

“WHAT THE FRACK?” WHY HYDRAULIC FRACTURING IS ABNORMALLY DANGEROUS AND WHETHER COURTS SHOULD ALLOW STRICT LIABILITY CAUSES OF ACTION

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I. INTRODUCTION

The United States of America has an energy problem. Knee-jerk reactions to the 2010 BP oil spill in the Gulf of Mexico called for an end to offshore petroleum drilling and for a decreased reliance on petroleum as the primary fossil fuel to power the country. Recent coal mining disasters and environmental concerns with mountaintop removal mining have damaged coal’s place among the country’s preferred sources of energy. The United States continues to search for cleaner, more efficient, and less environmentally harmful energy alternatives.

Fossil fuels such as petroleum and coal are more than necessary evils, these resources are essential components of our economy, and thus responsible and sustainable energy policy is vital to the future of our nation. However, it’s debatable how large a share of total energy production each of these natural resources should be responsible for in the future. Reliance on nuclear energy to power America’s increasing energy demands may ultimately prove unwise. Increased construction costs and the recent Fukushima nuclear power plant disaster in March 2011 have seemingly halted any enthusiasm for an American “nuclear renaissance.”¹

Proponents of alternative energy sources consider America’s reliance on foreign oil importation a compelling reason to look for alternative energy. Though the United States was the third-largest petroleum producer in the world in 2010, the country imported about forty-nine percent of the petroleum it consumed that year.² Stabilizing the price and supply of petroleum is essential, but often proves difficult when much of that supply is imported from areas of the world characterized by social and political upheaval. For example, oil imports from the Persian Gulf made up eighteen percent of the United States’ total petroleum imports in

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¹ See Jim Rubin & Jennifer Morrisey, *Fracking in the Spotlight: What Regulatory Developments Can be Expected and How Companies Can Best Position Themselves* 2011 Emerging Issues 5576 (MB) (Apr. 1, 2011).

² *Energy In Brief: How Dependant are we on Foreign Oil?*, U.S. ENERGY INFO. ADMIN., http://www.eia.gov/energy_in_brief/foreign_oil_dependence.cfm (last updated June 24, 2011).

2010.³ However, this reliance may have reached its zenith. American dependence on foreign oil imports has declined since peaking in 2005, and should continue to do so given the economic downturn from the 2008 financial crisis, changes in consumer behavior, and gains in domestic production of crude oil.⁴

Enter natural gas, which fueled twenty-three percent of the nation's electricity produced in 2009.⁵ With the increasing importance of cleaner energy alternatives in the United States natural gas has emerged as a viable alternative source of energy, replacing other fossil fuels such as coal and oil which are generally considered more environmentally damaging.⁶ In 2009, President Obama signed the American Recovery and Reinvestment Act, now commonly referred to as the "Stimulus Bill."⁷ This law jumpstarted investment in alternative energy sources by putting over \$40 billion into renewable and efficient energy programs in the form of tax benefits, grants, and entitlements.⁸

However, not all employees in the United States Energy Information Administration, a division of the Energy Department, are fully sold on the wonders of natural gas.⁹ Numerous emails among agency staff members point to a perceived disconnect between the scientific realities of natural gas extraction and lay opinions influenced by industry public relations firms.¹⁰ The lack of enthusiasm for natural gas as the cleaner fossil fuel of the future stems in large part from the proliferation of hydraulic fracturing, or hydrofracking, as a primary natural gas extraction method. Hydrofracking will be an important piece in the United States' future energy puzzle, not only because it is generally viewed as cleaner than oil and coal, but also because it is largely unregulated. Indeed, the process was exempted in 2005 from environmental regulations contained in the Safe Drinking Water Act.¹¹

This note aims to fully explore the hydrofracking process, from drilling to extraction, to ultimately determine whether the activities relating to it are abnormally dangerous and ultrahazardous. This is an important

³ *Id.*

⁴ *Id.*

⁵ U.S. ENERGY INFO. ADMIN., ANNUAL ENERGY OUTLOOK 2011, at 3 (Apr. 2011), available at [http://www.eia.gov/forecasts/archive/aeo11/pdf/0383\(2011\).pdf](http://www.eia.gov/forecasts/archive/aeo11/pdf/0383(2011).pdf).

⁶ Ian Urbina, *Behind Veneer, Doubt on Future of Natural Gas*, N.Y. TIMES (June 26, 2011), http://www.nytimes.com/2011/06/27/us/27gas.html?_r=1&pagewanted=all.

⁷ See generally American Recovery and Reinvestment Act of 2009, H.R.1, 111th Cong. (2009).

⁸ Breakdown of Funding, RECOVERY.GOV, <http://www.recovery.gov/Transparency/fundingoverview/Pages/fundingbreakdown.aspx> (last visited Mar. 21, 2012).

⁹ Urbina, *supra* note 6 (discussing Energy Information Administration employees' skepticism of natural gas as an alternative to oil and gas energy supply).

¹⁰ *Id.*

¹¹ See Safe Drinking Water Act, 42 U.S.C. § 300h(b)(1), (d)(1) (2012).

distinction in that abnormally dangerous or ultrahazardous activities subject companies to strict liability actions. This note does not attempt to formulate broad energy policy objectives or propose regulations of hydrofracking. Rather, this note will evaluate the narrow role that the courts have played thus far, and the role courts should play in future tort claims resulting from injuries sustained as a result of hydrofracking.

As the introduction demonstrates, hydrofracking will likely become more common in the United States as reliance on natural gas increases. With this rise in popularity, it is likely that the nation's courts will have to make decisions about whether or not to subject companies participating in this energy production method to strict scrutiny. A fairly detailed explanation of hydrofracking is necessary to inform the legal determination of whether energy production companies should be subjected to strict liability. This note will then briefly outline the history of the strict liability doctrine. Next, it will discuss possible defenses to strict liability and introduce two pending cases dealing directly with this query. Finally, this note will conclude that hydrofracking is an abnormally dangerous or ultrahazardous activity and thus that courts should subject companies engaged in hydrofracking for natural gas extraction purposes to strict liability in tort claims for injuries caused by the process.

