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legal opinion

Federal Suit Could Impact Utica Drilling

BY GLENN MORRICAL & CARTER STRANG

A lawsuit working its way through federal court in Cleveland alleges that oil and gas drilling in Ohio is "abnormally dangerous" and that the operator of a well should pay for any damage caused by chemicals that escape the well — even if the operator met all applicable standards of care.

If the plaintiffs succeed on this theory, landowners will be able to pursue operators of oil and gas wells for injuries associated with drilling activities — regardless of how careful drillers were when constructing the well or whether they adhered to state regulations. That could dampen enthusiasm for Utica Shale drilling in Ohio.

The defendant, Landmark 4 LLC, with offices in Hartville, operates two horizontal oil and gas wells in Medina County. The plaintiffs, William and Stephanie Boggs, live about 2,500 feet from the wells. According to their complaint, the drilling, construction and operation of the wells resulted in "pollutants and industrial and/or residual waste" being discharged into the ground or waters near the Boggs' home — all of which they would have to prove in court to win. The complaint asks not only for damages, but also that the wells be shut down and a court-supervised "medical monitoring program" be set up.

The plaintiffs claim Landmark was negligent in failing to use sufficient cement in constructing the wells and in how it trained and supervised its employees. Claiming negligence in drilling and operating a gas well is not new in Ohio. Recovering for negligence, however, requires proof that the operator failed to exercise "reasonable care."

In this case, however, the plaintiffs go further and claim that the well operator engaged in "abnormally dangerous" activities simply by drilling such a well — and should be held liable even if it took every reasonable precaution to prevent the harm.

This theory is known as "strict liability" under Ohio law. However, we know of no Ohio case applying it to oil and gas drilling. So this case — coming at the dawn of Ohio's Utica Shale boom — may prove pivotal.

Whether an activity is "abnormally dangerous" is a matter of law, so it is up to a judge, not a jury, to make that decision. Will the federal judge hearing the case conclude that oil and gas drilling is abnormally dangerous under Ohio law, thus making Ohio well operators liable even when they do everything reasonably within their control to prevent harm?

The judge might consider other Ohio cases where "abnormally dangerous" activities were alleged, such as damage resulting from blasting, electrical lines, etc. Other federal courts have listed six specific factors to consider when deciding whether an activity is "abnormally dangerous" under Ohio law. They are: a high degree of risk of some harm to others; the likelihood that the harm will be great; the inability to eliminate the risk by exercising reasonable care; the extent to which the activity is not a matter of common usage; the inappropriateness of the activity to the place where it took place; and the extent to which the value of the activity to the community is outweighed by its dangerous attributes.

If the judge considers cases from other states that address this issue, he will find those states are split. Texas and Oklahoma hold that oil and gas drilling is not abnormally dangerous, while Kansas and California maintain that it is.

In two cases pending in Pennsylvania, the judges haven't yet decided whether strict liability applies, but in preliminary rulings they acknowledge their decision should turn on the six factors listed above.

In applying these factors, a key part of the analysis is likely to focus on whether the risk of serious harm can be eliminated with reasonable care. This is where opinions differ.

Anti-drilling activists contend that no amount of care can make hydraulic fracturing safe, while industry supporters assert that environmental harms result solely from the failure to follow industry standards. For example, an investigation by the Ohio Department of Natural Resources ("ODNR") into a widely publicized 2008 home explosion in Bainbridge concluded that the explosion was the result of substandard work by drillers. Since that time, the ODNR has adopted strong new rules on well construction requirements.

There have been more than 260,000 oil and gas wells drilled in Ohio since the 1800s and the use of hydraulic fracturing here dates back to the 1950s. The industry maintains that techniques used in drilling horizontal wells merely extend established methods.

In considering factors such as the appropriateness of drilling to the place and benefit to the community, it seems clear that the Ohio General Assembly and the ODNR have concluded that drilling in the Utica Shale provides benefits well beyond its risks. Recent legislation gives the ODNR more authority to apply special conditions to horizontal drilling, and re-emphasizes its sole authoriy to regulate the activity. This illustrates that at least two of the three branches of Ohio government believe that horizontal drilling should go forward within safety standards established by the regulators.

In our view, operators should be responsible only for harms caused by their failure to exercise reasonable care — not for activities they undertake with the utmost care in accordance with the law and industry standards. To apply strict liability against well operators would create a strong disincentive to develop the tremendous resource presented by the Utica Shale.

We shall see if the judge agrees. ■

Glenn Morrical and Carter Stang are partners at the Cleveland law firm Tucker Ellis LLP