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Hydraulic Fracturing as a Subsurface Trespass: A new ruling in West Virginia provides protection for the landowner

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On April 10, 2013, U.S. District Judge John Preston Bailey of the Northern District of West Virginia handed down a ruling that may give oil and gas producers—especially those active in the Marcellus Shale—cause for concern. Judge Bailey, interpreting the law as he believed the West Virginia Supreme Court of Appeals would, denied an oil and gas producer’s motion for summary judgment, finding that “hydraulic fracturing under the land of a neighboring property without that party’s consent is not protected by the ‘rule of capture,’ but rather constitutes an actionable trespass.”¹

As hydraulic fracturing activities continue to rise, the number of lawsuits attacking the process has increased. Most of the lawsuits to date have focused on the potential health risks of hydraulic fracturing, mainly involving claims that fracturing fluid chemicals pollute water supplies. But the issue of hydraulic fracturing as a subsurface trespass is one of growing importance. Texas has a significant line of relevant precedent, including the seminal case of *Coastal Oil v. Garza*, 268 S.W.3d 1 (Tex. 2008). However, Texas has been alone. While other states have considered subsurface trespass claims arising from activities related to secondary recovery operations and wastewater injections, none has issued a decision addressing subsurface trespass as it relates to hydraulic fracturing. But, with Judge Bailey’s recent order, West Virginia has its first stake in the ground, and it is one that expressly rejects Texas law.

In *Stone*, Chesapeake Appalachia, LLC (“Chesapeake”) drilled a horizontal well on property neighboring the plaintiffs’ land. Chesapeake’s vertical wellbore was approximately 200 feet from the plaintiffs’, with the horizontal wellbore only tens of feet

¹ Order at 16, *Stone v. Chesapeake Appalachia, LLC*, No. 5:12-cv-00102-JPB at *16 (N.D.W.V. April 10, 2013).

from the property line.² Plaintiffs filed suit, alleging, among other things, that the defendants were illegally injecting hydraulic fracturing fluid into the formation underlying plaintiffs' property, which constituted a trespass, and converting plaintiffs' oil and gas.³ The defendants filed a motion for summary judgment, arguing that the rule of capture precluded plaintiffs' trespass cause of action: the plaintiffs had no right to or interest in any minerals that the defendants captured, and thus could not recover any damages for it.⁴ Defendants relied on West Virginia case law interpreting and applying the rule of capture, and the Texas Supreme Court case of *Garza* for the rule's application to hydraulic fracturing.⁵

In *Garza*, the plaintiffs leased the mineral rights in a tract of land to Coastal Oil & Gas Corp. ("Coastal"). Coastal also owned the mineral estate in an adjacent tract, and engaged in hydraulic fracturing on both tracts. The plaintiffs asserted, among other things, a claim of trespass against Coastal, alleging that Coastal's fracturing on the adjacent tract invaded the reservoir below the plaintiffs' tract, causing damage in the form of substantial drainage of gas from the plaintiffs' property to the adjacent tract.

In *Garza*, the Supreme Court of Texas never decided the "broader issue" of whether subsurface fracturing could give rise to a claim for trespass. Instead, the majority opinion stated that an actionable trespass requires an injury, and the plaintiffs' only claim of injury—that Coastal's fracturing operation made it possible for gas to flow from the plaintiffs' tract to the adjacent tract's wells—was precluded by the rule of capture. Based on the rule of capture, the plaintiffs only had the right to capture the gas beneath their tract, as opposed to having ownership of the gas itself; the gas they claimed to have lost simply did not belong to them. Thus, because plaintiffs incurred no actual damages, no actionable claim of trespass could be sustained, and the court did not have to rule on whether the entry of hydraulic fracturing fluid into another's land that causes injury constitutes a trespass.

In his order in *Stone*, Judge Bailey considers the *Garza* opinion in detail. He outlines the *Garza* court's four "justifications" for its decision:

1. The law already offers the property owner full recourse—he can drill to offset the drainage, sue the lessee for violation of the implied covenant to protect against drainage, offer to pool, or apply to the Texas Railroad Commission ("RRC") to force pooling.
2. Allowing recovery for the value of minerals drained by fracturing operations would usurp the authority placed in the RRC.
3. Determining the value of minerals drained by fracturing is very difficult, and is not the kind of issue the litigation process is equipped to handle. Trial judges and juries cannot take into account social policies, industry concerns, and the greater

² *Id.* at *2.

³ Complaint at 4, *Stone v. Chesapeake*.

⁴ Defendant's Memorandum in Support of Motion for Summary Judgment at 7, *Stone v. Chesapeake*.

⁵ *Id.* at 6-8.

good in deciding whether hydraulic fracturing should or should not be against the law.

