

THE UNITED STATES COURT OF APPEALS
THE FIFTH CIRCUIT

No. 94-40138

RUDOLPH BARTIE, ET AL.,

Plaintiffs-Appellants,

versus

WILLIAMS EXPLORATION CO. INC., ET AL.,

Defendants-Appellees,

Appeal from the United States District Court
for the Western District of Louisiana

(89-CV-1516)

(December 15, 1994)

Before JONES, DeMOSS, Circuit Judges, and TRIMBLE¹, District Judge.

PER CURIAM:*

The plaintiffs-appellants are owners of various royalty interests in certain mineral leases located in whole or in part in the North Creole Field, Cameron Parish, Louisiana. The appellants participate in production from the reservoir-wide unit created for the Clark Sand, Reservoir A, which was established by the Office of Conservation, Order No. 1026-B-3, effective August 31, 1983.

The North Creole Field produces from what is known as a retrograde condensate

¹ District Judge of the Western District of Louisiana, sitting by designation.

* Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

reservoir. Upon discovery, all hydrocarbons in the reservoir were in a gaseous state because of existing high pressure. As the pressure in the reservoir decreased, certain hydrocarbons in the reservoir would liquify as condensate. Any condensate that liquifies while still in the reservoir is unrecoverable and lost to production. In 1982, the operator, Williams Exploration Company ("WXC"), and the other working interest owners, decided to institute a gas injection program for pressure maintenance. In 1983 they amended their gas sales contract to provide for a source of injection gas and to permit an exchange of gas on a Btu basis. As operator, WXC commenced unitization proceedings to establish a reservoir-wide unit for the Clark Sand, Reservoir A. The appellees submit that this unitization order authorized the Pressure Maintenance Program by the injection of gas and the exchange of gas for that purpose.

This litigation involves a dispute over royalties. Appellants contend that they were paid royalties on the gas condensate from the field and on the mixture of natural gas liquids. Because the appellees failed to process the natural gas to separate the liquids, they were not paid the difference between the higher value of the natural gas liquids and the lower gas price.

Appellants contend that WXC procured lean gas from Louisiana Resources Company ("LRC"), a wholly owned subsidiary, for injection and exchanged, on a Btu basis, the rich North Creole gas, which contained a larger amount of valuable natural gas liquids. Under its amended gas sales contract with LRC, WXC picked up gas in the nearby pipeline, measured its Btu content, and then injected it into the reservoir. Produced gas was likewise measured for Btu content, and exchanged for the injected gas on a Btu basis. No royalties were paid on produced gas until an equal amount in Btu had been repaid to LRC. In addition, once royalties were due, the plaintiffs were presumably paid the price fixed in the gas sales contract for the unprocessed gas. The primary dispute between the parties centers on how "value" is measured.

The appellants also contend that appellees failed to prudently market the gas, that there were excessive deductions for transportation of the condensate, and that the royalties were incorrectly calculated as to the severance tax deductions.

The original petition in this case was filed in the Thirty- Eighth Judicial District Court for the State of Louisiana by ninety plaintiffs (Appellants herein) who are royalty owners. The petition sought mineral lease cancellation, as well as an accounting and payment of royalties, and damages, that the plaintiffs alleged were due under various mineral leases in the North Creole Field in Cameron Parish, Louisiana. The defendants- appellees are either current or previous owners of operating or working interests in the North Creole Field, or are affiliates of companies owning such an interest.

In July, 1989, the original defendants removed the case to the United States District Court for the Western District of Louisiana pursuant to 28 U.S.C. 1441(c). The plaintiffs are citizens of several states, including Louisiana, Texas, and California. The defendant corporations are citizens of Delaware, Texas, Louisiana, and California. There are some individual plaintiffs that are completely diverse to the defendants.

In 1993, the defendants moved to dismiss the case for lack of subject matter jurisdiction and failure to state a claim. In their motion, the defendants argued that the plaintiffs' claim that the Btu exchange was improper constituted a collateral attack on the order issued by the Louisiana Commissioner of Conservation unitizing the North Creole Field. In any action that places a Commissioner's order at issue, the Commissioner is an indispensable party and the suit must be filed in the Nineteenth Judicial District Court in Baton Rouge.¹ The district court concluded that the plaintiffs' claims did place the Commissioner's order in issue and accordingly dismissed the action, holding that it lacked subject matter jurisdiction.

Appellants, plaintiffs below, appeal from the district court's ruling dismissing their claims, arguing that: (1) removal was improper under 28 U.S.C. 1441(c) because diversity was incomplete and there were no separate and independent removable claims; (2) dismissal was improper because their claims do not constitute a collateral attack on the Commissioner's

¹ E.g., Montasano Chemical Co. v. Southern Natural Gas Co, 102 So.2d 223 (La. 1958) (interpreting LA. Rev. Stat. Ann. Section 30:12).

unitizing order; and (3) even assuming dismissal was proper as to some claims, the district court should not have dismissed all of their claims. If removal was improper, the district court had no jurisdiction and the other issues raised would not be properly before this court. Therefore, the first issue before this court is whether removal was proper under 28 U.S.C. 1441(c).

In 1989, when this case was removed, 1441(c) stated:

"...whenever a separate and independent claim or cause of action, which would be removable if sued upon alone, is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters not otherwise within its original jurisdiction."²

The specific question before this court is whether there are any separate and independent claims or causes of action, which would have been removable if sued upon alone. The defendants-appellees contend that each plaintiff's claims are separate and independent of every other plaintiff's claims. This contention is based primarily on the fact that the plaintiffs' rights arise under separate individual leases. Because there is complete diversity between some plaintiffs and all defendants the defendants argue that all plaintiffs' claims were removable under Section 1441(c).

