# THE INCREASING EMERGENCE OF NUANCED, SPECULATIVE, AND NOVEL DAMAGES IN ENVIRONMENTAL LITIGATION: A Select Review of Property "Stigma" Damages and Hydraulic Fracturing Damages

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Environmental practitioners are usually quite familiar with the damages typically sought by aggrieved parties when litigating environmental actions. As the practice continues to grow, however, plaintiffs have gradually begun to seek more nuanced, speculative, and novel damages in their quest for recovery. Environmental practitioners should continue to be aware of such recovery approaches, which may either apply to a broad spectrum of environmental matters or simply to a specific area of environmental law. This article examines an example of both the former and the latter – providing a general review of the use of speculative property ''stigma'' damages, which can be applicable to a host of environmental actions, and the use of novel, unique (and at times, unusual) damages that have been increasingly requested in a specific developing sector of environmental law – hydraulic fracturing (fracking).[1]

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[1] Although not the focus of this article, certain novel damage claims have also begun to appear in the area of climate change, specifically through lawsuits against corporate defendants alleging that their actions (or inactions) have contributed to climate change that has caused real property damage. *See American Elec. Power Co., Inc. v. Connecticut*, 582 F.3d 309 (2d Cir. 2009) *rev'd* 131 S. Ct. 2527 (2011); *Native Village of Kivalina v. ExxonMobil Corp.*, 696 F.3d 849 (9th Cir. 2012) (city brought federal public nuisance suit against 24 oil, gas, coal and utility companies claiming the destruction of the coastal city of Kivalina, Alaska was being caused by activities of the energy industry that resulted in global warming; 9th Circuit denied claims, no standing under federal common law); *Comer v. Murphy Oil USA*, 607 F.3d 1049 (5th Cir. 2010) (residents and property owners along the Mississippi Gulf Coast filed class action suit against various companies alleging that greenhouse gases were emitted by the defendants thereby contributing to air and city temperature elevations which caused glacial melting and rising sea levels; also defendants actions fueled Hurricane Katrina which caused damage to property; case dismissed on two occasions, court holding that the Clean Air Act displaced the public nuisance claim). In *American Electric Power*, the United States Supreme Court in an 8-0 decision held that corporations cannot be sued for greenhouse gas emissions under federal common law, primarily because the Clean Air Act delegates the management of carbon dioxide and other greenhouse gas emissions to EPA. Recently, Greenpeace International has written to large insurance corporations as well as fossil fuel and other major carbon companies seeking clarity on who will pay the defense and indemnification bill if a lawsuit is brought against their directors or officers for funding climate denialism and/or opposing policies to fight climate change. It is not clear if such lawsuits are covered claims under the policy. Thus, corporate executives at major fossil fuel companies may face personal liability. *See* Greenpeace International, Amsterdam, May 28, 2014.

## A. Property Stigma Damages

In addition to the typical damages usually sought in environmental actions,[2] courts across the country have increasingly recognized a cause of action allowing aggrieved property owners to recover for the diminution in property value resulting from the stigma that accompanies the environmental contamination of their properties.[3] Plaintiffs often claim that the fear and concern about environmental contamination affects public perception as to the value of their property and thus assert that prospective purchasers will turn away from or devalue the purchase of their previously-affected property.[4] In essence, plaintiffs believe that once property is contaminated, it becomes stigmatized by public perceptions about the contamination's effects on health and the environment and that even if the property is subsequently remediated, it will still continue to have a stigma because of the past contamination – effectively arguing that once seriously contaminated, property can almost never reclaim a marketable uncontaminated status.[5]

The ability to recover for such damages is dependent on the jurisdiction as well as the type of stigma complained of – mainly on-site or off-site contamination. Typically, plaintiff property owners with on-site contamination have been much more successful than those seeking recovery for off-site contamination – that is, contamination of adjacent or nearby land – with courts typically dismissing the latter claims as being too speculative in nature. In *Adams v. Star Enterprise*, for example, a federal district court ruled that fear of future contamination from a nearby oil spill was not a compensable injury and thus refused to award property diminution and stigma damages to the complaining plaintiff, noting that absent physical damage or substantial interference, damages based solely on the public's perception or fears are generally not recoverable.[6] Similarly, in *Paoli Railroad Yard PCB Litigation*, a federal district court dismissed a market stigma claim as

