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As a natural consequence of energy projects increasingly moving into residential areas, the energy industry has begun to experience an uptick in nuisance and negligence claims filed by landowners. This presentation will discuss recent cases, including *Ely v. Cabot Oil & Gas Corp.*, and how the decisions in these recent cases forecast the results of currently pending or future cases. The presentation will also examine emerging trends in the types of claims being pursued as well as defense trends.

I. WHAT IS DRIVING THE INCREASE IN NUISANCE CLAIMS?

Much ink and video has been devoted in the last decade to the oil and gas revolution occasioned by the improvement in fracking and drilling technologies, and much of that coverage has been overwhelmingly negative in nature. Wind power, once and still a darling of the media, has been the subject of some increasingly negative press coverage in the last several years. Coal, while vitally important to the nation’s energy needs, has long been a convenient villain. Plaintiffs sense opportunity and, in many cases, hold a profound dislike of the energy industry – and a high profile lawsuit provides a high profile platform from which to argue policy and/or use public opinion for personal gain.

While most of the suits the energy industry is facing seek damages based upon multiple theories of liability, plaintiffs’ attorneys have increasingly focused on claims of private nuisance because, in our opinion, these claims are both 1) difficult to defeat with preliminary motions and
2) conducive to letting a plaintiff tell, and a judge or jury hear, the story of the industry’s interference with an individual’s life. Objective measurements or expert opinions are not necessary to prove many nuisance claims.\(^1\) One court commented that “[t]he cases are legion in which the extent of the interference with reasonable use and enjoyment attributable to noise has been established by the evidence of witnesses describing the character and effect of the noise.”\(^2\) This same principle applies to vibration, light, smell, and other interferences which are readily perceptible to a lay person. Nuisance claims are frequently able to survive dispositive motions because they are often, at their core, largely factually-intensive claims, and the existence of material issues of fact regarding the impact of noise, light, smell, and vibration often precludes a defense win before trial.\(^3\)

The increasing frequency with which nuisance suits are being filed is partially because the energy industry, and specifically, the arm of the energy industry which actually produces energy, is pushing into geographic regions that traditionally have not experienced the burdens associated with the production of energy. This is particularly evident in the oil and gas and wind industries. As production, and the large scale industrial activity associated with it, moves into non-traditional areas, we see excitement, promise, potential… and pushback.

The damages available to plaintiffs who successfully assert nuisance claims are significant, as well. Plaintiffs can and do obtain large verdicts – verdicts based not on mathematical calculations, but on more nebulous judgment calls by juries on the impact of production activities on a plaintiff’s quality of life. Furthermore, injunctive relief is often sought

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\(^3\) On the other hand, nuisance cases involving interferences which are not readily perceptible to a lay person (i.e., water contamination, health effects, and earthquakes) often require expert testimony to establish that the defendants’ activities are the legal cause of the interference.
and not infrequently granted, forcing defendants to modify the way in which they do business, or even forcing defendants to abandon their plans and find another place for their activities. In short, a nuisance claim provides a vehicle through which a plaintiff can obtain sizable monetary damage awards, injunctive relief, or a platform from which to advance a particular political viewpoint.

II. WHAT ACTUALLY IS A “PRIVATE NUISANCE”?

A private nuisance is a nontrespassory interference with another's interest in the private use and enjoyment of his/her land.\(^4\) In order to rise to the level of a nuisance, the conduct must be “more than a slight inconvenience or petty annoyance.”\(^5\) Though there is variation among the different jurisdictions, an actor is generally subject to liability for a private nuisance if his conduct is a legal cause of an invasion in another’s interest in the private use and enjoyment of his land, and the invasion is either (a) intentional and unreasonable, or (b) unintentional, but caused by negligent or reckless conduct, or abnormally dangerous conditions or activity for which there is strict liability.\(^6\) For an act to be considered intentional, the actor must either act for the purpose of causing the invasion or know that it is resulting or is substantially certain to result from his conduct.\(^7\) Under a private nuisance theory, an actor is not liable for invasions which are purely accidental or invasions which are intentional, but reasonable.\(^8\) The interpretation of “unreasonable” can vary dramatically depending on the jurisdiction and circumstances. The Restatement (Second) of Torts notes that an invasion is unreasonable “if the gravity of the harm outweighs the utility of the conduct.” Factors considered in determining the gravity of the harm include: (1) the extent of the harm, (2) character of the harm, (3) the social

\(^4\) Restatement (Second) of Torts § 821D (1979).
\(^5\) Restatement (Second) of Torts § 821F(c).
\(^6\) Restatement (Second) of Torts § 822.
\(^7\) Restatement (Second) of Torts § 825.
\(^8\) Restatement (Second) of Torts § 822, Comment a.
value of the plaintiff’s use of his land and the defendant’s conduct, (4) suitability of each to the character of the locality; and (5) the burdens on each party of avoiding the harm. In determining the utility of the defendant’s conduct, the following factors are considered: (a) the social value of the defendant’s conduct, (b) the suitability of the conduct to the character of the locality, and (c) the impracticability of preventing or avoiding the invasion.

In addition, an interference must cause significant harm, of a kind that would be suffered by a normal person in the community or by property in normal condition and used for a normal purpose. Under the Restatement (Second) of Torts, the standard for determining whether an invasion is significant is an objective one – whether a normal person living in the community would regard the invasion in question as definitely offensive, seriously annoying or intolerable; if so, the invasion is significant. This standard does not consider a plaintiff’s particular sensitivities.

III. **NUISANCE CASES INVOLVING OIL AND GAS PRODUCTION - NOTABLE DECISIONS/VERDICTS**

In the oil and gas context, nuisance claims stem from activity related to oil and gas production and transportation and include a wide range of complaints -- noise, lights, dust, water contamination, and even earthquakes. Even if the oil and gas development is properly permitted and operating in accordance with all local regulations and ordinances, an oil and gas producer can still be subject to a nuisance claim. Compliance with regulations and ordinances, however, can be an important part of the defense.

Nuisance cases in the oil and gas context have garnered a significant amount of media coverage, and have been used by activists to advance their platform and sway public opinion.

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9 Restatement (Second) of Torts §§ 827.
10 Restatement (Second) of Torts §§ 828.
11 Restatement (Second) of Torts § 821F.
12 Restatement (Second) of Torts § 821F(d).
One of the highest profile and significant nuisance cases is *Ely v. Cabot Oil & Gas Corporation*, a water contamination case brought by residents of Dimock, Pennsylvania, which resulted in a $4.2 Million verdict in March, 2016. The water contamination issues in the town of Dimock drew media attention from the start, including a feature in the film “Gasland.” While the industry is mounting a strong challenge to this verdict\(^\text{13}\), there has also been some concern that it will open the floodgates for additional claims.

