Is Hydraulic Fracturing of the Utica Shale "Abnormally Dangerous"?

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In a lawsuit working its way through federal court in Cleveland, the plaintiffs allege that oil and gas drilling in Ohio is "abnormally dangerous" and that the operator of a well should pay for any damage caused by chemicals that escape the well – even if the operator met all applicable standards of care.[1] If plaintiffs succeed on this theory, landowners will be able to pursue operators of oil and gas wells for any injuries associated with drilling activities, even if the operators exercised the utmost care to prevent any harm. That result likely would dampen enthusiasm for Utica shale drilling in Ohio and lessen the expected financial boom.

The defendant, Landmark 4 LLC, operates two horizontal oil and gas wells in Medina County.[2] The plaintiffs, William and Stephanie Boggs, who are not the landowners where the wells are located, live about 2,500 feet from the wells. According to the complaint, the drilling, construction and operation of the wells resulted in "pollutants and industrial and/or residual waste," including barium, manganese, and strontium, being discharged into the ground or waters near the plaintiffs' home.[3] The complaint asks not only for an award of damages against Landmark, but also that the operation of the wells be shut down and a court-supervised "medical monitoring program" be set up that:

a. notifies individuals who have been exposed to toxic substances, toxic fumes and carcinogens of the potential harm from such exposure and the need for periodic testing and examination;
b. provides periodic medical testing and examinations designed to facilitate early detection of adverse affects [sic] related to exposure to toxic substances, toxic fumes and carcinogens; and
c. gathers and forwards to treating physicians information related to the diagnosis and treatment of injuries and diseases which may result from exposure to toxic substances, toxic fumes and carcinogens.[4]

Mr. and Mrs. Boggs claim Landmark was negligent in failing to use sufficient cement in constructing the wells and that it was negligent in training and the supervision of its employees.[5]

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[1] Complaint, Boggs v. Landmark 4, LLC, No. 1:12-cv-00614-DCN (N.D. Ohio, filed Mar. 12, 2012). Another case brought by the same attorneys on behalf of other neighbors against the same defendant is pending in the same court. The allegations and causes of action are substantially the same. Mangan v. Landmark 4, LLC, No. 1:12-cv-00613-DCN (N.D. Ohio, filed Mar. 12, 2012). The Boggs case has progressed through a motion to dismiss and a ruling by the judge. For convenience, this article directly discusses only the Boggs case.
[2] Complaint, Boggs v. Landmark at ¶ 6-7.
[3] *Id.* at ¶ 12, 14.
[4] *Id.* at ¶ 16, 18.

Mr. and Mrs. Boggs claim Landmark was negligent in failing to use sufficient cement in constructing the wells and that it was negligent in training and the supervision of its employees.[5] Claiming negligence in drilling and operating a gas well is not new in Ohio.[6] Recovering for negligence, however, requires proof that the operator failed to exercise "reasonable care."

We know of no Ohio case where strict liability has been applied to oil and gas drilling.

In this case, the plaintiffs go further and claim that the well operator engaged in "abnormally dangerous" activities and should be held liable even if it took every reasonable precaution to prevent the harm.[7] This theory is known as "strict liability," a legal doctrine that is recognized in a number of states, including Ohio.[8] However, we know of no Ohio case where it has been applied to oil and gas drilling, which is why this case -- coming at the dawn of Ohio's Utica Shale boom -- may be so important. Whether an activity is abnormally dangerous is a matter of law, so it is up to the judge, not a jury, to make that decision.[9] Will the federal judge hearing the case conclude that oil and gas drilling is abnormally dangerous under Ohio law, thus making Ohio well operators liable even when they do everything reasonably within their control to prevent harm?

The judge might consider other Ohio cases where "abnormally dangerous" activities were alleged. For example, Ohio, like most states that have considered the issue, held that transmission of electricity does not give rise to strict liability.[10] In contrast, it has long been the law of Ohio that when explosives are used in "such proximity to adjoining property that regardless of the care used, the natural, necessary or probable result of the force of the explosion … will invade the adjoining premises," the person using the explosives is liable for the damage resulting from the blasting without regard to negligence.[11]

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[5] *Id.* at ¶ 13.