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[2] There are a number of statutory and common law mechanisms available for pursuing environmental claims. *See e.g.*, the Comprehensive Environmental Response Compensation and Liability Act, 42 U.S.C. § 9607, the New Jersey Spill Compensation and Control Act, N.J.S.A. 58:10-23.11(f), the New York Navigation Act, § 172 et seq., and traditional common law claims for trespass, nuisance, negligence, negligence per se and strict liability. *See also* 50A N.J. Prac., Business Law Deskbook, Environmental Litigation and Toxic Torts § 25:1; Dobbs, The Law of Remedies: Damages, Equity and Restitution, § 5.4-5.6 (2nd ed. 1993).

[3] *See generally*, Andrew N. Davis & Santo Longo, "Stigma Damages in Environmental Cases: Developing Issues and Implications for Industrial and Commercial Real Estate Transactions," 25 Envtl. L. Rptr. 10345 (July 1995) (providing an overview of stigma damages and developing case law pertaining to stigma damages).

[4] Timothy J. Muldowney & Kendall W. Harrison, "Stigma Damages: Property Damage and the Fear of Risk," 62 Def. Couns. J. 525 (1995).

[5] *Id*.

[6] *Adams v. Star Enterprise*, 851 F. Supp. 770 (E.D. Va. 1994) *aff'd*, 51 F.3d 417 (4th Cir. 1995).

too speculative.[7] In *Paoli Railroad*, plaintiffs claimed a "stigma" attached to plaintiffs' properties as a result of their proximity to the defendant's railroad yard, which was contaminated by Polychlorinated Biphenyls (PCBs).[8] The court refused to allow such recovery, noting that plaintiffs failed to cite any authority which "determined that decreases in property values due to mere proximity to a site containing perceived hazardous chemicals were compensable in Pennsylvania."[9]

For cases of on-site contamination, plaintiffs typically have a greater chance of recovery. Indeed, the Third Circuit, in reviewing the Eastern District of Pennsylvania's decision in *Paoli Railroad*, did note that where a physical injury to land such as chemical contamination has occurred, damages for diminution in a property's value caused by market stigma may be recoverable if the plaintiff can demonstrate (i) that repairing the damage will not restore the property to its original market value and (ii) that the stigma attached to the property, resulting from the prior presence of contaminants on the land, could itself be a permanent injury where the stigma stemmed from an initial physical injury.[10] Just last year, the Supreme Court of Texas agreed, noting that plaintiffs must experience some physical injury to their property before they may recover stigma damages.[11]

Given that such stigma damages are highly speculative in nature, plaintiffs must establish these damages with at least a reasonable degree of certainty to succeed.[12] An increasing number of jurisdictions are allowing plaintiffs to introduce evidence that their property has been permanently stigmatized in the minds of the buying public due to on-site or off-site environmental hazards.[13] To prove stigma damage claims, expert witness reports and testimony are typically required that establish a property is stigmatized in the marketplace, and as a result of such unfavorable public perception, there has been quantifiable market depreciation.[14] Such experts are tasked with

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[7] *In re Paoli R.R. Yard PCB Litigation*, 811 F. Supp. 1071 (E.D. Pa. 1992) *aff'd in part and rev'd in part on other grounds*, 35 F.3d 717 (3d Cir. 1994).

[8] *Id*.

[9] *Id*. at 1076-1077.

[10] *In re Paoli R.R. Yard PCB Litigation*, 35 F.3d 717 (3d Cir. 1994); *see also Walker Drug Co. v. La Sal Oil Co*., 972 P.2d 1238 (Utah 1998); *Kemblesville HHMO Ctr., LLC v. Landhope Realty Co.*, No. CIV.A. 08-2405 (E.D. Pa. July 28, 2011).

[11] *Houston Unlimited, Inc. Metal Processing v. Mel Acres Ranch*, 443 S.W.3d 820 (Tex. 2014), *reh'g denied* (Oct. 24, 2014).

