

Byline

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REBUTTAL: Fracking Bans May Trigger Civil Authority Coverage

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A recent Law360 article¹ suggests that civil authority coverage will not be implicated by local fracking bans because the bans will not result in a complete denial of access to the insured property. The article also claims that bans on fracking are not sufficient to trigger civil authority coverage because those bans are not a consequence of any actual property damage but, rather, they are merely a prophylactic measure to guard against future injury. The article does not, however, fully address three important issues that will impact the question of whether civil authority coverage is, in fact, triggered.

Fracking Bans Can Result in a Complete Denial of Access to Mineral Property

The prior article assumes that fracking bans cannot trigger civil authority coverage because the bans do not result in a complete denial of access to the mineral property.² This is not correct.

Whether there will be coverage will largely depend on how (and if) the policy defines the word “access.” Not all policies define the term. Some courts have rejected the argument that loss of actual physical access to the property is the only type of “access” that is covered. Finding the word ambiguous, courts have found coverage for loss of the specific access necessary to use the property in its intended manner.³ Such a broader interpretation could cover damages arising from a ban on fracking, given that fracking is the primary method available to “access” (i.e., extract) shale gas.

The availability of coverage for subsurface mineral interests will also depend on the type of mineral interest at issue. Leases for specific subsurface depth intervals or regional/geological formations are common. If the rock layer at a certain depth or within a certain formation is comprised of shale (which has notoriously low or poor permeability), then hydraulic fracturing may be the only way to access the gas locked within the rock.⁴ In that instance, a fracking ban, as a practical matter, could result in a complete denial of access to certain kinds of mineral property, insofar as no other means of extraction will permit access to the shale-locked gas.

Such a denial of access is distinguishable from the 9/11 case law relied upon in the prior article. Civil authority orders issued following the 9/11 attacks inhibited, but did not totally prohibit,

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access to many of the properties that became the subject of claims for civil authority coverage. For example, despite the federal government's "no fly" order, courts concluded that patrons of businesses adversely affected by the lack of air travel could still reach those businesses by other means (e.g., car, bus, train).⁵ With fracking bans, however, there may be no other way to access the mineral property at a specific interval or within a specific formation.⁶

Fracking Bans May Arise from Actual — as Opposed to Threatened — Property Damage

The prior article also assumes that recently enacted fracking bans are not sufficiently connected to actual property damage to trigger coverage under typical civil authority coverage provisions. In doing so, it focuses on the legislative petitions for the recent bans in Denton, Texas, and San Benito County, California, which cited various possible risks — as opposed to actual damage — to health and property in support of the measures. The legislative petitions, however, were not part of the actual ballot questions posed to the electorate, so the reasons that the bans were enacted are more complex than what is contained in the petitions. For example, in Denton, the initiative was pushed by the homeowners who claimed that local fracking caused various types of property damage⁷, and the initiative was preceded by a controversial gas well blowout in April 2013.⁸ Thus, evidence about the context in which these bans are enacted will prove important to insurance coverage disputes.⁹

There May be Coverage if the Damage or Ban was Caused by a "Peril Insured Against"

In discussing whether there is actual or threatened property damage, the prior article mentions in passing the question of whether the damage or ban results from "covered property damage." That question may, in fact, be a stumbling block for many insureds, since most civil authority coverage requires that property damage or the ban itself result from a "peril insured against."

Such perils are typically fire, explosion or smoke, and sometimes, certain types of water damage. Some types of civil authority clauses require that one of the enumerated perils damage or destroy property adjacent to the insured property in order for there to be coverage. Others simply require that an enumerated peril cause the government's prohibition of access to "real or personal property," more generally. Either way, the impetus for the damage is a primary consideration.