[6] *See, e.g.*, Complaint, Payne v. Ohio Valley Energy Systems Corp., No. 09P000115 (Geauga C.P. Jan. 30, 2009); D.T. Atha, Inc. v. Land and Shore Drilling, Ltd., 5th Dist. No. 2007-CAE-120072, 2008-Ohio-6217; Rock Run Coal Co. v. Chartiers Oil Co., 29 Ohio C.D. 317 (1916); Langabaugh v. Anderson, 68 Ohio St. 131 (1903); Wheeler v. Fisher Oil Co., 6 Ohio N.P. 309 (1899).

[7] Complaint at ¶ 37, Boggs v. Landmark 4, LLC, No. 1:12-cv-00614-DCN (N.D. Ohio, filed Mar. 12, 2012).

[8] Baldwin's Oh. Prac. Tort L. § 10:10 (2d ed. 2011).

[9] RESTATEMENT (SECOND) OF TORTS § 520, cmt. l (1977) ("Whether the activity is an abnormally dangerous one is to be determined by the court, upon consideration of all the factors listed in this Section, and the weight given to each that it merits upon the facts in evidence. In this it differs from questions of negligence. Whether the conduct of the defendant has been that of a reasonable man of ordinary prudence or in the alternative has been negligent is ordinarily an issue to be left to the jury.") *See also* Slack v. Fort Defiance Const. & Supply Inc., 10th Dist. No. 03AP-1268, 2004-Ohio-6520 ("[T]his court finds that the activity at issue was not abnormally dangerous as a matter of law…").

[10] Hall v. Lorain-Medina Rural Electric Co-op., Inc., 148 N.E. 2d 232, 234 (Ohio App. 1957).

[11] Walczesky v. Horvitz Co., 269 N.E.2d 844 (1971).

Federal courts applying Ohio law have also looked to the Restatement (Second) of Torts, which judges may consider for guidance but do not have to follow.[12] The Restatement sets out six factors to consider in deciding whether an activity is "abnormally dangerous." No single factor is controlling. They are:

(a) existence of a high degree of risk of some harm to the person, land, or chattels of others;
(b) likelihood that the harm that results from it will be great;
(c) inability to eliminate the risk by the exercise of reasonable care;
(d) extent to which the activity is not a matter of common usage;
(e) inappropriateness of the activity to the place where it is carried on; and
(f) extent to which its value to the community is outweighed by its dangerous attributes.[13]

The judge also could consider cases from other states that address this issue. If he does, he will find those states are split. When the Texas Supreme Court was asked to apply strict liability to brine runoff from oil and gas activities that invaded neighboring properties, it refused to do so.[14] It considered the activities to be common and appropriate in that context. The Oklahoma Supreme Court has held that oil/gas drilling is not abnormally dangerous.[15] In 1934 the Kansas Supreme Court held that damage from salt water escaping from oil and gas operations is a harm resulting from abnormally dangerous activities,[16] but it held in 1987 that escape of natural gas from oil and gas drilling activities is not a harm resulting from an abnormally dangerous activity.[17] The California Supreme Court found oil and gas drilling to be abnormally dangerous, but, although the court did not expressly base its holding on the location of the activity, the well was in a "residence district outside the City of Long Beach, in Los Angeles County," and when it blew out it spewed debris to a depth of four to seven inches onto the plaintiffs' property, including their home.[18] The property line was only 200 feet from the well.

Anti-drilling activists contend that no amount of care can make hydraulic fracturing safe.

Two cases pending in Pennsylvania raise the issue of whether horizontal drilling in the Marcellus Shale is abnormally dangerous.[19] In ruling on motions to dismiss filed by the defendants in those cases, the judges noted that the legal framework to determine whether strict liability applies is the Restatement factors listed above, but both judges declined to dismiss those

[12] RESTATEMENT (SECOND) OF TORTS § 520 (1977). *See also* Crawford v. National Lead Co., 784 F. Supp. 439 (S.D. Ohio 1989); Oros v. Hull & Associates, Inc., 302 F.Supp.2d 839 (N.D. Ohio 2004) (citing Crawford and reciting the Restatement factors without attributing them to the Restatement).
[13] RESTATEMENT (SECOND) OF TORTS § 520 (1977).
[14] *See* Turner v. Big Lake Oil Co., 96 S.W.2d 221 (1936).
[15] Tidal Oil Co. v. Pease, 5 P.2d 389 (1931).
[16] Berry v. Shell Petroleum Co., 33 P.2d 952 (1934).
[17] Williams v. Amoco Prods. Co., 734 P.2d 1113 (1987).
[18] Green v. General Petroleum Corp., 270 P.2d 952 (1928);
[19] *See* Berish v. Southwestern Energy Production Co., 763 F.Supp.2d 702 (M.D. Pa. Feb. 3, 2011); Fiorentino v. Cabot, 750 F.Supp.2d 506 (M.D. Pa. Nov. 15, 2010).

counts.[20] Instead they indicated a need for a more developed factual background and said that the issue could be raised again in the form of a motion for summary judgment.

