limited to the cost of a health assessment or health effects study, medical monitoring, and interest.[106]

G. *Fraud*

In *Mitchell v. Encana Oil & Gas (USA), Inc*., the plaintiffs claimed that the defendants failed to warn plaintiffs of the dangers of potential

97. *See e.g.*, Pl.'s Original Compl. at 7, Harris v. Devon Energy Prod. Co., No. 4:10-CV-00708 (N.D. Tex. filed Dec. 15, 2010) (No. 1); Pl.'s Original Compl. at 10–11, Tucker v. Sw. Energy Co., 11-CV-0044 (E.D. Ark. filed May 17, 2011) (No. 1); Br. in Opp'n at 25, *Fiorentino*, No. 3:09-CV-02284 (M.D. Pa. Nov. 19, 2009) (No. 19).

98. Tucker v. Sw. Energy Co., 2012 WL 528253 (E.D. Ark. Feb. 17, 2012).

99. Fiorentino v. Cabot Oil & Gas Corp., 750 F. Supp. 2d 506, 511–12 (M.D. Pa. 2010).

100. Berish v. Sw. Energy Prod., 763 F. Supp. 2d 702, 705 (M.D. Pa. 2011).

101. *Tucker*, 2012 WL 528253.

102. Prather v. Brandt, 981 S.W.2d 801, 804 (Tex. App.—Houston [1st Dist.] 1998, pet. denied).

103. Br. in Opp'n at 19, Fiorentino v. Cabot Oil & Gas Corp., No. 09-CV-2284 (M.D. Pa. filed Nov. 19, 2009) (No. 19).

104. *Id.*

105. *Id.*

106. *Id.* at 20.

discharges into groundwater.[107] The plaintiffs claimed that the defendants' failure to disclose amounted to fraud and that facts were concealed knowingly and with reckless disregard to the plaintiffs' health and well-being, which proximately caused the plaintiffs' damages. Similarly, in *Harris v. Devon Energy Production Co.*, the plaintiffs claimed that the defendant failed to warn the plaintiffs of the dangers of the hydraulic fracturing process and the chemicals used by the defendant in its drilling operation near the plaintiffs' home.[108] The plaintiffs claimed that the defendant's failure to disclose amounted to fraud, and facts were concealed knowingly and with reckless disregard to the plaintiffs' health and well-being, which proximately caused the plaintiffs' damages.[109]

However, a plaintiff must plead fraud with particularity and must include "the time, place and contents of the false representations, as well as the identity of the person making the misrepresentation and what that person obtained thereby."[110] On this basis, several defendants have been successful on motions to dismiss based upon the plaintiffs' failure to plead their fraud claims with particularity. For instance in *Tucker v. Southwestern Energy Co.* and *Boggs v. Landmark 4 LLC*, the courts granted the defendants' motion to dismiss fraud claims because they were not pled with particularity.[111]

IV. Typical Damages

Plaintiffs seek various damages, including property damages, cost of testing, loss of use of land, loss of market value of land, mental damages, exemplary damages, and injunctive relief. Plaintiffs have also sought damages for future medical monitoring. For instance, in *Tucker v. Southwestern Energy Co.*, the plaintiffs sought the establishment of a monitoring fund to pay for medical monitoring of the named-plaintiffs and all others similarly situated for health effects stemming from the defendants' alleged use of harmful and hazardous compounds.[112] However, the plaintiffs' ability to assert such claims

107. Br. for Pl. at 7, Mitchell v. Encana Oil & Gas (USA), Inc., No. 3:10-CV-02555-N (N.D. Tex. filed Dec. 15, 2010) (No. 1).

108. Pl.'s Original Compl. at 6–7, Harris v. Devon Energy Prod. Co., L.P., No. 4:10-CV-00708 (E.D. Tex. Dec. 15, 2010) (No. 1).

109. *Id*.

110. United States *ex rel.* Russell v. Epic Healthcare Mgmt. Grp., 193 F.3d 304, 308 (5th Cir. 1999), *abrogated on other grounds by* United States *ex rel.* Eisenstein v. City of New York, 556 U.S. 928 (2009); *see* United States *ex rel.* Thompson v. Columbia/HCA Healthcare Corp., 125 F.3d 899, 903 (5th Cir. 1997).

111. Order at 3, Tucker v. Sw. Energy Co., No 1:11-CV-0044-DPM (E.D. Ark. May 17, 2011) (No. 82); Boggs v. Landmark 4 LLC, No. 1:12-CV-00614 (N.D. Ohio Mar. 12, 2012); *see also* Order at 3, Harris v. Devon Energy Prod. Co., L.P., No. 4:10-CV-00708 (E.D. Tex. Dec. 15, 2010) (No. 13).

