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Drainage and the Rule of Capture in the Oil and Gas Industry

BY BY PETER B. LEWIS

Special to the Legal

In the 2007 movie “There Will Be Blood,” there is a scene featuring Eli Sunday, an evangelical minister who has fallen on hard times, and Daniel Plainview, an oil developer.

For those who are not familiar with the legal concept referred to as the rule of capture, I can think of no better (or entertaining) explanation.

Sunday, who is destitute, has come to offer Plainview the lease on “the Bandy tract,” a 1,000-acre undrilled parcel in the middle of the “Little Boston” oilfield. After teasing Sunday with the drilling possibilities, Plainview tells him:

Plainview: Those areas have been drilled.

Eli Sunday: What ... ?

Plainview: Those areas, they’ve been drilled.

Eli Sunday: No they haven’t.

Plainview: Yes; it’s, uh, it’s called



PETER B. LEWIS is a partner in the business and finance department at Obermayer Rebmann Maxwell & Hippel. He focuses his practice on energy law. He has experience representing oil and gas producers, as well as coal companies.

drainage, Eli. See, I own everything around it; so of course, I get what’s underneath it.

Eli Sunday: But there are no derricks there. This is the Bandy tract, do you understand?

Plainview: Do you understand, Eli, that’s more to the point, do *you* understand? I drink *your* water. I drink it up. *Every day*, I drink the blood of the lamb from Bandy’s tract. You can sit down again.

Sunday does not understand what has happened, and so to drive the point home they have the following exchange

Eli Sunday: If you would just—

Plainview: You lose.

Eli Sunday: Take this lease, Daniel—

Plainview: *DRAAAIIINNNNAGE!* Drainage, Eli, you *boy*. Drained dry, I’m so sorry. Here: if you have a milkshake ... and I have a milkshake ... and I have a straw; there it is, that’s the straw, see? Watch it. My straw reaches *across* the room ... and starts to drink your milkshake: I ... drink ... your... *milkshake!* [*slurps*] *I drink it up!*

The rule of capture holds that “The owner of a tract of land acquires title to the oil and gas which he produces from wells drilled thereon, though it may be proved that part of such oil or gas migrated from adjoining lands, Williams & Meyers Oil and Gas Law Section 204.4, quoting Hardwicke, “The Rule of Capture and Its Implications as Applied to Oil and Gas,” 13 Tex. L. Rev. 391, 393 (1935). The rule exists as a consequence of the characterization of oil and gas as fugacious. In *Westmoreland & Cambria Natural Gas Co. v. DeWitt*, 130 Pa.

235, 18 A. 724 (1889), the Pennsylvania Supreme Court stated that:

“Water and oil, and still more strongly gas, may be classified by themselves, if the analogy is not too fanciful, as minerals *ferae naturae*. In common with animals, and unlike other minerals, they have the power and the tendency to escape without the volition of the owner. Their ‘fugative and wandering existence within the limits of a particular tract was uncertain,’ ... They belong to the owner of the land, and are part of it, so long as they are on or in it, and are subject to his control; but when they escape, and go into other land, or come under another’s control, the title of the former owner is gone. Possession of the land, therefore, is not necessarily possession of the gas. If an adjoining, or even a distant, owner, drills his own land, and taps your gas, so that it comes into his well and under his control, it is no longer yours, but his,” Williams & Meyers Oil and Gas Law Section 204.4, quoting *Westmoreland & Cambria Natural Gas Co. v. DeWitt*, 130 Pa. 235, 18 A. 724 (1889).

Needless to say, the rule of capture is extremely important in the oil and gas industry. That being said, the scope of the rule was significantly reduced on April 2, when the Pennsylvania Superior Court handed down its decision in *Briggs v. Southwestern Energy Production*, 2018 PA Super 79, --- A. 3d--- (2018),

rejecting the argument that the rule of capture precludes a claim of subsurface trespass in conjunction with hydraulic fracturing.

Before we get to the case discussion, a very, very brief explanation of conventional drilling versus hydraulic fracturing is appropriate.

Conventional drilling is what laymen typically view as oil and gas production. A wellbore is drilled

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straight down into a reservoir of oil or gas, and the pressure of the reservoir forces the oil or gas out of the ground. Once the pressure abates, a pump jack is installed on the well to pump out the oil or gas from the reservoir.

