

## Pennsylvania Departs from Texas on Trespass by Hydraulic Fracturing

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In Texas, the long-standing "rule of capture" controls claims for subsurface trespass predicated on hydraulic fracturing activities. The rule of capture is, of course, shorthand for the theory that landowners acquire title to the minerals they produce from wells on their land, even when some of the oil or gas migrates from adjoining tracts. Put another way, landowners may properly appropriate oil and gas that has flowed from adjacent lands—without their neighbors' consent and without incurring liability to them for drainage.

In *Coastal Oil & Gas Corp. v. Garza Energy Trust*, 268 S.W.3d 1 (Tex. 2008), the Supreme Court of Texas held that trespass claims for drainage by hydraulic fracturing are barred by the rule of capture, when the only result of the drilling operations is that the minerals migrate more easily from one tract into another. As an aside, however, the *Garza* court emphasized that, if operations result in actual injuries—for example, damage to reservoirs or offsetting wells—liability may then attach.

But in *Briggs v. Southwestern Energy Production Company*, 2018 Pa. Super. 79 (2018), the Pennsylvania Superior Court split with Texas, holding that plaintiffs may sue for subsurface trespass from hydraulic fracturing, even in the absence of physical damages to reservoirs or offset wells. In reaching its decision, the Pennsylvania court specifically discussed the *Garza* opinion and rejected the notion that the rule of capture precludes these claims as a matter of law.

The basic reasoning in *Briggs* is as follows:

- Hydraulic fracturing aims to produce oil and gas that is, in its natural state, trapped in rock; in other words, minerals locked in shale formations do not migrate of their own accord.
- Operators must therefore forcibly create artificial fissures through which oil and gas can migrate into take points along a horizontal well bore.
- The essential premise of the rule of capture—the free and natural migration of minerals—is thus missing in the context of hydraulic fracturing.
- In short, according to the decision in *Briggs*, “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,” and this is sufficient to state a claim for subsurface trespass as a matter of law.

*Briggs* is a watershed case that could have a profound impact on the operations of exploration and production companies in Pennsylvania. Left unchecked, the decision could easily open the floodgates to a large volume of litigation against drillers and mineral owners alike. Additionally, E&Ps with a footprint in Pennsylvania may now have to review their drilling programs, either to ensure that their fracturing operations do not spill over into adjoining, unleased tracts or, at a minimum,

to take a calculated risk and proceed with business as usual with eyes wide open—even if this means exposing themselves to potential liability under *Briggs*.

*Tom is a litigation partner in the Houston office of Kane Russell Coleman Logan PC, where he serves as the head of the firm's energy practice group. Tom is also the host of a weekly podcast on legal news and developments in the oil-and-gas industry, available at [www.energylawroundup.com](http://www.energylawroundup.com), and a video series on effective legal writing, available at [www.theartofthebrief.com](http://www.theartofthebrief.com).*

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