USING THE COMMON LAW TO FILL A REGULATORY VOID: CAN COMMON LAW REMEDIES BE USED AGAINST HYDRAULIC FRACKING ENTITIES?

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Hydraulic fracturing (also knowing as fracing or fracking) has led to a new energy boom across many different areas of our country.[1] Fracking is a process in which a well is drilled, cased in concrete and cement, then fluids are pumped into the ground under pressure creating fractures through which natural gas or oil can flow into the well.[2] It is crucial to domestic oil production; approximately thirty-five to forty percent of oil reserves would be unrecoverable without the use of fracking.[3] Yet, the process is not without controversy, as people fear that fracking could be leading to groundwater contamination[4] and even micro-earthquakes.[5]

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[1] *See* A.L. Parlow, *Rethinking a Twenty-First Century Model for Energy Development*, 87 N.D. L. REV. 691, 695–696 (2011) (describing the effects of the hydraulic fracturing boom across the United States).

[2] Francis Gradijan, *State Regulations, Litigation, and Hydraulic Fracturing*, 7 ENVT'L & ENERGY L. & POL'Y 47, 48 (2012). The fluids pumped into the ground contain a variety of chemicals that could be toxic in and of themselves; however they are mixed with water when pumped into the ground so that less than two percent of the solution are the chemicals. *See* Jeffrey C. King et al., *Factual Causation: The Missing Link in Hydraulic Fracture-Groundwater Contamination Litigation*, 22 DUKE ENVTL. L. & POL'Y F. 341, 343 (2012); FRACFOCUS, *What Chemicals Are Used* (last visited Mar. 22, 2013), http://fracfocus.org/chemical-use/what-chemicals-are-used.

[3] Dennis C. Stickey, *Expanding Best Practice: The Conundrum of Hydraulic Fracturing*, 12 WYO. L. REV. 321, 323 (2012).

[4] *See* Heather Ash, *EPA Launches Hydraulic Fracturing Study to Investigate Health and Environmental Concerns while North Dakota Resists Regulation: Should Citizens be Concerned?*, 87 N.D. L. REV. 717, 724–25 (2011).

Fracking operations are exempted from regulation under the Safe Drinking Water Act (SDWA), provided they do not use diesel fuel in the fracking fluid.[6] Dubbed the "Haliburton loophole," the exemption was passed as part of the Energy Policy Act of 2005.[7] This has led to the states becoming the primary regulators, with states differing in the amount of regulation.[8] Facing a regulatory void, private landowners have resorted to litigation as a means to address alleged groundwater contamination and other claims.[9]

This paper will look at the potential for common law claims to be used against fracking operators. The causes of action this paper will look at are trespass, nuisance, strict liability, and negligence, as these are the claims most likely to be asserted.[10] This paper will focus mainly on

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[5] Stickey, *supra* note 3, at 324.

[6] 42 U.S.C. § 300h(d)(1)(b) (2006).

[7] Thomas E. Kurth et al., *Shaking Up Established Case Law and Regulation: The Impacts of Hydraulic Fracturing*, 57 THE ADVOC. (TEXAS) 18, 23 (2011).

[8] *See* Gradijan, *supra* note 2, at 63–80 (describing different levels of regulation in different states).

[9] *See* Barclay Nicholson & Kadian Blanson, *Tracking Fracking Case Law: Hydraulic Fracturing Litigation*, 26-FALL NAT. RESOURCES & ENV'T 25, 25 (2011).

[10] *See* Hannah Wiseman, *Beyond Coastal Oil v. Garza: Nuisance and Trespass in Hydraulic Fracturing Litigation*, 57 THE ADVOC. (TEXAS) 8, 8 (listing nuisance and trespass as an "interesting legal issue[]"); Joe Schremmer, Comment, *Avoidable "Fraccident": An Argument Against Strict Liability for Hydraulic Fracturing*, 60 U. KAN. L. REV. 1215, 1217–18 (discussing the use of nuisance and strict liability).

the states of Texas, Pennsylvania, and North Dakota because of their unique status as major energy players when it comes to fracking.[11]

I. Trespass

Trespass claims present a potentially flexible form of relief that could be used to stop fracking operations.[12] These claims could come from surface and subsurface invasions.[13] However, the interaction of the rule of capture could prove problematic.[14]