II. HYDROFRACKING EXPLAINED

To determine whether energy production companies engaged in hydrofracking should be subjected to strict liability for tort claims brought against them, the exact processes of hydrofracking needs to be examined in close detail. Put simply, hydrofracking is a "well-stimulation process used to maximize the extraction of underground resources."¹² Examples of such underground resources include oil, geothermal energy, water, and natural gas.¹³

Hydrofracking begins with the drilling of wells, which may be vertical or combined with other horizontal or directional sections of existing wells.¹⁴ The length of each well section depends on many factors but can extend thousands of feet below the surface vertically and more than one mile from the well horizontally.¹⁵ After the wells have been drilled, highly pressurized water mixed with chemical additives is pumped into geologic

¹² *Hydraulic Fracturing Background Information*, U.S. ENVTL. PROT. AGENCY, http://water.epa.gov/type/grounwater/uic/class2/hydraulicfracturing/wells_hydrowhat.cfm (last updated Mar. 6, 2012).

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

formations, creating fractures in the subsurface rock that may extend several hundred feet away from the well.¹⁶

Once the rock fractures, “propping agents” such as sand and nitrogen are pumped into the geologic formation to keep the cracks open.¹⁷ These fractures enable the natural gas to move freely from rock pores in subterranean reservoirs to production wells, which ultimately bring the natural gas to the surface.¹⁸ Internal pressure causes the injected fracturing fluids, which consist of water, chemicals, and “propping agents,” to flow up to the surface where they are stored prior to disposal.¹⁹ Disposal is accomplished either by discharging the fluid into surface water or by injecting it underground.²⁰ The recovered fracturing fluid is called “flowback,” and its disposal is regulated by the National Pollutant Discharge Elimination System (NPDES) when discharged into surface water. The NPDES requires that “flowback” be treated, usually at a water treatment plant, prior to disposal.²¹ Underground injection as a method of disposal for recovered fracturing fluid is subject to EPA regulation through the Underground Injection Control (UIC) program as a Class II injection well.²² As such, the owners and operators of these Class II wells created for disposing of recovered fracturing fluid must meet permit requirements for construction, operation, monitoring, and testing and be subject to regular inspection.²³

It is important to note that regulation under NPDES and UIC only governs the process of recovered fracturing fluid disposal. As stated previously, the Safe Drinking Water Act explicitly excludes from regulation the injection of the highly pressurized fluid containing chemical additives and “propping agents” used in the hydrofracking process.²⁴ This exclusion was created pursuant to the Energy Policy Act of 2005.²⁵ It is colloquially referred to as the “Halliburton Loophole” due to Vice President Dick Cheney’s involvement in securing the exemption.²⁶ Cheney was a former Halliburton executive and the chairman of the task force appointed by

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Hydraulic Fracturing Background Information*, *supra* note 11
http://water.epa.gov/type/groundwater/uic/class2/hydraulicfracturing/wells_hydrowhat.cfm (last updated Dec. 7, 2011).

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ *Class II Wells – Oil and Gas Related Injection Wells*, U.S. ENVTL. PROT. AGENCY, <http://water.epa.gov/type/groundwater/uic/class2/index.cfm> (last updated Mar. 6, 2012).

²⁴ 42 U.S.C. § 300h (d)(1)(B)(ii) (2012).

²⁵ See Energy Policy Act of 2005, Pub. L. No. 109-58, sec. 322, § 300h(d), 119 Stat. 694 (2005).

²⁶ Susan Phillips, *Burning Question: What Would Life Be Like Without the Halliburton Loophole?*, STATEIMPACT, (Dec. 5, 2011), <http://stateimpact.npr.org/pennsylvania/2011/12/05/burning-question-what-would-life-be-like-without-the-halliburton-loophole/>.

President George W. Bush to determine whether hydrofracking should be protected from the reach of the Safe Drinking Water Act's regulations.²⁷

III. HYDROFRACKING UNDER FIRE

Hydrofracking has been severely criticized in a variety of situations. In April 2010, Cabot Oil & Gas Corporation had its drilling operation suspended, and was ordered to plug its natural gas wells in its northeastern Pennsylvania hydrofracking operation, because it was believed to have contaminated the drinking water of fourteen neighboring homes.²⁸ Residents reported that after Cabot began operations, the water coming out of their faucets became cloudy, discolored, and had a foul smell and taste.²⁹

An explosion of a private drinking well in 2009 provoked a state investigation in Pennsylvania, ultimately concluding that Cabot had allowed combustible gas to escape from wells and contaminate groundwater in the area.³⁰ Cabot was drilling into the Marcellus Shale, a sedimentary rock formation extending through much of the Appalachian Basin.³¹ This formation underlies many states, including New York, Pennsylvania, Ohio, West Virginia, Kentucky, and Tennessee.³² The shale in this particular geologic formation contains vast untapped natural gas reserves and is especially attractive to energy production companies interested in hydrofracking due to its proximity to major metropolitan markets on the east coast of the United States.³³

The Energy and Commerce Committee of the United States House of Representatives led an inquiry into hydrofracking in 2010. Their final report concluded that energy production companies injected "hundreds of millions of gallons of hazardous or carcinogenic chemicals into wells in more than [thirteen] states from 2005 to 2009."³⁴ The Committee's report also faulted energy companies for using fluids in their hydrofracking processes that they could not identify when pressed.³⁵ In addition, it

²⁷ *Id.*

²⁸ Michael Rubinkam, *Contamination Suspends Cabot's Pa. Gas Drilling*, BLOOMBERG BUSINESSWEEK (Apr. 15, 2010), <http://www.businessweek.com/ap/financialnews/D9F3NCP81.htm>.

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² Alan Bailey, *Appalachia to the Rescue*, PETROLEUM NEWS (Jan. 27, 2008), <http://www.petroleumnews.com/pntruncate/246893563.shtml>.

³³ *Id.*

³⁴ HOUSE COMM. ON ENERGY & COMMERCE, 112TH CONG., CHEMICALS USED IN HYDRAULIC FRACTURING (Comm. Print 2011) available at <http://democrats.energycommerce.house.gov/sites/default/files/documents/Hydraulic%20Fracturing%20Report%204.18.11.pdf>; Ian Urbina, *Hazardous Chemicals Injected Into Gas Wells, Report Says*, N.Y. TIMES, Apr. 17, 2011, at A16, available at <http://www.nytimes.com/2011/04/17/science/earth/17gas.html?ref=health> [hereinafter *Hazardous Chemicals*].

