



Pennsylvania Superior Court Recognizes Claims for Hydraulic Fracturing Trespass

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On April 2, 2018, in *Briggs v. Southwestern Energy Production Company*, 2018 PA Super 79, — A.3d — (2018), the Pennsylvania Superior Court recognized claims for subsurface trespass from hydraulic fracturing and rejected the argument that the rule of capture precludes such claims as a matter of law. A full copy of the opinion can be found [here](#).

Briggs involved the owners of 11.07 acres of unleased property (the Briggs) claiming that Southwestern's hydraulic fracturing operations on neighboring parcels resulted in the unauthorized drainage of oil and gas from their property. The Briggs filed a complaint against Southwestern asserting trespass and conversion. The trial court granted Southwestern's motion for summary judgment, ruling that the rule of capture precludes, as a matter of law, subsurface trespass and conversion claims based on hydraulic fracturing originating on neighboring property.¹

On appeal to the Superior Court, the Briggs asked whether the rule of capture precludes trespass² claims even when the gas is extracted from property through hydraulic fracturing. The Pennsylvania Superior Court answered "no."

The *Briggs* Court's opinion provides a thorough examination of jurisprudence on the rule of capture,³ the process of hydraulic fracturing,⁴ and two existing cases from other jurisdictions addressing claims for trespass by hydraulic fracture, *Coastal Oil & Gas Corp. v. Garza Energy Trust*, 268 S.W.3d 1 (Tex. 2008) and *Stone v. Chesapeake Appalachia, LLC*, 5:12-CV-102, 2013 WL 2097397 (N.D.W.Va. Apr. 10, 2013), *order vacated*, 2013 WL 7863861 (N.D.W.Va. July 30, 2013).⁵ Ultimately, the Court held that the rule of capture does not preclude liability for trespass due to hydraulic fracturing.⁶ The Court's rationale is as follows:

- The rule of capture assumes that oil and gas *in situ* can migrate freely from property to property. Because of this natural state, it follows that no individual property owner can be said to own the oil and gas underlying his or her property until it is reduced to possession (*i.e.* produced).
- Thus, a property owner should not be liable for draining her neighbor's oil and gas simply because it flowed across the property line.
- Hydraulic fracturing, on the other hand, targets oil and gas locked in shale formations—*i.e.*, it is not migratory by nature. It utilizes high pressure fluid and proppant to free the oil and gas and make it migratory so that it can be produced.
- Because the rule of capture's fundamental basis does not exist where hydraulic fracturing occurs, it cannot be used to preclude liability as a matter of law for trespass via hydraulic fracturing. Thus, where a neighbor utilizes hydraulic fracturing on her property, and "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[.]" the rule of capture does not preclude a claim for trespass as a matter of law.⁷

In reaching its holding, the *Briggs* Court rejected the *Coastal Oil* majority, which held the rule of capture precludes hydraulic fracturing trespass claims; the *Briggs* Court found the dissenting opinion more persuasive. Likewise, the *Briggs* Court agreed with the holding in *Stone*, which distinguished hydraulic fracturing from conventional production and held hydraulic fracturing beneath neighboring property without consent to be an actionable trespass.⁸

While *Briggs* presents new challenges to Pennsylvania producers (unless overturned by the Pennsylvania Supreme Court),⁹ its limits must be recognized. This opinion states only that, as a matter of law, the rule of capture does not preclude a trespass claim for hydraulic fracturing. A plaintiff would still bear the burden of proving that fracturing fluid and proppant entered her property. A plaintiff would

also bear the burden of proof as to the amount of oil or gas allegedly produced from her property. In fact, the Court acknowledges that proving a subsurface trespass by hydraulic fracturing is fraught with difficulty: “we are cognizant that establishing the occurrence of a subsurface trespass determining the value of natural gas drained through hydraulic fracturing will present evidentiary difficulties.”¹⁰

For more information, please contact [Kenneth Witzel](#), [Chris Rogers](#) or any other member of Frost Brown Todd’s [Energy and Natural Resources Industry Team](#).

1 *Briggs*, *1 – *2.

2 As set forth in footnote 4 of the opinion, the Briggs Court only addresses the viability of the trespass claim because the Briggs’ brief does not include a separate discussion of conversion.

3 *Briggs*, *4 – *5.

4 *Id.* *5 – *6.

5 *Id.* *6 – *8.

6 *Id.* *9.

7 *Briggs*, *9.

8 *Id.* *7 – *8.

9 Although we expect this holding to be appealed, as of the date of this update, no appeal has been filed.

10 *Briggs*, *9 (intern citation omitted).

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