In Texas, a trespass on real property occurs when one makes an "unauthorized entry upon the land of another."[15] A trespass occurs regardless of whether damage occurs or not.[16] Permitting a thing to move onto another's property is also a trespass, and a trespass can also occur beneath the surface of the Earth.[17] To recover damages, a plaintiff must show "(1) the plaintiff owns or has a lawful right to possess real property, (2) the defendant entered the plaintiff's land and the entry was physical, intentional, and voluntary, and (3) the defendant's trespass caused injury to the plaintiff."[18]

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[11] *See* Joshua P. Fershee, *The Oil and Gas Evolution: Learning from the Hydraulic Fracturing Experiences in North Dakota and West Virginia*, 19 TEX. WESLEYAN L. REV. 23, 24 (2012).

[12] Aaron Stemplewicz, *The Known "Unknowns" of Hydraulic Fracturing: A Case for a Traditional Subsurface Trespass Regime in Pennsylvania*, 13 DUQ. BUS. L.J. 219, 225 (2011).

[13] Wiseman, *supra* note 10, at 8.

[14] *Id.* at 10.

[15] Barnes v. Mathis, 353 S.W.3d 760, 764 (Tex. 2011).

[16] *Id.*

[17] Ehler v. LVDVD, L.C., 319 S.W.3d 817, 823 (Tex. App. 2010).

[18] Tex. Women's Univ. v. The Methodist Hosp., 221 S.W.3d 267, 286 (Tex. App. 2006).

Pennsylvania and North Dakota have very similar definitions of trespasses, as the plaintiff must show an intentional and unprivileged intrusion on to their land.[19] It is not necessary for the plaintiff to allege any harm or injury to the property.[20] Pennsylvania requires that the "plaintiff must have had exclusive use and possession of property at issue."[21] Thus, a lessor cannot sue the lessee who lawfully enters the property.[22] North Dakota requires some intentional or voluntary act of the defendant to bring a claim.[23]

In the oil and gas context, trespass claims could prove problematic because of the rule of capture. The rule of capture "gives a mineral rights owner title to the oil and gas produced from a lawful well bottomed on the property, even if the oil and gas flowed to the well from beneath another owner's tract."[24] Pennsylvania and North Dakota have also adopted the rule of capture, but North Dakota has done so with statutory modifications.[25] In *Costal Oil & Gas Corp. v. Garza Energy Trust*, the Supreme Court of Texas applied the rule of capture to hydraulic fracturing.[26]

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[19] Roth v. Cabot Oil & Gas Corp., No. 3:12 cv 898, 2013 WL 358176, at *14 (M.D. Pa. Jan. 30, 2013); Tibert v. Slominski, 692 N.W.2d 133, 137 (N.D. 2005).

[20] *Tibert*, 692 N.W.2d at 137; Jones v. Wagner, 624 A.2d 166, 169 (Pa. Super. Ct. 1993).

[21] *Roth*, 2013 WL 358176 at *14 (internal quotation marks and citation omitted).

[22] *Id.* at *15.

[23] *Tibert*, 692 N.W.2d at 137.

[24] Coastal Oil & Gas Corp. v. Garza Energy Trust, 268 S.W.3d 1, 13 (Tex. 2008).

[25] *See* Texaco Inc. v. Indu. Comm'n of State of N.D., 448 N.W.2d 621, 623 (N.D. 1989); Jones v. Forest Oil Co., 44 A. 1074, 1075 (Pa. 1900). *See also* Stemplewicz, *supra* note 12, at 240.

[26] *Coastal*, 268 S.W.3d at 12–13.

The plaintiff in *Coastal* brought a trespass claim against the defendant alleging that the defendant's well's fractures extended into his property and thus was a trespass.[27] The fractures from the well extended into the plaintiff's subsurface property.[28] The court found that the rule of capture precluded his trespass claim because the gas he lost "simply does not belong to him."[29] The court focused on four reasons not to amend the rule of capture for hydraulic fracturing beyond lease lines: remedies already exist under the law,[30] it would usurp the "authority of the Railroad Commission to regulate oil and gas production,"[31] the litigation process is not equipped to handle determining the value of oil and gas recovered improperly,[32] and industry did not want or need a change in the rule of capture.[33] The dissent would not have applied the rule of capture under the facts of the case, where the defendant "effectively enters another's lease without consent, drains minerals by means of an artificially created channel or device, and then 'captures' the minerals on the trespasser's lease."[34]

What could make the *Coastal* decision even more damaging for prospective plaintiffs is another Texas decision authorizing secondary recovery, *Railroad Commission of Texas v.*

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[27] *Id.* at 4.

