

Energy Newsletter



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New Decisions -- Pleading Requirements for Complaints Alleging Contamination from Hydraulic Fracturing by H. Victor Thomas

The development of natural gas wells using hydraulic fracturing technology—fracking—has grown exponentially and increased natural gas reserves to record levels. Hydraulic fracturing requires the discharge of significant volumes of hydraulic fracturing fluids into a geologic formation under extreme pressure in order to dislodge and discharge “trapped” natural gas. The composition of “fracking fluid” may include chemicals that, depending on the level of exposure, are deemed to be potentially toxic.

The increased production from such drilling has helped to drive U.S. natural gas prices to historic lows, making profit margins thin or non-existent. Profits have been jeopardized further by the difficult-to-estimate costs of defending an escalating number of lawsuits alleging contamination from such drilling.

During litigation in the U.S., it is typical that before incurring huge costs of discovery, a defendant may move to dismiss an action due to the plaintiff’s failure to comply with state or federal pleading requirements.

This article discusses two recent federal decisions regarding such motions to dismiss complaints alleging fracking contamination, *Tucker* and *Fiorentino*. These decisions may shed light as to how other courts are likely to apply pleading requirements that may require dismissal at an early stage. They are applicable to estimating defense costs for fracking contamination litigation.

Federal Pleading Requirements

In 2007, and then again in 2009, the United States Supreme Court clarified the pleading requirements of the Federal Rules of Civil Procedure and corrected lower court misinterpretations in two important decisions, *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). These decisions identified the following requirements to avoid the dismissal of a complaint.

Rule 8(a)(2) of the Federal Rules requires a “short and plain statement of the claim showing that the pleader is entitled to relief.” Rule 8 does not require detailed factual allegations, but it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation. *Iqbal*, 129 S. Ct. at 1949.

“To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to ‘state a claim for relief that is plausible on its face.’” *Id.* quoting *Twombly*, 550 U.S. at 570. “The plausibility standard is not akin to a ‘probability requirement,’ but it asks for more than a sheer possibility that a defendant has acted unlawfully.” *Id.* Threadbare recitals of the elements of a cause of action, supported by mere

conclusory statements, do not suffice. *Id.*

Recent Application of the Pleading Requirements

Recently, two federal courts issued decisions applying these pleading requirements to complaints alleging fracking contamination, *Tucker v. Southwestern Energy Co.*, 2012 WL 528253 (E.D. Ark. Feb. 17, 2012) and *Fiorentino v. Cabot Oil & Gas Corp.*, 750 F. Supp. 2d 506 (M.D. Pa. Nov 15, 2010), but with very different results.

The Tucker Decision

In *Tucker*, Plaintiffs sued various companies that drilled gas wells within several miles of Plaintiffs' tracts, seeking both damages and injunctive relief for medical monitoring. They alleged that the fracking has contaminated their water well and air; they asserted claims for nuisance, trespass, negligence, and strict liability. 2012 WL 528253 at *1.

The Court held that the Plaintiffs' complaint was are mostly conclusions. "The Tuckers say the companies have wells within one mile of their property; the Tuckers' well water used to be fine; then it started smelling bad and a recent test revealed alpha methylstyrene, a poisonous chemical sometimes used in fracking fluid. The Berrys point to [gas] wells within three miles of their property; they say a water well and ponds on adjoining property are contaminated with methane and hydrogen sulfide; and that these substances continue to spew into the air from the well, polluting their property. *Id.* at *2. "Missing are particular facts about particular fracking operations by particular fracking companies using particular substances that allegedly caused the [water and air contamination]. General statements about the many dangerous substances used in fracking, and conclusory statements about the migration of those substances, will not suffice. For their claims to be plausible in the strong sense recently dictated by the Supreme Court, the [Plaintiffs] must plead more facts linking each company's operations with the particular harm alleged." *Id.*

"As they stand, the complaints are mostly a matter of "after this, therefore because of this"—bad things happened after the fracking, and therefore because of the fracking. But this fallacy is not sound as a matter of logic or law." *Id.* "This is not to say that the [Plaintiffs] must now plead (or eventually prove) their case with the exactitude required in a car-wreck case. ... At a minimum, however, the [Plaintiffs] must allege more than that fracking fluids are dangerous, migratory animals. This is a conclusion." *Id.*

