A Picture Worth a Thousand Words Under Twombly?

August 12, 2011 by Sean Wajert

We have posted about plaintiffs attorneys seeking to exploit the valuable and significant economic boon that is hydraulic fracturing. Today's post comes from that litigation, but the focus is not on fracking, but on a civil procedure issue that one infrequently sees in mass torts. Plaintiffs in a case complaining about hydraulic fracturing operations in the Fayetteville Shale deposit in Arkansas recently survived a motion to dismiss, in large part because of the photographs they attached to the complaint. Ginardi v. Frontier Gas Services LLC, No. 4:11-cv-00420 (E.D. Ark., 8/10/11).

Plaintiffs alleged that the defendant's compressor stations caused harmful levels of noise pollution, and emitted large amounts of methane and hydrogen sulfide, among other flammable and toxic gasses. Plaintiffs offered multiple theories of liability including: strict liability, nuisance, trespass and negligence. Plaintiffs are seeking to represent similarly situated persons in a class action.

Defendant moved to dismiss, arguing that the complaint was insufficient because it failed to connect Kinder Morgan to the noise and gas emissions that are the central alleged injury of the case. Defendant's argument relied on the heightened pleading standards of *Twombly* and *Iqbal.*

The district court downplayed the clear significance of those two decisions, continuing to emphasize the supposed "relatively low hurdle of presenting plausible facts to create a reasonable inference" that Kinder Morgan is involved in activities that may have harmed plaintiffs.

But of more interest is the treatment of the argument that plaintiffs made suggesting that the photographs attached to the amended complaint were sufficient to create a reasonable inference that Kinder Morgan was connected to the alleged misconduct. One supposedly showed the proximity of plaintiffs' property and residences to the compressor station. The second was a photograph of warning signs at the compressor station, allegedly showing that Kinder Morgan was involved in its operation, and that the facility created noise and emitted toxic material.

Certainly, exhibits properly attached to the complaint may be considered in analyzing a motion to dismiss. *Lum v. Bank of America*, 361 F.3d 217, 221 n. 3 (3d Cir.2004). And it may be more common for a plaintiff to attach photographs to the complaint in certain kinds of claims, such as intellectual property claims. E.g., *Magna Mirrors of America, Inc. v. Dura Global Technologies*, LLC, 2011 WL 1120265 (E.D.Mich.). But it is not true that a picture is always worth a thousand words. If a plaintiff has to write a brief explaining what the picture supposedly shows, or the photograph is susceptible to a variety of interpretations, the photograph cannot substitute for the well-pleaded allegations of a complaint. *Dock v. Rush*,

2010 WL 4386470 (M.D.Pa.). A famous photographer once noted, "I always thought good photos were like good jokes. If you have to explain it, it just isn't that good."

The proximity allegedly shown in the first clearly did not apply to the putative class members; the proposed class was of all those who live or own property within a one-mile radius of defendants' stations in Arkansas -- not what was shown in the photograph. The signs in the second had no context but apparently were merely to warn workers about potential hazards on the site. Nevertheless, the court, with no real analysis, concluded that the complaint with photographs attached as exhibits contained sufficient factual content. If, in words, plaintiffs had alleged merely that the defendant posted signs on its property, warning workers on the site of certain hazards, no reasonable court would have concluded that the pleading requirement was met.