112. Pl.'s Original Compl. at 19, *Tucker*, No. 1:11-CV-0044-DPM (No. 1).

varies from jurisdiction to jurisdiction. For instance, medical monitoring claims are permitted in Pennsylvania but not in Texas.[113]

Intentional infliction of emotional distress has also been alleged. For instance, in *Teel v. Chesapeake Appalachia, LLC*, the plaintiffs claimed that the defendant's intentional actions proximately caused the plaintiffs to suffer injuries, including but not limited to elevated concern for health, elevated concern for safety, depression, and feelings of helplessness.[114] However, one court granted a motion to dismiss related to such a claim due to the plaintiff's failure to plead or prove manifestation of an injury.[115] Another court acknowledged that manifestation was a required element, but held off on dismissing the claim until the case had developed further.[116]

Recently, in *Magers v. Chesapeake Appalachia, LLC*, the defendant moved to dismiss the plaintiffs' claims for punitive damages on the basis that they made no allegations of intentional conduct, which is required to support such a claim.[117] However, the court found that the plaintiffs' claims that the defendants refused to provide the plaintiffs with water or compensate them for the contamination of their well water, which contamination the plaintiffs alleged occurred as a result of the defendants' drilling-related activities on adjoining property, sufficiently raised the probability of the applicability of punitive damages above mere speculation, which satisfied the requirements of Rule 8 of Federal Procedure.[118]

V. Key Defenses and Strategies

Several key defenses and strategies are available in response to claims of alleged contamination caused by hydraulic fracturing activities. For the most part, these are the same defenses that have historically been utilized in environmental pollution cases in Texas and elsewhere, which are described below.

A. *Surface Estate Owner and Neighboring Property Owner*

The duties owed by an oil and gas operator to the surface estate owner are much narrower than those owed to a neighboring property owner. When the mineral and surface estates are severed, the mineral estate is the dominant estate.[119] The execution of a mineral lease typi-

113. *Compare* Fiorentino v. Cabot Oil & Gas Corp., 750 F. Supp. 2d 506, 512–13 (M.D. Pa. 2010) (finding the plaintiff had alleged the elements of a medical monitoring claim) *with* Norwood v. Raytheon Co., 414 F. Supp. 2d 659, 668 (W.D. Tex. 2006).

114. Teel v. Chesapeake Appalachia, LLC, 2012 WL 5336958 (N.D. W. Va. 2012).

115. Berish v. Sw. Energy Co., 763 F. Supp. 2d 702, 705 (M.D. Pa. 2011).

116. Fiorentino v. Cabot Oil & Gas Corp., 750 F. Supp. 2d 506, 514–15 (M.D. Pa. 2010).

117. Magers v. Chesapeake Appalachia, LLC, 2013 WL 1558647 (N.D. W. Va. Apr. 10, 2013).

118. *Id*.

119. Acker v. Guinn, 464 S.W.2d 348, 352 (Tex. 1971).

cally not only severs the minerals from the surface but also creates dominant and servient estates.[120] The entity that owns the minerals enjoys the dominant estate.[121] Ownership of the dominant estate carries with it the right to enter and extract the minerals and "all other such incidents thereto as are necessary to be used for getting and enjoying" the minerals.[122] Incident to the right to extract is the right to explore.[123] If in pursuing these rights, the servient estate is susceptible to use in only one manner, then the owner of the dominant estate may pursue that use irrespective of whether it results in damage to the surface.[124] In other words, if particular damage to the surface estate cannot reasonably be avoided in legitimately pursuing the rights of the dominant estate, the owner of the dominant estate is not liable for the damage.[125]

Thus, the mere fact of damage to the surface does not evince unreasonable conduct.[126] Instead, it is incumbent upon the surface owner to establish that the dominant estate owner failed to use reasonable care in pursuing its rights or that the rights could have been pursued through reasonable alternate means sufficient to achieve the goal desired but without the damage.[127] Accordingly, the servient estate owner must prove that its opponent failed to act reasonably given the correlative rights and liabilities involved.[128] However, these same standards are not applicable to neighboring property owners who also claim that their property has been impacted by an oil and gas operator. Accordingly, the status of the plaintiff could widely determine the duties owed to him.

In *Teel v. Chesapeake Appalachia, LLC*, the plaintiffs, the surface estate owners, claimed that the defendant, Chesapeake, physically intruded and caused damage to the plaintiffs' land by depositing drilling waste and other material in pits on the plaintiffs' property.[129] The defendant moved for summary judgment, arguing that it obtained broad rights to use the property through the severance deed and lease, and that the West Virginia Department of Environmental Protection

120. H.B. Taylor v. Brigham Oil & Gas, L.P., No. 07-00-0225-CV, 2002 WL 58423 at *2 (Tex. App.—Amarillo 2002, no pet.) (not designated for publication).

121. Tarrant Cnty. Water Control & Improvement Dist. No. One v. Haupt, Inc., 854 S.W.2d 909, 911 (Tex. 1993).

122. *Id.*

123. *Id.*

124. *Id.*; Getty Oil Co. v. Jones, 470 S.W.2d 618, 622 (Tex. 1971).

125. *Tarrant Cnty. Water Control*, 854 S.W.2d at 911; *Getty Oil Co.*, 470 S.W.2d at 622.

126. *See* Ball v. Dillard, 602 S.W.2d 521, 523 (Tex. 1980).

127. *Tarrant Cnty. Water Control*, 854 S.W.2d at 911.

