

### **Pennsylvania Supreme Court Cautiously Extends the Rule of Capture**

*By Andrew H. Bell, Esq. and Evan G. Conard, Esq.*

In its recent ruling in *Briggs v. Southwestern Energy Prod. Co.*, the Supreme Court of Pennsylvania (the “Court”) affirmed the continuing validity of the historic rule of capture, even as to production of oil and gas by hydraulic fracturing operations. However, the Court’s ruling did not conclusively resolve a five-year long legal battle concerning the application of the rule of capture to hydraulic fracturing operations that physically enter into an adjoining, unleased mineral property and cause the production of the underlying oil and gas.

In *Briggs*, unleased plaintiff-landowners (the “plaintiffs”) claimed that Southwestern Energy Production Company’s (“Southwestern”) operations on an adjacent mineral property constituted a trespass and conversion of the oil and gas underlying their property. Southwestern denied the plaintiffs’ allegations, claiming that it had not drilled underneath the plaintiffs’ property to produce and extract the plaintiffs’ oil and gas; even so, Southwestern’s pleadings also asserted that the rule of capture barred liability for the plaintiffs’ claims. The Court found that the record did not indicate that the plaintiffs made any specific claims that Southwestern’s drilling activities had actually caused a physical intrusion into the plaintiffs’ oil and gas estate.

Initially, the trial court entered summary judgment in Southwestern’s favor, ruling that the longstanding rule of capture precluded the plaintiffs from recovering damages. The Court noted that the Superior Court improperly framed the dispute based on the pleadings when it ruled that hydraulic fracturing operations may constitute an actionable trespass if subsurface fractures, frac fluids, and proppant cross lease boundaries and enter into adjoining oil and gas estates for which the operator does not have a lease to operate.

The Superior Court found that the plaintiffs pled sufficient facts to establish a claim for trespass and remanded the case to the trial court for further discovery to determine if Southwestern’s operations had actually entered into the plaintiffs’ oil and gas estate. On appeal, Southwestern framed the issue to the Court as whether the rule of capture precludes liability when an operator completes wells by hydraulic fracturing on property where the operator has the right to do so and the hydraulic fracturing operations remain within the property boundary where the operator has lease rights to develop the oil and gas.

For the first time, the plaintiffs argued to the Court that Southwestern’s operations physically contacted and intruded upon on their oil and gas estate. The plaintiffs specifically asserted, during briefing to the Court, that it was physically impossible for Southwestern to drain oil and gas in a shale formation underlying an adjoining property by hydraulic fracturing without effectuating a physical intrusion into that oil and gas estate. The Court rejected the plaintiffs’ argument, noting that the plaintiffs had not previously alleged that Southwestern’s operations had committed a physical intrusion into their oil and gas estate in their original pleadings, briefings on summary judgment to the trial court, or the plaintiffs’ briefs to the Superior Court.

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## OIL & GAS INDUSTRY ANALYSIS

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The Court recognized that the factual record lacked any evidence suggesting that a physical intrusion into the plaintiffs' oil and gas estate had occurred from Southwestern's hydraulic fracturing operations. As a result, the Court overruled the Superior Court's ruling that the rule of capture was inapplicable to hydraulic fracturing operations. Importantly, the Court's majority opinion and Justice Dougherty's concurrence recognized that drainage might naturally occur even with the use of hydraulic fracturing techniques based on the fugacious nature of gas. Instead of simply analyzing the pleadings to determine if the plaintiffs had properly pled an action for trespass, Justice Dougherty believed that the Court should have remanded the case back to the trial court for further discovery related to Southwestern's operations and the oil and gas that could reasonably be anticipated to be extracted as a result of Southwestern's operations.

### CONCLUSION

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The *Briggs* Court's ruling reaffirmed the continuing applicability of the longstanding rule of capture to modern drilling techniques, such as hydraulic fracturing. Operators should note that the Court's ruling only affirms the rule of capture ***insofar as it applies to activities located within the owned or leased mineral tract***. Nonetheless, the *Briggs* Court did indicate that the rule of capture **would not** preclude an operator's liability if hydraulic fractures, injected proppants, or other material extend beyond the operator's lease boundary into an adjacent property and cause the extraction of the underlying minerals from the adjacent property.

The *Briggs* Court signaled that the Pennsylvania General Assembly may be better suited to formulate public policy to address the issues raised by the plaintiffs and Southwestern, such as modifications to existing well spacing regulations and set-back requirements or the drilling of offset wells. Further litigation will occur because the *Briggs* Court remanded the case back to the Superior Court to determine whether the plaintiffs asserted any specific facts claiming that a physical intrusion into the plaintiffs' oil and gas estate occurred as a result of Southwestern's operations to substantiate the plaintiffs' trespass claim.

### ABOUT THE AUTHORS

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**Andrew H. Bell** is a member of the Bowles Rice Energy Team. Admitted in Pennsylvania and West Virginia, Andrew practices from the firm's Southpointe, PA office. Contact him at (724) 514-8929 or via email at [abell@bowlesrice.com](mailto:abell@bowlesrice.com).

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**Evan G. Conard** is also a member of the Bowles Rice Energy Team. Admitted in West Virginia, Evan practices from the firm's Charleston, WV office. Contact him at (304) 347-1730 or via email at [econard@bowlesrice.com](mailto:econard@bowlesrice.com).

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