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THE TEXAS SUPREME COURT HOLDS HYDRAULIC FRACTURING TRESPASS CLAIM IS PRECLUDED BY THE RULE OF CAPTURE

Mark E. Vandermeulen

HYDRAULIC fracturing (a.k.a. “fracing”) is a frequently-used technique in the oil and gas industry worldwide for the harvesting of natural gas trapped inside impermeable rock formations several thousand feet below the surface of the Earth and, therefore, unavailable through simple wellbore drilling techniques.¹ Fracing is a process whereby water or a special fluid is mixed with proppants, like grains of sand or ceramic beads, and then “pumped at high pressure and rate into the reservoir interval (such as a rock formation containing natural gas) to be treated, causing a fracture to open” along the natural fault lines of the geometric formation.² These fractures, both vertical and horizontal, created by the high-pressure fluid injections are held open by the proppants, because they would otherwise reseal under the immense pressure existing at that depth.³ The proppants allow the trapped natural gas to flow freely to the wellbore where it can be pumped to the surface for harvest.⁴ The effect or length of the procedure is measured in three ways: hydraulic length (distance the fluid travels), propped length (distance the proppant travels), and effective length (area in which natural gas production is actually improved).⁵ These lengths decrease in distance from the well respectively, making the effective length the least expansive.⁶ Fracing, however, is not an exact science. Though the vertical fractures are confined “by barriers . . . or other lithological changes above and below the reservoirs,” the horizontal fractures created can expand beyond the estimated (and often intended) scope of the procedure.⁷ This can become a problem when nearby parcels of land overlie the same rock formation and reservoir as the well performing the fracing procedure,

1. See *Coastal Oil & Gas Corp. v. Garza Energy Trust*, 268 S.W. 3d 1, 6-7 (Tex. 2008).

2. Environmental Protection Agency, Hydraulic Fracturing, http://www.epa.gov/safe-water/vic/wells_hydrofrac.html (last visited Mar. 20, 2009).

3. *Coastal*, 268 S.W. 3d at 6-7.

4. *Id.* at 7.

5. *Id.*

6. *Id.*

7. *Id.*

potentially resulting in horizontal fractures that protrude into the neighboring parcel.⁸ The issue of whether such intrusions constitute a trespass was recently addressed by the Texas Supreme Court in *Coastal Oil & Gas Corp. v. Garza Energy Trust*.⁹ Although declining to rule on the broad issue of whether such intrusions constitute a trespass in general, the court held that the rule of capture precludes trespass claims that assert drainage of the natural gas as the only injury.¹⁰ Superficially, this limited holding appears to be a legally unsound and overly pragmatic solution to a problem deserving of a more all-inclusive resolution, but deeper inspection reveals an unarticulated forethought by the court, especially in its consideration of the impact on the industry at large.

Coastal Oil and Gas Corporation (Coastal) had been the lessee of minerals from a group of South Texas landowners' (Salinas) tract of land (Share 13) for many years.¹¹ Coastal also owned the mineral rights for a parcel of property (Share 12), which borders Share 13.¹² Both parcels overlie the Vicksburg T formation, a natural gas reservoir between 11,688 and 12,610 feet below the surface of the Earth.¹³ The Vicksburg T is a "tight" sandstone formation . . . from which natural gas cannot be commercially produced without hydraulic fracturing stimulation."¹⁴ To harvest gas from the reservoir, Coastal placed a well (Coastal Fee No. 1) on Share 12 roughly 660 feet away from the border of Share 13 and performed a fracing procedure in order to harvest the gas.¹⁵ The hydraulic length of the procedure was designed to extend over 1,000 feet from the well, and both parties conceded that the hydraulic and proppant lengths exceeded the property lease line.¹⁶ Each party's expert witnesses, however, disagreed whether the effective length (the area in which the natural gas production is stimulated) had extended beyond the lease line.¹⁷ Several months after filing suit, Salinas amended the pleadings to include a trespass action for the fracing of Coastal Fee No. 1 into the reservoir under Share 13, resulting in the substantial drainage of gas from Share 13.¹⁸

At trial, Salinas' expert asserted that twenty-five to thirty-five percent of the gas produced by Coastal Fee No. 1 was being drained from Share 13 as a result of the fracing, claiming \$388,000 to \$544,000 in damages.¹⁹ The jury found that there had been a trespass causing substantial drainage and awarded Salinas \$1 million in damages for lost royalties.²⁰ The

8. *See id.*

9. *Id.* at 11-12.

10. *Id.* at 12-13.

11. *Id.* at 5.

12. *Id.*

13. *Id.*

14. *Id.* at 6.

15. *Id.* at 7.

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.* at 8.