Although there may be circumstances where fracking bans arise directly from a specific blowout or fire, none yet have directly followed such an incident. However, each case (and each cause) will have to be evaluated based on the actual facts presented. Accordingly, this requirement of civil authority coverage will have to be addressed on the merits of the actual basis for a possible fracking ban.¹⁰

Coverage is Not a Lost Bet

Thus, while the prior article identifies some areas where insureds will need to establish the factual basis to obtain civil authority coverage for fracking bans, it is important to understand the nuances and bases that may — or may not — justify such claims. The nature of the relevant property interest and the underlying facts may indeed provide coverage for damages arising from certain types of fracking bans.

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¹ James Holbrook, III and Shannon M. O'Malley, Fracking Bans Don't Trigger Civil Authority Coverage, Law360 (Jan. 7, 2014), available at http://www.law360.com/insurance/articles/608811?nl_pk=441907cb-272c-481a-92f2-526e15b21d6f&utm_source=newsletter&utm_medium=email&utm_campaign=insurance.

² Some civil authority coverage will require prohibition of access to the "insured property" (which is unlikely to include the mineral property), while others only require prohibition of access to "real or personal property" (which may include mineral property).

³ See, e.g., *Datatab, Inc. v. St. Paul Fire & Marine Ins. Co.*, 347 F. Supp. 36, 38 (S.D.N.Y. 1972) (meaning of "access" "ambiguous," given that insured's ability to physically touch its computers was of little use to it if it could not actually utilize the computers on a normal basis).

⁴ U.S. Dep't. of Energy, *Modern Shale Gas Development in the United States: A Primer* (2009), available at http://energy.gov/sites/prod/files/2013/03/f0/ShaleGasPrimer_Online_4-2009.pdf.

⁵ See, e.g., *730 Bienville Partners Ltd. v. Assurance Co. of America*, No. Civ. A. 02-106 (E.D. La. Sept. 30, 2002).

⁶ In the context of ingress/egress clauses, some courts have held that denial of access means only "reasonable access" to property, such that extraordinary efforts to reach property would not prevent coverage. See *Fountain Powerboat Indus., Inc. v. Reliance Ins. Co.*, 119 F. Supp. 2d 552, 557 n.4 (E.D.N.C. 2000) (business' extraordinary effort to pick up employees and drive them to work over closed and flooded roads did not change court's opinion that the insured facility was not "access[ible]" under the possible). The same reasoning could be used in the context of fracking to rebut arguments that fracking bans merely make it more expensive – as opposed to impossible – to access gas.

⁷ See, e.g., Julie Dermansky, *Residents Deliver Petition to Ban Fracking to City Hall in Denton, Texas*, DESMOGBLOG.com (May 7, 2014, 5:55), <http://www.desmogblog.com/2014/05/07/residents-deliver-petition-ban-fracking-city-hall-denton-texas> (describing class action comprised of Denton residents); Jim Malewitz, *Fracking a "Nuisance," Denton Tells Court*, Texas Tribune (Dec. 1, 2014), <https://www.texastribune.org/2014/12/01/defending-ban-denton-calls-fracking-nuisance/>.

⁸ See, e.g., Peggy Heinkel-Wolfe, *Few Answers in April Gas Well Blowout*, Denton Record-Chronicle (July 27, 2013, 11:40 PM), available at <http://www.dentonrc.com/local-news/local-news-headlines/20130727-few-answers-in-april-gas-well-blowout.ece>.

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⁹ See, e.g., *Assurance Co. of Am. v. BBB Serv. Co.*, 593 S.E.2d 7, 8 (Ga. App. 2003) (affirming judgment of trial court in civil authority coverage dispute, where trial court considered county officials' testimony about the basis for their recommendation that the county issue a hurricane evacuation order).

¹⁰ See generally Walter Andrews, Michael Levine & Jennifer White, *Insurance Coverage Issues in Hydraulic Fracturing*, 2014 *Emerging Issues* 7295 (Dec. 2014), available at <http://www.lexis.com/research/xlink?interface=1&searchtype=Lexsee&search=2014+Emerging+Issues+7295>.