[12] *See* RESTATEMENT (SECOND) OF TORTS § 912 (1979) (One to whom another has tortiously caused harm is entitled to compensatory damages for the harm if, but only if, he establishes by proof the extent of the harm and the amount of money representing adequate compensation with as much certainty as the nature of the tort and circumstances permit.).

[13] *See Strawn v. Canuso*, 271 N.J. Super. 88, (App. Div. 1994) *aff'd*, 140 N.J. 43 (1995).

[14] 56 Am. Jur. Trials 369 (Originally published in 1995).

proving that the stigma exists in the minds of potential buyers, and not only in the personal beliefs of the property owners.[15] Commonly, plaintiffs will seek out real estate brokers or appraisers as experts, in hopes of establishing a marketplace fear of purchasing commercial or residential properties that are stigmatized by on- or off-site environmental contamination.[16]

Such expert reports and witnesses must be thorough, comprehensive, and cognizable. Indeed, some jurisdictions even require that experts not only have experience in real estate or appraisals but also possess some form of contamination- or environmental-related experience.[17] A plaintiff with a strong expert typically has a higher likelihood of success in recovering stigma damages. As an example, in *Bonnette v. Conoco, Inc.*, the Supreme Court of Louisiana upheld the recovery of stigma damages awarded to plaintiff homeowners whose homes contained dirt contaminated with asbestos, which migrated from an oil refinery nearby due to flooding.[18] Plaintiffs provided a real-estate-appraisal expert who testified (i) that the homeowners would have to disclose that their properties had once been contaminated, (ii) that other homes in the same general area sold more slowly after the flooding that had contaminated the dirt, and (iii) that the word ''asbestos'' generally frightened potential purchasers from purchasing homes.[19] The Supreme Court found nothing manifestly erroneous or wrong with the trial court's acceptance of plaintiffs' expert, which found that such testimony was credible, thorough, and sound. Accordingly, plaintiffs were able to recover the stigma damages they sought.

However, if an expert's report or testimony is vague or not fully credible, stigma damages are unlikely to be recovered. Such was the case in a recent New Jersey district court case from this past year. In *Leese v. Lockheed Martin Corp.*, a federal district judge dismissed plaintiffs' claims for stigma damages, finding that plaintiffs' expert report and deposition testimony should be excluded as unreliable.[20] In reviewing plaintiffs' expert's methodology and rationale, the court found a jumble of unexplained arithmetic, unreliable methodology, and internal inconsistencies. Plaintiffs' expert utilized three separate valuation approaches – the ''cost to cure'' approach (subtracting the cost of environmental remediation from the ''if clean'' valuation); the ''paired

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[15] *Id.*; *see also Houston Unlimited, Inc. Metal Processing*, supra (holding that plaintiffs must experience some physical injury to property, not just public perceptions, which can change over time).

[16] 56 Am. Jur. Trials 369 (Originally published in 1995).

[17] *See Player v. Motiva Enterprises LLC*, No. CIV. 02-3216 (D.N.J. Jan. 20, 2006) *aff'd*, 240 F. App'x 513 (3d Cir. 2007) (holding a property appraiser who lacks contamination-related experience was not qualified to offer expert testimony about the loss of value attributable to stigma.).

[18] *Bonnette v. Conoco, Inc.*, 837 So. 2d 1219 (La. 2003).

[19] *Id.* at 1239.

[20] *Leese v. Lockheed Martin Corp.*, No. CIV.A. 11-5091 (D.N.J. Mar. 18, 2014).

sales" analysis (comparing other stigmatized properties and assessing a percentage discount for the environmental stigma from each property); and the "realtor and broker survey" approach (utilizing a survey of multiple realtors and brokers in the area to come up with an appropriate discount for stigma damages). Even though plaintiffs' expert provided multiple options to prove stigma damages, the court attacked each one, eventually finding that none of plaintiffs' expert's valuation methods were reliable or credible.

Six months after the *Leese* decision, the Supreme Court of Texas reiterated these stringent requirements.[21] In analyzing plaintiff's claims for stigma damages, the Supreme Court performed a meticulous analysis of the plaintiff's diminution of property value expert, and rejected both the expert's methodology used and conclusions drawn – stressing that any diminution in property value, whether or not stigma is alleged, must be supported by strong evidentiary proof and reliable expert testimony.[22] Both cases highlight the often difficult burden a claimant must meet when seeking to prove stigma damages.