³⁵ *Hazardous Chemicals*, *supra* note 33.

concluded that because reporting chemical contents in companies' fluids used in hydrofracking remains voluntary, it is impossible to obtain accurate data about how much and what kinds of toxic or carcinogenic materials are being injected into the ground or sent to water treatment plants for treatment before being released into waterways.³⁶ Fuller disclosure may be coming, as President Obama called on natural gas production companies drilling on public lands to disclose the chemicals used in their processes in his 2012 State of the Union Address.³⁷

Congress responded to concerns raised by citizens and their representatives about the potential impact of hydrofracking on drinking water, human health, and the environment. In its 2010 Appropriations Committee Conference Report, Congress directed the EPA to study the relationship between hydrofracking and drinking water in much more detail.³⁸ This study is separate from that completed by the members of the Energy and Commerce Committee and is meant to be more thorough, as it will include five to ten case studies and will take place over a longer period of time.³⁹ A first report analyzing the results of this study is not due until the end of 2012, with conclusions from longer-term projects not expected before 2014.⁴⁰

The environmental effects of hydrofracking are pervasive, and go beyond contamination of groundwater. A June 2010 natural gas well blowout in Pennsylvania sent at least 35,000 gallons of wastewater into the air for more than sixteen hours.⁴¹ The well completion company was extracting natural gas from the Marcellus Shale when the blowout occurred and the well was not capped until the following day.⁴² The well owner, a different entity than the well completion company, had its operations suspended just days after the blowout for unrelated violations.⁴³

A proliferation of natural gas wells in Texas was initially thought to be nothing but an economic boon to localities sitting atop the Barnett Shale, another vast geologic formation similar to the Marcellus Shale containing untapped natural gas resources.⁴⁴ However, these localities have since been

³⁶ *Id.*

³⁷ President Barack Obama, State of the Union Address (Jan. 24, 2012) (transcript available at <http://www.whitehouse.gov/the-press-office/2012/01/24/remarks-president-state-union-address>).

³⁸ *Questions and Answers About EPA's Hydraulic Fracturing Study*, U.S. ENVTL. PROT. AGENCY, <http://www.epa.gov/hfstudy/questions.html#1> (last updated Mar. 16, 2012).

³⁹ *Questions and Answers About EPA's Hydraulic Fracturing Study*, U.S. ENVTL. PROT. AGENCY, <http://www.epa.gov/hfstudy/questions.html#2> (last updated Mar. 16, 2012).

⁴⁰ *Questions and Answers About EPA's Hydraulic Fracturing Study*, U.S. ENVTL. PROT. AGENCY, <http://www.epa.gov/hfstudy/questions.html#4> (last updated Mar. 16, 2012).

⁴¹ Anya Litvak, *Marcellus Shale Well Blowout Prompts Second DEP Suspension*, PITTSBURGH BUSINESSTIMES (June 9, 2010), <http://www.bizjournals.com/pittsburgh/stories/2010/06/07/daily32.html>.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ Jeff Carlton, *Drilling Might Be Culprit Behind Texas Earthquakes*, USA TODAY (June 15, 2009), http://www.usatoday.com/tech/science/2009-06-15-drilling-earthquake_N.htm.

experiencing minor earthquakes with increased frequency.⁴⁵ There is no scientific consensus that hydrofracking has led to the increased seismic activity, but the rarity of seismic events in that part of Texas lends support to the idea that hydrofracking may be an upsetting subterranean force.⁴⁶ In January of 2012 similar earthquakes rattled areas surrounding a well in Youngstown, Ohio, prompting a seismologist to conclude that hydrofracking "almost certainly caused the series of minor quakes."⁴⁷ State Representative Robert Hagan called for a statewide moratorium on hydrofracking until 2014, which was met with approval by the Youngstown City Council.⁴⁸ However, correlation does not imply causation and more research must be completed before the theory that hydrofracking causes earthquakes is rejected or accepted.

A documentary entitled *Gasland*, which centers on the families and communities affected by hydrofracking, was released in January 2010 to critical acclaim.⁴⁹ In addition to winning the 2010 Sundance Film Festival Special Jury Prize and a Primetime Emmy Award, the documentary was nominated for the Academy Award for Best Documentary Feature.⁵⁰ The film certainly has its detractors,⁵¹ but its negative portrayal of hydrofracking has brought the process into the consciousness of many as a major environmental issue. As a result of these events and media attention, hydrofracking is at the heart of debates about the future of American energy policy and the country's use of its natural resources.

IV. HINTS AT STRICTER GOVERNMENT REGULATION AND THE ROLE OF STATE REGULATION

It is unlikely that much will change with the federal regulation of hydrofracking until the EPA completes parts of its study in 2012. Major regulatory changes will probably not occur until the EPA completes the more comprehensive parts of its study in 2014, but Congress may force significant regulatory changes first. The Fracturing Responsibility and Awareness of Chemicals (FRAC) Act, originally introduced to the 111th Congress by Senators from New York and Pennsylvania and Representatives from Colorado and New York, aims to repeal exemptions

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ Julie Carr Smyth, *Ohio Well Owner Undertakes Study After Earthquakes*, ABC NEWS (Jan. 5, 2012), http://abcnews.go.com/US/wireStory/ohio-owner-undertakes-study-earthquakes-15297777#_TxBo6PJvGSp.

⁴⁸ *Id.*

⁴⁹ *Reviews*, GASLAND: A FILM BY JOSH FOX, <http://www.gaslandthemovie.com/about-the-film/press-reviews> (last visited Mar. 21, 2012).

⁵⁰ *Id.*

⁵¹ E.g., *Leadership Voices on Gasland*, AMERICA'S NATURAL GAS ALLIANCE, <http://www.anga.us/critical-issues/the-truth-about-gasland/leadership-voices-on-gasland> (last visited Mar. 21, 2012).

for hydrofracking created by the Energy Policy Act of 2005.⁵² After being referred to the Subcommittee on Energy and the Environment, the House of Representatives took no further action.⁵³ In the Senate, the bill was referred to the Committee on Environment and Public Works with no further action taken.⁵⁴ The proposed legislation would also require the industry to disclose the chemicals it uses for hydrofracking.⁵⁵ The bill has met a similar fate upon introduction to the 112th Congress, as it has not gone past committee consideration in either the House or the Senate.⁵⁶

Much of the regulation of hydrofracking is done at the state level. State regulatory agencies control procedures for obtaining drilling permits and are in charge of oversight of required drilling permits and operation of natural gas wells.⁵⁷ While the exception to the Safe Drinking Water Act exempts the process from regulation at the federal level, many states, especially those situated atop geologic formations containing large natural gas reserves, have remained decidedly cautious in sanctioning hydrofracking in their states.⁵⁸