A. **Ely v. Cabot Oil & Gas Corporation - $4.2 Million Water Contamination Verdict in Pennsylvania**

Water contamination claims typically stem from allegations that hydraulic fracturing activities contaminated water supplies through methane gas migration and other environmental contamination. These cases are difficult and costly to prove from the plaintiff’s perspective as they require expert testimony to establish a causal link between the defendant’s acts or omissions and contamination of the water supply in order to survive dispositive motions and ultimately, reach a jury. In addition, in 2015, the EPA released a draft report indicating that it “did not find evidence that [hydraulic fracturing activities] have led to widespread, systemic impacts on drinking water resources in the United States.”\(^\text{14}\) The EPA’s findings provided an additional hurdle to a plaintiff’s ability to survive expert challenges in cases alleging drinking water contamination. However, there is some concern that the *Ely* verdict, as well as recent criticisms of the EPA’s findings, will encourage additional claims.\(^\text{15}\)


\(^{15}\) In August 2016, following the *Ely* verdict, the EPA’s Science Advisory Board (“SAB”) criticized the EPA’s draft report on hydraulic fracturing for failing to support its findings that hydraulic fracturing has not led to widespread impact on drinking water resources with data or analysis.\(^\text{15}\) The SAB calls for the EPA to either provide support or drop that conclusion. Also of note, the SAB recommended that the EPA include additional findings and data.
In *Ely v. Cabot Oil & Gas Corporation*, a group of 44 residents from Dimock Township, Susquehanna County, Pennsylvania collectively filed suit against Cabot alleging that its fracking and the operation of its wells contaminated their water supplies. The Plaintiffs asserted a variety of claims, including negligence, private nuisance, strict liability, breach of contract, fraudulent misrepresentation, gross negligence, claims under the Pennsylvania Hazardous Sites Cleanup Act, and for medical monitoring. Through early dismissal and summary judgment, Cabot was able to eliminate most of these claims, leaving only claims for negligence and private nuisance by a few of the original Plaintiffs.\(^\text{16}\) *Ely* was originally filed in 2009 in the U.S. District Court for the Middle District of Pennsylvania. In 2012, Cabot reached a confidential settlement with approximately 40 of the Plaintiffs, leaving only the Hubert and Ely families, who refused to participate in the settlement and pressed on to trial.\(^\text{17}\)

With respect to the private nuisance claim, Plaintiffs alleged that Cabot’s drilling operations at wells located within 700 feet of the Elys’ water supply contaminated their well water with methane and shallow gas sources, as well as drilling mud and other drilling materials.\(^\text{18}\) Plaintiffs allege that the water contamination interfered significantly with the use and enjoyment of their property. In support of their claims, the Plaintiffs submitted the expert report of hydrologist, Paul Rubin, who opined that the aquifer supplying the Elys’ water was “compromised and contaminated by Cabot’s drilling activities, leading to ‘highly variable methane concentrations in the Scott Ely and Hubert wells’ from gas drilling activities, and that


such contamination can be expected to last for decades, or even a century or more.”

Plaintiffs also submitted the report of Anthony Ingraffea, a professor of engineering at Cornell University, who opined that the contamination of the Elys’ water supply was the direct result of Cabot’s negligently conducted drilling operations in the vicinity. Ingraffea also opined that Cabot’s negligence in the drilling operations directly permitted “methane gas together with other unwelcome constituents and fluids [to] migrate, as they naturally will, into the aquifer that supplies the well water to the Nolen Scott Ely and Ray Hubert households.”

In accordance with the Restatement (Second) of Torts § 822, Pennsylvania recognizes a claim for private nuisance liability, but only if the defendant’s conduct “is a legal cause of an invasion of another's interest in the private use and enjoyment of land.” In addition, to prevail on a claim for private nuisance, a plaintiff must have suffered “significant harm.” Finding that the Plaintiffs’ evidence was sufficient to proceed to trial on a claim for private nuisance, the Court noted that:

The Plaintiffs have alleged a serious invasion of their possessory interest in their property, in that they have alleged that the Defendants' drilling activities has caused contamination of their domestic water supply, and has caused them to resort to the use of bottled water for their family's needs. The Plaintiffs have also offered expert testimony to support their claims of pollution and that the pollution is the direct result of the Defendants' negligent drilling operations.

Cabot urged the Court to dismiss Plaintiffs’ private nuisance claim because they had not come forward with evidence to show that Cabot’s alleged invasion of their property interest was

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20 Id.
21 Id., at *16.
24 Id., at *18.
“intentional and unreasonable.” However, the Court reminded that an actor’s breach of an applicable standard of care is sufficient to support a claim for nuisance, finding that the Plaintiffs have proffered “some evidence [referring to the opinions of Rubin and Ingraffea] to show that Cabot breached an applicable standard of care, and under the law in this field that is sufficient to support a claim for nuisance.” Despite Cabot’s challenges, the Court also determined that Plaintiffs’ negligence claims could proceed to trial.

During trial, the Court dismissed the negligence claim finding that Plaintiffs had not established the element of damages as they had not presented evidence that could establish the preinjury value of their property. This left the Plaintiffs with only one claim – private nuisance. Further, the Court limited the potential damages in the private nuisance claim to “inconvenience and discomfort” caused by the nuisance, which explicitly did not include mental and emotional discomfort or the cost to replace water. Despite these limitations, the jury found in favor of the Plaintiffs in the total amount of $4.2 Million, which verdict included $50,000 for each of the three Ely children and a Hubert family member, $720,000 for each of the adult Huberts, and $1.3 Million for each of the adult Elys.

One factor that may have contributed to the Plaintiffs’ success is that they were able to take advantage of a unique statutory presumption of causation that exists in Pennsylvania. The Pennsylvania statute creating the rebuttable presumption, 58 Pa. Const. Stat. Ann. § 3218(c),

25 Id.
26 Id.
29 Id.
provides that “it shall be presumed that a well operator is responsible for the pollution of a water supply that is within 1,000 feet of the oil or gas well, where the pollution occurred within six months after the completion of drilling or alteration of such well.” Under the statute in effect at the time of the events giving rise to this lawsuit, to rebut the presumption of causation, a well operator must affirmatively prove one of the following: (1) the pollution existed prior to the drilling or alteration activity as determined by a predrilling or pre-alteration survey; (2) the landowner or water purveyor refused to allow the operator access to conduct a predrilling or pre-alteration survey; (3) the water supply is not within 1,000 feet of the well; (4) the pollution occurred more than six months after completion of drilling or alteration activities; or (5) the pollution occurred as the result of a cause other than the drilling or alteration activity.

Following the verdict, Cabot filed a post-trial motion requesting judgment as a matter of law, a new trial, or remittitur based upon numerous grounds. Cabot’s primary argument is that judgment as a matter of law is appropriate, because: (1) the evidence presented at trial is insufficient to demonstrate that Cabot was negligent in the drilling and/or completion of the wells at issue; (2) the evidence presented at trial is insufficient to demonstrate that Cabot, in the drilling and/or completion of the wells at issue, caused injury to the Plaintiffs’ water supply; and (3) that the Hubert family lacks standing to bring a nuisance claim under Pennsylvania law. On the issue of causation, Cabot cites to a litany of examples demonstrating the insufficiency of the

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31 The statute in effect at the time of the events giving rise to the plaintiffs’ claims provided that “it shall be presumed that a well operator is responsible for the pollution of a water supply that is within 1,000 feet of the oil or gas well, where the pollution occurred within six months after the completion of drilling or alteration of such well.” 58 Pa.S. § 601.208(c). However, Pennsylvania has subsequently amended the Oil & Gas Act, 58 Pa. Cons. Stat. Ann. §§ 2301, et seq., and this statutory presumption is codified at 58 Pa. Const. Stat. Ann. § 3218(c). The statute was later amended to broaden the radius of property protected to 2,500 feet and the time period to 12 months for unconventional wells.


evidence, including that Plaintiffs’ hydrology expert, Rubin, should have been precluded under Daubert from offering any opinions. Alternatively, Cabot requests a new trial, or remittitur.

