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Fracking Bans Don't Trigger Civil Authority Coverage

Law360, New York (January 07, 2015, 11:02 AM ET) -- On Nov. 4, 2014, voters in Denton, Texas, which is home to more than 270 natural gas wells, approved a ballot initiative banning all hydraulic fracturing within the city's limits.[1] The Denton ban, which took effect on Dec. 2, 2014, made Denton the first major city in Texas to permanently prohibit fracking.[2]

Just hours after the measure was passed, two lawsuits were filed challenging the constitutionality of the Denton ban and its alleged impairment of mineral rights and royalty interests.[3] Additional challenges to the controversial ordinance are expected, with threats of more lawsuits and legislative challenges coming from a variety of sources.[4]

While litigants and legal commentators continue to debate the constitutionality of the Denton ban,[5] one commentator recently tackled the issues presented by the local fracking ban from a more novel perspective. A recently published Law360 article raised the possibility that companies with interests affected by the Denton ban — and similar fracking bans recently approved in Ohio and California — may find relief through the civil authority coverage provided under some commercial property insurance policies,[6] which, in very general terms, insures against the loss of business income sustained by an insured when access to its property is prohibited by order of civil or military authority. While the article raised a novel theory of recovery, in reality, the civil authority provisions in property policies will not provide coverage for losses associated with these types of bans.



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Property Insurance Policies Typically Require an Insured to Satisfy Three General Conditions to Trigger Civil Authority Coverage

Noting that every insurance policy is unique, the article only vaguely addresses the intricacies of civil authority coverage and, in the end, advises insureds to carefully consider policy terms and conditions before making a claim for any losses sustained as the result of a local fracking ban. But, while it is true that many insurance policies contain unique conditions, most contain similar threshold requirements for civil authority coverage — requirements which are not likely triggered by local fracking initiatives. For example, the Fifth Circuit in *Dickie Brennan & Co. v. Lexington Ins. Co.*,[7] considered the following provision:

We will pay for the actual loss of Business Income you sustain and necessary Extra Expense caused by action of civil authority that prohibits access to the described premises due to direct physical loss of or damage to property, other than at the described premises, caused by or resulting from any Covered Cause of Loss. This coverage will apply for a period of up to two consecutive weeks from the date of that action.[8]

This provision, and most other civil authority provisions, require three general conditions to trigger coverage: (1) the civil authority's order must result in the complete denial of access to the insured's property; (2) the order must be the result of actual insured property damage, rather than the threat of property damage; and (3) the order must be mandatory, rather than permissive. Based on the courts' analyses of these relatively common requirements, two of the three widely accepted triggering conditions are likely to be missing from any claim for civil authority coverage arising from a local fracking ban.

Local Fracking Bans Do Not Result in a Complete Denial of Access to the Insured's Property

First, local fracking bans, as enacted in Denton and elsewhere, do not completely deny an insured access to its property or mineral property rights. The bans simply make it more difficult for the insured to access and extract minerals and gases located in the subsurface shale.

Courts generally find that mere difficulty of access is not sufficient to trigger civil authority coverage. For

example, in *Commstop v. Travelers Indem. Co. Connecticut*,^[9] the court determined there was no coverage under the civil authority provision where access to the insured's premises was made more difficult by city construction, but was not completely denied. The court concluded the insured may not merely "argue access was 'diminished' or 'limited.'" Rather, [the insured] has the burden to prove access to the premises was completely blocked ..."^[10]

In reaching its conclusion, the *Commstop* court relied on a number of unpublished federal opinions discussing the civil authority provision, including cases relating to claims arising from the 9/11 terrorist attacks in New York. For example, some insureds, such as hotels, airlines and airport parking garages, sought coverage for loss of income as a result of the Federal Aviation Administration's ground stop order. The courts addressing those claims consistently held that access was merely limited, rather than completely prevented, by the FAA ground stop order and affirmed the insurers' denial of coverage.^[11] Absent highly unique policy language, claims for civil authority coverage arising from local fracking bans are likely to meet the same fate.

The Mere Threat of Covered Property Damage is Generally Not Sufficient to Trigger Civil Authority Coverage

As a second hurdle, civil authority coverage generally extends only to orders issued by the civil authority as a result of covered property damage. The mere threat of property damage is generally insufficient to trigger coverage.