In 2009, New York's Governor David Paterson created a de facto moratorium on hydrofracking until July 2011 by signing an executive order halting the process.⁵⁹ The order prohibited horizontal drilling and hydrofracking until completion of a comprehensive study by the state Department of Environmental Conservation.⁶⁰ However, Paterson declined to sign legislation passed by the New York Assembly and State Senate that would have directly placed a moratorium on hydrofracking.⁶¹ Governor Andrew Cuomo's administration sought to lift the moratorium after the Department of Environmental Conservation finished this study and released its report in July 2011.⁶² Under the Governor's proposal for lifting the moratorium, hydrofracking would be allowed only on private lands and would exclude watersheds in the New York City metropolitan area and Syracuse.⁶³ Hydrofracking would remain banned on all other state lands, including parks and wildlife preserves.⁶⁴ The state would also keep regulations in place compelling energy companies to disclose the chemicals

⁵² See H.R. 2766, 111th Cong. (2009); S. 1215, 111th Cong. (2009).

⁵³ See H.R. 2766.

⁵⁴ See S. 1215.

⁵⁵ H.R. 2766 § 2(b)(1).

⁵⁶ See H.R. 1084, 112th Cong. (2011); S. 587, 112th Cong. (2011).

⁵⁷ Rubin & Morrissey, *supra* note 1, at 2.

⁵⁸ See *id.* at 3.

⁵⁹ Sarah Hoye, *New York Governor Pauses 'Fracking'*, CNN (Dec. 13, 2010), <http://www.cnn.com/2010/US/12/13/new.york.fracking.moratorium/index.html>.

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² Danny Hakim & Nicholas Confessore, *Cuomo Moving to End a Freeze On Gas Drilling*, N.Y. TIMES June 30, 2011, at A1, available at <http://www.nytimes.com/2011/07/01/nyregion/cuomo-will-seek-to-lift-drilling-ban.html?pagewanted=all>.

⁶³ *Id.*

⁶⁴ *Id.*

used in hydrofracking operations.⁶⁵ Environmental groups disagree with the Governor's allowance of limited hydrofracking on private land, even with significant and rigorous regulation. Evidently New York policymakers could no longer ignore hydrofracking's potential for economic development.

Pennsylvania takes a more business-friendly regulatory approach to hydrofracking than New York. This makes sense, as most of the state is situated atop the Marcellus Shale.⁶⁶ Regulations exist regarding the issuance of permits for drilling operations, disclosure of chemicals used in the hydrofracking process, and storage of "flowback" and other waste.⁶⁷ This business-friendly approach has perpetuated the growth of drilling sites in the past several years in the state. Pennsylvania also allows companies engaged in hydrofracking to complete pre-drilling studies of water pollution levels, which preserves those companies' defenses against pollution allegations by serving as a baseline should contaminants be released into either the air or ground during the hydrofracking process.⁶⁸

Stricter regulations may be on the way in Pennsylvania. In October 2010, the Environmental Quality Board of Pennsylvania voted fourteen to one to pass a proposal updating regulations on hydrofracking in the state.⁶⁹ These proposed regulations limit the amount of pressure that could be used to pump the hydrofracking fluid into the ground, create more stringent safety requirements for cement and pipe construction in the natural gas wells, and force drilling companies to replace any water supply contaminated by their operations.⁷⁰ On February 14, 2012, Pennsylvania Governor Tom Corbett signed into law House Bill 1950, requiring greater chemical disclosures and online reporting on a newly formed Chemical Disclosure Registry website.⁷¹ While this new law increases disclosure standards for hydrofracking, it appears that the proposed Environmental Quality Board regulations have not been adopted in full, and the state remains amenable to energy companies initiating hydrofracking operations.⁷²

⁶⁵ See H. Wiseman, *Untested Waters: The Rise of Hydraulic Fracturing in Oil and Gas Production and the Need to Revisit Regulation*, 20 FORDHAM ENVTL. L. REV. 115, 159 (2009).

⁶⁶ Rubin & Morrissey, *supra* note 1, at 3.

⁶⁷ *Id.*

⁶⁸ 25 PA. CODE § 78.52 (2011).

⁶⁹ *Hydraulic Fracturing: Pennsylvania Moves Forward With Regulations For Natural Gas Drilling, 'Fracking'*, HUFFINGTON POST (Oct. 12, 2010), http://www.huffingtonpost.com/2010/10/13/hydraulic-fracturing-penn_n_760788.html.

⁷⁰ *Id.*

⁷¹ An Act Amending Title 58 (Oil and Gas) of the Pennsylvania Consolidated Statutes, H.B. 1950, 2011 Sess. (P.A. 2012), http://www.legis.state.pa.us/cfdocs/billinfo/bill_history.cfm?syyear=2011&sind=0&body=H&type=B&bnum=1950.

⁷² See *Natural Gas Law Signed in PA*, WBNG NEWS (Feb. 14, 2012), <http://www.wbng.com/news/local/Natural-Gas-Law-Signed-in-PA-139331543.html>.

Texas is also grappling with disputes between environmentalists and business interests concerning the proper scope of regulation. Texas has similar regulations to those in Pennsylvania, such as requirements for permits and disclosure of chemical contents in hydrofracking fluid.⁷³ State regulators with the Texas Railroad Commission sided with the natural gas drilling companies in a dispute with the EPA concerning whether hydrofracking led to contamination of local drinking water sources.⁷⁴ It seems that Texas, like Pennsylvania, remains open for business for companies engaged in hydrofracking. By lifting the moratorium put in place by his predecessor in New York, Governor Cuomo's actions signal that New York might not be far behind Pennsylvania and Texas in the race for economic benefits from hydrofracking operations.

V. STRICT LIABILITY, GENERALLY

Under a strict liability scheme, persons are responsible for injuries suffered by others resulting from that person's actions, regardless of culpability. Put another way, that person would be responsible for the injury merely because he or she acted. These principles came from early English law, which required anyone causing harm to another to compensate the injured for their loss regardless of fault or intent to injure on the part of the actor. Today strict liability is only applied to abnormally dangerous,⁷⁵ ultrahazardous,⁷⁶ or abnormally hazardous⁷⁷ activities.