It appears from the docket that the parties have extensively briefed the issues and are awaiting decision from the Court. There is a lot riding on the Court’s decision from both perspectives. A decision in favor of Cabot would be a huge victory for the industry, and may dissuade future claims. Likewise, if the Court sides with the Plaintiffs, it will lend additional momentum to the anti-fracking sentiment and may spur additional claims – especially given the amount of press this case has received. No matter the decision, it will likely not be an end to the Ely saga as we expect that any decision will surely result in appeal.

Regardless, we expect this verdict to have some impact on the value and handling of similar claims. There are several key takeaways from this case that a defendant facing similar claims may want to consider:

**Continue to aggressively challenge expert qualifications and findings.** These cases are often won or lost on Daubert or similar challenges to expert testimony. Since the subject matter of these claims is relatively new ground for the courts, and many of the experts proffered are untested, courts have been generally receptive to these challenges.

Despite Cabot’s efforts to restrict and challenge the expert testimony in this case, some of which were successful,\(^{34}\) the Ely Court permitted hydrology expert, Paul Rubin, to offer testimony that oil and gas drilling caused contamination of water supplies. This Court’s decision on this issue has provided Cabot with grounds for challenging the verdict. Notably, this same expert’s testimony was excluded in its entirety by the federal district court for the Western District of New York in Baker v. Anschutz Exploration Corp., 68 F.Supp.3d 368, 381 (W.D.  

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\(^{34}\) See Memorandum and Order granting in part and denying in part Cabot’s Motion to Exclude Mr. Rubin’s expert testimony, February 17, 2016, Document No. 696, Ely, et al. v. Cabot Oil & Gas Corp., No. 3:09-CV-2284 (M.D. Pa.).
N.Y. December 17, 2014). In Baker, the Court found that Rubin’s opinion that drilling of a natural gas well was the source of contaminated residential well water was “not based upon sufficient facts or data and was not the product of reliable principles and methods applied reliably to the facts of the case.” The court found that even if Rubin were qualified to testify as to causation, his testimony regarding causation was based upon speculation. Finding that the Plaintiffs had relied entirely on the report of Rubin to establish that the Defendant caused methane contamination of their water wells, the court granted summary judgment in favor of the Defendant on all claims. The decision in Baker is encouraging in that the Court stated that it is not willing to accept mere temporal proximity of the drilling and the water problems to establish liability. This decision highlights the importance of aggressively challenging expert qualifications and findings.

Pursue motions to dismiss/summary judgment to eliminate claims and limit potential damages. Cabot aggressively pursued early dismissal and summary judgment to eliminate and narrow the claims before trial. Of particular note, Cabot was successful in foreclosing Plaintiffs’ strict liability claim. Plaintiffs asked the Ely Court to declare hydraulic fracturing an abnormally dangerous or ultra-hazardous activity, such that it would be subject to strict liability for damages caused by such activities. The Court refused and granted the Defendants’ motion for summary judgment on the strict liability claims, noting that the Plaintiffs had failed to substantiate their contention that natural gas drilling activities, including hydraulic fracturing, are

36 Baker v. Anschutz Exploration Corp., 68 F.Supp.3d at 381, noting that Rubin merely speculated that “deep well gas migrated up through yet unidentified fissures or faults into the same rock formations, thousands of feet away from Plaintiffs’ water wells.”
37 Id.
38 Baker, 68 F.Supp.3d 368.
so inherently dangerous that these activities should be deemed ultra-hazardous.\textsuperscript{40} In making this
determination, the Court relied on government reports, data analysis, and expert commentary
which established that risks from properly drilled, cased, and hydraulically fractured gas wells
were minimal.\textsuperscript{41} The District Court noted that no court in the United States has chosen to declare
hydraulic fracturing an ultra-hazardous activity, and it was also unwilling to take this step.\textsuperscript{42}
While many complaints against oil and gas producers include claims for strict liability, we are
not aware of any successful case brought under this theory.\textsuperscript{43}

Although the case resulted in a substantial verdict, had the jury been able to consider the
many other claims initially asserted by the Plaintiffs, the verdict could have been much larger.
The jury awarded $4.2 Million for the Plaintiffs’ “inconvenience and discomfort”, alone.

Track state and federal agency actions. In August 2016, following the \textit{Ely} verdict, the
EPA’s Science Advisory Board (“SAB”) criticized the EPA’s draft report on hydraulic fracturing
for failing to support its finding that hydraulic fracturing has not led to widespread impact on
drinking water resources with data or analysis.\textsuperscript{44} The SAB has called for the EPA to either
provide support or drop that conclusion. The SAB also recommended that the EPA include
additional findings and data regarding the alleged impacts to drinking water resources in
Dimock, PA (the site at issue in \textit{Ely}) as well as other areas in which there have been public
concern.\textsuperscript{45} In response, the EPA has indicated that it will “use the SAB’s comments and
suggestions, along with relevant literature published since the release of the draft assessment,
and public comments” to revise and finalize its report.\textsuperscript{46} Once finalized, the EPA’s study could have the effect of shaping the Courts’ (and juries’) perceptions of the industry, expert opinions, and allegations of water contamination. For these reasons, it is important to stay up to date with the EPA’s final report, as well as studies and reports issued by equivalent state agencies.

Consider pursuing a Lone Pine order (if available)\textsuperscript{47}. A Lone Pine order is a modified case management order that requires the plaintiff to make a \textit{prima facie} showing of exposure and causation before full discovery is allowed.\textsuperscript{48} Though courts are reluctant to implement these orders, they can be a successful tool to eliminate meritless claims at an early stage, streamline discovery, and keep defense costs under control.

Though later overturned, the Defendants in \textit{Strudley v. Antero Resources Corp.}, 2012 WL 1932470 (Colo. D. Ct., Denver County, May 9, 2012), were successful in obtaining a Lone Pine order and then using it to obtain summary judgment at an early stage. In \textit{Strudley}, the Lone Pine order required the Plaintiffs to make a \textit{prima facie} showing of exposure and causation before full discovery and other procedures were permitted. The Plaintiffs had 105 days to comply with the order. Following the expiration of 105 days, the Defendants moved for summary judgment on the basis that Plaintiffs’ expert reports failed to establish that their alleged injuries were caused by the Defendants’ hydraulic fracturing activities. The court granted summary judgment, noting that the Plaintiffs’ expert did not even attempt to conclude that the Plaintiffs’ alleged injuries or illnesses were caused by the Defendants’ activities. However, the Colorado Court of Appeals reversed, holding that the Lone Pine order interfered with the Plaintiff’s opportunity to prove

\textsuperscript{46} https://www.epa.gov/hfstudy/peer-review.
\textsuperscript{47} For example, Colorado’s Supreme Court has held that the state’s court rules do not allow for Lone Pine Orders. See \textit{Antero Res. Corp. v. Strudley}, 347 P.3d 149 (Colo. 2015).
their claims and that it was not necessary to prevent a frivolous claim or to protect against unreasonably burdensome discovery.\textsuperscript{49}

Despite the reversal in \textit{Strudley}, defendants have been successful in obtaining Lone Pine orders in subsequent cases involving hydraulic fracturing.\textsuperscript{50} In 2013, a New York court entered a Lone Pine order in \textit{Baker v. Anschutz Exploration Corp.}, 2013 WL 3282880 (W.D.N.Y., June 27, 2013), a case involving allegations of water contamination. The order required Plaintiffs to provide the Defendants with expert evidence establishing “a) the identity of each and every hazardous substance to which Plaintiffs claim exposure as a result of Defendants' activities; (b) if other than the Plaintiffs' residences, the precise location of any claimed exposure; and (c) an explanation of causation” before proceeding with the rest of the case.\textsuperscript{51}

A Lone Pine order puts pressure on a plaintiff to come forward with sufficient expert evidence prior to engaging in expensive and potentially lengthy full-scale discovery relating to damages, etc. While this type of a case management plan does not make sense for all cases, in the right case, this can be a great tool to eliminate meritless claims at an early stage.