While each jurisdiction treats stigma damages differently, it is clear that these speculative, nuanced damages can, at times, be recovered in certain environmental contamination actions if plaintiffs can produce adequate proof through strong and credible expert reports and testimony. As such, environmental practitioners should be aware of the possibility of litigating against such claimed damages, and be prepared to attack the credibility and findings of such expert reports, or, in the alternative, be prepared to seek such damages for their clients and produce thorough, comprehensive, and substantiated expert reports and testimony to prove such claims.

## B. Hydraulic Fracturing Damages

Plaintiffs have also regularly begun asserting speculative and unique damages in a relatively newer area of environmental law - hydraulic fracturing, commonly known as "fracking." In such fracking cases, plaintiffs have sought a broad spectrum of damages, ranging from ordinary, expected damages to outright unusual damages.[23] Surprisingly, since such cases rarely reach a jury, these plaintiffs have typically been able to recover a sizeable amount of

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[21] See *Houston Unlimited, Inc. Metal Processing*, supra.

[22] *Id.*

[23] Damages related to earthquakes allegedly caused by fracking have also recently been sought. A recent study, published in the January 2015 Bulletin of the Seismological Society of America, found that hydraulic fracturing increased subterranean pressures causing slippage in an existing fault. An analysis of the seismological data in Youngstown, Ohio found 77 well-related earthquakes from March 4 to March 12. All occurred about 1.9 miles underground, along a horizontal fault that at times ran less than half a mile under wells where fracking was underway. Ohio regulations now require wells to be monitored seismically active areas. *See* the New York Times, January 8, 2015.

monetary damages through settlement with various energy and drilling defendants – recovering for damages ranging anywhere from stigma damages, as discussed above, to ''sentimental value damages.''[24] As the law surrounding fracking continues to develop, one thing is clear – aggrieved parties have propounded a multitude of creative damages, which often times are settled in the complaining party's favor.

Fracking is a method of extracting natural gas from shale by forcing water, sand, and chemicals into a shale formation.[25] While fracking has been around since the 1940s, only recently has new technology developed that, coupled with the rising price of foreign natural gas, has made fracking a realistic alternative to more traditional drilling practices.[26] The rise in fracking has also signaled a rise in fracking litigation, wherein affected parties seek to sue energy and drilling companies alleging that their fracking practices have either caused groundwater contamination or have exposed landowners to toxic fracking substances. Such lawsuits have been filed by landowners in states with high fracking activity, including Arkansas, Colorado, Louisiana, Ohio, New York, Pennsylvania, Texas, and West Virginia – usually by private residents who either leased oil and gas rights to the companies, or reside in close proximity to where fracking operations have been conducted.

Private citizens initiating such litigation have advocated a number of recovery theories, including nuisance, trespass, negligence, strict liability, fraudulent misrepresentation, and violations of state and federal environmental laws, among others, to redress alleged wrongs caused by fracking activities. Such complaints usually involve the contamination of well water, air quality, exposure to toxic chemicals, and the like. A review of litigation filed by private citizens involving shale and fracking over the last four years has shown that aggrieved parties have also sought a plethora of damages related to these fracking activities, which are oftentimes settled out of court with energy and drilling companies.

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[24] *See Parr v. Aruba Petroleum, Inc.*, infra.
[25] 57 The Advoc. (Texas) 42.
[26] *Id.*

Over the last four years, plaintiffs affected by fracking have sought to recover the following damages: loss of use of land;[27] loss of market value of land;[28] losses from property market value "stigma;"[29] loss of intrinsic value of well water;[30] the cost of water testing;[31] medical monitoring, future health monitoring costs, and medical monitoring trust funds;[32] emotional harm and mental anguish;[33] remediation of hazardous substances and contaminants;[34] costs of

