The “SLAPP” Defense to Litigation Comes under Fire Following EPA’s Assessment on Hydraulic Fracturing and Recent EHB Decision

Action Item: The recently released draft EPA Assessment of Potential Impacts of Hydraulic Fracturing on Drinking Water, along with a recent important decision from the Pennsylvania Environmental Hearing Board, demonstrate that oil and gas extraction by hydraulic fracturing is safe and can be done without adverse impacts to drinking water resources. So, among other things, it’s full steam ahead for lawsuits by landowners and others, like the one just brought in Butler County, PA, against environmental advocacy groups who routinely employ falsehoods, distortions, and incendiary scare tactics against responsible energy production activities.

An interesting case is brewing in Butler County, Pennsylvania, where landowners have organized, hired counsel, and brought suit related to oil and gas development. See Dewey Homes and Investment Properties, LLC et al. v. Delaware Riverkeeper Network et al., Docket No. 15-10393 (Butler Co. 2015). If you are thinking that this is more of the same old—i.e., landowners banding together with the help of environmental groups to limit or prohibit oil and gas development—you would be wrong. In an interesting twist, these landowner-plaintiffs, along with a real estate developer, brought suit against the Delaware Riverkeeper Network, Clean Air Council, and certain individuals alleging interference with contracts between the plaintiffs and various oil and gas companies that would allow drilling activities on the plaintiffs’ properties in return for royalties based on the percentage of oil, gas, and other constituents recovered.

The three-count complaint asserts claims for tortious interference with contracts, tortious interference with contractual relations, and civil conspiracy, and alleges that the defendants, among other things, intentionally misstated known facts and health issues by disseminating false, misleading, and inflammatory statements about oil and gas drilling activities as well as engaged in a “scorched earth” campaign against all Marcellus shale development. The complaint also charges the defendants with filing frivolous challenges to a new zoning ordinance that would open a percentage of township land for gas development. The plaintiffs allege that, as a result of the defendants’ improper actions, the oil and gas companies ceased development with regard to the plaintiffs’ leases. According to the complaint, the defendants’ improper actions have had a dampening effect on the negotiation and execution of new leases, and the plaintiffs have lost the benefit of all royalties that were provided under the terms of the leases.
Not surprisingly, opponents of the lawsuit have already labeled this a classic “SLAPP” suit, a pejorative acronym meaning Strategic Lawsuits Against Public Participation. The basic premise underlying a so-called SLAPP suit is that one party, typically a corporate plaintiff, files suit for the sole purpose of “bullying” a defendant into settling in order to avoid costly litigation defending an otherwise meritless claim. SLAPP suits can come in all shapes and sizes, and can include any conceived claim brought by either a corporation or an individual. The common theme among SLAPP suits is that the threat of lengthy litigation coerces a defendant into settling and, in the process, has a chilling effect on the defendant’s public involvement and First Amendment Rights.

Bowing to interest groups who make a cottage industry from suing industry, and a lot of money to boot, some states have passed anti-SLAPP laws. Anti-SLAPP laws and hydraulic fracturing have recently collided in Texas. Under Texas law, defendants can defeat an alleged SLAPP lawsuit by filing a motion to dismiss within 60 days of being served with the complaint on the grounds that the suit was filed in response to an exercise of free speech on a “matter of public concern.” If the defendant is successful in making this showing, the burden shifts to the plaintiff who must, at this early stage of the litigation, make a prima facie case with “clear and specific” evidence to substantiate its complaint or alleged SLAPP-related claim. In In re Lipski, a case of first impression in Texas involving hydraulic fracturing, defamation claims, and the state’s anti-SLAPP law, Mr. Lipsky famously and very publically lit his tap water on fire and blamed an oil and gas developer for polluting his drinking water. After the Texas Railroad Commission exonerated the developer, finding that it was not responsible for or otherwise linked to the alleged contamination, the developer sued Lipsky for defamation. In its recent decision, the Texas Supreme Court ruled that circumstantial evidence can be used to satisfy the plaintiff’s burden of showing “clear and specific” evidence to establish a prima facie case. The ruling will force courts to recognize that relevant and probative circumstantial evidence can be used to overcome a challenge to a lawsuit under an anti-SLAPP law. Some commentators have concluded that the court’s reasoning is in line with the Texas legislature’s intent when it passed the anti-SLAPP law.

Pennsylvania established an anti-SLAPP law in 2000 that is limited to the narrow area of environmental law and regulations. That said, there are ongoing attempts by well-heeled special interests to introduce even more stringent anti-SLAPP laws that will give defendants an opportunity to recover attorney fees, costs, and damages resulting from the litigation. Apparently, free speech is good thing for them to have, but not for others. Recently, Senate Bill 95 was introduced after a similar bill failed in 2013.

Enter the long-awaited “EPA Assessment of the Potential Impacts of Hydraulic Fracturing for Oil and Gas on Drinking Water Resources,” which was released in draft form on June 4, 2015. Despite fracturing opponents’ attempts to falsify the findings of the Assessment, it clearly demonstrates that claims like those filed by the Butler County landowners alleging the dissemination of false information regarding hydraulic fracturing are dead on and thus cannot be considered a SLAPP lawsuit.

The Assessment, originally requested by Congress in 2010, charged the EPA with the task of analyzing the relationship between hydraulic fracturing and drinking water using the best available science and information. The EPA, as required, performed the study in a transparent, peer-reviewed manner. In short, after five years of public meetings, reviews of scientific studies, receipt of input from states, and independent stakeholders (3,500 sources of information were reviewed), the EPA concluded that there is a lack of evidence that aboveground and below ground mechanisms have led to “widespread, systemic impacts on drinking water resources in the United States,” and that the “number of identified cases where drinking water resources were impacted are small relative to the number of hydraulically fractured wells.”

On top of that, the Pennsylvania Environmental Hearing Board just held last week in the case of Kiskadden v. Pennsylvania Department of Environmental Protection and Range Resources, Docket No. 2011-149-R, after a 20-day trial, that oil and gas operations were not the source of a local landowner’s water well problems. The Board upheld the Department’s 2011 determination that the drilling operations had not caused Kiskadden’s water well problems.
As Chief Judge Renwand artfully articulated in the Board’s 58-page Adjudication:

Simply because there are problems on a drilling site ... it does not mean that a water well located approximately one half mile away was impacted by those drilling operations. The homeowner must show by a preponderance of the evidence that any pollution to his water well is caused by the drilling operations, and the Appellant failed to do that here.

The Board noted, among other things, that the Kiskadden well was never maintained, that it was next to other industrial operations, such as an automobile junk-yard, and that other wells closer to the drilling activity showed lower levels of various elements that Kiskadden had alleged were present due to drilling operations.

As a spokesperson for the drilling company said after the decision was released:

This ruling is the latest in a long series of events including the EPA’s recent report of a multi-year study that we believe should provide the public with confidence drilling can and is being done safely and that regulatory agencies are diligently overseeing the process.

Both the EPA’s Assessment and the Kiskadden case demonstrate what those in the industry as well as many state and federal regulators have been saying for years: that horizontal drilling and hydraulic fracturing can be done safely and effectively in accordance with existing state regulatory requirements and without adverse impacts to drinking water resources.

As it impacts anti-SLAPP laws and litigation, the EPA’s Assessment and the Kiskadden case provide plaintiffs with additional evidence and support for well-placed lawsuits, such as the Dewey Homes case in Butler County.

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