\textbf{B. Mass Litigation in West Virginia}

In West Virginia, hundreds of residents have filed nuisance claims against Antero Resources Corp. and Hall Drilling LLC arising out of oil and gas operations in various counties.\textsuperscript{52} Antero is the owner of horizontal Marcellus Shale wells in various counties in West

\textsuperscript{51} \textit{Baker}, 2013 WL 3282880, at *4.
\textsuperscript{52} Memorandum of Law in Support of Antero Resources Corporation’s Motion for Summary Judgment, LexisNexis File and Serve Transaction ID 58437703.
Virginia. Hall was hired by Antero to construct the well pads and roads, drill the wells, and to complete and operate the wells and gathering lines.

Due to the number of cases filed, the West Virginia Supreme Court of Appeals transferred these nuisance claims to the Mass Litigation Panel, where they were consolidated. The Defendants strenuously objected to the consolidation of these cases in fear that the court would apply a one-size-fits-all approach rather than considering the individual facts of each case. However, the court sided with the Plaintiffs, and lumped the cases together “to facilitate the Panel’s case management and trial methodologies.” These cases commonly allege excessive noise, dust, and light caused by nearby drilling activities. In addition, certain of these cases, include problems such as air and water contamination, travel delays due to excessive traffic, noxious emissions, odor, and harm to livestock.

In April 2016, the Defendants received a very favorable decision from the Court. The Court granted the Defendants’ motions for summary judgment with respect to the first trial group, being a group of thirteen (13) cases. The Defendants’ motions were granted on the ground that the Defendants’ had express contractual rights to conduct the activities they were conducting on the Plaintiffs’ properties. The Court found that Antero and Hall were operating within the scope of Antero’s leasehold rights to develop oil and gas underlying the Plaintiffs’ properties, as well as various surface-use and right of way agreements, which similarly entitled Antero to conduct oil and gas-related activities on the Plaintiffs’ properties. The Court relied on a prior West Virginia Supreme Court of Appeals case, *Quintain Development, LLC v. Columbia*

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53 *Id.*
54 *Id.*
56 See Marcellus Shale Litigation 4/18/2016 Order granting Defendants’ motions for summary judgment in the Harrison County Cherry Camp Trial Group.
Nat. Res., Inc., 210 W.Va. 128 (2001), in which the Court determined that use of land in accordance with an agreement cannot constitute a nuisance without a showing that the actions or inactions of the defendant have exceeded the scope of the rights granted.

Following its decision, the Court ordered the Defendants to draft a detailed order with findings of fact and conclusions of law, which would serve as the final order granting summary judgment. The Defendants’ proposed order was unsurprisingly opposed by the Plaintiffs and after the filing of several briefs, the Court entered an Order stating that the parties had agreed to reconvene mediation in not only the Cherry Camp trial group (in which the court granted summary judgment in favor of the Defendants), but also two other trial groups. Accordingly, the Court ordered that its detailed, final order granting summary judgment in favor of the Defendants in the Cherry Camp Trial Group was to be held in abeyance pending the outcome of mediation. The outcome of these cases will surely impact the viability of future nuisance claims in West Virginia, and additional filings. It appears that the Court’s decision granting summary judgment in favor of the Defendants in the first trial group may have forecast its future treatment of these claims. Since the Court’s decision was issued, additional filings in West Virginia have seemed to slow, or even stop. Of course, the industry-wide downturn could have also had an impact on new filings as the number of new wells being drilled also slowed.

West Virginia lawmakers have also taken notice of the recent flood of nuisance lawsuits. In February 2016, perhaps in recognition of the strain these cases could put on the industry, the state Senate introduced Senate Bill 508. This bill would have curtailed the ability of residents to file a nuisance claim against oil and gas producers. The bill required that physical property

57 Id.
58 See Marcellus Shale Litigation Orders: http://www.courts.wv.gov/lower-courts/mlp/marcellus-shale.html, which demonstrates that no additional Motions to join in existing mass litigation were filed following the Panel’s Order Regarding Dispositive Motions, filed on April 18, 2016.
damage or bodily injury exist before a person can seek damages for a private nuisance. Notably, the bill also prohibited private nuisance claims if the activity at issue is conducted pursuant to and in compliance with a permit, license or other approval by a state or federal agency or other entity. Senate Bill 508 passed in the Senate, and was then sent to the House Judiciary committee, but was not voted out of committee before the end of the session.\footnote{http://www.legis.state.wv.us/Bill_Status/Bills_history.cfm?input=508&year=2016&sessiontype=RS&btype=bill} It remains to be seen whether the West Virginia legislature revives SB 508.

C. \textbf{Titan Operating, LLC v. Marsden - Quasi-Estoppel as a Defense}

In a 2015 decision, \textit{Titan Operating, LLC v. Marsden}, 2015 WL 5727573 (Tex. App. – Ft. Worth), a Texas appellate court applied the principle of quasi-estoppel to bar a nuisance claim stemming from oil and gas operations. Quasi-estoppel precludes a party from asserting, to another's disadvantage, a right inconsistent with a position previously taken; the doctrine applies when it would be unconscionable to allow a person to maintain a position inconsistent with one to which he acquiesced or from which he accepted a benefit.\footnote{Titan Operating, LLC v. Marsden, 2015 WL 5727573, at \textsuperscript{*7} (Tex. App. – Ft. Worth, August 27, 2015), citing Little v. Delta Steel, Inc., 409 S.W.3d 704, 711 (Tex.App.–Fort Worth 2013, no pet.); see Brooks v. Brooks, 257 S.W.3d 418, 423 (Tex.App.–Fort Worth 2008, pet. denied) (explaining that “unlike equitable estoppel, quasi-estoppel requires no showing of misrepresentation or detrimental reliance”).} In other words, the defense of quasi-estoppel prevents a party from “accepting the benefits of a transaction and then subsequently taking an inconsistent position to avoid corresponding obligations or effects.”\footnote{Id., referencing Nash v. Beckett, 365 S.W.3d 131, 144 (Tex.App.–Texarkana 2012, pet. denied); Lindley v. McKnight, 349 S.W.3d 113, 133 (Tex.App.–Fort Worth 2011, no pet.).} For quasi-estoppel to apply, the party being estopped must have had knowledge of all material facts at the time of the conduct on which estoppel is based.\footnote{Id., at \textsuperscript{*7}.}

