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Hydraulic Fracturing: Tolerate, Regulate or Litigate?

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Energy sector industry experts predict that hydraulic fracturing, aka “fracking” or “hydrofracking,” will provide the United States, among other countries, with the means to become more energy independent.

Hydrofracking is the process used to extract oil and gas from shale rock deep within the earth. Although it is difficult to dispute that hydrofracking is making vast plays of otherwise inaccessible natural gas available, its effects on the environment, and the manner and extent by which it should be regulated, is being hotly contested. The media has focused its attention on this process that pits the economic advantages of natural gas extraction against human health and the environment. Indeed the highly publicized consumer advocate Erin Brockovich has joined forces with the well-known plaintiffs’ law firm Weitz and Luxenberg to “fight for you” against contamination from the dangers of fracking. Moreover, one need only travel the back roads of upstate New York or Northeast Pennsylvania to detect the apparent sentiments both for and against the development of shale gas through hydraulic fracturing.

Although natural gas provides about 25 percent of total U.S. energy, shale gas made up less than two percent of total U.S. natural gas production in 2001. Today it is approaching 30%. Moreover, while natural gas production by hydraulic fracturing is currently banned in certain countries in Europe, increased interest in gas shale development is evident on an international basis by the significant investment in preliminary leasing activity in many parts of the world, including Eastern and Western Europe, Asia, Africa and South America. It is estimated that recoverable shale gas reserves in those regions exceed 5,760 trillion cubic feet, as compared to 862 trillion cubic feet of recoverable shale gas reserves in the U.S.

In the U.S., energy companies are being closely scrutinized regarding this process of natural gas extraction that is exploding in certain parts of the country. State and federal investigations are underway, new regulations are being promulgated, and lawsuits are being filed by property owners, environmentalists and others impacted by hydraulic fracturing.

Although the majority of lawsuits alleging property damage or bodily injury have been to date filed in Pennsylvania, environmental advocacy groups link hydraulic fracturing to contamination in several states other than Pennsylvania including Wyoming, West Virginia, Texas, Louisiana, Arkansas, and Colorado. Further, as the international interest in hydraulic fracturing and the need for gas production increases, it is likely that many countries will permit the process to go forward. There is therefore a growing concern that hydrofracking may not be strictly regulated in certain countries which may lead to fracking lawsuits on a global basis. This article discusses the hydraulic fracturing process, recent investigations and regulations relating to hydraulic fracturing, the current status of litigation relating to claims of bodily injury and property damage allegedly arising out of the process, and the probable liability coverage issues that may result from the anticipated litigation.

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