128. *Id.*

129. Teel v. Chesapeake Appalachia, LLC, 2012 WL 5336958, at *2 (N.D. W. Va. 2012).

(WVDEP) permit recognizes that its actions were reasonable and necessary, and thus it did not commit a trespass.[130]

The court first noted that "[i]t is well settled in West Virginia that one who owns subsurface rights to a parcel of property has the right to use the surface of the land in such a manner and with such means as would be fairly necessary for the enjoyment of the subsurface estate."[131] In addition, the court recognized that Chesapeake's decision to fill the pits on the Teel's property was an act contemplated by West Virginia law.[132] However, permits do not provide immunizations from common law standards.[133] Nonetheless, the court stated that the WVDEP permits can, as they did in this case, serve to inform this court of the practices of the oil and gas industry in West Virginia.[134] The court then relied upon earlier precedent and held that the mere fact that Chesapeake eventually migrated to a closed-loop system does not render its prior use of pits unreasonable, especially given the West Virginia law currently in place regulating the use of the pits.[135] Accordingly, based upon West Virginia law and the facts in this case, the court found that the plaintiffs' trespass claim failed.[136]

Similarly, in *Fiorentino v. Cabot Oil & Gas Corp.*, the defendant argued that under Pennsylvania law, it, as the owner of the dominant mineral estate, had the right to burden the servient surface estate in whatever manner reasonably necessary for the development of the minerals.[137] In a related case, an operator sought a declaratory judgment that a lease granted it the right to use the surface for disposal of waste water produced by hydraulic fracturing by virtue of its subsurface rights and that the company had in essence an implied easement to do so.[138] With respect to subsurface rights, the court held that pursuant to the deed the operator owned the rights to the oil and gas associated with the subject property, but had no rights to the space occupied once the oil and gas was depleted.[139] With respect to surface rights, the operator argued that it had an implied right to the reasonably necessary use of the surface to utilize its disposal well.[140] The court held that although the operator had an implied right to use the

130. *Id.*
131. *Id.*
132. *Id.*
133. *Id*. at *6 (citing FPL Farming Ltd. v. Envtl. Processing Sys., L.C., 351 S.W.3d 306, 310 (Tex. 2011)).
134. *Id*.
135. *See* Kartch v. EOG Res., Inc., 845 F. Supp. 2d 995 (D.N.D. 2012); Whiteman v. Chesapeake, 873 F. Supp. 2d 767 (N.D. W. Va. 2012).
136. *Teel*, 2012 WL 5336958, at *6.
137. Supp. Order at 12, Fiorentino v. Cabot Oil & Gas Corp., No. 09-CV-2284 (M.D. Pa. filed Nov. 19, 2009) (No. 346).
138. EXCO Res. (PA), LLC v. New Forestry, LLC, 2012 WL 3043008, at * 1 (M.D. Pa. 2012).
139. *Id.* at *4.
140. *Id.* at *5.

surface to take away the "subterranean minerals," such implied right did not extend to perpetual use of the surface for purposes other than accessing those minerals.[141] The court then granted summary judgment against the operator with respect to its claims for declaratory judgment.[142]

B. *Causation*

1. Lone Pine Orders

Perhaps one of the most successful techniques in keeping defense costs down has been the entry of a Lone Pine order that requires the plaintiff to make a prima facie showing of exposure and causation before full discovery is allowed.[143] The first case to enter such an order involving hydraulic fracturing was *Strudley v. Antero Resources, Corp*.[144] In that case, the court, cognizant of the significant discovery and cost burdens presented by a case of this nature, endeavored to invoke a more efficient procedure than that set out in the standard case management order (MCMO).[145] On this basis, the court required the plaintiffs, before full discovery and other procedures were allowed, to make a prima facie showing of exposure and causation.[146] The plaintiffs were given 105 days to comply with the MCMO.[147] The defendants subsequently moved for summary judgment, arguing that the plaintiffs failed to show how the alleged injuries were caused by the defendants' hydraulic fracturing operations.[148] The court granted the motion and dismissed the plaintiff's claims with prejudice.[149]

In reaching its decision, the court relied on the fact that the Colorado Oil and Gas Conservation Commission (COGCC) had conducted an investigation of the plaintiffs' well water and had concluded that the water supply was not affected by oil and gas operations in the vicinity.[150] The court further considered the defendants' sworn testimony that their activities were conducted in compliance with applicable laws and regulations designed to protect human health and the environment, including those administered by the COGCC and the Colorado Department of Public Health and Environment.[151] In addition, the court considered evidence that the defendants' air emission-

141. *Id.* at *6.
142. *Id.* at *9.
143. *See* Lore v. Lone Pine Corp., No. L-33606-85, 1986 WL 635707 (N.J. Sup. Ct. Nov. 18, 1986).
144. Strudley v. Antero Res., Corp., 2012 WL 1932470 (Colo. D. Ct., Denver Cnty. May 9, 2012).
145. *Id.* at *2.
146. *Id.*
147. *Id.*
148. *Id.*
149. *Id.*
150. *Id.*
151. *Id.*

control equipment at the wells and prevailing wind patterns made it unlikely that the plaintiffs or their property were exposed to harmful levels of chemicals from the defendants' activities.[152]