In \textit{Titan Operating, LLC v. Marsden}, the Second District Court of Appeals of Texas held that when a royalty interest holder accepts benefits flowing from an oil and gas lease, he is precluded from bringing a claim for nuisance against the leaseholder. In this case, the Marsdens
signed an oil and gas lease expressly allowing Titan (as assignee of the lease) to “prospect, drill, and produce oil and gas from beneath the surface of [the Marsdens’ property] by operations…on adjoining or nearby lands through the drilling, operating, and maintaining of directional wells located on the surface of such adjoining or nearby lands.” In exchange for these rights, the Marsdens received a per-acre bonus, and their lease entitled them to receive a royalty from the well’s production. When they entered into the lease, the Marsdens were told that wells would be drilled “somewhere on [their neighbor’s] property, which spanned approximately 50 acres.” Titan selected a drilling site on the Marsdens’ neighbors’ property which was 176 feet from the Marsdens’ home, the first well itself being a little over 300 feet away from the house. After the first well was drilled, the Marsdens sued Titan for intentional nuisance alleging that Titan’s drilling activities were substantially interfering with the use and enjoyment of their property. Specifically, the Marsdens claimed that Titan’s drilling activities had caused “constant compressor noise, truck traffic[,] and truck pump noises” as well as odor and dust. Titan raised the affirmative defense of quasi-estoppel in response to the complaint and also sought summary judgment on this ground, but the trial court denied that part of the motion for summary judgment. The case proceeded to trial with the jury finding that Titan had intentionally created a temporary private nuisance and awarding $18,000 to each Mr. and Mrs. Marsden. After trial, Titan filed a motion for judgment notwithstanding the verdict requesting the court to find that quasi-estoppel precluded the nuisance claim, which was denied by the trial court. On appeal,
the Court considered whether the trial court erred by denying the motion for judgment notwithstanding the verdict on the basis that it proved its quasi-estoppel defense as a matter of law. The Court of Appeals found that, even after the Marsdens knew the location of the drill site, they thereafter received and retained a benefit (in the form of royalty payments) flowing from the lease and from production at the very site that they complain about.\textsuperscript{72} In addition, the Court noted that even after the Marsdens had knowledge of the drilling location and of the impacts from drilling and fracking, they accepted a new benefit related to operations at the site when they received $8,470.62 in exchange for granting a pipeline easement across their property so that the gas could be marketed and sold.\textsuperscript{73} In conclusion, the Court summarized as follows:

\begin{quote}
[W]e conclude as a matter of law, quasi-estoppel precludes the Marsdens’ nuisance suit because they have unconscionably accepted benefits of transactions – their lease and easement agreement – while taking positions that inconsistently attempt to avoid the obligations and effects (including all of the circumstances forming the gravamen of their nuisance claim) of those same transactions.\textsuperscript{74}
\end{quote}

Given the Defendants’ success in Marsden, quasi-estoppel is certainly a defense to consider in nuisance cases brought by lessors, who have accepted royalty checks associated with the drilling activities on which their complaints are based.

\textbf{D. Crosstex North Texas Pipeline, L.P. v. Gardiner – A 2016 Clarification of Texas Nuisance Law}

In June of 2016, the Supreme Court of Texas delivered its opinion in \textit{Crosstex North Texas Pipeline, L.P. v. Gardiner}, and the opinion was an important one.\textsuperscript{75} The Court saw in the case a chance to clarify “what constitutes a ‘nuisance’ that gives rise to liability,” and it took full advantage of that opportunity to deliver a virtual treatise on nuisance law in the Lone Star state.

\textsuperscript{72} \textit{Id.}, at *10.
\textsuperscript{73} \textit{Id}.
\textsuperscript{74} \textit{Id}.
\textsuperscript{75} \textit{Crosstex North Texas Pipeline, L.P. v. Gardiner}, No. 15-0049, 2016 WL 3483165 (Texas, June 24, 2016).
In *Crosstex*, the aggrieved landowners, Andrew and Shannon Gardiner, purchased an undeveloped 95-acre ranch in Denton County. Crosstex built a pipeline adjacent to the Gardiner property, and, in fact, secured a right of way to run the pipeline through the southwest corner through the Gardiner ranch itself after some negotiation. However, Crosstex also installed a generator station on another tract it had previously purchased directly across a small farm road from the Gardiner ranch.

Predictably, the compressor station, described in the opinion as having four large diesel engines each “bigger than [a] mobile home,” created a lot of noise. The compressor station was always in operation; typically, at least one of the diesel engines was running twenty-four hours a day, seven days a week. Crosstex made several remedial efforts to control or minimize the noise, none of which were satisfactory to the Gardiners. Thus, suit was filed on several theories, including nuisance and negligence. Ultimately, the Gardiners prevailed at the trial court level and were awarded north of $2 Million in damages. Crosstex appealed, and the court of appeals overturned the verdict and remanded the case for a new trial. The Supreme Court affirmed the court of appeals remand of the case for a new trial, and exhorted the parties and the lower courts to “apply the guidance” the Court shared in the *Crosstex* opinion.

The Court confirmed the definition a private nuisance (the type of nuisance occasioned by Crosstex’s activities) as “a condition that substantially interferes with the use and enjoyment of land by causing unreasonable discomfort or annoyance to persons of ordinary sensibilities attempting to use and enjoy it.” This definition perfectly illustrates why nuisance claims very often succeed where others fall – almost every element of a compensable private nuisance is a subjective question of fact that will require a jury decision. These are not claims readily disposed of by preliminary or other motion – they are claims designed for submission to a
jury. In this regard, the Court clarified that to prove a nuisance, a plaintiff must establish that the effects of the substantial interference on the plaintiff are unreasonable (not that the defendant’s conduct or land use was unreasonable). 76

Notably, the Court also clarified that a nuisance is not a cause of action, but rather a “particular type of legal injury that can support a claim or cause of action seeking legal relief.” 77 As well, the Court served up a reminder that the focus in a case seeking damages for a private nuisance should not be on the defendant’s actions, but rather on the impact of that activity, whatever it may be, on the plaintiff’s comfort or contentment. In this regard, the Court noted that “a defendant can be liable for a nuisance if the defendant intentionally causes it, negligently causes it, or – in limited circumstances – causes it by engaging in abnormally dangerous or ultra-hazardous activities.” 78

Overall, the lengthy opinion in Crosstex is an excellent, direct, and authoritative statement on the status of nuisance law in Texas.

E. Ladra v. New Dominion, LLC – The Oklahoma Supreme Court allowed a case involving personal injuries sustained during an earthquake to proceed.

Earthquake litigation, the newest type of nuisance claim being pursued by plaintiffs, is increasing as seismic activity continues to increase in certain states, most notably, Oklahoma. Oklahoma has seen a significant uptick in earthquakes in the last five years, including two earthquakes greater than magnitude 5.0 in 2016. 79 The plaintiffs in these lawsuits seek to attribute increased seismic activity on the disposal of wastewater injected into deep underground wells.

77 Crosstex, at *6.
78 Id., at *1.
The Oklahoma Supreme Court recently allowed a case involving injuries sustained during an earthquake to proceed in court. In Ladra v. New Dominion, LLC, 353 P.3d 529 (Okla. 2015), a property owner brought a nuisance claim against the operators of wastewater injection wells alleging that the wells caused an earthquake during which the property owner was injured. The Defendants filed a motion to dismiss the claims arguing that the district court lacked jurisdiction over the claims because the Oklahoma Corporation Commission had exclusive jurisdiction concerning oil and gas activities. The Supreme Court of Oklahoma overturned the district court’s decision, holding that jurisdiction lies with the district court. In making this determination, the Court noted that while the OCC has exclusive jurisdiction to regulate oil and gas exploration and production, this does not include the jurisdiction to afford a remedy to those whose common law rights have been infringed. The Court remanded this case to the district court, where Ladra will have to establish, through scientific evidence, that activity from an injection well operated by the Defendants caused the earthquake leading to her injuries. While it remains to be seen whether the Plaintiff is successful in establishing that the Defendants are liable for her damages, her case is significant as it may open the door for these novel claims.