In applying the Restatement factors to the Boggs case, a key part of the analysis is likely to focus on whether the risk of serious harm can be eliminated with reasonable care. This is a point on which opinions differ. Anti-drilling activists contend that no amount of care can make hydraulic fracturing safe,[21] while oil industry supporters assert that environmental harms result solely from the failure to follow industry standards.[22] For example, an investigation by the Ohio Department of Natural Resources ("ODNR") into a 2008 home explosion in Bainbridge, Ohio concluded that the explosion was the result of failure to install cement to the full extent called for by industry standards.[23] Since that time the ODNR has adopted strong new rules on well construction requirements.[24]

The fourth Restatement factor considers whether the activity in question is a matter of common usage. Oil and gas drilling is certainly common in Ohio, as illustrated by more than 260,000 oil and gas wells drilled in this state since the 1800s.[25] More than 60,000 wells are currently active in the state,[26] and the use of hydraulic fracturing in Ohio dates back to the 1950s.[27] Only 144 horizontal wells have been drilled in the Utica shale in Ohio as of September 16, 2012,[28] but the industry maintains that techniques used in drilling horizontal wells merely combine and extend established methods. Directional drilling has been used for many years and has now advanced to the point that wellbores can go horizontally within a shale formation. A horizontal well now has thousands of feet within the producing formation rather than the hundreds of feet that might have been penetrated by a conventional vertical well. This allows fracturing in multiple stages within those thousands of feet instead of just the hundreds of feet of wellbore fractured in conventional drilling.

In our view, well operators should be responsible only for those harms caused by their failure to excercise reasonable care.

In considering the last two Restatement factors (appropriateness to the place and benefit to the community), it seems clear that the Ohio General Assembly and the ODNR have concluded that drilling of the Utica shale provides benefits well beyond its risks. Recent legislation gives

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[20] *See Berish*, 763 F.Supp.2d at 705-06; *Fiorentino*, 750 F.Supp.2d at 511-12.
[21] *See, e.g.*, Hannah Coman, *Balancing the Need for Energy and Clean Water: The Case for Applying Strict Liability in Hydraulic Fracturing Suits*, 39 B.C. EVTL. AFF. L. REV. 131 (2012).
[22] *See, e.g.*, Joe Schremmer, *Avoidable "Fraccident": An Argument Against Strict Liability for Hydraulic Fracturing*, 60 U. KAN. L. REV. 1215 (2012).
[23] OHIO DEPARTMENT OF NATURAL RESOURCES, http://www.dnr.state.oh.us/Portals/11/bainbridge/report.pdf.
[24] OHIO DEPARTMENT OF NATURAL RESOURCES, http://www.ohiodnr.com/Portals/11/oil/pdf/Well%20Construction%201501.9.1.08.pdf.
[25] OHIO DEPARTMENT OF NATURAL RESOURCES, http://ohiodnr.com/mineral/program/tabid/17865/default.aspx.
[26] OHIO DEPARTMENT OF NATURAL RESOURCES, *supra* note 21.
[27] OHIO DEPARTMENT OF NATURAL RESOURCES, http://www.dnr.state.oh.us/Portals/11/oil/pdf/stronger_review11.pdf.
[28] OHIO DEPARTMENT OF NATURAL RESOURCES, http://ohiodnr.com/oil/shale/tabid/23174/Default.aspx.

In our view, well operators should be responsible only for those harms caused by their failure to exercise reasonable care. It would be unfortunate if under Ohio law a gas well operator may be found liable for activities it has undertaken with the utmost care in accordance with the law and industry standards. To apply strict liability against well operators would create a strong disincentive to develop the tremendous resource presented by the Utica shale.

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[1] OH. REV. CODE § 1509.03 (West 2012); S.B. 315, 129th Gen. Assemb., Reg. Sess. (Ohio 2012).

[1] OH. REV. CODE § 1509.02 (West 2012); S.B. 315, 129th Gen. Assemb., Reg. Sess. (Ohio 2012).