While courts have differed over how close (i.e., the proximity) the damage to the insured property must be, courts generally find that the mere threat of property damage does not suffice to trigger coverage. For example, in *South Texas Medical Clinics PA v. CNA Financial Corp.*,^[12] the court addressed whether an evacuation order in Wharton County, Texas, related to Hurricane Rita was sufficient to trigger the civil authority coverage. In September 2005, Hurricane Rita entered the Gulf of Mexico, causing property damage in the Florida Keys, but it did not land near Wharton County. Because the evacuation order was not "due to" direct physical damage, the insurer denied coverage for the civil authority claim.

The court agreed with the insurer's position, holding the evacuation order was issued based on the anticipated threat of damage, rather than actual damage. In so holding, the court: (1) determined the phrase "due to" requires a direct causal link between actual physical damage and the civil authority order and (2) stated that "generally, civil authority coverage is intended to apply to situations where access to an insured's property is prevented or prohibited by an order of civil authority issued as a direct result of physical damage to other premises in the proximity of the insured's property."^[13]

Local fracking bans, much like the evacuation order at issue in *South Texas Medical Clinics*, are typically enacted to protect against the threat of potential loss or damage to property (e.g., earthquakes, environmental contamination and destruction of roadways) — not to address actual physical loss or damage that has already occurred.^[14] For example, the Denton ban was implemented, in part, to prevent the threat that, "during hydraulic fracturing, chemicals and waste fluid pumped into such wells may be introduced into and could contaminate drinking water aquifers."^[15] Similarly, the San Benito County measure was enacted, in part, to alleviate "[t]he risk of increased seismic activity" safety associated with fracking operations in the county and the related threat such seismic activity poses to the public health and safety.^[16]

Moreover, even if the mere threat of potential property damage was sufficient to implicate the potential application of a civil authority provision — which it is not — an insured's claim for losses resulting from a local fracking ban may lack sufficient proximity to such potential property damage and, therefore, the requisite "causal link" between the civil authority's action and the insured damage cannot be met.^[17]

Civil Authority Coverage is Typically Restricted to a Specified (and Limited) Time Frame

Finally, most modern civil authority provisions have specifically limited time frames for this coverage. The sample civil authority provision quoted above, for example, limits coverage to two weeks. Therefore, an insured's claim for lost income resulting from a local fracking ban, if viable, would likely be restricted to a set and finite time frame, providing the insured only limited relief.

Absent Unique Policy Language and Exceptional Facts, an Insured is Not Likely to Succeed on a Claim for Civil Authority Coverage Arising from a Local Fracking Ban

Does the civil authority coverage provided under some commercial property insurance policies provide possible relief for a company facing a loss of income as the result of a local fracking ban? The answer ultimately depends on the specific terms and conditions of the policy at issue. But, despite wide-ranging variations in policy language, civil authority provisions almost universally require that three general conditions be satisfied to trigger coverage. Two of these common requirements — that the civil authority's action stem from actual property damage insured by the policy and completely deprive the insured of access to its own property — are

likely to pose significant obstacles for an insured seeking civil authority coverage for fracking-ban-related losses. Accordingly, absent highly unique policy language and/or exceptional facts, an insured is not likely to recover on such a claim.

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[1] Jess Davis, Texas Agency, Energy Lobby Challenge Denton Fracking Ban, Law360 (Nov. 5, 2014) available at <http://www.law360.com/articles/593704/texas-agency-energy-lobby-challenge-denton-fracking-ban> (noting that “Denton residents made history in 2014, becoming the first city in Texas to ban hydraulic fracking”).

[2] Nicholas Sakelaris, 2014 Starts with Fracking Near Denton Homes, Ends with State's First Ban, *Lawsuits, Houston Business Journal* (Jan. 2, 2015), available at <http://www.bizjournals.com/houston/news/2015/01/02/2014-starts-with-fracking-near-denton-homes-ends.html>.

[3] See *supra* at note 1.