4. No one in the oil and gas industry appears to want a change in the application of the rule of capture to hydraulic fracturing.⁶

Judge Bailey looks to Justice Johnson's *Garza* dissent in debunking these justifications. Judge Bailey focuses on the interests of the small, unsophisticated landowner. In addressing the first justification—that the law already provides full recourse to the landowner—Judge Bailey echoes Justice Johnson in pointing out “that not all property owners are sophisticated enough or have the resources to drill their own well.”⁷ Judge Bailey goes a step further, stating that “[t]he *Garza* opinion gives oil and gas operators a blank check to steal from the small landowner.”⁸ Specifically, Judge Bailey is concerned that, under Texas law, drilling companies may hydraulically fracture under a small landowner's property without even contacting the landowner, or force them to sign a lease.⁹ Judge Bailey could not believe that the West Virginia Supreme Court would permit such a result.¹⁰

Judge Bailey quickly dispenses the second *Garza* justification, noting that the Texas RRC apparently “has far more regulatory power than West Virginia's regulatory authority.”¹¹ He dismisses the fourth justification as well, stating that “[t]his Court sees no reason why the desires of the industry should overcome the property rights of small landowners.”¹²

Regarding the third justification—that judges and juries are not equipped to consider social policies, industry concerns and the greater good in determining whether fracturing should be against the law, and litigation is not the ideal process through which to determine the value of any converted minerals—Judge Bailey states that the relevant issue is not whether fracturing should be against the law, but whether it can be used on neighboring property, “thereby taking the neighbor's oil and gas without compensation.”¹³ And Judge Bailey again cites Justice Johnson's dissent in noting that “[d]ifficulty in proving matters is not a new problem to trial lawyers.”¹⁴ Thus, the difficulty of proving the value of drained minerals in court is not a reason to preclude trespassing as a cause of action.

Despite the different determinations in *Garza* and Judge Bailey's order, it is not difficult to justify the two. Judge Bailey is clearly concerned with the rights of the small

⁶ Order at 10-11, *Stone v. Chesapeake*.

⁷ *Id.* at 12.

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.* at 12-13.

¹¹ *Id.* at 14.

¹² *Id.* at 15.

¹³ *Id.* at 14.

¹⁴ *Id.* (quoting *Garza*, 268 S.W.3d at 45, n.3).

landowner - it certainly seems to be his greatest concern—but it's a concern to which the Texas Supreme Court wasn't oblivious. As mentioned above, Justice Johnson addressed this concern in his dissent. But where Judge Bailey's chief concern is the small landowner, the *Garza* holding has a strong and clear focus on the importance of oil and gas operations to Texas. It's directly addressed in the Court's "justifications," and Justice Willett opens his concurring opinion by referring to oil and gas as the "muscle" of Texas, noting that the "Texas common law should not give traction to an action rooted in abstraction."¹⁵ Indeed, even Justice Johnson's dissent offered a sort of "compromise" in deference to the importance of mineral production, proposing that, while the law should subject fracturing to an actionable trespass claim, it should be flexible in balancing the circumstances and interests involved.¹⁶ Specifically, exemplary damages could be precluded in certain cases.¹⁷

Additionally, the rights of the small West Virginia landowner may require more court-based protection than the rights of the small Texas landowner. Texas grants the RRC significant power and authority to regulate drilling operations, including the ability to force pooling, which can protect a small landowner.¹⁸ A landowner in West Virginia has no such recourse.¹⁹ And, as the *Stone* plaintiffs pointed out in briefing, the fact that they can sue the operator for a breach of the implied covenant to protect against drainage (which they did, in a separate count in the same lawsuit) is no reason to prevent plaintiffs from bringing a trespass claim.²⁰

Given the more developed case law in Texas addressing hydraulic fracturing as a subsurface trespass, it is no surprise that courts in other states, including West Virginia, look to Texas and *Garza* when addressing the issue. And given the difference in regulatory authorities in Texas and West Virginia, it is understandable that Judge Bailey felt it incumbent upon his court to, in his view, keep a "blank check to steal from the small landowner" out of the hands of drilling operators. But the importance of hydraulic fracturing in the Marcellus is only increasing, and it remains to be seen whether deference to the industry will ultimately prevail in West Virginia as it so far has in Texas.

¹⁵ *Garza*, 268 S.W.3d at 27.

¹⁶ *Id.* at 47.

¹⁷ *Id.*

¹⁸ See Tex. Nat. Resources Code Ann. § 102.011 (Vernon 1977) ("Mineral Interest Pooling Act").

¹⁹ Plaintiffs' Response in Opposition to Defendants' Motion for Summary Judgment at 12, *Stone v. Chesapeake*.

²⁰ *Id.*



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