

PRODUCT LIABILITY

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IN THIS ISSUE

Robert G. Smith describes hydraulic fracturing, used to extract natural gas from difficult geological formations, and the possible litigation storm on the horizon.

Sands through the Hourglass or the Next Big Tort?

ABOUT THE AUTHOR



Robert G. Smith is a member of the firm of Lorance & Thompson, PC in Houston, Texas. Rob is on the steering committee for the ALFA International Product Liability Practice Group, and was a speaker and panel moderator during the 2008 and 2011 practice group seminars. Rob is also active in the Defense Research Institute, and serves as the Fifth Circuit Editor for DRI's Daubert Online, a publication which analyzes the most recent court decisions nationally related to the admissibility of expert testimony. Rob's product liability work has included defending cases for manufacturers of tractors, hospital beds, wheelchairs, and hoists/cranes, among other items. He can be reached at rgs@lorancethompson.com.

ABOUT THE COMMITTEE

The Product Liability Committee serves all members who defend manufacturers, product sellers and product designers. Committee members publish newsletters and *Journal* articles and present educational seminars for the IADC membership at large and mini-seminars for the committee membership. Opportunities for networking and business referral are plentiful. With one listserv message post, members can obtain information on experts from the entire Committee membership.

Learn more about the Committee at www.iadclaw.org. To contribute a newsletter article, contact:



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The International Association of Defense Counsel serves a distinguished, invitation-only membership of corporate and insurance defense lawyers. The IADC dedicates itself to enhancing the development of skills, professionalism and camaraderie in the practice of law in order to serve and benefit the civil justice system, the legal profession, society and our members.

Hydrofracturing, or “fracking”, is a technique used to extract oil and natural gas from geological formations that were previously inaccessible using traditional drilling methods. Fracking fluid is forced into the well with sufficient force to overcome the surrounding rock and extend the fractures, making the oil and gas easier to collect. The fractures are kept open by introducing a “proppant” to fracking fluid, such as grains of sand, silica, ceramic, or other particulates, that prevent the fractures from closing when the fluid injection is stopped.

Fracking fluid is usually a mixture of 98-99% water and proppants, plus 1-2% chemical additives. Although 1-2% is small as a relative percentage, it may amount to 100,000 gallons of chemical additives over the life of a typical gas well.

The chemical additives used in fracking include substances such as ethylene glycol and methanol. Some of the additives are known carcinogens, and the fluid is being pumped into the ground, so plaintiff attorneys are paying attention. Although fracking technology has been around for several decades, more recent technological improvements have made it commercially productive and helped spark the recent energy boom in the U.S.

A U.S. House of Representatives investigative report last year found that more than 650 of the 2,500 chemicals used in fracking are known or possible carcinogens, regulated under the Safe Drinking Water Act or listed as a hazardous air pollutant. *See Chemicals Used in Hydraulic Fracturing*, Committee on Energy and Commerce, U.S. House of Representatives, April 18, 2011.

Many companies assert that components of their fracking fluids are proprietary trade secrets, and withhold any proprietary information from the Materials Safety Data Sheets (MSDS) required under Occupational Safety and Health Administration (OSHA) regulations. The House study found that many companies participating in the investigation were unable to identify the proprietary component of the fracking fluid.

Some states require exploration companies to disclose all chemicals used at a drilling site to the state environmental agency. Wyoming and Arkansas have passed regulations that require companies to register the contents of fracking fluid, but include provisions to protect any information that amounts to a trade secret, such that it is not subject to a public records request. *See* Section 45 of Chapter 3 of Wyoming’s oil and gas regulations, and Rule B-19 of Arkansas’ oil and gas regulations, respectively.

Environmentalists and plaintiff attorneys will work to capitalize on this uncertainty about what exactly is in fracking fluid and what chemicals are being injected into the ground. Attorneys are already gathering “cases” related to fracking fluid on websites such as www.fracking-lawsuit.com. Lawsuits alleging product liability claims related to fracking fluid and drilling equipment are likely.

Ms. Norma Fiorentino claims the water well near her home in Dimock, Pennsylvania blew up on January 1, 2009 because of nearby gas exploration. The Pennsylvania Department of Environmental Protection blamed Cabot Oil & Gas Corporation for methane polluting the water well. The civil lawsuit is ongoing after the court denied a motion to dismiss. *See Fiorentino, et al v. Cabot Oil & Gas Corp., et al*, 3:09-CV-2284 (M.D. Penn.).

On the other hand, a Colorado state court recently dismissed a suit alleging that oil and gas exploration about one mile from the home caused groundwater contamination. *See Strudley v. Antero Resources Corp., et al*, District Court for Denver County Colorado. The court had entered a Lone Pine Order, which is a case management order requiring plaintiffs to produce prima facie evidence showing exposure, general, and specific causation. The plaintiffs submitted sampling reports, medical records, maps, and other items but their expert's affidavit simply stated that further investigation is necessary.

To date, fewer than 50 lawsuits have been filed in the U.S. alleging contamination caused by fracking operations. Several of these lawsuits are set to go to trial in 2012, and will test plaintiff's arguments. Similar to the Toyota stuck accelerator "defect" that turned out to not be the case, it seems plaintiff attorneys will try to leverage this new technology, isolated incidents, the public's fear of a widespread problem, new and developing regulations and enforcement, etc., to their financial advantage before all the science is in.

The U.S. Environmental Protection Agency is conducting a study to be released for peer review at the end of 2012, of hydraulic fracturing's impact on drinking water and ground water resources. *See Plan to Study the Potential Impacts of Hydraulic Fracturing on Drinking Water Resources*, Office of Research and Development, U.S. Environmental Protection Agency, Wash., D.C., November 2011. Injecting fracking fluid into the ground arguably overlaps with existing environmental laws related to hazardous waste and groundwater, as well as oil and gas law related to drilling and the exceptions. It will be interesting to see whether the regulations on exploration

companies and manufacturers increase, or whether the current public scrutiny will pass to another sensational story. Strong, proactive legal counsel will help companies navigate the regulatory and tort *de jour* culture that must always be considered with new products and emerging technology.



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James M. (Jim) Doran, Jr. and Alyssa Leffall

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Robert W. Trumble, Jonathan L. Wertman and Jeffrey D. Van Volkenburg

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Michael D. Crim and Jeffrey D. Van Volkenburg