"[T]he Plaintiffs must plead more facts to give the companies adequate notice of what and how each driller supposedly did wrong. [Although the applicable law] does not require proof of the precise damage caused by each of several tortfeasors, the Plaintiffs must show that tortious conduct was a substantial factor in causing the harm. At the threshold, the plaintiff must allege specific facts linking each company's acts or omissions with their harm." ... "The [Plaintiffs] must therefore plead more than "company X was involved in fracking within a few miles of my property" to state plausible claims." *Id.*

The Court ordered the Plaintiffs to file an amended complaint to attempt cure these defects. Presumably, these claims will be dismissed if Plaintiffs are unable to provide the required specificity.

The Fiorentino Decision

In *Fiorentino*, Plaintiffs alleged that Defendants negligently conducted hydraulic fracturing and other natural gas production activities that allowed the release of methane, natural gas, and other toxins onto Plaintiffs' land and into their groundwater. Plaintiffs sought both property and personal injury damages. Their causes of action included: (1) a claim pursuant to the Hazardous Sites Cleanup Act ("HSCA"); (2) negligence; (3)

private nuisance; (4) strict liability; and (5) medical monitoring. 750 F. Supp. 2d at 508.

First, Defendants argued that Plaintiffs' HSCA allegations were bald, legal conclusions that the Court need not credit. However the court noted that, Section 702 of the HSCA provides that a defendant who is responsible for releasing hazardous substances is strictly liable for response costs, for other reasonable and necessary or appropriate costs of response incurred by any other person, and for the cost of a health assessment or health effects study. *Id.* at 510-11.

The Court held that the Plaintiffs have sufficiently alleged a claim for response costs under Section 702. "The Complaint specifically asserts that Defendants are strictly liable for costs incurred by Plaintiffs to respond to Defendants' releases

. . . of hazardous substances and contaminants, including but not limited to the cost of a health assessment or health effects study, and medical monitoring. We are aware that a court 'need not credit ... when deciding a motion to dismiss' a bare legal conclusion. However, the Complaint alleges in detail that Defendants were responsible for causing to release hazardous substances, that Defendants failed to take necessary steps to remedy contaminated water supplies, and that Plaintiffs have become physically sick and ill in a manner that could continue." *Id.* at 511.

Defendants further argued that a medical monitoring claim must be dismissed because Plaintiffs merely recited the elements of such a claim in a conclusory fashion, rather than asserting facts that would satisfy the plausibility standard. A claim for medical monitoring has several elements, including: (1) exposure greater than normal background levels; (2) to a proven hazardous substance; (3) caused by defendant's negligence; and (4) as a proximate result of the exposure, plaintiff has a significantly increased risk of contracting a serious latent disease. *Id.* at 512-13.

The Court found that Plaintiffs sufficiently stated a plausible claim with the following allegations. Plaintiffs alleged that Defendants negligently drilled wells and engaged in hydraulic fracturing that used "fracking fluid," the composition of which "includes hazardous chemicals that are carcinogenic and toxic." Plaintiffs alleged that these operations were performed within close proximity to their homes. Plaintiffs also alleged that elevated levels of dissolved methane are present in their well water and that pollutants and industrial waste were discharged into the ground and waters near the Plaintiffs' homes and water wells. Plaintiffs alleged that they have manifested neurological, gastrointestinal, and dermatological symptoms and that blood testing returns results consistent with toxic exposure. The Court held that although a much greater showing is required to actually prove this claim, including expert testimony, the Plaintiffs have sufficiently alleged plausible facts necessary to support a claim for medical monitoring. *Id.* at 513.

Conclusion

In *Tucker* and *Fiorentino*, plaintiffs' allegations are arguably very similar. Although these courts purported to apply the very same pleading requirements, they reached very different results. *Tucker* held that the claims were insufficiently pled while *Fiorentino* held that they were pled sufficiently to survive defendant's motion to dismiss.

Two alternative conclusions may be drawn from these results: 1) Either that one of these decisions was incorrectly decided; or 2) notwithstanding the Supreme Court's attempts to clarify the pleading requirements, the standard remains highly subjective.

The early dismissal battle will continue to rage, but now each side has a precedent to cite.



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