20. *Id.*

trial court, however, reduced those damages to \$543,776, which was nearly the maximum of Salinas' expert witness findings.²¹ The Texas Court of Appeals in Corpus Christi affirmed the jury's findings and reduced the damages.²² Thereafter, Coastal filed a petition for review, which was granted by the Texas Supreme Court.²³

Rather than resolve the issue as to whether trespass by fracing, or "Tres-Frac," is an actionable claim, the Texas Supreme Court instead reversed the appellate and trial courts by holding that an "actionable trespass requires injury, and Salinas's only claim of injury . . . is precluded by the rule of capture."²⁴ In so holding, the court recognized the settled law that the rule of capture gives title to a mineral rights owner for *all* the oil and gas lawfully produced from a well bottomed on the owner's property, "*even if the oil and gas flowed to the well from beneath another owner's tract.*"²⁵ Thus, despite whether the fracing had extended beyond Salinas's property lines and into Share 13, causing natural gas to flow from Share 13 to Coastal Fee No. 1 on Share 12, there could be no injury based solely on the resulting drainage and, therefore, no trespass.²⁶

At first, the majority tentatively recognized that trespass may not be a reasonable claim because the common law maxim that ownership of land reaches to the heavens above and to the center of the earth below "has no place in the modern world."²⁷ Yet shortly after this proclamation, the court expressly declined to determine the broader issue of whether hydraulic fracturing could constitute a trespass.²⁸ Rather, the majority focused on four specific reasons for keeping the rule of capture from preventing trespass claims that assert drainage as the only injury.²⁹ First, the court stated that full recourse for drainage is already available under the law: the owner may himself drill a well on his property to offset the drainage.³⁰ If the owner has already leased the mineral rights, he may sue the lessee for breach of the implied covenant to protect against drainage.³¹ If drainage is not offset by these measures, the owner may offer to pool with the draining party, and, if rejected, may apply to the Railroad Commission (the governing body for drilling and oil production) to force the draining party to pool.³² Second, the court held that allowing for such injuries would usurp the "authority of the Railroad Commission to regu-

21. *Id.*

22. *Mission Res., Inc. v. Garza Energy Trust*, 166 S.W. 3d 301, 331 (Tex. App.—Corpus Christi 2005, pet. granted), *overruled by* *Coastal Oil & Gas Corp. v. Garza Energy Trust*, 268 S.W. 3d 1 (Tex. 2008).

23. *See Coastal Oil & Gas Corp.*, 268 S.W. 3d at 5.

24. *Id.* at 12-13.

25. *Id.* at 13 (emphasis added).

26. *Id.*

27. *Id.* at 11 (quoting *United States v. Causby*, 328 U.S. 256, 260-61 (1946)).

28. *Id.* at 12.

29. *Id.* at 14.

30. *Id.*

31. *Id.*

32. *Id.*

late oil and gas production" secured by the rule of capture.³³ The court justified this by determining that drainage could be equated to a taking in the absence of the rule of capture, thus seriously impairing the Railroad Commission's ability to regulate oil and gas production and making it vulnerable to the takings clause of the constitution.³⁴ Third, the court reasoned that the ability to accurately prove the value of drainage lost would be too difficult, and courts are ill-equipped to undertake such analysis.³⁵ Fourth and finally, the Court looked to the abundant amicus briefs received from the oil and gas industry and the community at large in reference to this case.³⁶ Upon review of these submissions, the court recognized that not only did nearly every participant in the industry strongly oppose liability for fracing, but also that in the over sixty years of fracing by the oil and gas industry, "neither the Legislature nor the [Railroad] Commission ha[d] ever seen fit to regulate it, though every other aspect of production has been thoroughly regulated."³⁷ Notably, however, the court expressly limited its holding by ruling that other misconduct, presumably relating to fracing, may not be shielded by the rule of capture.³⁸

Although concurring in the opinion, Justice Willett contended that hydraulic fracturing over property boundaries is no trespass at all, regardless of whether the injuries claimed drainage.³⁹ In support of this argument, Justice Willett cited to *Railroad Commission of Texas v. Manziel*, which held that water injected into reservoirs and crossing property lines to push residual oil towards wells did not constitute trespass.⁴⁰ Specifically, Justice Willett found highly persuasive the opinion stated in *Manziel* that "[t]he orthodox rules and principles applied by the courts as regards surface invasions of land may not be appropriately applied to subsurface invasions as [sic] arise out of the secondary recovery of natural resources."⁴¹ Moreover, after recognizing the "dire alarms sounded in the amicus curiae briefs," Justice Willett asserted that allowing Tres-Frac liability would significantly impede, if not cripple, the oil and gas industry by discouraging the use of an effective and essential procedure at a time when energy needs and costs are at an all-time high in Texas and around the world.⁴² More specifically, such liability would negatively impact the production of natural gas from the Barnett Shale, which requires fracing procedures for effective extraction.⁴³ Lastly, Justice Willett pointed to alternative remedies available for trespass injuries not based on drainage

33. *Id.* at 14-15.