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[27] *See Fiorentino v. Cabot Oil & Gas Corp. and Gas Search Drilling Services Corp.*, No. 3:09-cv-02284 (M.D. Pa., Nov. 19, 2009); *Scoma v. Chesapeake Energy Corp., Chesapeake Operating, Inc., and Chesapeake Exploration, LLC*, No. 3:10-cv-01385 (N.D. Tex., July 15, 2010); *Otis v. Chesapeake Appalachia, LLC, Chesapeake Energy Corporation, and Nomac Drilling, LLC*, No. 3:11-cv-00115-ARC (M.D. Pa., Jan. 18, 2011); *Parr v. Aruba Petroleum, Inc., Ash Grove Resources, LLC, Encana Oil & Gas (USA), Inc., Halliburton Co., Republic Energy, Inc., Ryder Scott Co., LP; Ryder Scott Oil Co., Tejas Production Services, Inc., and Tejas Western Corp.*, No. 11-01650-E (Dallas County Ct. at Law, Mar. 8, 2011); *Strudley v. Antero Resources Corp., Calfrac Well Services, and Frontier Drilling LLC*, No. 2011-cv-2218 (Denver County Dist. Ct., Mar. 23, 2011); *Ginardi v. Frontier Gas Services, LLC, Kinder Morgan Treating LP, Chesapeake Energy Corporation, and BHP Billiton Petroleum*, No. 4:11-cv-0420 BRW (E.D. Ark. May 17, 2011); *Ruby Hiser v. XTO Energy, Inc.*, No. 4:11-cv-00517-KGB (E.D. Ark. June 24, 2011); *Kamuck v. Shell Energy Holdings GP, LLC, Shell Energy Holdings LP, LLC, and SWEPI, LP*, No. 4:11-cv-01425-MCC (M.D. Pa., Aug. 3, 2011); *Mitchell v. Encana Oil & Gas (USA), Inc.; Chesapeake Operating, Inc.; Chesapeake Exploration, LLC*, No. 3:10-cv-02555 (N.D. Tex., Dec. 15, 2010).

[28] *See Sizelove v. Williams Production Co., LLC; Mockingbird Pipeline, LP; XTO Energy, Inc.; Gulftex Operating, Inc., Trio Consulting & Mgmt., LLC, and Enexco, Inc.*, No. 2010-50355-367 (367th Dist. Court, Denton County, Tex. Nov. 3, 2010); *Heinkel-Wolfe v. Williams Production Co., LLC; Mockingbird Pipeline, LP, XTO Energy, Inc., Gulftex Operating, Inc., Trio Consulting & Mgmt., LLC, and Enexco Inc.*, No. 2010-40355-362 (362nd Dist. Court, Denton County, Texas, Nov. 3, 2010); *Harris v. Devon Energy Prod. Co., L.P.*, No. 4:10-cv-00708 (E.D. Tex., Dec. 22, 2010); *Smith v. Devon Energy Production Company, L.P.*, Case No. 4:11-cv-00104 (E.D. Tex., March 7, 2011); *Baker v. Anschutz Exploration Corp., Conrad Geoscience Corporation, and Pathfinder Energy Services, Inc.*, No. 6:11-cv-06119 (W.D.N.Y. Mar. 9, 2011); *Beck v. ConocoPhillips Company*, No. 2011-484 (Dist. Ct. Panola County Tex., Dec. 1, 2011); *Mitchell*, supra; *Scoma*, supra; *Parr*, supra.

[29] *Andre v. EXCO Resources, Inc. and EXCO Operating Co.*, No. 5:11-cv-00610-TS-MLH (W.D.La. April 15, 2011); *Evenson v. Antero Resources Corporation, Antero Resources Piceance Corporation, and John Doe Well Service Providers*; No. 2011-cv-5118 (Denver County Dist. Ct., July 20, 2011).

[30] *See Mitchell*, supra; *Harris*, supra; *Smith*, supra; *Beck*, supra.

[31] *See Dillon v. Antero Resources a/k/a Antero Resources Appalachain [sic] Corp. s/k/a Antero Resources Appalacia [sic], LLC*; No. 2:11-cv-01038 (W.D.Pa. August 11, 2011); *Scoma*, supra; *Baker*, supra.