[28] *Id.* at 8.

[29] *Id.* at 13.

[30] *Id.* at 14.

[31] *Id.* at 14–15.

[32] *Id.* at 16.

[33] *Id.*

[34] *Id.* at 43 (Johnson, J. dissenting).

Manziel.[35] The plaintiff in *Manziel* brought a trespass action seeking to prevent their neighbors from injecting water into their wells that would flood and destroy the plaintiff's wells.[36] The court found that when the Railroad Commission validly authorizes such a project, a trespass does not occur when the fluids cross lease lines.[37] The *Coastal* court cited to *Manziel* as supporting its decision on applying the rule of capture to fracking.[38] *Manziel* could apply in the case of migration of fracking fluids across lease lines, since such fluids are essential to the recovery of gas.

Although Texas plaintiffs could have a harder time bringing a trespass claim, their options may not be completely eliminated. A subsequent decision provided a window for some trespass claims.[39] *FPL Farming, Ltd. v. Envtl. Processing Sys., L.C.* held that a permit does not immunize a permit holder from civil liability.[40] The plaintiff alleged that fluids from a wastewater injection well migrated onto its property, contaminating drinking water.[41] The court limited the holding in *Manziel* to the issuance of injunctions,[42] possibly opening the door for a contamination claim.[43] The court also noted the importance of the rule of capture in *Manziel* and

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[35] 361 S.W.2d 560.

[36] *Id.* at 565.

[37] *Id.* at 568.

[38] *Coastal*, 268 S.W. 3d at 12.

[39] Wiseman, *supra* note 10, at 9.

[40] 351 S.W.3d 306, 310 (Tex. 2011).

[41] *Id.* at 307.

[42] *Id.* at 313.

[43] Wiseman, *supra* note 10, at 10.

Garza, which did not apply to an injection well.[44] Because the rule of capture would not necessarily apply to a leaking well, if a plaintiff's property is damaged by the leak they would likely have a stronger claim than one simply alleging migration.[45]

For plaintiffs in other states, *Coastal* has yet to prove a leading decision on the subject. In a decision preceding *Coastal*, Wyoming had already held that drainage from hydraulic fracturing could provide a basis for damages, but the court did not elaborate deeply on the issue, making comparisons difficult.[46] So far, no state appellate court has applied the *Coastal* decision in their jurisdictions. In North Dakota, *Coastal* may possibly conflict with existing precedent. North Dakota has held that a subsurface trespass occurs when a well is bottomed on the land of another without his consent.[47] Thus, drilling a slant well is a subsurface trespass.[48] However, fracking operators usually drill horizontal wells, which the North Dakota court has encouraged.[49] Additionally, the *Coastal* court did distinguish between a slant well and a fracking well.[50] Thus if a *Coastal*-type claim does come before the North Dakota court, a decision could go either way.

In Pennsylvania, one federal court has rejected a trespass claim. In *Roth v. Cabot Oil & Gas Corp.*, the plaintiffs brought forth numerous claims alleging contamination of the

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[44] *FPL Farming*, 351 S.W.3d at 314.

[45] Wiseman, *supra* note 10, at 9.

[46] *Id. See also* ANR Production Co. v. Kerr-McGee Corp., 893 P.2d 698 (Wyo. 1995).

[47] Cont'l Res., Inc. v. Farrar Oil Co., 559 N.W.2d 841, 844 (N.D. 1997).

[48] *Id.*

[49] *Id.* at 843, n.1.

[50] Coastal Oil & Gas Corp. v. Garza Energy Trust, 268 S.W.3d 1, 14 (2008).

groundwater supply after the defendants began fracking operations near their property.[51] The plaintiffs had granted the defendants a lease to the defendants to drill for gas.[52] Thus, the court found the trespass claims could not proceed because the defendants were authorized to be on the premises.[53] While this decision proves problematic for plaintiffs who leased to defendants, it may not preclude a suit from plaintiffs who have not leased to fracking operations.