Following the Oklahoma Supreme Court’s decision in Ladra, fourteen Oklahoma residents filed suit against a number of energy companies in Oklahoma County alleging that the Defendants’ use of wastewater injection wells caused or contributed to seismic activity in December 2015 and January 2016. The Plaintiffs in that case claim that this seismic activity resulted in property damage including cracks in walls and foundation movement. The Plaintiffs are seeking both money damages as well as a permanent injunction against the operators. Another similar case was filed in Logan County, Oklahoma, on behalf of a class of Oklahoma landowners, who alleged property damage from a series of earthquakes occurring in

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2014 and 2015.\textsuperscript{81} However, that case was removed to the U.S. District Court for the Western District of Oklahoma and in July, 2016, was voluntarily dismissed without prejudice during the motion to dismiss stage of the litigation.\textsuperscript{82}

Establishing causation will be a difficult feat in each of these cases. However, as research in this area increases and as the science becomes more developed, the chances of establishing causation increase.\textsuperscript{83} This will be an area of nuisance law to watch in the future.

IV. **NUISANCE CLAIMS IN WIND ENERGY – KEY POINTS**

The search for a clean, renewable source of energy has triggered the expansion of wind energy in the United States over the last decade. However, this expansion has not been met with acceptance across the board – especially not from neighboring landowners. The nuisance claims facing wind energy producers range from complaints of noise, vibrations, a “flicker” or “strobe” effect (which occurs when the sun is near the horizon and alternating shadows of light and dark are reflected by a wind turbine’s blades), danger from broken blades, and ice throws. Some landowners even claim that they have suffered physical impacts, including disturbed sleep, headaches, rapid heartbeat, dizziness, nausea, irritability, and blurred vision, caused by low-frequency sounds and vibrations from the turbines.\textsuperscript{84} These common ailments are, bemusingly, the symptoms of so-called “wind turbine syndrome,” a condition coined by American Pediatrician Dr. Nina Pierpont.

Despite the limited number of cases published on this subject, we have identified some key points that can be drawn from an examination of the current case law: (a) visual impact,

\textsuperscript{81} Griggs, et al. v. Chesapeake Operating LLC, et al., No. CJ-2016-6 (Logan Cnty. Dist. Ct.).
\textsuperscript{82} Griggs, et al. v. Chesapeake Operating LLC, et al., No. 5:16-cv-00138-F (W.D. Ok.)
alone, is likely insufficient to support a claim for private nuisance; (b) anticipatory nuisance claims to enjoin the construction of wind farms are viable under certain circumstances, (c) the granting of a permit by a public authority does not preclude a claim for private nuisance, and (d) defendants have been successful in attacking expert causation evidence linking health problems to wind turbines.

A. The visual impact of a wind farm, alone, is likely insufficient to establish a nuisance claim.

Due to the imposing size of wind turbines, it is no surprise that many nuisance claims include aesthetic-based complaints. Courts have generally held that a nuisance claim cannot be based upon visual impact, alone. However, when aesthetics are combined with other factors, a nuisance may be found.

In Rankin v. FPL Energy, 266 S.W.3d 506 (Tex. App. 2008), a Texas court of appeals upheld a lower court’s dismissal of neighbors’ nuisance claims based upon the visual impact of a wind farm. The neighbors claimed that they lost their scenic view due to the presence of numerous 400-foot tall wind turbines. The Court considered whether an emotional response to the loss of their view was sufficient to establish a cause of action for nuisance and noted longstanding Texas case law holding that “the law will not declare a thing a nuisance because…it is

85 Rankin v. FPL Energy, 266 S.W.3d 506, 513 (Tex. App. 2008); Ladd v. Silver Star I Power Partners, No. 11-11-00188-CV, 2013 Tex. App. LEXIS 6065 (Tex. App. 2013) (plaintiff, who claimed that the neighboring wind turbines were unsightly, created an eyesore, and destroyed his scenic view, could not recover on visual nuisance claims as a matter of law); Doggett v. National Energy Solutions, 2015 WL 6087568, *4 (N.D. Alabama, Eastern Div., October 16, 2015) (noting that general unsightliness does not constitute a nuisance) (internal citations omitted); Burch v. NedPower Mount Storm, LLC, 647 S.E.2d 879, 891-2 (W.Va. 2007); Sowers v. Forest Hills Subdivision, 294 P.3d 427 (Nev. 2013) (Aesthetics of a residential wind turbine, alone, are not grounds for finding a nuisance, but a nuisance in fact may be found when the aesthetics are combined with other factors, such as noise, shadow flicker, and diminution in property value. While the size of the residential wind turbine, alone, could not form the basis of a nuisance finding, the court could properly consider the enormity of the object as one factor in its decision.)

86 For example, see Burch v. NedPower Mount Storm, LLC, 647 S.E.2d 879, 891-2 (W.Va. 2007); Sowers v. Forest Hills Subdivision, 294 P.3d 427 (Nev. 2013) (Aesthetics of a residential wind turbine, alone, are not grounds for finding a nuisance, but a nuisance in fact may be found when the aesthetics are combined with other factors, such as noise, shadow flicker, and diminution in property value.)
unpleasant to the eye.”87 While the Court recognized the importance of a landowner’s view, it also noted that a landowner’s view is largely determined by his neighbors’ activity.88 The Court held that Texas law does not recognize a nuisance action for aesthetic impact and granted partial summary judgment in favor of the Defendants on this issue. The neighbors’ noise-related nuisance claims proceeded to trial. The wind farm presented expert testimony that the noise from the wind turbine did not exceed the EPA recognized noise standard. Ultimately, the jury found against the neighbors and in favor of the wind farm on the noise complaint.

The West Virginia Supreme Court of Appeals, in *Burch v. NedPower Mount Storm, LLC*, also held that aesthetics alone are generally insufficient grounds for a nuisance claim.89 However, the Court noted that when unsightliness is accompanied by other interferences to the use and enjoyment of another’s property, the Court has shown a willingness to abate the activity as a nuisance.90 In *Burch*, the Plaintiffs sought an injunction to enjoin the construction of a wind farm. Plaintiffs alleged, *inter alia*, that, if the wind farm were constructed, a “flicker” or “strobe” effect from the turbines would create an eyesore. In considering whether Plaintiffs’ claim could constitute a nuisance, the Court noted that “while unsightliness alone rarely justifies interference by a circuit court applying equitable principles (i.e. an injunction), an unsightly activity may be abated when it occurs in a residential area and is accompanied by other nuisances.”91 Accordingly, as Plaintiffs also alleged that noise from the turbines would constitute a nuisance, the Court determined that allegations of a “flicker” or “strobe” effect could also constitute an actionable nuisance.

88 *Rankin*, 266 S.W.3d at 512.
91 *Burch*, 647 S.E.2d at 892.
Similarly, in *Brouha v. Vermont Wind, LLC*, 2014 WL 4748221 (U.S.D.C., D. Vermont 2014), a landowner brought an action for private nuisance against the owner and operator of a wind farm. He claimed that the 420-foot-tall turbines, located about 1,100 feet from the Plaintiff’s property line and approximately one mile from his home, created an unreasonable visual and noise impact. The Court noted that Vermont does not recognize adverse aesthetic impact, alone, as a basis for a private nuisance claim. However, excessive noise is an appropriate basis for a private nuisance claim and the Court determined that the Plaintiffs’ allegations of “excessively loud” noise which continued for long periods of time during both day and night were sufficient to state a claim for nuisance.