The court further noted that the plaintiffs' sole expert, Dr. Kurt, was apparently not willing to go beyond a temporal connection between the plaintiffs' alleged injuries and the defendants' drilling activities.[153] These missing links in the chain of causation were exactly what the court sought to remedy through the MCMO.[154] As discussed above, the MCMO was entered in an effort to determine whether the plaintiff could produce admissible evidence concerning exposure and causation.[155] Despite this, Dr. Kurt was willing to represent only that environmental exposure and health information existed to warrant further substantive discovery.[156] Dr. Kurt did not opine on whether any of the substances present in the air and water samples can cause the type(s) of disease or illness that the plaintiff claimed (general causation).[157]

The court further stated that Dr. Kurt did not discuss the dose or other quantitative measurement of the concentration, such as the timing and duration of each plaintiff's exposure to each substance.[158] Dr. Kurt failed to address whether there was any exposure at some precise location in addition to the plaintiffs' residence.[159] He further neglected to provide an identification, by way of reference to a medically recognized diagnosis, of the specific disease or illness from which each plaintiff allegedly suffered or for which medical monitoring was purportedly necessary.[160] Finally, and perhaps most significantly, Dr. Kurt did not even attempt to draw a conclusion that the plaintiff's alleged injuries or illnesses were in fact caused by such exposure (specific causation).[161]

However, on July 3, 2013, the Colorado Court of Appeals reversed the dismissal and held that the Lone Pine order prevented the plaintiffs from proving their claims and was not necessary to protect against frivolous claims or unreasonably burdensome discovery.[162] The court reasoned that circumstances surrounding the case were not shown to be so extraordinary as to require departure from the existing rules of civil procedure.[163] Further, the court stated that by entering the or-

152. *Id.*
153. *Id.* at *4.
154. *Id.*
155. *Id.*
156. *Id.*
157. *Id.*
158. *Id.*
159. *Id.*
160. *Id.*
161. *Id.*
162. *See* Strudley v. Antero Res. Corp., 2013 WL 3427901, at *18, No. 12 CA 1251 (Col. Ct. App. July 3, 2013).
163. *Id.* at *28.

der, the trial court unduly interfered with the plaintiffs' opportunity to prove their claims against the companies.[164]

Nonetheless, since the underlying *Strudley* decision, several cases have similarly sought to enter a Lone Pine order early in the litigation. The results have varied. For instance, in *Boggs v. Landmark 4 LLC*, the court, similar to the court in *Strudley*, granted the defendant's motion to modify the case management order requiring the plaintiffs to produce evidence sufficient to show prima facie elements of exposure, injury, and causation prior to further discovery or other proceedings in the case.[165] In addition, based upon the pleadings, it appears that the plaintiff consented to the entry of such order in *Teekell v. Chesapeake Operating, Inc*.[166]

However, the court denied the defendants' request in *Roth v. Cabot Oil & Gas Corp*.[167] In that case, the defendants based their argument primarily on the fact that the plaintiffs' counsel had been engaged in a related lawsuit for more than two years and had in fact been representing the plaintiffs since 2011, prior to bringing this lawsuit.[168] The defendants argued that the counsel's longstanding involvement in related litigation, negotiations with the defendants' counsel even before this litigation was filed, and the content of the defendants' voluminous initial disclosures should be sufficient to give the plaintiffs the information they would need to establish a prima facie case, if they were in fact able to do so.[169]

The plaintiffs argued that this case was not well-suited for a Lone Pine case-management order.[170] Plaintiffs contended that, where they have been issued, Lone Pine orders have been focused on toxic tort cases involving personal injury and medical causation. Since there were no medical claims stated in the amended complaint, the plaintiffs suggested that a Lone Pine order was no longer appropriate based upon the subject matter of the litigation alone.[171]

Furthermore, the plaintiffs argued that the claims pleaded in this case related to gas and oil drilling activities located less than 1,000 feet from the plaintiffs' property and groundwater supply, and that the DEP actually documented defects in the gas wells and instances of contamination releases or spills, which were incorporated as part of

164. *Id.*

165. Order at 1–3, Boggs v. Landmark 4 LLC, No. 1:12-CV-00614 (N.D. Ohio Mar. 12, 2012) (No. 18).

166. Teekell v. Chesapeake Operating, Inc., No. 555,703 (La. Dist. Ct., Caddo Parish, Dec. 6, 2011), *removed*, Order at 1–2, No. 5:12-CV-00044 (W.D. La., Jan. 12, 2012) (No. 30).

167. Roth v. Cabot Oil & Gas Corp., 287 F.R.D. 293, 299–300 (M.D. Pa. 2012).

168. *Id.*

169. *Id.*

170. *Id.*

171. *Id.*

the amended complaint.[172] The plaintiffs suggested that this evidence alone supported the plaintiffs' prima facie case that the defendants' operations contaminated the plaintiffs' groundwater.[173]

Finally, the plaintiffs contended that the claims in this case were straightforward and familiar property-related tort claims, which were neither doubtful nor implausible.[174] The plaintiffs thus maintained that the claims stated in the amended complaint were easily distinguishable from claims of medical injury in mass tort litigation that may be predicated upon questionable and unsubstantiated claims of causation, which were more typically subjected to Lone Pine case-management orders.[175]

