Tomechko v. Garrett – Ohio's Seventh District Holds Adverse Possession of Shallow Gas Covers All Gas

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Tomechko is important because it adds to Ohio's jurisprudence related to whether a conveyance or reservation of "minerals" includes oil and gas. However, its greater significance upends the law of adverse possession, holding that adverse possession of shallow oil and gas will constitute adverse possession of all oil and gas on a parcel where the shallow production "modified the subterranean structure."

Tomechko involved a 60.24-acre tract in Beaver Township, Noble County, originally owned by Herbert Garrett and John Garrett as tenants in common.[2] Herbert died in 1965 and devised his interest to his wife, Mary. In 1977, Mary conveyed it to Coralee Garrett, the wife of John Garrett, but reserved "one-half interest all the minerals in and under" the property and other lands (hereinafter, the "1977 Reservation.").[3] Coralee and John conveyed it in 1979 to Lance Cramer and referenced the 1977 Reservation.[4] Lance conveyed it to James and Margaret Anderson, also referencing the 1977 Reservation.[5] The Andersons leased the property for oil and gas in 1989 to Trans Atlantic Energy Corp.; John and Coralee ratified it.[6] Two wells were drilled in 1991 and produced oil and gas from shallow formations.[7] Royalties were paid only to the Andersons—not to the heirs of Mary Garrett (Mary died in 1984).[8] In 2010, the Andersons conveyed their interest to the Tomechkos, who conveyed it to themselves as trustees.[9] In 2013 and 2014, the heirs of Mary Garrett signed oil and gas leases with Gulfport.[10] In 2014, Northwood Energy Corporation, which was apparently a successor lessee of the Anderson lease, advised the Tomechkos that their royalties would be reduced by 50% because of the 1977 Mary Garrett mineral reservation.[11] This prompted the Tomechkos to file suit on June 30, 2016.

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The amended complaint asserted, *inter alia*, that the 1977 reservation of "all minerals" did not actually include oil and gas, and ***that the shallow gas production adversely possessed all the oil and gas on the tract.[12]*** With regard to the question of whether "all minerals" in the 1977 deed included oil and gas, the trial court relied upon *Sheba v. Kautz* and held that, because oil and gas development was common by this point, "all minerals" included oil and gas.[13] As to adverse possession, the trial court held that, as to the shallow rights, adverse possession was established because the Tomechkos' actual production met the exclusivity requirements.[14] However, because the deep rights were not produced, exclusivity was not established, and adverse possession was not established as to the deep oil and gas on the property.[15]

On appeal, the Seventh District agreed with the trial court: the reservation of "all minerals" in the 1977 deed included oil and gas.[16] In short, oil and gas development was common by 1977 and because there was no language compelling otherwise, oil and gas was included.

As to adverse possession, however, the Seventh District disagreed. Acknowledging that neither party cited any cases addressing the "vertical limits of an adverse possessor's rights to minerals[,]" the Seventh District discussed *Diederick v. Ware*, 288 S.W.2d 643, (C.A. Ky. 1956). The Kentucky court held that two wells producing on a 56-acre parcel that met the requirements for adverse possession ***"modified the subterranean structure under the large tract of land and this constituted constructive possession of all of the minerals underlying the entire 56-acre estate."[17]*** The Kentucky court said this was because of the "fugacious nature of oil and gas and how it alters property and the strata upon withdrawal of oil and gas by drilling."[18]

Finding the facts before it similar enough, the Seventh District drew the same conclusion: ***"The Court finds that appellee possesses the deep rights in this case based upon the adverse possession of the shallow rights, the permeating nature of the drilling and production of oil and gas, and the lease with Trans Atlantic which provided for drilling to all strata."[19]***

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While claims of adverse possession of mineral estates are liberally asserted, successful claims are rare. Here, the Seventh District's ruling strains credulity. The Utica shale has low permeability, meaning hydrocarbons do not easily move through it. This is precisely why hydraulic fracturing is used—it creates a network of fractures in the shale to allow the hydrocarbons to flow.[20][21] The logical conclusion is that shallow production of gas in formations thousands of feet above the Utica will have no effect on hydrocarbons within the Utica—that it would not "modify the subterranean structure" of the Utica. Thus, even though this rationale may apply to more permeable formations closer to the shallow gas, it does not apply to the unconventional formations with the most value—the Utica and Marcellus. As with many things in oil and gas law, however, old concepts are difficult to shed (e.g., the rule of capture). The problem is that decisions seemingly based upon inapplicable concepts may have unintended consequences and will almost certainly result in greater uncertainty and litigation. We anticipate the Ohio Supreme Court may weigh in on this one.

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[1] GERALD J. TOMECHKO, TRUSTEE OF THE GERALD J. TOMECHKO TRUST ET AL., Plaintiffs-Appellants, v. THOMAS GARRETT ET AL., Defendants-Appellees, 7th Dist. Noble No. 20 NO 0473, 2021-Ohio-1377.

[2] *Tomechko*, ¶ 2.

[3] *Id.*, ¶¶ 3-4

[4] *Id.*, ¶ 5.

[5] *Id.*

[6] *Id.*, ¶ 7.

[7] *Id.*, ¶ 8.

[8] *Id.*

[9] *Id.*, ¶ 10.

[10] *Id.*, ¶ 11.

[11] *Id.*, ¶ 12.

[12] *Tomechko*, ¶ 14.

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[13] *Id.*, ¶ 18.

[14] *Id.*, ¶ 19.

[15] *Id.*, ¶ 20.

[16] The Seventh District also addressed, and rejected, Tomechko's claim/argument that 1977 Reservation's reference of "all minerals" did not include oil and gas because the Garrett heirs' failed to timely respond to their request for admission that "all minerals" did not include oil and gas. *Tomechko*, ¶ 22. The Garrett heirs did respond denying this request, albeit late, and the Seventh District determined that this, combined with the lack of prejudice to Tomechko, warranted rejection of the Tomechko's contention. *See Tomechko*, ¶¶ 23-27.

[17] *Tomechko*, ¶ 56 (internal citations omitted).

[18] *Id.*

[19] *Id.*, ¶ 57.

[20] "Because shales are low-permeability geologic plays, horizontal drilling and hydraulic fracturing are crucial to increasing production from those formations." § 20.01. INTRODUCTION., 2012 WL 8018503

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