

# PUBLICATION

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## Reviewing Courts' Approaches to State or Local Control of Hydraulic Fracturing

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**While many debates over hydraulic fracturing continue throughout the oil and gas industry, a growing number of state courts are addressing the "home rule" argument, or in this case, whether local governments within the state have the right to self-regulate hydraulic fracturing.**

Most recently, a Colorado court ruled that the Colorado Oil and Gas Conservation Act preempted a provision in a city charter that banned hydraulic fracturing. In its opinion, the court explained that the city "does not have the authority to prohibit what the state authorizes and permits. The court's ruling will likely have little lasting impact however, as the case still has to make it through the appeals process, four similar cases are pending in other districts in Colorado, and ballot initiatives relating to the regulation of hydraulic fracturing have been approved by the Colorado Supreme Court for consideration in the November elections.

Similar to the Colorado decision, the Ninth District Court of Appeals in Ohio found a city's ordinances unconstitutional because the ordinances "are in direct conflict with the state statutes. . . ." This case is currently on appeal to the Supreme Court of Ohio.

Finding differently than the Colorado and Ohio courts, the Supreme Court of the Commonwealth of Pennsylvania affirmed local government's regulation of hydraulic fracturing. In finding critical provisions of Act 13 – a 2012 law that, in part, governs oil and gas drilling – unconstitutional, the court focused less on preemption and more heavily on the court's obligation to uphold the constitutional rights of its citizens, which include the "right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment."

Finally, the New York Court of Appeals also held that hydraulic fracturing can be regulated by local governments, but it addressed the preemption issue head-on. The court found that the state's Oil, Gas and Solution Mining Law (OGSML) did not expressly preempt a municipality's ability to enforce land-use restriction, such as zoning ordinances.

Although these decisions reach different outcomes, they are uniform in finding state preemption where legislation is in place that expressly preempts local government from regulating hydraulic fracturing. On the other hand, in states where the legislation falls short of express preemption or is more recent, reactionary legislation, the courts seem to be more open to considering local regulation of hydraulic fracturing. As uncertainty on the regulation of hydraulic fracturing continues and oversight increases, the issue may ultimately be taken out of the judiciary's hands, either by the legislature or voters.