34. *Id.* at 15.

35. *Id.*

36. *Id.* at 16.

37. *Id.* at 17.

38. *Id.*

39. *Id.* at 29 (Willett, J., concurring).

40. *Id.* at 36 (Willett, J., concurring) (citing R.R. Comm'n of Tex. v. Manziel, 361 S.W.2d 560, 566-570 (Tex. 1962)).

41. *Id.* (Willett, J., concurring) (quoting R.R. Comm'n of Tex. v. Manziel, 361 S.W.2d 560, 568 (Tex. 1962)).

42. *Id.* at 31-33 (Willett, J., concurring).

43. *Id.* at 31-32 (Willett, J., concurring).

or precluded by the rule of capture, namely negligence.⁴⁴ His position is firmly rooted in the principle that non-drainage damages arising out of hydraulic fracturing should and would be adequately remedied under negligence theories, therefore relieving any need for trespass claims in the area of hydraulic fracturing.⁴⁵

The dissent, on the other hand, argued that the rule of capture should not preclude drainage damages until it is determined whether fracing is a trespass.⁴⁶ The key to the dissent's rationale was the premise that the rule of capture is operable *only* when the oil or gas has been extracted *legally*.⁴⁷ Therefore, if fracing across property lines, regardless of the injury, does in fact constitute a trespass, then the rule of capture *cannot be applied* due to the illegal nature of the procedure.⁴⁸ The dissent argued that such fracing is a trespass and is thus illegal by likening it to a deviated well (one that is drilled at an angle into a neighboring owner's property) because both provide a means for gas to flow into the neighboring well.⁴⁹ The dissent, therefore, claimed that the majority effectively changed the rule of capture by applying it to practices of illegal extraction.⁵⁰ The dissent warned that the majority's holding would reduce incentives for operators (drillers) to obtain mineral leases from small property owners because they could instead simply drain gas from those owners via fracing with impunity.⁵¹

The dissent's recognition of the legality requirement to the rule of capture as stated in *Halbouty v. Railroad Commission* seems to render the majority's four reasons for allowing the rule of capture to preclude a trespass claim in hydraulic fracturing moot and inapplicable.⁵² After all, if the majority intentionally holds open the possibility for trespass claims asserting injuries other than drainage, then there might be an implied assertion that hydraulic fracturing across property lines does constitute a trespass.⁵³ If so, the court may have put the cart before the horse by holding that the rule of capture negated the necessary injury element of trespass, barring the claim, because the proper procedure would apparently be to determine whether the extraction was legal in the first place. The question then becomes: which came first, the injury or the claim? The majority argues that the nature of the injury should determine the legality of the extraction, rather than the character of the extraction itself. Yet only once the legality of the extraction is determined should the court

44. *Id.* at 30 (Willett, J., concurring).

45. *Id.* (Willett, J., concurring).

46. *Id.* at 44 (Johnson, J., dissenting).

47. *Id.* at 43-44 (Johnson, J., dissenting).

48. *Id.* (Johnson, J., dissenting).

49. *Id.* at 44-45 (Johnson, J., dissenting).

50. *Id.* at 45 (Johnson, J., dissenting).

51. *Id.* (Johnson, J., dissenting).

52. *See id.* at 43 (Johnson, J., dissenting); *see also* *Halbouty v. R.R. Comm'n*, 357 S.W.2d 364, 375 (Tex. 1962) (harmonizing the rule of capture by holding that rule of capture grants ownership to all oil and gas legally recovered).

53. *See Coastal Oil & Gas Corp.*, 268 S.W. 3d at 12.

decide whether to apply the rule of capture, which is recognized as the appropriate procedure. The majority thus wrongfully denied Salinas' claims by precluding the drainage injuries based on the rule of capture and, rather, should have determined whether or not hydraulic fracturing across property lines constitutes a trespass.

In this case, however, the Texas Supreme Court is stuck between a rock and a hard place: either determine that fracing is *never* a trespass and face the potential destruction to individual property owners' mineral rights across the state (not to mention subjecting them to unrecoverable property damage resulting from non-negligent fracing), or hold that it is *always* a trespass, regardless of the injury, and possibly cripple the thriving and critical natural gas industry in Texas. Perhaps not surprisingly, the court took the more pragmatic approach by simply limiting its holding to drainage injuries, which of course has negative implications for individual property owners. *Coastal* does, however, leave the door open for owners injured by non-negligent fracing to potentially assert trespass claims not involving drainage. At the same time, the natural gas industry is saved from a windfall of lawsuits and debilitating jurisprudence for the time being. Although the court improperly applied the rule of capture before addressing the legality of the fracing procedure performed by Coastal, there are drops of prudence and necessity within the decision, which allude to perhaps the most practicable solution given the surrounding circumstances of the industry at large.