Strict liability attaches to *abnormally* dangerous activities.⁷⁸ Under strict liability, negligence need not be proven so long as the actor actually engages in abnormally dangerous or ultrahazardous activities and is the cause or proximate cause of the plaintiff's injuries.⁷⁹ One important distinction in strict liability causes of action is the difference between abnormally dangerous or ultrahazardous *materials* and abnormally dangerous or ultrahazardous *activities*. Strict liability only attaches to abnormally dangerous or ultrahazardous activities.⁸⁰ The social utility of the activity is not taken into account with strict liability. Liability is imposed on

⁷³ Mark Passwaters, *Texas Railroad Commission contradicts EPA, says Range did not pollute Barnett wells*, SNL DAILY GAS REPORT (Mar. 15, 2011), <http://www.snl.com/InteractiveX/ArticleAbstract.aspx?id=12488637>.

⁷⁴ *Id.*

⁷⁵ *E.g.*, Pac. Nw. Bell Tel. Co. v. Port of Seattle, 491 P.2d 1037, 1039-40 (Wash. 1971).

⁷⁶ *E.g.*, Parks Hiway Enter., L.L.C. v. CEM Leasing, Inc., 995 P.2d 657, 665 (Alaska 2000).

⁷⁷ *E.g.*, G.J. Leasing Co. v. Union Elec. Co., 54 F.3d 379, 386 (7th Cir. 1995) (citing Indiana Harbor Belt R.R. v. Am. Cyanamid Co., 916 F.2d 1174 (7th Cir. 1990)).

⁷⁸ *Doudoulakis v. Town of Hempstead*, 368 N.E.2d 24, 26 (N.Y. 1977).

⁷⁹ *Green v. Ensign-Bickford Co.*, 595 A.2d 1383, 1386 (Conn. App. Ct. 1991).

⁸⁰ *Splendorio v. Bilray Demolition Co.*, 682 A.2d 461, 465-66 (R.I. 1996) (citing *G.J. Leasing Co. v. Union Elec. Co.*, 854 F.Supp. 539, 567-69 (S.D. Ill. 1994)).

any actor who, for his or her own benefit, introduces an extraordinary risk of harm into the community despite the social utility of that activity.⁸¹

Conducting abnormally dangerous or ultrahazardous activities is one of the few instances where the common law has attached strict liability.⁸² Strict liability is also justified on the belief that these types of activities leave communities and their residents vulnerable to abnormal risks. The Supreme Court of Oregon stated that strict liability as a standard for liability can be appropriate when there has been a “creation of an additional risk to others which cannot be alleviated and which arises from the extraordinary, exceptional, or abnormal nature of the activity.”⁸³

Strict liability in the United States traces its roots back to *Rylands v. Fletcher*, a 19th century dispute in England.⁸⁴ A negligence claim was brought after the defendant’s recently built reservoir burst and flooded a neighboring mine operated by the plaintiff.⁸⁵ The House of Lords held in *Rylands* that a person who brings on his or her land anything that was not naturally there, and which is likely to do mischief if it escapes, must keep it at his or her own peril.⁸⁶ If damage results, the party bringing the cause of that damage onto their land is *prima facie* liable for the injuries which were a natural consequence of its escape.⁸⁷ Courts in many states have interpreted *Rylands* in a similar fashion. For example, the Supreme Court of Appeals of West Virginia stated that “where a person chooses to use an abnormally dangerous instrumentality he is strictly liable without a showing of negligence for any injury proximately caused by that instrumentality.”⁸⁸

The Restatement (Second) of Torts § 519 explains the relationship between abnormally dangerous activities and strict liability. It reads in its entirety:

- (1) One who carries on an abnormally dangerous activity is subject to liability for harm to the person, land or chattels of another resulting from the activity, although he has exercised the utmost care to prevent the harm.
- (2) This strict liability is limited to the kind of harm, the possibility of which makes the activity abnormally dangerous.⁸⁹

⁸¹ T & E Indus., Inc. v. Safety Light Corp., 587 A.2d 1249, 1257 (N.J. 1991).

⁸² Ravan v. Greenville Cnty., 434 S.E.2d 296, 304 (S.C. Ct. App. 1993).

⁸³ McLane v. Nw. Natural Gas Co., 467 P.2d 635, 638 (Or. 1970).

⁸⁴ See *Rylands v. Fletcher*, [1868] 3 L.R.E. & I. App. 330 (H.L.) (appeal taken from Eng.).

⁸⁵ *Id.* at 330.

⁸⁶ *Id.* at 339-40.

⁸⁷ *Id.*

⁸⁸ Peneschi v. Nat'l Steel Corp., 295 S.E.2d 1, 5 (W. Va. 1982).

⁸⁹ RESTATEMENT (SECOND) OF TORTS § 519 (1977).

The Restatement also supplies factors to be considered in determining whether an activity should be classified as abnormally dangerous or ultrahazardous.⁹⁰ These include:

- (1) the existence of a high degree of risk of some harm to the person, land or chattels of others;
- (2) the likelihood that the harm that results from it will be great;
- (3) the inability to eliminate the risk by the exercise of reasonable care;
- (4) the extent to which the activity is not a matter of common usage;
- (5) the inappropriateness of the activity to the place where it is carried on; and
- (6) the extent to which its value to the community is outweighed by its dangerous attributes.⁹¹

These factors were derived from common law strict liability opinions and provide a roadmap for judges in deciding whether activities should be classified as abnormally dangerous or ultrahazardous.

Not all jurisdictions recognize strict liability causes of action for abnormally dangerous or ultrahazardous activities. Therefore, any plaintiff bringing a claim for strict liability must first ensure that the state in which the action is brought had fully adopted strict liability principles as applies to abnormally dangerous or ultrahazardous activities. In New Hampshire, for example, strict liability may be applied to products liability actions, but not in the case of trespass where a dam owner failed to keep its dam from bursting and flooding the plaintiff's land.⁹² The Texas Supreme Court intimated in 1936 that its state does not recognize the strict liability doctrine in most situations, although the court focused much of its analysis on absolute rather than strict liability in ultimately deciding not to apply strict liability.⁹³ Where strict liability was not applied, this Texas plaintiff was required to show negligence on the part of the defendant.⁹⁴ Texas does not currently recognize strict liability causes of action for abnormally dangerous or ultrahazardous activities.⁹⁵ Strict liability in that state is limited to products liability actions involving dangerously defective

⁹⁰ See RESTATEMENT (SECOND) OF TORTS § 520 (1977).