It's similarly unclear how plaintiffs will fare bringing trespass claims against fracking operations. In *Kartch v. EOG Res., Inc.*, the defendants had a mineral lease on plaintiff's land.[54] The plaintiff sued after a leak was discovered in the lining of a reserve pit that contained waste fluids and solids.[55] The court found as a matter of law "that the burying of waste and the use of a synthetic liner in a reserve pit does not constitute a trespass under North Dakota law."[56] However, the court rejected the defendant's motion for summary judgment, allowing limited discovery to determine if there was any potential contamination.[57] Thus, it would appear that if a plaintiff can establish contamination resulting from a fracking operation, they will have a chance to allege a viable trespass action. Furthermore, unlike the federal court in Pennsylvania, the

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[51] Roth v. Cabot Oil & Gas Corp., No. 3:12 cv 898, 2013 WL 358176, at *4 (M.D. Pa. Jan. 30, 2013).

[52] *Id.* at *3.

[53] *Id.* at *10.

[54] Kartch v. EOG Res., Inc., 845 F. Supp. 2d 995, 997 (D.N.D. 2012).

[55] *Id.* at 999.

[56] *Id.* at 1015–16.

[57] *Id.* at 1015.

North Dakota court did not consider the fact that the defendant had a right to be on the premises in ruling on the trespass claim.

Overall, it would appear that a trespass claim is most likely to be successful if a plaintiff can show the migration of chemicals from a leaking well. The claim least likely to succeed would be a simple drainage claim. Additionally, plaintiffs who have leased to fracking operations might also have problems. Thus, potential plaintiffs would be well advised to bring a trespass claim with others.

II. Nuisance Claims

Nuisance claims have been a favorite common-law claim for environmental plaintiffs.[58] This has appeared to be the case for hydraulic fracturing plaintiffs as well.[59] Nuisance claims can be divided into two categories: public and private.

A public nuisance is something that creates "an unreasonable interference with a right common to the general public."[60] A private nuisance in Texas is defined "as a condition that

[58] Raymond G. Mullady, Jr. et al., *Defending Marcellus Shale Groundwater Contamination Claims: The Case Against Class Actions and Other Theories of Liability*, 79 DEF. COUNS. J. 155, 167 (2012).

[59] *See* Wiseman, *supra* note 10, at 9–10 (discussing the development of nuisance and trespass claims as it related to fracturing).

[60] Jamail v. Stoneledge Condo. Owners Ass'n, 970 S.W.2d 673, 676 (Tex. App. 1998) (internal quotation marks and citation omitted).

substantially interferes with the use and enjoyment of land by causing unreasonable discomfort or annoyance to persons of ordinary sensibilities."[61]

Pennsylvania courts have also adopted the public versus private nuisance distinction. The definition of a private nuisance is similar to that of Texas, with Pennsylvania courts adopting Section 822 of the Restatement (Second) of Torts, which provides for liability:

> [I]f, but only if, his conduct is a legal cause of an invasion of another's interest in the private use and enjoyment of land, and the invasion is either (a) intentional and unreasonable, or (b) unintentional and otherwise actionable under the rules controlling liability for negligent or reckless conduct, or for abnormally dangerous conditions or activities.[62]

Such invasions must be significant, which requires that "normal persons living in the community would regard the invasion in question as definitively offensive, seriously annoying or intolerable."[63] A public nuisance is similar, except that it affects the greater community.[64]

In North Dakota, the elements of a public and private nuisance are similar but are defined by statute. Nuisance is first defined as "unlawfully doing an act or omitting to perform a duty, which act or omission: (1) Annoys, injures, or endangers the comfort, repose, health, or safety of others; ... (4) In any way renders other persons insecure in life or in the use of property."[65] A private nuisance is then defined as "one which affects a single individual or a determinate

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[61] Rankin v. FPL Energy, LLC, 266 S.W.3d 506, 509 (Tex. App. 2008) (internal quotation marks and citation omitted).

[62] Roth v. Cabot Oil & Gas Corp., No. 3:12 cv 898, 2013 WL 358176, at * 12 (M.D. Pa. Jan. 30, 2013) (quoting RESTATEMENT (SECOND) OF TORTS § 822 (1965)).

[63] Roth, 2013 WL 358176 at *12 (internal quotation marks and citation omitted).

[64] Duquesne Light Co. v. Pa. Am. Water Co., 850 A.2d 701, 704 (Pa. Super. Ct. 2004).