[32] *See Berish v. Southwestern Energy Production Co. and Southwestern Energy Co.*, No. 3:10-cv-01981 (M.D. Pa., Sept. 29, 2010); *Armstrong v. Chesapeake Appalachia, LLC, Chesapeake Energy Corp., and Nomac Drilling, LLC*, No. 10-cv-000681 (Pa. Ct. Com. Pl., Oct. 27, 2010) (removed to M.D. Pennsylvania, No. 3:10-cv-002453, on Dec. 6, 2010, remanded to Pa. Ct. Com. Pl. on July 29, 2011); *Hagy v. Equitable Production Co., Warren Drilling Co., Inc., BJ Services Co., USA, and Halliburton Energy Services, Inc.*, No. 2:10-cv-01372 (S.D. W. Va., Dec. 10, 2010); *Mangan v. Landmark 4, LLC*, No. 1:12-cv-00613 (N.D. Ohio, March 12, 2012); *Manning, et al. v. WPX Energy Inc. and The Williams Companies, Inc*., No. 3:12-CV-00646 (M.D. Pa., April 9, 2012); *Fiorentino*, supra; *Otis*, supra;, *Mitchell*, supra; *Harris*, supra; *Baker*, supra; *Parr*, supra; *Strudley*, supra; *Kamuck*, supra.

[33] *See Teel v. Chesapeake Appalachia, LLC*, No. 5:11-cv-00005-FPS (N.D. W. Va. January 6, 2011); *Fiorentino*, supra; *Scoma*, supra; *Otis*, supra; *Berish*, supra; *Harris*, supra;, *Smith*, supra; *Strudley*, supra; *Andre*, supra; *Ruby Hiser*, supra; *Kamuck*, supra; *Beck*, supra; *Manning*, supra.

[34] *See Fiorentino*, supra; *Berish*, supra; *Mitchell*, supra; *Otis*, supra; *Harris*, supra; *Teel*, supra; *Parr*, supra; *Strudley*, supra; *Andre*, supra; *Kamuck*, supra; *Manning*, supra.

purchasing alternative sources of water;[35] sickness, annoyance, discomfort, bodily harm, and personal injury;[36] loss of quality of life;[37] harm from noise, vibration, odor, and pollution;[38] contamination of soil, groundwater, and air damages;[39] loss of earning capacity, loss of consortium, and sentimental value damages;[40] and nominal damages, exemplary damages, and injunctive relief. Occasionally, parties also seek punitive damages against the energy and drilling companies.[41]

As mentioned above, many of these cases have been settled out of court, and thus there is no succinct way to determine what damages, if any, are deemed viable and recoverable in fracking-related litigation. Theoretically, one can make the argument that plaintiffs can recover any of their claimed damages given the abundance of settlements, even those far-fetched damages that typically would not survive in a court room setting (such as the plaintiff who claimed damages related solely to his fear that his health may one day deteriorate or that he may develop cancer or other serious illnesses from living in close proximity to fracking activities).[42]

Recently, however, two fracking-related actions reached a jury, wherein both plaintiffs were rewarded with substantial recoveries. In *Parr v. Aruba Petroleum*, a Dallas, Texas jury awarded plaintiffs a $2.925 million verdict for nuisance damages arising from fracking activities.[43] In *Parr*, plaintiffs alleged that defendants' natural gas drilling activities and operations, including releases, spills, emissions, and discharges of hazardous gases from vehicles, engines, construction, pits, condensate tanks, dehydrators, flaring, venting, and fracking, exposed plaintiffs and their property to hazardous gases, chemicals, and industrial wastes. Plaintiffs claimed to have experienced serious health effects, and produced medical tests which revealed the presence of natural gas chemicals, compounds, and metals such as ethyl benzene and xylene. In addition, plaintiffs alleged that defendants' activities killed

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[35] *See Berish*, supra; *Mitchell*, supra.

[36] *See Tucker v. Southwestern Energy Co., XTO Energy, Chesapeake Energy Corp., and BHP Billiton Petroleum*, No. 1:11-cv-0044-DPM (E.D. Ark. May 17, 2011); *Fiorentino*, supra; *Sizelove*, supra; *Berish*, supra; *Heinkel-Wolfe*, supra; *Otis*, supra; *Parr*, supra; *Strudley*, supra; *Beck*, supra.

