12/10/2018 | Articles

Year-End Recap on *Briggs* - The Pennsylvania Supreme Court to Decide Ancient "Rule of Capture" in Era of Extraction by Frac: Whose Milkshake Is It?

No Pennsylvania case in recent memory, other than *Briggs*, seems to have given court onlookers, practitioners, and industry insiders greater pause. Colloquially, the matter has become known as the “trespass by frac” case which has upended long-settled rules governing the development of a common source or pool of underground oil or natural gas.

After its Petition for Re-argument was denied earlier this year in June, the Supreme Court of Pennsylvania, on November 20, 2018, granted Southwestern Energy Production Company’s (“SWN”) Petition of Allowance of Appeal of the Pennsylvania Superior Court’s decision in *Briggs v. Sw. Energy Prod. Co*., 2018 Pa. Super. 79, 184 A.3d 153. The issue before the Supreme Court is whether the “rule of capture” applies to oil and gas produced from wells that were completed using hydraulic fracturing. If the rule stands, an operator is protected from trespass liability from producing oil or gas from unleased property when tiny fractures in the rock travel from leased properties into unleased land.

In *Briggs*, Plaintiffs, Adam Briggs, Paul Briggs, and Joshua Briggs, being the co-owners of a tract of land in Susquehanna County sued SWN in 2015 for unlawfully draining hydrocarbons from their property by an unconventional horizontal well drilled on adjacent property. Briggs argued that since they had not executed a lease, SWN’s stimulation and removal of hydrocarbons from the Briggs’ land constituted a subsurface trespass. In April 2017, SWN filed a Motion for Summary Judgment asserting that the trespass claim failed because the horizontal well bore had not entered the Plaintiffs’ property and that the “rule of capture” bars damages for the drainage of natural gas from a common pool due to hydraulic fracturing. The trial court granted SWN’s motion on August 21, 2017.

Briggs appealed claiming that the trial court erred in determining the “rule of capture” precluded SWN from liability because the extraction of natural gas from beneath their property is a trespass despite the lack of physical intrusion by SWN. The Court stated that “rule of capture,” which has been applied in Pennsylvania for nearly 130 years, precludes liability for drainage of oil and gas from unleased land; however, this rule had only been applied to conventional, vertical oil and gas extraction.

After examining relevant case law from Texas and West Virginia, the Court concluded that hydraulic fracturing is distinguishable from conventional methods of extraction and ultimately that the “rule of capture” did not preclude liability for trespass due to hydraulic fracturing which “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.” Accordingly, the Superior Court reversed the decision of the trial court finding that SWN could be found liable for subsurface trespass upon further development of the evidentiary record. Now the issue will be determined by the Supreme Court.

The foregoing is an issue of first impression for the Pennsylvania Supreme Court with sweeping implications. If sustained, the ruling could curtail Pennsylvania’s hydraulic fracturing industry by limiting the ability of operators to maximize production of oil and gas from leased lands. However, to successfully prove “trespass by frac,” landowners will need to bear considerable cost to meet their evidentiary burden and may be required to invest in costly

technologies such as 2D and 3D seismic surveys, or micro-seismic surveys (down the hole), to prove any single fracture or related fluids unlawfully migrated across property boundaries 9,000 feet (and in some cases, deeper) underground. However, operators as a matter of course may already gather seismic data and logs on their laterals, all of which will likely be discoverable. Visions of Daniel Day-Lewis and his rhetorical characterization of the rule of capture as the draining of a milkshake ("I Drink Your Milkshake!") in the 2007 film *There Will Be Blood* comes to mind. Plaintiffs will need to prove it's their milkshake.

For a copy of the *Briggs* decision, or for any additional insights on how it affects your ownership or development plans in Pennsylvania, do not hesitate to contact the Energy Group with Dickie, McCamey & Chilcote, P.C.

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