[65] N.D. CENT. CODE §42-01-01 (2011).

number of persons in the enjoyment of persons in the enjoyment of some private right not common to the public."[66] A public nuisance can harm different members of the community unequally, but it must still "affect[] an entire community or neighborhood or any considerable number of persons."[67] In all three states, to allege a public nuisance claim a private party must have some special injury unique to that person or his property.[68]

A nuisance claim challenging fracking has yet to be decided by a Texas appellate court. However, a potentially relevant case is *Z.A.O., Inc. v. Yarbrough Drive Ctr. Joint Venture*.[69] The lessee kept underground storage tanks containing gasoline on the premises, and the lessor sued in part for nuisance for contamination of the property.[70] The court found that the lessor did not show intentional or negligence on the conduct of the lessee as was necessary to establish their claim.[71] Furthermore, the court considered the contractual clause containing provisions on what would occur in the event of a spill meant the lessor could not show that the activity was out of place with its surroundings.[72] Thus, if a plaintiff were to be the lessor, a fracking defendant

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[66] *Id.* § 42-01-02.

[67] *Id.* § 42-01-06.

[68] *Id.* § 42-01-08; *Duquesne*, 850 A.2d at 704; Jamail v. Stoneledge Condo. Owners Ass'n, 970 S.W.2d 673, 676 (Tex. App. 1998).

[69] 50 S.W.3d 531 (Tex. App. 2001).

[70] *Id.* at 535–37.

[71] *Id.* at 543.

[72] *Id.*

could potentially point to this case if the plaintiff cannot show some form of negligent or intentional conduct as it relates to contamination.[73]

Plaintiffs can be encouraged by federal court decisions in Pennsylvania and North Dakota. In *Roth*, the court found that the plaintiff's allegations of groundwater contamination and the remediation costs they have incurred were enough to state a nuisance claim and defeat the defendants' motion to dismiss.[74] In *Kartch*, the court found that summary judgment on the nuisance claim was not warranted because of the potential contamination of soil from the reserve pit.[75] However, noise and the use of flares in accord with North Dakota regulations do not constitute nuisances under North Dakota law.[76] Thus, with the right facts, plaintiffs should be able to successfully bring nuisance claims against fracking operations.

III. Strict liability claims

Strict liability is an alluring claim for plaintiffs to bring against fracking operators because they would not to have show any negligence on the part of the operators.[77] The applicable doctrine is found in Sections 519 and 520 of the Restatement (Second) of Torts, which provide for strict liability for ultrahazardous activities.[78]

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[73] Additionally, in Texas emotional reactions and aesthetic concerns are not enough to bring a nuisance action. *See* Rankin v. FPL Energy, LLC, 226 S.W.3d 506, 509 (Tex App. 2008).

[74] Roth v. Cabot Oil & Gas Corp., No. 3:12 cv 898, 2013 WL 358176, at * 13 (M.D. Pa. Jan. 30, 2013).

[75] Kartch v. EOG Res., Inc., 845 F. Supp. 2d 995, 1010 (D.N.D. 2012).

[76] *Id.* at 1009, 1011.

[77] *See* Mullady et al., *supra* note 58, at 169.

[78] *See id.*

Pennsylvania courts have applied the six Restatement factors to determine if an activity is ultrahazardous.[79] The factors 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.[80]

So far, the courts have been cautious in applying these factors to fracking operations. While deciding whether an activity meets this test is a matter of law, the district court in *Berish v. Sw. Energy Prod. Co.* was cautious and did not decide the issue on a motion to dismiss until more facts were developed during discovery.[81] The more recent case of *Roth* followed the *Berish* court and did not decide the issue either.[82]

Commentators are skeptical as to whether plaintiffs can establish these elements. The scientific debate as to the dangerousness of fracking could hurt plaintiffs under factor (b).[83] Also, the infrequent nature of fracking accidents would show that reasonable care can reduce the risk of accidents under factor (c).[84] Under factor (e), fracking is appropriate in these places

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[79] *Id.*

[80] *Id.* (quoting RESTATEMENT (SECOND) OF TORTS § 520 (1965)).

[81] Berish v. Sw. Energy Prod. Co., 763 F. Supp. 2d 702 (M.D. Pa. 2011).

[82] Roth v. Cabot Oil & Gas Corp., No. 3:12 cv 898, 2013 WL 358176, at * 14 (M.D. Pa. Jan. 30, 2013).

[83] Schremmer, *supra* note 10, at 1238.