Unconventionally drilled gas wells, or fracked wells, involve several more steps. First, a horizontal well bore is drilled into a shale formation. Once the wellbore is completed, hydraulic

fluid is injected at high pressure into the wellbore, fracturing the shale formation. As the pressure decreases, hydraulic proppants are injected to “prop” open the created fractures. The gas then flows from the fracture and out the wellbore.

Now back to the *Briggs* decision.

In *Briggs*, the plaintiffs were the owners of an unleased 11-acre tract lying adjacent to the Ines Gas Unit and the Folger Gas Unit, both operated by Southwestern. The units were for horizontal wells that employed hydraulic fracturing to extract gas from the Marcellus Shale. The plaintiffs (the Briggs) filed suit against Southwestern, asserting claims of trespass and conversion and demanding compensatory and punitive damages. Southwestern filed a motion for summary judgment on the grounds that the rule of capture precluded any claimed trespass. On April 8, 2017, the Court of Common Pleas of Susquehanna County granted Southwestern’s motion and the plaintiffs appealed.

On appeal, the Briggs presented two questions for the Superior Court to review:

- Does the rule of capture preclude any liability under the theories of trespass or conversion of natural gas, even if the natural gas originated under the appellants’ property and was extracted by hydraulic fracturing?
- Does the rule of capture apply to the extraction of natural gas

from under land owned by a third party through the process of hydraulic fracturing, so as to preclude any liability on the part of Southwestern under the theories trespass or conversion for natural gas extracted by Southwestern, even if said natural gas originated under the lands of appellants and was extracted from under appellants' land?

The Briggs relied primarily on the case of *Young v. Ethyl*, 521 F.2d 771 (8th Cir. 1975) to argue that the rule of capture is inapplicable in cases involving hydraulic fracturing.

Young involved a salt-water recycling operation where the defendants injected debrominated salt water into the ground, forcing subterranean brine toward the production wells. The landowner, Young, prevailed because the court found that Young had proven "that the brine solution under his land would not migrate to the defendants' production wells but for the force exerted by injection wells; in other words, that the brine is primarily nonfugacious." Given that the basis of the rule of capture is the fugacious nature of certain minerals, the rule of capture did not apply in this case.

Southwestern argued that it could not be held liable in trespass because it never physically entered, or drilled any gas wells on, the Briggs' property. Southwestern argued, further, that *Young* was not applicable because the

defendants' wells in *Young* employed a process different from hydraulic fracturing.

The court sided with the Briggs, concluding: hydraulic fracturing is distinguishable from conventional methods of oil and gas extraction. Traditionally, the rule of capture assumes that oil and gas originate in subsurface reservoirs or pools, and can migrate freely within the reservoir and across property lines, according to changes in pressure ... Unlike oil and gas originating in a common reservoir, natural gas, when trapped in a shale formation, is non-migratory in nature. Shale gas does not merely "escape" to adjoining land without the application of an external force.

Consequently: the rule of capture does not preclude liability for trespass due to hydraulic fracturing. Therefore, hydraulic fracturing may constitute an actionable trespass where subsurface fractures, fracturing fluid and proppant cross boundary lines and extend into the subsurface estate of an adjoining property for which the operator does not have a mineral lease, resulting in the extraction of natural gas from beneath the adjoining landowner's property.

In my opinion, the *Briggs* court stands for the following:

- First, the rule of capture cannot be used as an affirmative defense to a claim of trespass where hydraulic fracking is involved.
- Second, in order to succeed on a

claim of trespass, a plaintiff must satisfy the elements of trespass as set forth in the court's decision. In the context of fracking, this would mean proof that the defendant knew or should have known that any one of the subsurface fractures, fracking fluid or fracking proppants entered onto the plaintiff's land.

- Third, with regard to causation, the plaintiff must prove that the defendant actually extracted gas from the plaintiff's land.
- Fourth, with regard to damages, the plaintiff must prove the value of the gas extracted.

In short, while eliminating the rule of capture as an affirmative defense could pose problems for the industry going forward, the proof necessary to successfully prosecute a claim of trespass is not insignificant. If the *Briggs* decision is allowed to stand, oil and gas operators will need to consider buffer zones around their units and certainly be more cognizant of the geology of the targeted shale formations to avoid any possibility of subsurface trespass.

In other words, no more free milkshakes. •