⁹¹ *Id.*

⁹² See *Moulton v. Groveton Papers Co.*, 289 A.2d 68, 72 (N.H. 1972).

⁹³ See *Turner v. Big Lake Oil*, 96 S.W.2d 221, 222 (Tex. 1936).

⁹⁴ *Id.* at 223.

⁹⁵ *Prather v. Brandt*, 981 S.W.2d 801, 804 (Tex. App. 1998).

products or actions concerning dangerous animal.⁹⁶ Louisiana tort reform measures in 1996 limited strict liability to only two instances – blasting with explosives and pile driving.⁹⁷

VI. DEFENSES TO HYDROFRACKING AS ABNORMALLY DANGEROUS OR ULTRAHAZARDOUS

Assuming a plaintiff's cause of action is brought in a state where the *Rylands* strict liability rule has been adopted, arguments will inevitably focus on whether hydrofracking is an abnormally dangerous or ultrahazardous activity. Generally, it is for the court to determine as a matter of law whether an activity is of a character such that strict liability will be imposed.⁹⁸

Arguments against classifying hydrofracking as abnormally dangerous or ultrahazardous correlate with the factors listed above from the Restatement (Second) of Torts § 520. Proponents of natural gas drilling could point to the multitude of natural gas wells that have been drilled and caused no harm to surrounding persons or property. There were over 450,000 confirmed natural gas wells drilled in the United States as of 2007.⁹⁹ Given that this figure is five years old, it almost certainly underestimates the total number of wells currently drilled in the United States. More recent estimates from July 2011 put that number at more than one million.¹⁰⁰ Obtaining an exact figure for the number of complaints or lawsuits filed is almost impossible, but it is likely to be a small percentage when compared to the number of wells in existence. Critics of this argument would propound the array of institutional hurdles would-be plaintiffs must clear before bringing an action in a court. Simply looking at the numbers seems to present a strong argument against classifying hydrofracking as abnormally dangerous or ultrahazardous under the first and fourth factors in Restatement (Second) of Torts § 520.¹⁰¹ With so many wells, it might be difficult to convincingly argue that great risk of some harm to the person, land or chattels of others exists. Hydrofracking is

⁹⁶ See *Firestone Steel Prod. Co. v. Barajas*, 927 S.W.2d 608, 613 (Tex. 1996) (involving defective products); *Marshall v. Ranne*, 511 S.W.2d 255, 258 (Tex. 1974) (involving animals known to be vicious).

⁹⁷ See 1996 La. Acts x, § 1 (amending LA. CIV. CODE ANN. art. 667 (2012)).

⁹⁸ *Berish v. Sw. Energy Prod. Co.*, 763 F. Supp. 2d 702, 705 (M.D. Pa. 2011) (citing *Diffenderfer v. Staner*, 722 A.2d 1103, 1107 (Pa. Super. Ct. 1998)).

⁹⁹ Abraham Lustgarten & Krista Kjellman, *Map: Number of Producing Gas Wells*, PROPUBLICA (July 8, 2009), <http://www.propublica.org/special/map-number-of-producing-gas-wells-708>.

¹⁰⁰ Keith B. Hall, *Hydraulic Fracturing Litigation – Defenses to “Abnormally Dangerous” Activity Claims*, OIL & GAS LAW BRIEF (July 29, 2011), <http://www.oilgaslawbrief.com/hydraulic-fracturing/hydraulic-fracturing-litigation----defenses-to-abnormally-dangerous-activity-claims/>.

¹⁰¹ RESTATEMENT (SECOND) OF TORTS § 520(e) (1977) (the first factor being “existence of a high degree of risk of some harm to person, land or chattels of others,” and the fourth factor being the “extent to which the activity is not a matter of common usage.”).

arguably a “matter of common usage,” especially in states situated atop geologic formations containing vast untapped natural gas resources such as New York, Pennsylvania, and Texas.

Other arguments can be made against classifying hydrofracking as abnormally dangerous or ultrahazardous using the factors from the Restatement (Second) of Torts § 520. The fifth factor analyzes the inappropriateness of the activity to the place where it is carried on. Natural gas drilling companies could argue that the decision to drill via hydrofracking is based on the geological characteristics of the area. So long as state regulations are complied with, the argument can be made that any hydrofracking operation, if conducted in an area where there exists a large supply of natural gas trapped in a subterranean reservoir, should not be deemed abnormally dangerous or ultrahazardous because the place in which the activity is carried on is not inappropriate.

The final factor from the Restatement, which considers the extent to which hydrofracking’s value to the community is outweighed by its dangerous attributes, might be the hardest argument to overcome for environmentalists pushing for an abnormally dangerous or ultrahazardous classification. The value to the community of many hydrofracking operations is significant. Natural gas drilling, especially at a productive geologic formation such as the Marcellus or Barnett Shale, creates a plethora of jobs and revenue for local communities.¹⁰² Large drilling sites can employ thousands of workers and create millions of dollars in revenue.¹⁰³ Although the dangers of hydrofracking to the environment and the health of residents near drilling sites may be great, a court balancing those dangers with the value hydrofracking adds to the community may not be inclined to find the practice abnormally dangerous or ultrahazardous in light of economic benefits. Even if the court were to determine the dangers of hydrofracking outweigh its benefits to the community, no one factor from the Restatement is dispositive.

The Restatement presents another possible defense for energy production and drilling companies. Strict liability is inapplicable in circumstances where the harm suffered was unexpected in light of the abnormally dangerous or ultrahazardous character of the defendant’s actions.¹⁰⁴ In *Foster v. Preston Mill Co.*, a dispute between mink farmers and a blasting company presented an instructive example of this defense.¹⁰⁵ In that case, strict liability might have applied if the injury had been directly caused by the force of the defendant’s explosion or debris.¹⁰⁶ Instead, the

¹⁰² See Marc Kovac, *Study: fracking could create jobs*, THE-DAILY-RECORD.COM (Sept. 21, 2011), <http://www.the-daily-record.com/news/article/5098788>.

¹⁰³ See *id.*

¹⁰⁴ RESTATEMENT (SECOND) OF TORTS § 519(2) (1977).

¹⁰⁵ *Foster v. Preston Mill Co.*, 268 P.2d 645, 646 (Wash. 1954).

