

## Publications

### *Oil and Gas Alert: Pennsylvania Appellate Court Rejects Rule of Capture for Hydraulic Fracturing*

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In *Briggs v. Southwestern Energy Production Co.* (Apr. 2, 2018), the Superior Court of Pennsylvania held that trespass and conversion claims concerning hydraulic fracturing were not precluded by the rule of capture.

### Background

Southwestern operated shale gas wells on property adjacent to the Briggs' leased tract. In their complaint for trespass and conversion, the Briggs alleged that Southwestern's wells—which were completed through hydraulic fracturing—were unlawfully draining gas from beneath their land.

Southwestern asserted that the Briggs' claims were barred by the rule of capture—the seminal principle that there is no liability for capturing oil and gas that drains from another's land. The trial court ruled for Southwestern on summary judgment, holding that the rule of capture precluded the Briggs' claims as a matter of law.

On appeal, the Briggs argued that the rule of capture addresses concerns with conventional development and does not apply to gas extracted from shale formations through hydraulic fracturing. Southwestern instead urged the court to follow the Supreme Court of Texas' decision in *Coastal Oil & Gas Corp. v. Garza Energy Trust*, 268 S. W.3d 1 (Tex.2008) (holding that damages for drainage by hydraulic fracturing are precluded by the rule of capture).

### Decision

Declining to follow *Garza*, the Superior Court of Pennsylvania sided with the Briggs, concluding that “[i]n light of the distinctions between hydraulic fracturing and conventional gas drilling...the rule of capture does not preclude liability for trespass due to hydraulic fracturing.”

The court offered several reasons for its decision.

First, the court said, the rule of capture assumes that oil and gas are capable of naturally migrating within a reservoir according to changes in pressure and without regard to surface property lines. But due to the low permeability of shale formations, shale gas is not capable of migrating to an adjoining tract absent the application of an artificial force—*i.e.*, hydraulic fracturing.

Additionally, under the rule of capture, the traditional remedy for a landowner impacted by a neighbor's well was “go and do likewise,” that is, drill an offsetting well to avoid drainage. But hydraulic fracturing is a “costly and specialized endeavor” that may not be available to the average landowner. Moreover, while the court acknowledged the evidentiary difficulties in calculating damages for gas extracted through hydraulic fracturing, it did not believe that these difficulties, standing alone, warranted precluding the Briggs’ claims.

Therefore, because the rule of capture does not apply, the court held that “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.”

It is not clear yet whether the decision will be appealed to the Supreme Court of Pennsylvania or whether the parties will proceed to trial on the trespass issue. If they do, the plaintiffs may face significant evidentiary challenges in proving that fractures, fluids, and proppant crossed onto their property, and if so, the value of any gas removed, a fact that the *Briggs* court noted. *See also Garza*, 268 S.W.3d at 16 (“determining the value of oil and gas drained by hydraulic fracturing is the kind of issue the litigation process is least equipped to handle.”). In either case, we will continue to monitor the case closely and provide updates when available.