The court agreed with the plaintiffs and denied the defendants' motion, stating, "Resorting to and crafting a Lone Pine order should only occur where existing procedural devices explicitly at the disposal of the parties by statute and federal rule have been exhausted or where they cannot accommodate the unique issues of this litigation. We have not reached that point."[176] Similarly, in *Kamuck v. Shell Energy Holdings GP, LLC*, the court found that although it has the authority to enter a Lone Pine order in the exercise of its broad discretion to manage a civil action, it was not persuaded that such an order was warranted at that time.[177] Accordingly, it denied the defendants' motion, but did so without prejudice to the defendants seeking to return to the court if they believed in good faith that the plaintiff's discovery requests were unreasonably burdensome in light of the relative generality of the plaintiff's allegations regarding his injuries and the defendants' allegedly tortious conduct.[178]

2. State Action Levels

In addition, plaintiffs might not be able to prove causation if contaminants are not present in concentrations above certain levels. In *Taco Cabana Inc. v. Exxon Corp.*, the purchaser of commercial property sued the former lessee of the prior owner for trespass, negligence per se, and other claims, alleging that the lessee failed to remediate the property it previously subleased as a gasoline station.[179] The San Antonio Court of Appeals held that the plaintiff failed to establish causation, as the evidence did not establish that the soil contained contaminants that exceeded state levels, which would have triggered a

172. *Id.*
173. *Id.*
174. *Id.*
175. *Id.*
176. *Id.*
177. Order at 16–17, Kamuck v. Shell Energy Holdings GP, LLC, No. 4:11-CV-01425 (M.D. Pa. Aug. 3, 2011) (No. 52).
178. *Id.*
179. Taco Cabana, Inc. v. Exxon Corp., 5 S.W.3d 773, 779–80 (Tex. App.—San Antonio 1999, pet. denied).

duty to take corrective action.[180] The court reasoned that "[t]o the extent that any common law duties regarding removal of contamination existed, such duties ha[d] been displaced by the Texas Water Code . . . because the Legislature ha[d] delegated to the TWC the task of determining appropriate cleanup standards."[181]

Based upon similar reasoning, in *Scoma v. Chesapeake Energy Corp.*, the defendant moved for summary judgment on the plaintiff's nuisance, trespass, and negligence claims because test results were below Texas's safe drinking water levels.[182] In addition, in *Harris v. Devon Energy Production Co.*, even though testing showed toxic contamination in the plaintiffs' well water when the lawsuit was filed in December 2010, more recent testing showed that the contamination was no longer at a toxic level for human consumption. Accordingly, the plaintiffs filed a motion to dismiss their claims without prejudice.[183]

3. No Evidence

With respect to water pollution claims, plaintiffs are required to show that contaminants from defendants' hydraulic fracturing activities migrated into plaintiffs' water wells and caused their injuries.[184] "Causation cannot be established by mere guess or conjecture; it must be established by evidence of probative value."[185] In *Mitchell Energy Corp. v. Bartlett*, the plaintiff relied on testimony from a geochemist that specialized in "isotopic geochemistry" to establish that the contaminants in the plaintiff's water wells came from the defendants' oil and gas operations.[186] However, the court held that the geochemist's testimony provided no evidence of causation in light of fact that the expert did not gather any evidence from other gas wells in the area and did not rule out other possibilities of the alleged contamination.[187] In *FPL Farming, Ltd. v. Environmental Processing Systems*, the Beaumont Court of Appeals held that there was no evidence that the plaintiff suffered any injury caused by the defendant's injections of waste into a wastewater injection well on its property, as there was no evi-

180. *Id.* at 780.

181. *Id.*

182. Mot. Summ. J. at 25–26, Scoma v. Chesapeake Energy Corp., No. 3:10-CV-01385 (N.D. Tex., July 15, 2010) (No. 44).

183. Order, Harris v. Devon Energy Prod. Co., L.P., No. 4:10-CV-00708 (E.D. Tex. Dec. 15, 2010) (No. 56).

184. Mitchell Energy Corp. v. Bartlett, 958 S.W.2d 430, 446 (Tex. App.—Fort Worth 1997, pet. denied) (citing Morgan v. Compugraphic Corp., 675 S.W.2d 729, 731 (Tex. 1984)).

185. *Id.* (citing McClure v. Allied Stores of Tex., Inc., 608 S.W.2d 901, 903 (Tex. 1980)).

186. *Id.*

187. *Id.* at 446–47.

dence that the wastewater had migrated to the surface of the property or that the injection well was a danger to the drinking water.[188]

Similarly, in *Hagy v. Equitable Production Co*., the court granted the defendants' motion for summary judgment, which asserted there was no evidence of causation for negligence, trespass, and nuisance claims.[189] In *Harris v. Devon Energy Production Co.*, the defendant moved for summary judgment, claiming that the plaintiffs' claim that their water well was contaminated as a result of the defendant's drilling, fracking, and storage activities was not scientifically possible.[190] Finally, in *Hearn v. BHP Billiton Petroleum (Arkansas) Inc.*, defendant Deep Six Water Disposal Services, LLC, filed a motion for summary judgment on the basis that, to date, the plaintiffs had not produced any proof of a causal relationship between the operation of the injection wells and seismic events, which the plaintiffs claimed were the source of their damages.[191]