¹⁰⁶ See Hall, *supra* note 99.

injury the farmers claimed was the death of several young minks. These young were killed by their parent, presumably because it was nervous from the sound of the explosions.¹⁰⁷ The Supreme Court of Washington held that the risk of noise from blasting compelling a wild animal raised for domestic purposes to kill its young did not make the activity abnormally dangerous or ultrahazardous.¹⁰⁸ While this is an extreme example of a harm suffered being drastically different than one might reasonably expect, this defense could persuade a court to refrain from deeming hydrofracking an abnormally dangerous or ultrahazardous activity in certain instances.

Courts must also consider the important public interests in securing a clean and sustainable energy supply for the nation. As the introduction to this note stated, recent disasters in both coal and petroleum operations have helped push demand toward alternative energy sources for the United States. The long-term viability of nuclear energy is in question because of safety concerns following the incident at Japan's Fukushima Daiichi Nuclear Power Plant in March 2011.¹⁰⁹ Natural gas, especially reserves that can be obtained most efficiently by hydrofracking, may ultimately become the future of American energy by default, notwithstanding the safety concerns surrounding the processes by which it is obtained. Plaintiffs seeking an abnormally dangerous or ultrahazardous classification for hydrofracking would be wise to keep these considerations in mind.

Even if a state recognizes the standard of strict liability and its courts determine that hydrofracking is abnormally dangerous or ultrahazardous, additional defenses exist. Assumption of risk may be a strong defense, especially when the natural gas well has been operated pursuant to a mineral lease or other agreement between a property owner and the energy company.¹¹⁰ If an aggrieved property owner is aware that hydrofracking will occur as a result of granting the mineral rights, his or her recovery may be limited because that property owner will be deemed to have assumed the risks associated with the sale of these rights. As a simple illustration, consider a landowner who allows blasting to be conducted in close proximity to his land and knows the damage that may be caused by such an operation. That landowner would likely be barred from recovery when the blasting operation goes awry and injury results, if the principle of assumption of the risk were applied. An ideal plaintiff in a case challenging hydrofracking would have had no contact with an energy company engaged in the drilling process, and have made no agreement pertaining to the mineral rights under or around his or her property. Any plaintiff engaged in

¹⁰⁷ *Foster*, 268 P.2d at 646.

¹⁰⁸ *Id.* at 648.

¹⁰⁹ See Norimitsu Onishi, Henry Fountain & Tom Zeller Jr., *Crisis Underscores Fears about Safety of Nuclear Energy*, N.Y. TIMES, Mar. 12, 2011, at A12, <http://www.nytimes.com/2011/03/13/world/asia/13nuclear-industry.html>.

¹¹⁰ See Hall, *supra* note 99.

prior communication with a drilling company is vulnerable to the defenses of waiver and assumption of risk.

A contributory negligence defense may also be available to energy companies. It is certainly not the strongest argument, but may be made in desperation, especially to mitigate damages in states where the doctrine is recognized. Restatement (Second) of Torts § 524 states, “the plaintiff’s contributory negligence in knowingly and unreasonably subjecting himself to the risk of harm from the activity is a defense to the strict liability.”¹¹¹ This defense may arise in litigation when the plaintiff knows or has reason to know that a water supply is contaminated, but disregards this knowledge and drinks that water anyway. This example of contributory negligence would be a defense to strict liability in an action by a plaintiff for personal injury sustained from drinking water contaminated by a hydrofracking operation.

VII. HYDROFRACKING AND STRICT LIABILITY CAUSES OF ACTION: CASES

Despite widespread media coverage of the environmental and public health risks surrounding hydrofracking, there exists a dearth of cases directly addressing whether the process is an abnormally dangerous or ultrahazardous activity and whether strict liability should apply to causes of action brought against companies engaged in the practice. Two pending cases in Pennsylvania between residents and energy production companies consider this exact issue.

*Fiorentino v. Cabot Oil & Gas Corp.*¹¹² commenced in November 2009, when sixty-three property owners in Pennsylvania sought to recover damages allegedly arising from Cabot’s natural gas drilling operations in Dimock Township, Susquehanna County.¹¹³ Among the causes of action brought was a strict liability claim against Cabot.¹¹⁴ The plaintiffs executed leases with the company, allowing Cabot to extract natural gas from their property through hydrofracking.¹¹⁵ In their complaint, they alleged that Cabot allowed the release of methane, natural gas, and other toxic substances onto their land and into their groundwater supply. The specific harms alleged include property damage, physical illness, constant fear of physical illness, and severe emotional distress.¹¹⁶

Cabot does not rely on cases directly supporting its proposition that hydrofracking is not abnormally dangerous or ultrahazardous, but on decisions that arguably support such an inference. Among these are

¹¹¹ RESTATEMENT (SECOND) OF TORTS § 524(2) (1977).

¹¹² *Fiorentino v. Cabot Oil & Gas Corp.*, 750 F. Supp. 2d 506, 512 (M.D. Pa. 2010).

¹¹³ *Id.* at 508.

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 509.

¹¹⁶ *Id.* at 510.

decisions in which similar activities were deemed not to be abnormally dangerous or ultrahazardous. For example, a strict liability cause of action for injuries inflicted by a company operating underground gasoline storage tanks at a gasoline station was not upheld.¹¹⁷ Additionally, operating a petroleum pipeline is not an abnormally dangerous or ultrahazardous activity subject to strict liability in Pennsylvania.¹¹⁸ Cabot relied on *Williams v. Amoco Prod. Co.*,¹¹⁹ where the Kansas Supreme Court held in 1987 that the drilling and operation of a natural gas well was not an abnormally dangerous or ultrahazardous activity.¹²⁰ The plaintiff's response "highlight[ed] that Pennsylvania courts have only affirmatively concluded that *storage and transmission* of gas and petroleum products are not abnormally dangerous activities, and have not decided whether *gas-well drilling and operation* are the same."¹²¹ Cabot's motion to dismiss with respect to the strict liability cause of action was denied by the District Court for the Middle District of Pennsylvania.¹²² It is important to consider the impact of the District Court's decision. It made no determination as to whether hydrofracking is an abnormally dangerous or ultrahazardous activity. The court here simply determined that the complaint was sufficient to survive a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6).¹²³ Per Rule 12(b)(6), the court here found that the plaintiffs may be entitled to relief after "accept[ing] all factual allegations as true, [and construing] the complaint in the light most favorable to the plaintiff."¹²⁴

To determine the ultimate issue of whether Cabot's hydrofracking operation are abnormally dangerous or ultrahazardous and thus warrant application of strict liability, the court will have to analyze hydrofracking under the Restatement's approach as adopted in Pennsylvania.¹²⁵ First, there exists a high degree of risk of some harm to the plaintiffs and their property. Contamination of groundwater poses serious medical problems, especially given that many of the possible contaminants are known to be carcinogenic or otherwise toxic.¹²⁶ This contamination also corresponds to the second Restatement § 520 factor, requiring that the resultant harm be great in order for the activity to be deemed abnormally dangerous or ultrahazardous.¹²⁷ An inability to eliminate the risk by the exercise of reasonable care must also exist. Cabot would likely argue via expert

¹¹⁷ *Smith v. Weaver*, 665 A.2d 1215, 1220 (Pa. Super. Ct. 1995).