[84] *Id.* at 1248.

because it cannot be done anywhere but these shale formations.[85] Additionally, the economic value fracking would favor defendants under factor (f).[86]

Moreover, even if plaintiffs can establish fracking satisfies the Restatement factors, plaintiffs will likely have an uphill battle in at least two of the major states. Texas courts have not recognized a cause of action under Section 520 of the Restatement, and have "consistently required some other showing, such as negligence or trespass, for recovery."[87] Additionally, it is unclear whether North Dakota allows for strict liability for abnormally dangerous activities.[88] A plaintiff, however, can argue that North Dakota has at least implied an action could lie with the proper facts.[89] Any plaintiff who wishes to bring a strict liability claim against a fracking operator should strongly consider bringing a negligence claim as well, discussed below.

IV. Negligence claims

While strict liability would appear to be an uphill battle for a plaintiff, negligence might fare much better as a cognizable claim against a fracking operation. Of course, a plaintiff will

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[85] Mullady et al., *supra* note 58, at 170.

[86] *Id.* at 171.

[87] Robertson v. Grogan Inv. Co., 710 S.W.2d 678, 679 (Tex. App. 1986).

[88] *See* Armes v. Petro-Hunt, LLC, No. 4:10-cv-078, 2012 WL 1493740, at *3 (D.N.D. Apr. 27, 2012) (noting the North Dakota Supreme Court has never found a cause of action for abnormally dangerous activities).

[89] *Id. See also* Wirth v. Mayrath Indus., Inc., 278 N.W.2d 789, 794 (N.D. 1979) ("We conclude that the provisions of Section 519 and 520 of the Restatement of Torts 2d are inapplicable to this case.").

have to show the fracking operator likely did something wrong. However, three different routes (straight negligence, negligence per se, and res ipsa loqitur) are potentially available to plaintiffs.

In all three states, a negligence action consists of a legal duty the defendant owes the plaintiff, a breach of that duty, and an injury to the plaintiff which was proximately caused by the defendant's breach.[90] However, when it comes to negligence per se and res ipsa loqitur, there are differences between the three jurisdictions. Negligence per se can be a potentially relevant claim because of the highly regulated nature of the oil and gas industry.[91] Negligence per se is a doctrine that allows plaintiffs to establish liability by showing a violation of a statute or regulation.[92]

The states, however, give different weights to negligence per se. Texas allows the use of penal statutes to establish the duty a defendant owes the plaintiff.[93] The plaintiff must first show that he belongs to the class of people the statute was drafted to protect.[94] If the plaintiff satisfies this, the court looks at five factors to determine if negligence per se should apply

> (1) whether the statute is the sole source of any tort duty from the defendant to the plaintiff or merely supplies a standard of conduct for an existing common law duty; (2) whether the statute puts the public on notice by clearly defining the required

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[90] *See* Forsman v. Blues, Brews and Bar-B-Ques, Inc., 820 N.W.2d 748, 753 (N.D. 2012); Scampone v. Highland Park Care Center, LLC, 57 A.3d 582, 596 (Pa. 2012); Doe v. Boys Clubs of Greater Dall., 907 S.W.2d 472, 477 (Tex. 1995).

[91] *Cf.* Fershee, *supra* note 11, at 31 (discussing the role of state regulation).

[92] *See* J.D. LEE & BARRY LINDAHL, 1 MODERN TORT LAW: LIABILITY AND LITIGATION § 3:42 (2d ed. 2012).

[93] *See* Discovery Operating, Inc. v. BP Am. Prod. Co., 311 S.W.3d 140, 162 (Tex. App. 2010).

[94] *Id.*

> conduct; (3) whether the statute would impose ruinous liability without fault; (4) whether negligence per se would result in ruinous damages disproportionate to the seriousness of the statutory violation, particularly if the liability would fall on a broad and wide range of collateral wrongdoers; and (5) whether the plaintiff's injury is a direct or indirect result of the violation of the statute.[95]

Pennsylvania adopts a similar approach to Texas. Negligence per se, however in Pennsylvania, can be used to automatically establish liability.[96] Pennsylvania has a four factor test similar to Texas to determine if negligence per se applies.[97] North Dakota, however, does not recognize the violation of a statutory duty as negligence per se; rather, it is merely evidence of negligence.[98]

Given the vast regulation of the oil and gas industry, negligence per se could be an attractive claim for plaintiffs. Courts in Texas and Pennsylvania have applied violations of energy and environmental regulations to establish negligence per se against a defendant.[99] The

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[95] Perry v. S.N., 973 S.W.2d 301, 309 (Tex. 1998).

