



Hydraulic fracturing and subsurface trespass in Pennsylvania: Briggs v. Southwestern Energy Production Co.

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In a case of first impression that drew interest across Appalachia, the Pennsylvania Supreme Court [determined](#) on January 22, 2020, that the rule of capture applies when natural gas is extracted through hydraulic fracturing operations but stopped short of adopting a bright line rule that trespass cannot occur miles beneath the surface. Specifically, the Court, in a split 3-2 decision (1) [affirmed](#) the Commonwealth's ongoing recognition of the rule of capture (which precludes trespass liability for exploration and production companies when oil and gas are lawfully produced, regardless of where the hydrocarbons come from); (2) recognized that the rule of capture can and does apply in the context of hydraulic fracturing; and (3) highlighted the importance of alleging critical facts in the complaint and properly raising issues on appeal.

In this case, the plaintiffs owned real estate in Susquehanna County, Pennsylvania. Their land was adjacent to land leased by Southwestern Energy Production Company and on which Southwestern "maintains wellbores...and has used hydraulic fracturing to boost natural gas extraction." The plaintiffs asserted trespass and conversion claims against Southwestern on the basis of its drilling activities but did not expressly allege that Southwestern's hydraulic fracturing operations physically intrude into the subsurface under their property. In defense against these claims, Southwestern argued both that the complaint was deficient (Pennsylvania follows fact-pleading rather than the notice pleading standard used in Ohio) and that the rule of capture precluded any such tort liability. The trial court agreed with Southwestern, ruling on cross-motions for summary judgment that, as a matter of law, the rule of capture precluded recovery by the plaintiffs because they had failed to allege or demonstrate that Southwestern had entered the plaintiffs' property, and the rule of capture bars damages for drainage of natural gas due to

hydraulic fracturing.

The case was appealed and, upon review, a two-judge panel of the Superior Court reversed the trial court decision, holding that hydraulic fracturing may give rise to liability in trespass, “particularly if subsurface fractures, fluid or proppant[s] cross boundary lines, resulting in the extraction of natural gas from beneath an adjoining landowner’s property.” The panel noted the distinction between traditional oil reservoirs and gas located in a shale formation, which it characterized as “non-migratory” and found that the plaintiffs’ “allegations” were sufficient to preclude summary judgment by “rais[ing] an issue as to whether there has been a trespass.”

The Superior Court’s decision was then appealed to the Pennsylvania Supreme Court, which affirmed the trial court’s decision. Specifically, the Court held that, absent claims that fractures from a well actually crossed property lines thousands of feet below the surface, the rule of capture remained applicable. “This court has held that the rule of capture applies although the driller uses further artificial means, such as a pump, to enhance production from a source common to it and the plaintiff — so long as no physical invasion of the plaintiff’s land occurs.” In fact, the Court stated, “we reject as a matter of law the concept that the rule of capture is inapplicable to drilling and hydraulic fracturing that occurs within the developer’s property solely because drainage of natural resources takes place as the direct or indirect result of hydraulic fracturing, or that such drainage stems from less ‘natural’ means than conventional drainage.” In other words, the rule of capture does apply in the context of oil and gas drilling activities involving hydraulic fracturing operations.

In overruling the lower court’s decision, the Pennsylvania Supreme Court rejected arguments that any post-fracturing migration of natural gas across property lines was, in and of itself, evidence of a trespass. Moreover, the Court noted procedural deficiencies relating to the plaintiffs’ assertion that Southwestern had physically intruded upon the subsurface property, as it was raised for the first time in its brief to the Supreme Court. Ultimately, the high court said that it was up to plaintiffs to prove that a physical intrusion onto their property actually took place, which the plaintiffs, at least in this case, failed to even allege. “A plaintiff alleging trespass by invasion of property must aver something more than mere drainage of minerals from the subject property, which by itself implicates the rule of capture,” the Pennsylvania Supreme Court found.

The practical result of this decision in Pennsylvania is that an oil and gas company *may* be immunized from suit via the rule of capture, so long as there is no actual trespassory invasion of a neighboring property. But, the Pennsylvania Supreme Court’s holding went no further. As a result, the decision left open for further determination whether hydraulic fracturing operations that cause a physical intrusion (*i.e.*, a fracture) into the subsurface of a neighbor’s property amounts to a trespass, a question that the Court found “is a factual question to be established through expert evidence.”

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