¹¹⁸ *Melso v. Sun Pipe Line Co.*, 576 A.2d 999, 1003 (Pa. Super. Ct. 1990).

¹¹⁹ *Williams v. Amoco Prod. Co.*, 734 P.2d 1113, 1123 (Kan. 1987).

¹²⁰ *Fiorentino*, 750 F. Supp. 2d at 511.

¹²¹ *Id.* at 512 (emphasis in original).

¹²² *Id.*

¹²³ *Id.* at 508.

¹²⁴ *Phillips v. Cnty. of Allegheny*, 515 F.3d 224, 231 (3d Cir. 2008) (quoting *Pinker v. Roche Holdings, Ltd.*, 292 F.3d 361, 374 n.7 (3d Cir. 2002)).

¹²⁵ *Azzarello v. Black Bros. Co.*, 391 A.2d 1020, 1026 (Pa. 1978).

¹²⁶ *Hazardous Chemicals*, *supra* note 33.

¹²⁷ RESTatement (SECOND) OF TORTS § 520(e) (1977).

testimony that exercise of reasonable care in hydrofracking operations, such as routine inspection and high standards for materials used in the process, eliminates the health and environmental risks alleged by plaintiffs.

The plaintiffs will have difficulty with the fourth factor, as they will have to argue that hydrofracking is not a matter of common usage. In Pennsylvania, especially in localities sitting atop the Marcellus Shale, such natural gas wells are increasingly commonplace. Furthermore, because plaintiffs executed agreements with Cabot allowing them to conduct the drilling activities in areas on and surrounding their land, the fifth factor assesses the appropriateness of the activity to the place where it is carried on does not weigh in plaintiffs' favor. The extent to which hydrofracking is valued to the community as compared to its dangerous attributes may also present a difficult hurdle for the plaintiffs. Arguments regarding this factor were discussed in *supra* Section IV of this note, discussing defenses to strict liability claims and will be a fact-specific inquiry.

The author posits that in *Fiorentino*, the court should conclude that hydrofracking is an abnormally dangerous or ultrahazardous activity subjecting Cabot to strict liability. This if the court can determine that its natural gas drilling operation did in fact cause the plaintiffs' injuries, Cabot should be held strictly liable. Although the factors listed in the Restatement (Second) of Torts § 520 are not dispositive, the specific characteristics of this and similar hydrofracking operations suggest an activity that is abnormally dangerous or ultrahazardous and thus subject to strict liability.

In *Berish v. Southwestern Energy Production Company* plaintiffs reside in the same Pennsylvania county as those in *Fiorentino*. As a result of insufficient casing in a well operated by the defendant, hazardous chemicals discharged into the ground during hydrofracking operation, contaminating the plaintiffs' water supply.¹²⁸ This contamination not only exposed the plaintiffs to dangerous chemicals, but also created possible present and future health problems and potentially devalued plaintiffs' property.¹²⁹ The court determined that the complaint was sufficient as to the six factors in Section 520 of Restatement of Torts relevant to deciding if natural gas drilling is abnormally dangerous or ultrahazardous.¹³⁰ However, as in *Fiorentino*, this decision only went to the sufficiency of the complaint; the court has not yet ruled on the merits. The court stated,

While meeting the "common usage," "inappropriateness of the activity," and "value to the community" prongs of [Restatement (Second) of Torts] § 520 will likely create difficulty for Plaintiffs at the Summary Judgment stage,

¹²⁸ *Berish*, 763 F. Supp. 2d at 704.

¹²⁹ *Id.*

¹³⁰ *Id.* at 706.

there is no requirement under the Federal Rules of Civil Procedure that Plaintiffs bring forth exhaustive factual pleadings at this stage, and they have more than met their burden of putting the Defendant on notice as to the basis of the strict liability claim.¹³¹

The question of whether hydrofracking rises to the level of abnormally dangerous or ultrahazardous activity is far from decided.

VIII. CONCLUSION: HYDROFRACKING IS AN ABNORMALLY DANGEROUS OR ULTRAHAZARDOUS ACTIVITY

Not all factors in Restatement (Second) of Torts § 520 point directly to classifying hydrofracking as abnormally dangerous or ultrahazardous. However, taken as a whole, those factors supporting such a conclusion weigh more heavily in the determination than those that do not support an abnormally dangerous or ultrahazardous conclusion. In states where the rule from *Rylands* and the Restatement's multi-factor approach have been adopted, courts deciding actions brought against energy production companies engaged in hydrofracking should allow strict liability causes of action.

Pennsylvania's courts could potentially establish persuasive precedent for other states likely to be affected by hydrofracking in areas where geologic formations exist containing vast natural gas resources. With the ban on hydrofracking about to expire in New York and a shift in thinking towards natural gas as a potential energy source of the future for the United States, claims against energy companies will most likely increase. Subjecting such companies to strict liability will help ensure that all necessary precautions are taken. Although regulations have been enhanced in many states, abiding by them may not provide protection to citizens in areas where hydrofracking is becoming a more common occurrence.

Given that natural gas is an attractive alternative energy source, it is important to consider the effects that subjecting companies engaged in hydrofracking to strict liability will have on the industry. Strict liability will not sound the death knell for hydrofracking. Blasting, long subjected to strict liability, seems to have continued largely unabated. Strict liability will ensure that companies act with the utmost care and preparation before, during, and after drilling takes place. Aggrieved plaintiffs will be able to recover for injuries caused by future hydrofracking without having to prove negligence. While not all questions surrounding the environmental and personal health risks of hydrofracking are answerable in the immediate

¹³¹ *Id.*

future, courts should take the next logical step in assuring that injuries to persons and property are not uncompensated by concluding that hydrofracking is an abnormally dangerous or ultrahazardous activity subject to strict liability.