Congress intended to restrict the right of removal when it used the language "separate and independent claim or cause of action" in Section 1441(c).³ In keeping with this purpose the Supreme Court has held that where there is a single wrongful invasion of a single primary right, and the invasion arises from a series of interlocking transactions, the claims are not "separate

²That version of the statute thus allowed removal of either a federal question or diversity case. In 1990, as part of its review of the wisdom of diversity jurisdiction generally, Congress amended section 1441(c) by limiting its application to cases in which subject matter jurisdiction is based on claims arising under federal law. See generally 28 U.S.C. § 1441, commentary at 8-10 (1994). Removal jurisdiction, if any, in this case must be based entirely on diversity. As cases such as this one are no longer removable under §1441(c), our decision today will have limited impact.

³ See American Fire & Casualty Co. v. Finn, 341 U.S. 6, 10, 71 S.Ct. 534, 538, 95 L.Ed.2d 702 (1951); Wright, Miller and Cooper, Federal Practice and Procedure, 2d Ed., Section 3724, "Removal from Federal Courts" at p. 359.

and independent" under Section 1441(c).⁴ If all damages arise "from a single incident" or if plaintiffs' claims against all defendants involve "substantially the same facts and transactions", a single primary right is implicated and removal is improper.⁵

Most commentators agree that few, if any, diversity cases can be properly removed under Section 1441(c) in light of the construction placed on the statute in the Finn case.⁶ The effect of the Supreme Court's approach in the Finn case has been such that the lower federal courts repeatedly have denied removal in scores of cases involving torts, contracts, [and] combinations of these two theories of recovery.⁷ Even in the handful of cases which have allowed removal, a strong argument can be made that the district courts have applied the statute erroneously.⁸

We find it clear that no claim or cause of action of any particular plaintiff is "separate and independent" of any other claim of that same plaintiff within the meaning of Section 1441(c). However, the defendant-appellees' primary argument is that the claims of each plaintiff are separate and independent of the claims of each other plaintiff because each plaintiff is asserting rights stemming from a lease contract particular to each plaintiff.

This argument ignores the Supreme Court's test in Finn. The individual leases, which were all affected by the Commissioner's unitization order, are indeed a "series of interlocking transactions" and the claims of all the plaintiffs against all the defendants involve substantially the same facts. All of the plaintiffs are royalty interest owners. They are all entitled to be paid royalties under either the terms of their oil and gas leases or under the unitization order issued by the Commissioner. There is a common fund, the gas revenues, from which their royalties are

⁴ American Fire & Casualty Co. v. Finn, 341 U.S. 6, 71 S.Ct. 534, at 540, 95 L.Ed.2d 702 (1951).

⁵ Id., at 16, 71 S.Ct. at 541.

⁶ Wright, Miller, and Cooper, Federal Practice and Procedure, 2d Ed., §3724 at p. 367.

⁷ Wright, Miller and Cooper, Federal Practice and Procedure, 2d. Ed., §3724 at p. 370.

⁸ Wright, Miller and Cooper, Federal Practice and Procedure, 2d Ed., §3724 at p. 383.

payable. Therefore, the plaintiffs have a common and undivided royalty interest by virtue of the communitization of their fractional mineral interests under the pooling order. The defendants' actions have had the same impact upon each individual plaintiff, notwithstanding the fact that the royalty interest of each plaintiff will determine the specific amount of the claim.

The logic of the Finn decision dictates that separate and independent causes of action are not created when a number of plaintiffs join their claims against a group of defendants to redress a common wrong.⁹ Considering the statute's perceived purpose of restricting the availability of removal and the Supreme Court's endorsement of a "single wrong" test, removal in this case was not proper.

Federal courts are courts of limited jurisdiction, having only the authority endowed by the Constitution and that conferred by Congress.¹⁰ Since we have determined that removal was improper, it follows that the federal district court did not have subject matter jurisdiction, and should have remanded this case *sua sponte* to the Thirty-eighth Judicial District Court for the State of Louisiana.¹¹

VACATED AND REMANDED to the district court with instructions to remand to the state court from which this case was removed.

⁹ Wright, Miller and Cooper, Federal Practice and Procedure, 2d Ed., §3724 at p. 368-369.

¹⁰ The appellees also argued that the appellants waived their objections to removal by failing to seek remand in the five years period that this case was pending in federal court, in essence consenting to jurisdiction. Even if this "waiver" is an implied consent, mutual consent cannot confer substantive jurisdiction. Finn, 341 U.S. at 17-18, 71 S.Ct. at 541-542.

Since the district court did not have original jurisdiction over the civil action, any waiver by the plaintiff of his objections to federal jurisdiction cannot expand this Court's jurisdiction grant to encompass a power which Congress has not extended to it. Finn, 341 U.S. at 18, 71 S.Ct. at 542.

This court, in Jones v. Petty-Ray Geophysical Geosource, Inc., No. 90-2093, 954 F.2d 1061 (5th Cir. 1992), distinguished between the ability to waive an objection based upon a defect in removal and the fundamental requirement of original subject matter jurisdiction in federal court.

¹¹ We vacate the decision of the Federal District Court that this suit constitutes a collateral attack on the Commissioner's order, and leave that determination to the state court upon remand.