As is apparent from these three cases, aesthetic impact is typically just one of many of the complaints made by plaintiffs. Given that many courts readily recognize that aesthetic impact is insufficient to establish a nuisance claim, defendants may consider moving for partial summary judgment on this issue as the Defendant did in *Rankin* to narrow the claims and limit the evidence.

**B. Anticipatory nuisance claims to enjoin the construction and/or operation of a wind farm are viable under certain circumstances.**

While the standards differ among the states, the burden of proof to enjoin a *proposed* enterprise as an anticipated nuisance is generally higher than the burden of proof for seeking to enjoin an existing enterprise as a nuisance. Courts have held that the alleged *possibility of*

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92 *Brouha v. Vermont Wind, LLC*, 2014 WL 4748221 (U.S.D.C., D. Vermont 2014), citing *Coty v. Ramsey Assoc., Inc.*, 546 A.2d 196, 201 (Vt. 1988) (noting that “[a]s a general rule, the unsightliness of a thing, without more, does not render it a nuisance under the law,” and declining to reconsider this general rule).

harm occurring is not sufficient to support an injunction of an anticipatory nuisance.\textsuperscript{94} Rather, a plaintiff must generally show that “the danger of injury from it is impending and imminent and the effect certain.”\textsuperscript{95} Other jurisdictions require a showing of irreparable harm.\textsuperscript{96}

The Supreme Court of Appeals of West Virginia, in \textit{Burch v. NedPower Mount Storm, LLC}, 647 S.E.2d 879 (W.Va. 2007), held that allegations including that a wind farm would cause constant noise, a “flicker” or “strobe” effect, and a reduction in property values was sufficient to state a claim for a prospective injunction to enjoin the construction thereof. In West Virginia, to state a claim for a prospective injunction to enjoin an activity, which is not \textit{per se} a nuisance, a plaintiff must show “that the danger of injury from it is impending, imminent, and the effect certain.”\textsuperscript{97} The Court explained that “[m]ere possible, eventual or contingent danger is not enough. That injury will result must be shown beyond question…not resting on hypothesis or conjecture, but established by conclusive evidence. If the injury be doubtful, eventual, or contingent…an injunction will not be granted.”\textsuperscript{98} The Court determined that the landowners who brought this action asserted facts sufficient to avoid dismissal on the pleadings and remanded the case to the trial court.

Similarly, in \textit{Doggett v. National Energy Solutions}, No. 1:14-cv-02328-JHE, 2015 WL 6087568 (N.D. Ala. October 16, 2015), the Court found that the Plaintiffs had stated a cause of action for an injunction to enjoin the construction of a proposed wind farm. Here, the Court noted that before a court can “arrest a nuisance before it is completed,” Alabama law requires a showing of “irreparable damages and that such consequences are not merely possible but to a

\textsuperscript{95} \textit{Burch}, 647 S.E.2d 879, 893 (internal citations omitted).
\textsuperscript{96} See \textit{Doggett}, 2015 WL 6087568.
\textsuperscript{97} \textit{Burch}, 647 S.E.2d at 893.
\textsuperscript{98} \textit{Burch}, 647 S.E.2d at 893, citing \textit{Pope v. Bridgewater Gas Co.}, 52 W.Va. 252, 43 S.E. 87 (1903).
reasonable degree certain." Thus, as a general rule, an injunction in an anticipatory nuisance case will be denied “when the act complained of may or may not become a nuisance...or when the injury apprehended is doubtful, contingent, or merely problematical.” In this case, the court determined that Plaintiffs’ complaints about “shadow flicker” and the *possibility* it could be seen from their residences was not sufficient to support an injunction of an anticipatory nuisance. However, Plaintiffs’ allegations (which appear to be relatively conclusory) that the proposed project will cause “constant noise” and that the Plaintiffs’ injury will be irreparable were sufficient to state a claim for an injunction of an anticipatory nuisance. 

C. **The granting of a permit by a public authority generally does not preclude a claim for private nuisance.**

Like other energy projects, wind farms are required to obtain construction and operational permits from state administrative agencies. In determining whether or not to grant a permit, agencies are often charged with appraising and balancing the interests of the public, the general interests of the state and local economy, and the interests of the applicant. Despite the often rigorous requirements for a wind farm to obtain the permits required for construction and operation, courts have determined that they can still be subject to private nuisance claims.

In *Burch v. NedPower Mount Storm, LLC*, 647 S.E.2d 879 (W.Va. 2007), discussed *supra*, the Supreme Court of Appeals of West Virginia held that the right of a person to bring a nuisance claim to enjoin the construction of a wind farm is not precluded by the fact that the Public Service Commission of West Virginia (“PSC”) has granted a siting certificate to the

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100 Id.
101 Id. at *4.
102 Id., at *4-5.
owner or operator of the facility. In 2003, the PSC granted the Defendant, NedPower Mount Storm, LLC a “certificate of convenience and necessity to construct and operate a wind power electric generating facility.”\textsuperscript{104} Approximately two years later, in 2005, seven landowners who lived between one-half mile and two miles from the proposed wind turbines filed suit against the owner and operator of the proposed wind farm to permanently enjoin the construction and operation of the wind farm on the basis that it would create a private nuisance.\textsuperscript{105} Specifically, the Plaintiffs asserted that they “will be negatively impacted by noise from the wind turbines; the turbines will create a “flicker” or “strobe” effect when the sun is near the horizon; the turbines will pose a significant danger from broken blades, ice throws, and collapsing towers; and the wind power facility will cause a reduction in the [landowner’s] property values.”\textsuperscript{106} The Defendants filed a motion for judgment on the pleadings arguing, \textit{inter alia}, that the PSC’s approval of the facility collaterally estopped the landowners from bringing a nuisance claim.\textsuperscript{107} The trial court granted the Defendants’ motion and dismissed the action with prejudice.\textsuperscript{108} On appeal, the Supreme Court found that the statutory language requiring an owner or operator of an electric generating facility to obtain a siting certificate prior to construction revealed no specific language indicating an intent to disregard or abrogate the common law doctrine of nuisance.\textsuperscript{109} In addition, the Court determined that, since the rights of nearby landowners are not a primary factor considered by the PSC when deciding whether to grant the siting certificate, a nuisance claim is not precluded by the fact that the PSC has granted a siting certificate to the owner or operator of the facility pursuant to W.Va. Code § 24-2-1(c)(1) (2006) and related statutes.\textsuperscript{110}

