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Is Fracking an Inflammatory Word?

Blake A. Watson

Hydraulic fracturing is a method of oil and gas extraction. It involves the pumping of a mixture of proppants, chemicals, and large amounts of water into wells to exert pressure and fracture rock formations, thereby allowing otherwise “trapped” gas and oil to flow more freely. See *Railroad Commission of Texas v. Citizens for a Safe Future and Clean Water*, 336 S.W.3d 619, 621 (Tex. 2011) (describing the “fracing” process). With the development of horizontal drilling and more effective lubricants, it is now possible to remove “unconventional” sources of oil and gas located in shale and other dense substrata. Positive effects include lower fuel costs and greater energy independence. Negative effects include air and water contamination, adverse impacts on water supplies and roads, noise concerns, and a possible connection to earthquakes.

According to Terrence Daintith, “[f]racing is really nothing more than today’s high-tech version of the nineteenth-century technique of ‘improving’ wells by dropping a container of nitroglycerin down them and standing well back.” Terrence Daintith, *FINDERS KEEPERS? HOW THE LAW OF CAPTURE SHAPED THE WORLD OIL INDUSTRY* 302 (2010). While the basic concept is well established, there is no question that fracturing is a controversial form of well stimulation. One aspect of this controversy relates to the use of the word “fracking” to describe hydraulic fracturing. The industry prefers the word “fracing,” and lawyers representing oil and gas interests have argued that “fracking” is a misleading and prejudicial term.

Although used by the historian Daintith and the Texas Supreme Court, the word “fracing” has been replaced by “fracking” in the popular lexicon. Many individuals in the oil and gas industry believe that anti-drilling advocates deliberately added the “k” in order to brand hydraulic fracturing as a “dirty” and “obscene” practice. According to Michael Kehs, vice president for Strategic Affairs at Chesapeake Energy, fracking is “a co-opted word and a co-opted spelling used to make it look as offensive as people can try to make it look.” Jonathan Fahey, *A Few Reasons Why the Energy Industry Hates the Word ‘Fracking,’* *Business Insider* (Jan. 27, 2012), available at www.businessinsider.com/a-few-reasons-why-the-energy-industry-hates-the-word-fracking-2012-1. Industry officials also suspect that their opponents focus on fracking, as opposed to horizontal drilling, because the “f-word” bears a strong resemblance to a well-known curse word. The “naughty connotation,” notes Chris Tucker of Energy in Depth, is “important for press releases and bumper stickers and everything else.” Jeff Brady, *Focus on Fracking Diverts Attention from Horizontal Drilling*, *National Public Radio* (Jan. 27, 2013), available at www.npr.org/2013/01/27/170015508/focus-on-fracking-diverts-attention-from-horizontal-drilling.

The word “fracking” first appeared in *The Associated Press Stylebook* in 2012. See Steve Vittorioso, *Five Updates to the 2012 Associated Press Stylebook*, *Inkhouse* (Jun. 8, 2012), available at <http://inkhouse.com/five-updates-to-the-2012-associated-press-stylebook>. The 2014 edition of *Merriam-Webster’s Collegiate Dictionary* includes the verb “frack” and the noun

“fracking,” defined as “the injection of fluid into shale beds at high pressure in order to free up petroleum resources (such as oil or natural gas).” According to National Public Radio, the editors at *Merriam-Webster* have indicated that the adjective “fracked” (as in “fracked” gas) may also be added to its dictionary. Marie Cusick, *No Matter How You Spell It, Fracking Stirs Controversy*, *National Public Radio* (May 28, 2014), available at www.npr.org/2014/05/28/316552595/no-matter-how-you-spell-it-fracking-stirs-controversy.

“It was a stupid, fracked-up decision, and we have paid for it.” Although this statement sounds like something an opponent of hydraulic fracturing might say, it is actually dialogue from the television show *Battlestar Galactica*, which frequently used “frak” (or “frack”) as a profanity. See [http://en.wikiquote.org/wiki/Battlestar_Galactica_\(2003\)](http://en.wikiquote.org/wiki/Battlestar_Galactica_(2003)). The use of the word as an expletive was also popularized by the computer game “Frak!” in the 1980s involving a caveman named Trogg, who would exclaim “Frak!” when encountering an obstacle or falling a substantial distance. See [http://en.wikipedia.org/wiki/Frak_\(expletive\)](http://en.wikipedia.org/wiki/Frak_(expletive)). The science fiction series and the computer game made negative use of the term “frak” many years before the development of horizontal hydraulic fracturing.