4. Collateral Attack

In *Lipsky v. Range Production Co.*, the defendant operator successfully argued that a finding by the Texas Railroad Commission that it was not the cause of alleged contamination collaterally barred the plaintiffs' subsequent civil claims.[192] Range drilled two natural gas wells in 2009 near the Lipskys' property.[193] According to the Lipskys, in the latter part of 2009, they began noticing problems with their water.[194] The Lipskys contacted public health officials, who referred them to an environmental consultant, Alisa Rich.[195] After the Lipskys contracted in August 2010 with Rich and her company, Wolf Eagle Environmental, to conduct testing, she confirmed the presence of various gases in the Lipskys' water well.[196]

In December 2010, after being notified by Rich and the Lipskys about the circumstances at the Lipskys' property and after conducting its own investigation, the EPA issued an emergency order stating that Range's production activities had caused or contributed to the gas in the Lipskys' water well and that the gas could be hazardous to the

188. FPL Farming Ltd. v. Envtl. Processing Sys., L.C., 305 S.W.3d 739, 741 (Tex. App.—Beaumont 2009), *rev'd*, 351 S.W.3d 306 (Tex. 2011).

189. Hagy v. Equitable Prod. Co., No. 10-C-163 (Cir. Ct., Jackson Cnty., W. Va. Oct. 26, 2010).

190. Mot., Harris v. Devon Energy Prod. Co., L.P., No. 4:10-CV-00708 (E.D. Tex. Dec. 15, 2010) (No. 36).

191. Mot. Summ. J., Hearn v. BHP Billiton Petroleum (Ark.), Inc., No. 4:11-CV-0474 (E.D. Ark. May 24, 2011) (No. 62).

192. Lipsky v. Range Prod. Co., No. CV-11-0798 (43rd Dist. Ct., Parker Cnty, Tex. filed June 20, 2011).

193. *In re* Lipsky, 2013 WL 1715459, at *1 (Tex. App.—Fort Worth, original proceeding).

194. *Id.*

195. *Id.*

196. *Id.*

Lipskys' health.[197] In the order, the EPA required Range to, among other actions, provide potable water to the Lipskys and install explosivity meters at the Lipskys' property.[198] The federal government, acting at the request of the EPA, later filed a lawsuit in federal district court against Range, alleging that Range had not complied with requirements of the emergency order.[199]

The Texas Railroad Commission also investigated the contamination of the Lipskys' well.[200] After calling a hearing and listening to testimony from several witnesses in January 2011, the Railroad Commission issued a unanimous decision in March 2011 that Range had not contaminated the Lipskys' water.[201]

Despite this finding, on June 20, 2011, the Lipskys filed suit against several defendants, including Range, for claims related to alleged contamination of their water well that, according to the Lipskys, resulted from Range's "oil and gas drilling activities."[202] In their original petition, the Lipskys claimed that the contamination had caused a water pump to malfunction and had caused the water "to be flammable."[203] Against Range, the Lipskys sought compensatory and punitive damages while asserting causes of action for negligence, gross negligence, and private nuisance.[204] The Lipskys alleged that Range's drilling, including hydraulic fracture stimulation operations, affected their water source, and they contended that they could no longer use their home as a residence.[205]

On August 18, 2011, Range filed a plea to the jurisdiction or, in the alternative, a motion for summary judgment on the basis that the plaintiffs' nuisance and trespass claims were an impermissible collateral attack on the Texas Railroad Commission's Final Order that found that Range's operations "ha[d] not caused or contributed, and [were] not causing or contributing to contamination of any domestic water wells." Range argued that the Lipskys were required to appeal the Railroad Commission's decision in Range's favor by filing suit in a Travis County district court. The trial court agreed and granted Range's motion on January 27, 2012.

It should be noted that a month after the Lipskys sued Range, Range answered the suit and brought counterclaims (against the Lipskys) and third-party claims (against Rich) for civil conspiracy, aiding

197. *Id.*
198. *Id.*
199. *Id.*
200. *Id.*
201. *Id.*
202. *See* Original Pet., Lipsky v. Range Prod. Co., No. CV-11-0798 (43rd Dist. Ct., Parker Cnty., Tex., filed June 20, 2011).
203. *Id.*
204. *Id.*
205. *Id.*

and abetting, defamation, and business disparagement.[206] Range contended, among other arguments, that Range's fracking of a deep shale formation could not have contaminated the Lipskys' much shallower water well; that Range's two gas wells near the Lipskys' residence had "mechanical integrity"; that other factors occurring before Range's drilling contributed to gas in the Lipskys' well; that the Railroad Commission had already found that Range's drilling did not contaminate the Lipskys' well; that the contrary conclusion that had been reached by the EPA was based on incomplete and overlooked data; that the Lipskys had ignored the Railroad Commission's findings by continuing to blame Range for the contamination; that Rich, along with the Lipskys, had, with malice against Range, made false, misleading, and disparaging statements; and that Range's business reputation had therefore suffered.[207]

The Lipskys and Rich each answered Range's claims and filed motions to dismiss under Chapter 27 of the Texas Civil Practice and Remedies Code, also known as the Texas Citizens' Participation Act, which is considered to be anti-SLAPP legislation.[208] The trial court denied the motions to dismiss, for which the Lipskys and Rich sought a writ of mandamus.[209] The Fort Worth Court of Appeals held that the trial court abused its discretion in not dismissing the claims against Mrs. Lipsky and Alisa Rich; however, the court permitted Range Resources to pursue its claims against Mr. Lipsky for defamation and business disparagement.[210]