[37] See *Fiorentino*, supra; *Berish*, supra; *Otis*, supra; *Strudley*, supra; *Kamuck*, supra; *Manning*, supra.

[38] *See Ramsey, et al. v. Desoto Gathering Company, LLC*, Case No. 23CV-14-258, In the Circuit Court of Faulkner County, Arkansas for the 20th Judicial District (April 24, 2014).

[39] *See Ginardi*, supra.

[40] *See Parr*, supra.

[41] *See Scoggin, et al. v. Southwestern Energy Company*, No. 4:12-cv-763 (E.D. Ark., December 7, 2012); *Fiorentino*, supra; *Berish*, supra; *Hagy*, supra; *Otis*, supra; *Baker*, supra; *Ginardi*, supra; *Tucker*, supra; *Ruby Hiser*, supra; *Manning*, supra; *Ramsey*, supra.

[42] *See Dillon*, supra.

[43] *See Parr*, supra.

numerous household pets and chickens, and ultimately forced plaintiffs to evacuate their home due to the advice of medical professionals.

Plaintiffs' complaint sought actual damages of $66 million for medical expenses, loss of earning capacity, loss of consortium, property damage, loss of market value, replacement and repair costs, sentimental value damages, loss of use, medical monitoring, cost of remediation, unliquidated damages, attorneys' fees, nominal damages, and exemplary damages. Surprisingly, the court disallowed expert testimony, stating that the sequence of events was such that a layperson may determine causation without the benefit of expert evidence, however the court also limited plaintiffs' personal injury damages to injuries that were within the common knowledge and experience of a layperson – thus barring recovery for any claim that defendants' actions caused a disease that occurs genetically and for which a larger percentage of the causes are unknown. Nonetheless, the jury awarded $2.925 million to the plaintiffs, finding that the defendants had intentionally created a private nuisance with their activities, awarding $275,000 for loss of market value, $2 million for past pain and suffering, $250,000 for future pain and suffering, $400,000 for past mental anguish, and $0 for future mental anguish. The jury did not award exemplary damages given that defendants' conduct was not abnormal nor out of place in its surroundings.

Similarly, in *Ruby Hiser v. XTO Energy, Inc.*, plaintiff alleged that defendant's natural gas drilling operations on her next-door neighbor's property created mechanical vibrations which practically destroyed plaintiff's home and continued to cause injury to her and her home.[44] Plaintiff plead nuisance per se and unlawful trespass and sought damages including the value of her home, the diminution in value of her property, the loss of use and enjoyment of her property, and the intentional and negligent infliction of emotional distress which caused harm to plaintiff's health and welfare. Again, this case reached a jury, which rendered a verdict in favor of the plaintiff for $300,000, awarding $100,000 in compensatory damages and $200,000 in punitive damages.[45]

It is abundantly clear that aggrieved parties have sought a wide range of damages when litigating fracking-related actions. To support such claims however, plaintiffs should be prepared to prove, or at least offer evidence supporting their alleged damages. This can typically be accomplished via the use of expert reports, affidavits, and medical and contamination testing.

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[44] *See Ruby Hiser*, supra.

[45] Following this award, defendants sought a new trial based on alleged juror misconduct. Such request was denied and defendants proceeded to file a notice of appeal with the 8th Circuit Court of Appeals (No. 13-03443) which is currently pending.

Such expert reports must be thorough and substantiated, however, and show an actual connection to alleged damages. In *Hagy v. Equitable Production Co.*, the Court did not consider plaintiffs' experts' reports because plaintiffs provided no evidence that identified any chemicals to which they were exposed, nor did plaintiffs provide evidence of dose, exposure amount, and duration.[46] As such, the court ruled against plaintiffs, stating that plaintiffs failed to provide evidence that defendant acted negligently, trespassed, or created a private nuisance; and that plaintiffs further failed to prove a causal connection between defendant's conduct and plaintiffs' injuries.

