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Toxic Chemicals

New Fracking Studies Aren't Fueling Toxic Tort Cases—Yet

By STEVEN M. SELLERS

Scientists warn that chemicals used in oil and gas fracking wells may pose serious health risks.

But neither their research nor a pair of multimillion-dollar contamination verdicts has produced a surge of toxic tort cases. At least not yet, lawyers and academics tell Bloomberg BNA.

Several recent studies have variously found that fracking fluids may disrupt hormones, threaten fertility, release cancer-causing radon gas and aggravate asthma, to name a few potential health problems.

But that catalogue of possible ailments doesn't mean plaintiffs have a clear litigation path forward, the lawyers say.

The sparseness of litigation—despite the studies, a nearly \$3 million contamination verdict in Texas and a similar \$4.2 million award in Pennsylvania—may be the result of several factors.

They include novel and complex causation questions and corresponding high costs.

"These are extremely expensive cases to bring," William Ruskin, a defense lawyer with Gordon Rees Scully Mansukhani in New York, recently told Bloomberg BNA.

"The upfront money needed to launch a toxic tort case involving a one-off plaintiff is prohibitive," Ruskin, an experienced toxic tort litigator, said.

He added that some of the studies are "significant" from a public health perspective, but their utility in litigation is questionable.

That's partly because these studies rely on participants' self-reported symptoms, and these symptoms may have other causes.

One prominent plaintiffs' lawyer who is handling other aspects of fracking-related litigation said his office hasn't yet fielded any inquiries from potential clients who allege personal injuries from fracking chemicals.

"I haven't had a client come to me with a medical exposure issue like this before," Scott Poynter, of Poynter Law Group in Little Rock, Ark., told Bloomberg BNA.

Poynter represents plaintiffs in litigation stemming from earthquakes allegedly induced by wastewater disposal in Oklahoma.

He's unaware of other lawyers bringing toxic exposure personal injury claims tied to fracking, he added.

But he's "convinced this is a real problem and most likely something to be developed" in the future, he said.

Blake Watson, a professor at the University of Dayton Law School in Dayton, Ohio, told Bloomberg BNA he hasn't seen much of a bump in litigation either.

"Although it is difficult to track new cases, I am not seeing many new fracking tort lawsuits, especially outside of Oklahoma, where there have been some earthquake related lawsuits," said Watson, who tracks fracking cases nationally.

Chemical Cocktails. Fracking fluids are largely comprised of water and sand, but also may include chemical additives that help release oil and gas from underground rock formations.

A staff report for the House Committee on Energy and Commerce, for example, concluded in 2011 that the oil and gas industry used more than 2,500 fracturing products with 750 chemicals and other components.

Some of the proprietary chemical cocktails used by drillers contain relatively harmless substances, such as salt, instant coffee and walnut hulls, the report found.

But the researchers also said that methanol, a hazardous air pollutant, and other risky additives enter the mix depending on the particular cocktail used.

And other toxic chemicals—hydrochloric acid, formic acid, ethanol and naphthalene—are also on the list for some drillers. That's according to FracFocus, a national hydraulic fracturing chemical registry operated by the Ground Water Protection Council and the Interstate Oil & Gas Compact Commission.

The Ground Water Protection Council is an organization of state ground water regulatory agencies.

The Interstate Oil & Gas Compact Commission is a multi-state government agency that works to "efficiently maximize oil and natural gas resources through sound regulatory practices while protecting our nation's health, safety and the environment," according to its website.

The council and commission are both based in Oklahoma City, Okla.

Mounting Evidence of Risk? The studies largely strike the same chord—that fracking chemicals expose people to significant health risks.

In November, for example, Washington, D.C.-based Physicians for Social Responsibility, an association of physicians focused on nuclear energy and toxic chemical dangers, and Concerned Health Professionals of NY, an initiative of New York health professionals opposed to fracking, issued a compendium of studies they said demonstrated the "rapidly expanding body of evidence related to the harms and risks of unconventional oil and gas extraction."

In September, researchers at Johns Hopkins School of Medicine, Baltimore, reported that fracking operations in Pennsylvania exacerbated asthma in patients.

Yet another study issued in August, this one funded by the University of Missouri and the Environmental Protection Agency, concluded that the endocrine systems of female mice exposed to fracking fluids were disrupted and that they had an increased risk of infertility, diabetes, obesity and certain cancers.

And, last year, another Johns Hopkins study found a “statistically significant association” between a number of private homes’ proximity to unconventional natural gas wells drilled in Pennsylvania and indoor radon levels.

But not all of the recent studies paint a bleak portrait of toxic fracking fluids.

A University of Colorado-Boulder analysis found in 2014 that the compounds and corrosion inhibitors used in fracking are no more toxic than common household cleaners.

Problems of Proof. Oil and gas industry representatives have their own explanations for why few toxic tort suits have been filed so far.

The dearth of exposure claims reflects the care drillers use in digging fracking wells, the proper management of fluids and the low exposure risks posed by real-world fracking operations, according to Seth Whitehead, a spokesman for Energy in Depth.

EID, based in Washington, D.C., is a research and education organization launched in 2009 by the Independent Petroleum Association of America.

Whitehead also faults the studies identifying potential health concerns.

“What you find in most of these studies, the relevant thing they overlook, is dose and exposure levels,” he told Bloomberg BNA.

“Fracking fluid is 99 percent water and sand,” Whitehead said. “So, the chemical presence is highly diluted. You can find dangerous chemicals in everyday products.”

Ruskin, the defense attorney with Gordon Rees, said the studies also point to another challenge in proving a toxic tort case based on fracking fluid exposures.

“These studies are region- or site-specific,” he said. “So, a study that finds a reaction in one region may not be probative because there are so many different re-

gions of the country using so many different types of processes,” Ruskin said.

And even if that hurdle is surmounted, plaintiffs typically must have reliable scientific proof that a given driller’s activities, and not other sources of toxins, caused the specific contamination at issue, and any resulting illness.

In 2014, for example, the Western District of New York dismissed a water contamination suit against a natural gas well driller because methane in the water could have arisen from sources other than the gas well.

Jury Verdicts Rare. Yet successful tort cases based on fracking chemical exposures aren’t unheard of.

In *Parr v. Aruba Petroleum Inc.*, a nuisance suit, a Texas jury awarded \$2.9 million in 2014 to a family that claimed alleged contamination from fracking operations caused them a variety of personal injuries and interfered with the use of their land.

The fracking operators’ appeal of that verdict was argued in September before the Texas Court of Appeals, Fifth District.

Aruba Petroleum’s brief contends that expert evidence submitted by Lisa Parr failed to prove the drilling operations were the source of any contamination or injury.

But Parr defends the verdict in her own brief, arguing that questions of dose and exposure don’t factor into nuisance liability.

“Evidence as to the dose of the contaminants was not required because no disease claim was made nor did the jury award damages for a specific ailment,” Parr said.

Both sides await the court’s ruling.

And, in March in *Ely v. Cabot Oil & Gas Corp.*, a federal jury awarded \$4.2 million to two Pennsylvania families who alleged fracking operations released methane and other contaminants into their drinking water.

Cabot has moved to set aside the verdict and for a new trial in that case, which was also a nuisance suit. A decision on the motions is pending in the Middle District of Pennsylvania.

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