The play on words, not surprisingly, is popular in law review articles criticizing the use of hydraulic fracturing. See, e.g., Jason T. Gerken, Comment, *What the Frack Shale We Do? A Proposed Environmental Regulatory Scheme for Hydraulic Fracturing*, 41 *CAP. U.L. REV.* 81 (2013). Opponents of hydraulic fracturing employ the same tactic, chanting “no fracking way” or carrying signs that say “frack off.” In July 2012, on NBC’s *Late Night Show with Jimmy Fallon*, activist Sean Lennon sang a song entitled “Don’t Frack My Mother,” while Yoko Ono danced with a globe labeled “Mother Earth” and said “Don’t frack me! Don’t frack me!” The host also joined in and sang “And when they’re done fracking, they’ll frack something else. I got one thing to say: Go frack yourself.” See www.huffingtonpost.com/2012/07/17/yoko-ono-jimmy-fallon-sean-lennon-frack-mother_n_1680464.html.

In one episode of *The Simpsons* television show, Mr. Burns plans to drill beneath Springfield, but protestors rally and hold signs that say “Frack you Burns” and “Burns in Hell.” Marge opposes fracking because her faucet water catches fire, but Homer insists she has been “brainwashed by liberal TV shows who use fracking as an easy bad guy.” However, after drilling causes an earthquake, Homer concludes that “fracking is great, but the only place it should happen is in other people’s towns.” See http://en.wikipedia.org/wiki/Opposites_A-Frack (Nov. 2, 2014).

In spring 2014, the Colorado Title Setting Board removed the term “hydraulic fracturing” from ballot initiatives seeking to amend the state’s constitution. The initiatives sought voter approval to establish setback requirements for new oil and gas wells and to provide that such setbacks do not constitute a taking of property rights. Opponents argued that “hydraulic fracturing” is an “impermissible catch phrase” that is “politically charged and is likely to appeal to voter emotion without contribution to public understanding of the relationship between the initiative and hydraulic fracturing.” Motion for Rehearing, *In the Matter of the Title, Ballot Title and Submission Clause for 2013–2014 #90*, available at www.sos.state.co.us/pubs/elections/Initiatives/titleBoard/filings/2013-2014/90Rehearing.pdf. The Board agreed and deleted references to hydraulic fracturing in the initiatives.

In two decisions issued on June 30, 2014, the Colorado

Supreme Court upheld the action of the Title Board. Proponents of the initiatives argued that the exclusion of the “hydraulic fracturing” language rendered the titles incomplete and unclear. The Court held that the modified titles “are not misleading and fairly reflect the purpose of the Proposed Initiatives.” *In the Matter of the Title, Ballot Title and Submission Clause for 2013–2014 #85*, 328 P.3d 136, 144 (Colo. 2014); see also *In the Matter of the Title, Ballot Title and Submission Clause for 2013–2014 #90*, 328 P.3d 155, 165 (Colo. 2014). In August 2014, however, the initiatives were removed from the ballot. Pursuant to an agreement between Governor John Hickenlooper and U.S. Representative Jared Polis (D-CO), a task force was created that will make recommendations to the legislature on ways “to minimize land-use conflicts that can occur when siting oil and gas facilities near homes, schools, business and recreational facilities.” Mark Jaffe, *Hickenlooper Compromise Keeps Oil and Gas Measures Off Colorado Ballot*, DENV. POST (Aug. 4, 2014), available at www.denverpost.com/business/ci_26274685/hickenlooper-polis-float-colorado-oil-gas-local-control.