Some jurisdictions have even begun exploring the use of so called "Lone Pine" orders in such cases, wherein the court requires plaintiffs to make a prima facie case showing of exposure, injury, and specific causation.[47] In *Strudley v. Antero Resources Corp.*, defendants asserted that plaintiffs had merely provided vague allegations of injury and exposure and that plaintiffs failed to identify any current or future risks of disease.[48] Further, defendants claimed no physician or scientist had connected any such disease to the chemicals or wastes used during defendants' operations. Because of the vagueness of plaintiffs' claims, the court issued a "Lone Pine" order requiring plaintiffs to make a prima facie showing of exposure, injury, and specific causation by providing expert affidavits and sufficient evidence of their claims by means of sworn affidavits from doctors, contamination reports, and other information relating to the identification and quantification of contamination on their property attributable to defendants' operations.

The court in *Strudley* eventually ruled that the affidavit from plaintiffs' doctor failed to establish a causal connection between plaintiffs' injuries and defendants' activities, thus dismissing plaintiffs' claims with prejudice. Plaintiffs appealed such decision, and the Colorado Court of Appeals reversed, holding the trial court lacked authority to issue a "Lone Pine" order, and that circumstances did not warrant such an order, assuming the trial court had authority to issue such an order.[49] The Colorado Supreme Court granted

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[46] *See Hagy*, supra.

[47] *See Lore v. Lone Pine Corp.*, No. L-33606-85 (N.J. Sup. Ct. Nov. 18, 1986) (In a toxic tort case, the court, through a case management order, required the plaintiffs to provide documentation showing the facts of each individual plaintiff's exposure to the alleged toxic substances at or from the site and reports from treating physicians or other experts, supporting each individual plaintiff's claim of injury and causation. The court also required the plaintiffs to provide reports from real estate or other experts supporting property damage claims, including the timing and degree of the damage as well as causation of the same, with respect to plaintiffs' property damage claims.).

[48] *See Strudley*, supra.

[49] *Strudley v. Antero Res. Corp.*, No. 12CA1251 (Colo. Ct. of App. July 3, 2013).

certiorari on the issue, which is currently pending as of the date of this article.[50] Defendants in Louisiana,[51] Ohio,[52] and Pennsylvania[53] have also attempted to use "Lone Pine" orders to clarify often vague damages propounded by plaintiffs; however, none of the related courts utilized such orders to bar a plaintiff's claim.

While the body of law surrounding fracking-related damages continues to develop, it is clear that plaintiffs have continually claimed a vast array of alleged damages and have typically settled such actions favorably. Even those cases which have reached a jury have provided sizeable recovery to claimants. Baseless claims, however, will likely not survive in court, and plaintiffs will either need to provide evidence of their alleged damages or survive a "Lone Pine" order, which has become an increasingly relevant tool in a defendant's arsenal when fighting against such claims. Expert reports, affidavits, and medical and contamination testing may all give credence to a plaintiff's damage claim, but until more law has developed in this area, plaintiffs will likely continue to unabashedly plead such novel and unique damages in their fracking-related disputes.

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[50] *Antero Res. Corp. v. Strudley*, No. 13SC576 (Colo. Apr. 7, 2014).

[51] See *Teekell v. Chesapeake Operating, Inc., Crow Horizons Company, JPD Energy, Inc., and Chesapeake Louisiana, L.P.*, No. 5:12-cv-00044 (W.D. La. Jan. 12, 2012). The Court signed an order in which the parties agreed to the entry of a "Lone Pine" order whereby plaintiffs "will attempt to make a prima facie case as to causation through expert witnesses prior to engaging in full discovery." The plaintiffs advised the Court on January 29, 2013 that they had run "into difficulty with the selection and hiring of expert witnesses." The Court extended the dates for "Lone Pine" discovery, however the case settled before such date.

[52] *See Mangan*, supra. The court denied a defendant's request for a "Lone Pine" order, stating that "at this stage of the proceedings. . .there are no extraordinary circumstances that would render the normal discovery and motion practice procedures insufficient in this case."

[53] *See Kamuck*, supra. Defendants sought a "Lone Pine" order due to plaintiff's vague damage assertions. The court denied this motion, finding that it was not currently warranted "despite what appear to be arguable shortcomings on the part of plaintiff's allegations and evidentiary production to date."