C. *Temporary and Permanent Injury*

"The difference between temporary and permanent injury is significant, primarily as it relates to" the appropriate measure of damages as well as the "affirmative defense of the statute of limitations."[211]

1. Measure of Damages

Permanent damage results from activity that is of such a character and that exists under such circumstances "that it will be presumed to continue indefinitely."[212] Permanent injuries are those that are "constant and continuous, not intermittent or recurrent."[213] The proper measure of damages for permanent injury to the land is the diminu-

206. *In re* Lipsky, 2013 WL 1715459, at *2 (Tex. App.—Fort Worth, original proceeding).
207. *Id.*
208. *Id*. at *1 (SLAPP stands for Strategic Lawsuit Against Public Participation).
209. *Id.*
210. *Id.* at *17.
211. *Id.*
212. Schneider Nat'l Carriers, Inc. v. Bates, 147 S.W.3d 264, 272 (Tex. 2004) (citing Bayouth v. Lion Oil Co., 671 S.W.2d 867, 868 (Tex. 1984)).
213. *Id.*

tion in the value of the land.[214] Temporary injuries are intermittent, sporadic, or recurrent injuries to land that are "contingent upon some irregular force, such as rain."[215] When an injury to land is temporary and can be remediated at reasonable expense, the proper measure of damages is the cost of restoration to its condition immediately preceding the injury.[216] However, when the cost of restoration exceeds the diminution in fair market value, the diminution in fair market value is the cap on the measure of damages.[217]

This argument was made by the defendants in *Teel v. Chesapeake Appalachia, LLC*.[218] However, the defendants' argument was denied as moot because the court found that the plaintiffs' trespass claim failed, and the plaintiffs stipulated to the dismissal of all other remaining claims. Thus, damages were no longer at issue.

2. Statute of Limitations

Trespass, nuisance, and negligence for damages to land are governed by the two-year statute of limitations and are required to be brought within two years from the date of accrual.[219] "An action for permanent damages to land accrues, for limitations purposes, upon the date of discovery of the first actionable injury"—not on the date the damages to the land are fully ascertainable.[220] Thus, an action to recover damages for permanent injury accrues when injury first occurs or is discovered. On the other hand, a temporary injury claim accrues anew upon each injury.[221] Accrual of limitations is a question of law for the court.[222] In *Scoma v. Chesapeake Energy Corp.*, the defendants argued that under Texas law the continuing tort doctrine, which is an exception to the statute of limitations, does not apply to claims where the damages arise from permanent injury to the land.[223]

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214. Kraft v. Langford, 565 S.W.2d 223, 227 (Tex. 1978).

215. Bayouth v. Lion Oil Co., 671 S.W.2d 867, 868 (Tex. 1978).

216. *Kraft*, 565 S.W.2d at 227.

217. N. Ridge Corp. v. Walraven, 957 S.W.2d 116, 119 (Tex. App.—Eastland 1997, pet. denied) (citing Atlas Chem. Indus., Inc. v. Anderson, 514 S.W.2d 309 (Tex. Civ. App.—Texarkana 1974), *aff'd*, 524 S.W.2d 681 (Tex. 1975)).

218. Teel v. Chesapeake Appalachia, LLC, 2012 WL 5336958, at *8 n.5 (N.D. W. Va. 2012).

219. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 16.003(a) (West 2012 & Supp.); Mitchell Energy Corp. v. Bartlett, 958 S.W.2d 430, 435 (Tex. App.—Fort Worth 1997, pet. denied).

220. Corley v. Exxon Pipeline Co., 821 S.W.2d 435, 437 (Tex. App.—Houston [14th Dist.] 1991, writ denied).

221. *Id.*

222. *Id.* at 437–38.

223. Mot. Summ. J. at 18, Scoma v. Chesapeake Energy Corp., No. 3:10-CV-01385 (N.D. Tex. July 15, 2010) (No. 44).

3. Application

Texas courts have generally considered contamination from oil and gas operations to be permanent injuries to the land. For instance, in *Mieth v. Ranchquest, Inc*., the Houston Court of Appeals held that the damage to property caused by discharge of drilling fluids, diesel fuel, oil, and saltwater during operations at oil and gas wells was permanent.[224] In *Hues v. Warren Petroleum Co.*, the same court determined that landowners could sue an oil and gas company for permanent damages to their property based upon gas leaks and the disposal of brine, which began several years earlier.[225] In *Walton v. Phillips Petroleum Co.*, the El Paso Court of Appeals held that a landowner alleged permanent injuries by asserting that an oil company's salt-water pits caused migration of pollutants into his groundwater. At the time, the landowner's water was contaminated and had been for several years, and there was never a time where contamination was non-existent or significantly diminished due to changing conditions.[226] Finally, in *Mitchell Energy Corp. v. Bartlett*, the Fort Worth Court of Appeals determined that the injuries to the landowners' property were permanent based upon claims of groundwater contamination from the defendant's historic oil and gas operations.[227]