[96] Kaplan v. Phila. Transp. Co., 171 A.2d 166 (Pa. 1961).

[97] Wagner v. Anzon, Inc., 684 A.2d 570, 574 (Pa. Super. Ct. 1996) (listing the four elements as "(1) the purpose of the statute must be, at least in part, to protect the interest of a group of individuals, as opposed to the public generally; (2) the statute or regulation must clearly apply to the conduct of the defendant; (3) the defendant must violate the statute or regulation; (4) the violation of the statute or regulation must be the proximate cause of the plaintiff's injury.").

[98] Kimball v. Landeis, 652 N.W.2d 330, 336 (N.D. 2002).

[99] *See* Roth v. Cabot Oil & Gas Corp., No. 3:12 cv 898, 2013 WL 358176, at * 11 (M.D. Pa. Jan. 30, 2013) (applying negligence per se to violations of the Pennsylvania Oil and Gas Act);

Pennsylvania case in *Roth* specifically dealt with fracking, while the Texas case did not.[100] However, the lack of regulations addressing the fracking industry becomes problematic, because for negligence per se claims to be successful, there must be a violation of a regulation or statute. Also, the requirement that the plaintiff show they were part of the class designed to be protected by the statute could be problematic, especially when relying on an environmental statute as the basis for the claim.[101]

One other negligence theory possibly available to plaintiffs would be a claim of res ipsa loquitur. Res ipsa loquitur can apply when the circumstances surrounding an injury shifts the burden to the defendant to show they were not negligent.[102] Res ipsa loquitur is essentially a middle ground between negligence and strict liability.[103]

In Texas, the courts consider res ipsa loquitur to be an evidentiary rule.[104] It "applies when (1) the character of the accident is such that it would not ordinarily occur in the absence of negligence, and (2) the instrumentality causing the injury is shown to be under the management

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Discovery Operating, Inc. v. BP Am. Prod. Co., 311 S.W.3d 140, 161 (Tex. App. 2010) (applying negligence per se for a violation of Section 85.321 of the Natural Resources Code).

[100] *Id.*

[101] *See Roth*, 2013 WL 358176 at *9 (rejecting negligence per se based on the Pennsylvania Clean Streams Law, Solid Waste Management Act, and the Hazardous Sites Cleanup Act because they protect the public generally).

[102] Schremmer, *supra* note 10, at 1234.

[103] *Id.*

[104] Traut v. Beaty, 75 S.W.3d 661, 664 (Tex. App. 2002).

and control of the defendant."[105] Pennsylvania courts also consider res ipsa loquitur to be an evidentiary rule.[106] In addition to the first factor considered by the Texas courts, Pennsylvania and North Dakota courts also require exclusive control of the instrumentality and that the plaintiff establish he did not cause the injury.[107]

Texas has applied res ipsa loquitur in oil cases, holding that applying the rule is proper in the case of oil spilling from a pipeline.[108] Thus, a potential plaintiff would have a comparable case to make, as groundwater near a fracking operation is not likely to simply become polluted without some type of negligence on the part of a defendant.[109] Furthermore, the wells are often going to be under the defendant's exclusive control, further justifying that a jury be instructed on res ipsa loquitur.[110] However, the requirement that the plaintiff rule out a third party cause could increase the costs of litigation for plaintiffs to conduct costly testing and discovery. Res ipsa loquitur, however, appears to be a more plausible claim for a plaintiff to make than strict liability.

CONCLUSION

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[105] *Id.*

[106] Haugen v. BioLife Plasma Serv., 714 N.W.2d 841, 843 (N.D. 2006); Toogood v. Rogan, 824 A.2d 1140, 1147 (Pa. 2003).

[107] *Id.*

[108] W.B. Harmon v. Sohio Pipeline Co., 623 S.W.2d 314, 315 (Tex. 1981).

[109] *See* King et al., *supra* note 2, at 351 (discussing improper well casing as the more likely cause of groundwater contamination).

[110] Schremmer, *supra* note 10, at 1250.

Plaintiffs have an array of tools available to them if they are injured by a fracking operation. However, each of the common law claims has potential problems that could trap the unwary plaintiff. The ultimate solution will be some form of federal and state regulation that comprehensively addresses the dangers fracking present. Until that happens, however, plaintiffs are on their own.