In at least two cases, defendants argued that the word “fracking” can confuse and influence jury deliberations. In *Shamblin v. Chesapeake Energy Corporation.*, No. 3:12-cv-00089 (M.D. Pa.), plaintiffs Todd and Dawn Shamblin asserted claims for loss of consortium and negligence in connection with injuries to Todd at a drilling site. Pursuant to Rules 402 and 403 of the Federal Rules of Evidence, the defendants filed a motion to preclude any discussion of fracking before the jury. After noting that the accident did not result from fracking, the defendants argued that “the value of using the word ‘fracking’ would be substantially outweighed by the danger of unfair prejudice, confusion of the issues, and misleading the jury.” The defendants contended that in light of “the plethora of news stories and the numerous, very public activities of environmental groups protesting fracking, the word ‘fracking’ will undoubtedly invoke polarizing emotions in the hearts of the jurors.” The district court did not address the merits of the motion, but instead denied the request as moot based upon plaintiffs’ representations at a pre-trial conference. 2014 WL 1796687 (M.D. Pa. May 6, 2014). The case eventually settled.

In a second case, Ruby Hiser of White County, Arkansas, sued XTO Energy Inc. (XTO) in state court for damages to her home allegedly caused by vibrations resulting from drilling activity. After XTO removed the action to federal court, a trial was held. The jury found XTO liable for negligence, nuisance, and trespass, and awarded \$100,000 in compensatory damages and \$200,000 in punitive damages. The litigants did not discuss hydraulic fracturing. Nevertheless, the jury sent three questions to the district court, including the following query: “Was the method known as ‘fracking’ used on the

subject wells?” The court informed the jury that it should render its decision based on its recollection of the evidence and the instructions presented.

XTO subsequently requested permission to contact the jurors to inquire whether “fracking” influenced their decision. See Brief in Support of Defendant’s Motion for Permission to Contact Jurors After Verdict, *Hiser v. XTO Energy Inc.*, No. 4-11-cv-99517 (E.D. Ark. Aug. 30, 2012) (“The word ‘fracking’ was not uttered one time during trial. If the jury considered news reports, internet rumors or documentaries about ‘fracking,’ further post trial briefs may be appropriate.”). One juror not only raised the question of whether fracking had occurred at the wellsite, but also explained the “fracking” process and discussed whether fracking causes earthquakes and vibrations. One of the other jurors believed this discussion played a “significant part” in the verdict. In support of its request for a new trial, XTO argued that hydraulic fracturing “has received much negative attention in the press and has been the subject of documentaries and countless ‘stop fracking’ websites.” Brief in Support of Defendant XTO’s Renewed Motion for Judgment as a Matter of Law, Motion for New Trial, and Alternative Motion for Remittitur, *Hiser v. XTO Energy Inc.*, No. 4-11-cv-99517 (E.D. Ark. Oct. 8, 2012).

The district court denied the request for a new trial. *Hiser v. XTO Energy Inc.*, 2013 WL 5467186 (E.D. Ark. Sept. 30, 2013), *aff’d*, 768 F.3d 773 (8th Cir. 2014). The Eighth Circuit on appeal held that the denial of a new trial was not an abuse of discretion because “XTO has not shown a reasonable possibility that the [fracking and earthquake] discussions prejudiced it or altered the verdict.” *Id.*, 768 F.3d at 778. The appellate court found that the district court’s instruction “eliminated any risk of prejudice” with regard to the fracking discussion. *Id.* at 777 (quoting *Yannacopoulos v. Gen. Dynamics Corp.*, 75 F.3d 1298, 1305 (8th Cir.1996) (holding that it is “certainly reasonable to believe, absent evidence to the contrary, that the jury adhered to the judge’s instructions”).

Hydraulic fracturing is a controversial practice, just as “fracking” is a controversial word. Proponents point to tremendous gains in oil and gas production and accompanying economic and energy benefits. The opposition, however, worries about long-term environmental degradation. Prudent planning and appropriate regulation are paramount. In the words of Kendra Shaw, a character from the *Battleship Galactica* franchise, “There are no do-overs, no second chances to make things right if you frak ‘em up the first time.” [http://en.wikiquote.org/wiki/Battlestar_Galactica_\(2003\)](http://en.wikiquote.org/wiki/Battlestar_Galactica_(2003)).

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