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$2.9 Million Jury Award For Texas Fracking Claim: Lessons for Energy Company Risk Managers

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A jury in Dallas recently awarded $2.9 million to a Texas family in one of the first trials involving allegations that hydraulic fracturing caused nearby residents to suffer health problems and property damage. Although commentators were quick to point out that there was no evidence that fracking actually caused the plaintiffs any injury, the jury's verdict contains an important lesson for the discerning energy company risk manager: regardless of the scientific support for the alleged dangers associated with the process, there may be greater risk of third-party liability associated with fracking than many in the industry have expected. If they do not want their companies stuck footing the bill, risk managers working in the energy space should consider how their insurance portfolio might address this unexpected liability and be prepared to challenge insurer coverage denials if warranted.

In *Parr v. Aruba Petroleum Inc.*, the Parr family, who owns a 40-acre tract of land in Wise County, claimed that Texas-based Aruba Petroleum exposed them to hazardous gases, chemicals, and industrial wastes through the operation of 22 nearby gas wells. They alleged that they had suffered from a host of medical problems since Aruba began drilling in 2008, including nosebleeds, rashes, and vomiting. The Parrs sued Aruba and a handful of other Barnett Shale drillers in 2011, asserting claims for negligence, trespass, and nuisance.

On the eve of trial, the general consensus among Aruba's lawyers and industry experts was that the Parrs would fail because they would not establish that Aruba's drilling activities actually caused their injuries. One month later, in a 5 to 1 verdict, a jury found that Aruba intentionally created a private nuisance and awarded the Parr family $2.9 million for physical and mental pain and suffering and diminution of the family's property value.

Since the trial, energy industry lawyers and other commentators have downplayed the significance of this verdict in relation to the broader ongoing litigation involving fracking. They

have asserted that the *Parr* case should be disregarded as an "anomaly," "fact-specific," and certainly not precedential or indicative of future wins for plaintiffs with fracking-related claims.

But *Parr v. Aruba* illustrates that, for a number of reasons, it is too soon to dismiss the possibility of massive third-party liability associated with fracking:

- Fracking litigation is still in its infancy: When compared to other major toxic tort litigation trends in recent history, many of which took over a decade or even many decades before plaintiffs began to score wins, it is possible that fracking litigation is just getting started. Dozens upon dozens of fracking suits are currently working their way through the justice system, with most still engaged in discovery or the early stages of litigation. While defendants have succeeded in using motions to dismiss or "Lone Pine" orders to cull some of these claims, and others have been withdrawn or resolved against the plaintiffs on summary judgment, still other claims have survived. In *Parr* itself, the plaintiffs' negligence claim was dismissed on summary judgment before they ultimately won at trial on their nuisance claim.

- New plaintiffs, new defendants, and new theories: In response to early defendant victories, clever plaintiffs' lawyers are beginning to adjust the template of the typical fracking lawsuit. Suits are being filed against new entities, such as owners and operators of disposal wells, gas compression stations, trucking companies, and water treatment plants. Plaintiffs are de-emphasizing toxic exposure claims and focusing instead on the more traditional nuisance and diminution of property value claims that were successful in *Parr*. It is also certain that plaintiffs' lawyers are paying close attention to cases alleging more novel theories, such as earthquakes caused by disposal wells or silica exposure from fracking sand.

- Litigation is expensive, even if you win: Even if energy companies and service contractors succeed in defeating fracking lawsuits, these defendants will incur significant defense costs. Plaintiffs have also received a number of settlements for fracking-related claims. Although most plaintiffs have settled for undisclosed amounts, in one recent settlement, it was announced that the plaintiffs were awarded 1.6 million dollars. If landowners like the Parr family continue to win judgments or lucrative settlements, energy companies may be forced to pay to defend or settle an increasing number of such suits.

- Legal cause is not scientific cause: Perhaps the biggest lesson to be learned from *Parr v. Aruba* is that, whatever the scientists, the lawyers, or the energy industry thinks about the dangers of fracking, in the end, the jury's opinion is the only one that counts. Even if overturned on appeal, claiming that the *Parr* verdict was an "anomaly" because the plaintiffs won without establishing causation suggests a short memory of historical toxic tort litigation. Asbestos litigation, for example, has bankrupted companies through suits by plaintiffs unable to prove that that company's specific asbestos-containing product actually caused their injury.

Rather than ignoring the verdict in *Parr* or writing it off as an anomaly, the discerning risk manager will appreciate the lesson that it offers: Whatever the current state of fracking litigation or the scientific basis of the risks ascribed to the controversial drilling process, hydraulic fracturing could still result in significant unexpected third-party liability for energy companies and contractors. In order to mitigate this potential liability, energy risk managers should familiarize themselves with relevant insurance provisions and policies—both standard commercial general liability, directors and officers, and property policies as well as more specialized control of well and environmental impairment coverage. The coverage provided by these policies is an extremely valuable corporate asset in the hands of a risk manager who is proactive in understanding the policies and willing to question and, where appropriate, challenge coverage denials from insurers.