D. *Standing*

Only the person whose primary legal right has been breached has standing to seek redress for an injury.[228] In other words, a person has standing to sue only when he or she is personally aggrieved by an alleged wrong.[229] "Without a breach of a legal right belonging to a plaintiff, that plaintiff has no standing to litigate."[230] A plaintiff must have a cause of action for injury to the property in order to have standing.[231] The cause of action for an injury to property belongs to the person owning the property at the time of the injury.[232] Without

224. Mieth v. Ranchquest, Inc., 177 S.W.3d 296, 303 (Tex. App.—Houston [14th Dist.] 2005, no pet.).

225. Hues v. Warren Petroleum Co., 814 S.W.2d 526, 529 (Tex. App.—Houston [14th Dist.] 1991, writ denied).

226. Walton v. Phillips Petroleum Co., 65 S.W.3d 262, 274 (Tex. App.—El Paso 2001, pet. denied), *abrogated on other grounds by In re* Estate of Swanson, 130 S.W.3d 144 (Tex. App.—El Paso 2003, no pet.).

227. Mitchell Energy Corp. v. Bartlett, 958 S.W.2d 430, 435 (Tex. App.—Fort Worth 1997, pet. denied).

228. Nobles v. Marcus, 533 S.W.2d 923, 927 (Tex. 1976).

229. Nootsie, Ltd. v. Williamson Cnty. Appraisal Dist., 925 S.W.2d 659, 661 (Tex. 1996).

230. Denman v. Citgo Pipeline Co., 123 S.W.3d 728, 732 (Tex. App.—Texarkana 2003, no pet.); Brunson v. Woolsey, 63 S.W.3d 583, 587 (Tex. App.—Fort Worth 2001, no pet.).

231. *Denman*, 123 S.W.3d at 732; *see Nobles*, 533 S.W.2d at 927.

232. Lay v. Aetna Ins. Co., 599 S.W.2d 684, 686 (Tex. Civ. App.—Austin 1980, writ ref'd n.r.e.).

an express assignment, the cause of action does not pass to a subsequent purchaser of the property; thus, he or she cannot recover for an injury committed before his or her purchase.[233]

In *Senn v. Texaco, Inc.*, the Eastland Court of Appeals regarded "the distinction between temporary and permanent injuries [a]s meaningless with respect to the issue of standing."[234] The court held that "any injury to the land that the defendants might have caused, whether temporary or permanent, occurred prior to the plaintiffs' purchase of the land," and the plaintiffs, therefore, "d[id] not own any causes of action for either type of injury that may have been caused by the defendants."[235] Adopting the reasoning of the Eastland Court of Appeals decision in *Senn*, the Tyler Court of Appeals held that, when the undisputed evidence "showed a continuing condition that already existed on the date of purchase," and no new injuries occurred after purchase of the property (or an assignment of a cause of action for the prior injury), "the [plaintiff] had not been aggrieved and therefore had no standing."[236]

In *West v. Brenntag Southwest, Inc.*, the court ruled that it had to determine whether there was evidence of a new and distinct injury that occurred after the plaintiff acquired the property.[237] The plaintiff argued that the contamination's gradual leaking into the soil continued while he owned the property and that this fact was sufficient to show a new injury to support standing.[238] The court disagreed, holding that the fact that the injury existed throughout the plaintiff's ownership did not create a new injury to the land.[239] The court found that the injury was continuous and lingering and, without an assignment, would not support standing to bring suit for negligence or nuisance.[240]

VI. Conclusion

Due to the size of the potential oil and natural gas reserves available, shale gas development utilizing hydraulic fracturing provides this nation with a realistic opportunity to finally reduce its dependence on foreign oil. However, to meet this nation's future demands, the scale of exploration and production will have to drastically increase over the coming years. Such activities will undoubtedly lead to increased environmental litigation.

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233. *Id.*

234. Senn v. Texaco, Inc., 55 S.W.3d 222, 226 (Tex. App.—Eastland 2001, pet. denied).

235. *Id.*

236. Exxon Corp. v. Pluff, 94 S.W.3d 22, 28 (Tex. App.—Tyler 2002, pet. denied).

237. West v. Brenntag Sw., Inc., 168 S.W.3d 327, 332–33 (Tex. App.—Texarkana 2005, pet. denied).

238. *Id.* at 335.

239. *Id.* at 335–36.

240. *Id.*

As referenced above, most of the recent cases are still in their early stages. However, there is a developing body of law for practitioners to follow. To date, the oil and gas operators have successfully asserted several key defenses that limited or dismissed plaintiffs' claims in their entirety. The success of these defenses is highly dependent on the jurisdiction. Perhaps the defense bar has been most successful at attacking causation, and it should be noted that to date no judge or jury has found that contamination was caused by hydraulic fracturing. Of course, this fact could change depending on the outcome of EPA's congressionally directed study of the risks to drinking water posed by hydraulic fracturing, which is slated for completion in 2014. With time, novel claims and new defenses will undoubtedly arise as the litigation matures and continues.

This paper was prepared in April 2013 as a general discussion of the issues presented and is not to serve as, or to be relied upon as, legal advice. This paper would not have been completed without the assistance of Erika Erikson, my colleague at Guida, Slavich & Flores, P.C. The views expressed in the paper are mine, and not of my law firm or its clients.