[4] See, e.g., Jim Malewitz, First Lawsuits Filed Over Denton's New Fracking Ban, *The Texas Tribune* (Nov. 5, 2014), available at <http://www.texastribune.org/2014/11/05/denton-fracking-ban-sees-first-lawsuit/> (noting that “several state lawmakers have ... promised to fight the ban in the statehouse”).

[5] Paul DeBenedetto, Texas Cases To Watch In 2015, Law360 (Jan. 2, 2014), available at http://www.law360.com/texas/articles/600918?nl_pk=4a9103a1-a975-4a3a-9320-a4f97606cc46&utm_source=newsletter&utm_medium=email&utm_campaign=texas.

[6] Micah Skidmore, Do Fracking Bans Trigger Civil Authority Coverage?, Law360 (Dec. 9, 2014), available at <http://www.law360.com/articles/602816/do-fracking-bans-trigger-civil-authority-coverage>.

[7] 636 F.3d 683, 685 (5th Cir. 2011).

[8] *Id.* at 685.

[9] Civ. A. No. 11-1257 (W.D. La. May 17, 2012).

[10] *Id.* at *10.

[11] See, e.g., 730 Bienville Partners Ltd. v. Assurance Co. of America, No. Civ. A. 02–106 (E.D. La. Sept. 30, 2002) (addressing a claim by the owner and operator of the St. Louis and St. Ann hotels in New Orleans' French Quarter). In 730 Bienville Partners, the insured argued the FAA's closure of the nation's airports after 9/11 and the subsequent cancellation of flights kept many intended guests from getting to its hotels, and, therefore, the civil authority provision covered its lost business income and necessary expenses. See *id.* The court determined that the FAA's closure of the airports and cancellation of flights may have prevented many guests from getting to New Orleans and ultimately to plaintiff's hotels, but did not actually prohibit access to the hotels). See *id.*; see also *Southern Hospitality Inc. v. Zurich American Ins. Co.*, 393 F.3d 1137, 1141 (10th Cir. 2004) (holding plain and ordinary meaning of the phrase “prohibits access” means to “formally forbid or prevent), citing *54th St. Ltd. Partners LP v. Fid. & Guar. Ins. Co.*, 306 A.D.2d 67, 763 N.Y.S.2d 243, 244 (N.Y. App. Div. 2003) (no coverage where “vehicular and pedestrian traffic in the area was diverted, [but] access to the restaurant was not denied; the restaurant was accessible to the public, plaintiff's employees and its vendors”); *St. Paul Mercury Ins. Co. v. Magnolia Lady Inc.*, No. Civ. A. 297-CV-153-BB (N.D. Miss. Nov. 4, 1999) (no coverage when state authorities hampered access to claimant's casino-hotel by closing damaged bridge, because “casino-hotel was accessible during the period of time the bridge was under repair”); *Syufy Enters. v. Home Ins. Co. of Ind.*, No. 94–0756 FMS (N.D. Cal. Mar. 21, 1995) (no coverage where theater access was never specifically foreclosed by civil authority order imposing dawn-to-dusk curfews in response to rioting following Rodney King verdict).

[12] Civ. A. No. H-06-4041 (S.D. Tex. Feb. 15, 2008).

[13] *Id.* at *9 (emphasis in original).

[14] By contrast, if a local fracking ban were intended to address the actual physical loss or damage already caused by an insured's fracking activities, a claim for civil authority coverage under such facts would arguably

be subject to fatal fortuity arguments.

[15] City of Denton Fracking Ban Initiative (November 2014), available at http://ballotpedia.org/City_of_Denton_Fracking_Ban_Initiative_%28November_2014%29#cite_note-Texas-2 (emphasis added).

[16] San Benito County Fracking Ban Initiative, Measure J (November 2014), available at [http://ballotpedia.org/San_Benito_County_Fracking_Ban_Initiative,_Measure_J_\(November_2014\)#Text_of_measure](http://ballotpedia.org/San_Benito_County_Fracking_Ban_Initiative,_Measure_J_(November_2014)#Text_of_measure) (emphasis added).

[17] See, e.g., *South Texas Medical Clinics at *9* (noting that "civil authority coverage is intended to apply ... where access to an insured's property is prevented or prohibited by an order of civil authority issued as a direct result of physical damage to other premises in the proximity of the insured's property) (emphasis in original).

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