\textsuperscript{104} \textit{Burch, LLC}, 647 S.E.2d 879, 884.
\textsuperscript{105} \textit{Burch}, 647 S.E.2d at 885.
\textsuperscript{106} \textit{Id}.
\textsuperscript{107} \textit{Id}.
\textsuperscript{108} \textit{Id}.
\textsuperscript{109} \textit{Id}., at 888-889.
\textsuperscript{110} \textit{Id}., at 889.
A similar finding was recently made by a U.S. District Court in Vermont. In *Brouha v. Vermont Wind, LLC, et al.*, 2014 WL 47478221 (U.S.D.C., D. Vermont 2014), the Court considered whether a permit granted pursuant to a quasi-judicial proceeding forecloses a private nuisance action on collateral estoppel grounds. This case involves a landowner’s private nuisance suit against the owners and operators of the Sheffield Wind Project. The landowner, whose property abutted the project, claimed that the visual impact and noise created by the wind turbines caused substantial and unreasonable interference with the use and enjoyment of his property. The Defendants argued, *inter alia*, that the landowner should be collaterally estopped from litigating his nuisance claim because he participated in and appealed the Vermont Public Service Board proceeding, which was “directed at determining appropriate standards for sound and visual aesthetics to ensure that the project would not offend the average person.”111 On the other hand, the landowner argued that he should not be collaterally estopped from litigating his nuisance claim because the issues the Public Service Board decided, as well as the standard it applied in the proceeding, are different from the issues and legal standard under which private nuisance is determined.112 In deciding this issue, the Vermont court considered the Supreme Court of Appeals of West Virginia’s decision in *Burch v. NedPower Mount Storm, LLC*, 647 S.E.2d 879 (W.Va. 2007), wherein the court found that collateral estoppel did not bar the Plaintiffs’ nuisance claim, “because the issues previously decided by the [Public Service Commission] in granting [the wind farm] a siting certificate are not identical to the issues in a nuisance claim.”113 Likewise, in *Brouha*, the Vermont court found that in deciding whether to issue a Certificate of Public Good, the Vermont Public Service Board did not decide the same issues that would be litigated in the Plaintiff’s private nuisance claim. The PSB “analyzed the

111 *Brouha*, 2014 WL 47478221, at *3.
112 *Brouha*, at *3.
113 *Id.*, at *5-6, citing *Burch*, 647 S.E.2d at 894-895.
burdens and benefits” of the wind farm with regard to “the general good of the state,” not with specific regard to the Plaintiff’s land (which would be the focus of his nuisance claim).\textsuperscript{114} While the PSB did make findings regarding aesthetic impact and noise on the community, it did not analyze or make findings regarding the impact on plaintiff’s use and enjoyment of his abutting land.\textsuperscript{115} Accordingly, the Court determined that the Plaintiff was not collaterally estopped from bringing a private nuisance claim.

D. \textbf{Williams v. Invenergy, LLC} – An Oregon court held that Plaintiff’s expert evidence was insufficient to establish a causal link between health problems and wind turbines.

In \textit{Williams v. Invenergy, LLC}, 2016 WL 1725990 (U.S.D.C., Oregon, Portland Div., April 28, 2016), a wind turbine operator was successful in excluding all of plaintiff’s experts’ testimony regarding the causal link between turbine-generated infrasound and adverse health effects. In this case, Williams asserted a claim for private nuisance and alleged that the Defendants’ wind turbine facility “emits audible noise, vibration, light, and low-frequency infrasound which causes him anxiety and disturbs his sleep.”\textsuperscript{116} Though his primary complaint was sleep disturbance, Williams also claimed to have experienced “irritability, anxiety, nausea, dizziness, headaches, and at least one anxiety attack.”\textsuperscript{117} To support his claim that his health problems were caused by turbine-generated infrasound, Williams relied upon three expert witnesses, Richard James, an acoustician; Jerry Punch, an audiologist, and Dr. Keith Ironside,

\begin{footnotes}
\item[114] Brouha, at *6.
\item[115] Id.
\end{footnotes}
James was retained to (1) assist in taking measurements in and around Williams’ home to determine the audible noise and infrasound and (2) to testify regarding the general causal relationship between acoustic outputs produced by wind turbines and adverse health effects in humans. The Court precluded James from testifying that the acoustic output from a wind turbine produces adverse health effects in humans, because he was neither a medical professional nor an epidemiologist, and the materials on which he relied lack scientific reliability to link turbine-created infrasound to adverse health effects. 

Similarly, the Court determined that Punch was unqualified to opine on the cause of Williams’ symptoms, because he was neither a medical doctor nor an epidemiologist, and the foundational literature on which he relied was “scientifically unreliable.” Finally, the Court excluded Dr. Ironside’s opinion that infrasound was a cause of Williams’ insomnia, because he had neither the qualifications nor the expertise to offer such an opinion, and because he otherwise relied solely on James’s inadmissible opinions to support his conclusions. With the exclusion of Williams’ experts, the Court noted that Williams could not prove that infrasound interferes with the enjoyment of his property, and granted summary judgment on Williams’ nuisance claim based upon infrasound produced by the wind turbines.

The Court’s decision not to accept the opinions of plaintiffs’ experts linking health problems to the operation of wind turbines is an important one, which will likely impact future claims. Aggressively attacking the expert evidence in these cases will help keep the gates closed to “wind turbine syndrome” cases, which could become a widespread problem if not contained.

118 Williams, at *3-5.
119 Id., at *3.
120 Id., at *14.
121 Id., at *15.
122 Id., at *17.
123 Id., at *18.
V. DEVELOPMENTS IN COAL MINING

The coal industry, the longstanding giant among domestic sources of energy, has not generated the number of significant new cases that the emerging wind and retooled oil and gas industries have recently. That does not mean that important cases are not being decided, just that there have been fewer, because the law around coal is more fully developed than the law around unconventional oil and gas operations and wind power.

A few recent decisions out of the Third, and more recently the Sixth, Circuits, however, are worth noting. In *Bell v. Cheswick Generating Station*, the United States Court of Appeals for the Third Circuit ruled conclusively, citing *International Paper Co. v. Ouellette*, 479 U.S. 481 (1987), that the federal Clean Air Act, 42 U.S.C. § 7401, does not preempt state common law tort claims (including nuisance claims) of air pollution attributable to a coal burning power plant. This means that a coal burning power plant can be in perfect compliance with the Clean Air Act, and its operational permits, and still face private nuisance claims for air pollution.

Citing *Bell*, as well as *Merrick v. Diageo Americas Supply*, 805 F.3d 685 (6th Cir. 2015), the Sixth Circuit has also now agreed, in *Little v. Louisville Gas & Electric Co*, that the Clean Air Act does not bar state common law claims of negligence, trespass, or nuisance. While industry has largely reacted in horror at the prospect of potentially being held liable for common law claims despite being in full compliance with the terms of a permit covering the operations being undertaken, *Bell* and *Little* are both consistent with the *International Paper Co. v. Ouellette* decision, which recognized that both the Clean Water Act and the Clean Air Act contain explicit savings provisions which preserve state common law causes of action. Permit compliance simply is not a bar to a nuisance claim, whether you are mining for coal, burning it for fuel, or producing energy in some other way.
VI. CONCLUSION

It is an exciting time to be in the energy industry – novel approaches to the age old problem of powering America seem to be advancing at breakneck speed. We, as a society, are harnessing the power of our countries’ vast resources to make tomorrow better than today, and the day after tomorrow even better. Yet, for a variety of reasons, personal or ideological, certain segments of our population and/or certain individuals are opposed to further energy development, or opposed to that development occurring near them. Predictably, with this advancement comes new legal challenges – a new wave of nuisance litigation being one of them. These claims are not only costly, but they can also have a huge impact on public perception. Considering these effects, certain of these claims should be met with an aggressive defense, while early resolution may be the best option for others. Overall, a commitment to best practices, competent counsel, and a sense of responsibility for the communities in which it operates in will do a lot to ensure that those battles are more often than not decided in the industry’s favor.