

Shale-Gas Case Ringing Alarms in State-Level Mineral-Rights Law

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The unexpected earthquake that rocked the Eastern Seaboard recently was not the only seismic shock the region has endured in recent months. A different kind of tremor was also felt, most keenly by those involved in the energy industry in that general area. However, this potential tectonic shift was not in the ground, but in the law governing what is extracted from what lies beneath. And while that jolt has been the subject of much discussion, our analysis tells us that it is much too early to tell if it represents a permanent change in the law.

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With that guarded optimism, we can proceed to the new case of *Butler v. Powers*.¹ As this audience knows well, the paramount question in the case is the lawful ownership of Marcellus Shale gas. The cause of such great consternation surrounding this appellate decision is that it might foreshadow a revision in a rule of law well over a century old, and thereby throw into disarray the respective rights of landowners, lease holders, and energy explorers and producers. Prior

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to *Butler*, the legal axiom we speak of dictated with fair precision the exact wording of deeds, and transfers of mineral rights. If this axiom is changed, would chaos ensue?

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NOT ARMAGEDDON YET

Even before we turn to the facts of the instant case, we have to stress this case is very preliminary. First, this decision was rendered by an intermediate appellate court within the commonwealth of Pennsylvania. Unless and until a further ruling is made by Pennsylvania's highest state court, *Butler's* future is murky at best.²

Second, *Butler* was remanded for further proceedings; in other words, it is far from over. There is still much to be done at the trial level. The outcome of those proceedings might very well change the entire complexion of the case. Third, and very prospectively, if *Butler* eventually turns out to be as disruptive as some think, legislative action to revamp the underlying law would no doubt be contemplated to restore the status quo.

IMPORTANCE DERIVES FROM MARCELLUS SHALE

Having calmed the fears, now we can turn to the facts of this case. The Butlers owned a parcel of land in rural Pennsylvania. Their deed contained an explicit reservation of one half of the minerals and petroleum oils therein contained to one Charles Powers, long deceased. But his heirs and assigns are alive and well, and appeared in court when the Butlers brought an action to quiet title to their land. The Powers faction sought a counter-declaration that the mineral rights were still theirs, including, most important, the right

to the Marcellus Shale gas found under the land. And that became the nub of controversy here.

Let us pause here for a quick but nonetheless essential geology lesson. For the unacquainted, the Marcellus Shale is a naturally occurring formation that occupies much of the subsurface beneath the states of Ohio; West Virginia; New York; and, relevant here, Pennsylvania. It further underlies smaller areas of Maryland, Kentucky, Tennessee, and Virginia. Surveys indicate that it occupies over two-thirds of the subsurface of Pennsylvania and all of West Virginia. The Marcellus Shale yields natural gas, but it is difficult to extract. Newer, yet controversial, technologies, such as “hydrofracing,” are being used to recover this natural gas from the earth.³

And where there is natural gas, there is money: “The presence of an enormous volume of potentially recoverable gas in the eastern United States has a great economic significance. This will be some of the closest natural gas to the high population areas of New Jersey, New York, and New England. This transportation advantage will give Marcellus gas a distinct advantage in the marketplace.” Little wonder then that recent data from the Pennsylvania Department of Environmental Protection reveals that nearly 1,400 Marcellus Shale gas wells were drilled in 2010, nearly double the number drilled the year before.⁴

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The foregoing makes the significance of *Butler* clear. Not only are the stakes high for the parties to the instant litigation, but the economic ramifications for the energy industry also might prove to be enormous.

MARCELLUS NOT COVERED BY MINERAL RIGHTS?

In the proceedings that follow, the Common Pleas court made only very preliminary findings but nevertheless indicated that the reservation of various mineral rights to Powers and his assignees did *not* include the Marcellus Shale gas to be found under the property. Seeking those rights for themselves, Powers’s successors appealed.

The gist of their argument was that Marcellus Shale gas is itself a mineral, because it is an inorganic substance that can be removed from the soil and used for commercial purposes. The

reservation for subterranean rights in the extant deed included minerals, and thus it would include the shale gas, said the Powers camp. Moreover, in the long history of the Pennsylvania law of mineral rights, no previous decision had ever held mineral rights did not encompass Marcellus Shale or the natural gas it yields.

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Pennsylvania Law Allows for Exceptions

Writing for the Superior Court, Judge Gantman quite naturally turned to that long and illustrious history of state law on the subject. He commenced with a case well over a century old, *Dunham v. Kirkpatrick*.⁵ It was the seminal Pennsylvania decision, in which the commonwealth’s Supreme Court decreed that a reservation or exception in a deed that reserves “mineral” rights to a specific party reserves only what is generically acknowledged to be minerals. Without more specificity, natural gas or oil *might* be included—then again, it might not be.⁶

Dunham established a rebuttable presumption—that is, it would initially be presumed that when a “grantor” (the seller or transferor of title to the land) retains for itself “mineral” rights, said retention does not include a reservation of the right to keep any natural gas or oil found beneath the land. Nonetheless, the presumption could be rebutted (and hence the legalism) if the grantor or its successors could prove that it indeed intended to reserve to itself natural gas or oil as part of its retention of the mineral rights. If such could be proved, the subsequent transferee would have no rights to minerals, natural gas, or oil found under the land. Such is the rule of *Dunham*, and the law in Pennsylvania for well over a century.

On their appeal, the Powers faction made the crucial argument that “natural gas,” as contemplated when *Dunham* was decided in 1882, meant precisely that—a naturally occurring gaseous substance. In sharp contradistinction, Powers argued, Marcellus Shale gas is classified as an “unconventional gas,” because it is not free-flowing, “wild” gas, also referred to as *ferae naturae*. As a point in fact, the Powers group took great note of how recovery techniques for

Marcellus Shale gas widely differ from traditional technologies used to recover natural gas.

To be certain, the 100-plus-year-old case of *Dunham* was not the sole precedent relied upon by Powers's successors. A mere youngster at less than 30 years old, *US Steel Corp. v. Hoge*⁷ is a case where Pennsylvania's highest court ruled that gas found in coal belongs to the owner of the coal bed, while, concomitantly, gas that migrates into adjacent property belongs to the owner of that land. The *Hoge* court enunciated the general rule that subterranean gas belongs to whoever has title to the land in which the gas resides. Powers's successors argued that *Hoge* validated their argument that "whoever owns the shale, owns the gas," given that the current extraction techniques for Marcellus Shale gas clearly demonstrated that one had to own the shale bed itself before one could liberate the valuable gas therefrom.

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Law in Other States Contradictory

Judge Gantman also took some time to catalogue the holdings of other jurisdictions on this subject. What he revealed was, at best, a mixed bag of decisions. In *Kalberer v. Grassham*,⁸ a Kentucky state court ruled that a conveyance of all minerals of every kind and character, with only natural gas and coal oil being specifically exempted, included the conveyance of sandstone quarry, in the absence of any other qualifications or restrictions in the subject deed. Similarly, over a century ago in the case of *McCombs v. Stephenson*,⁹ the Alabama courts enunciated a rule that the transfer of mineral rights means all substances in the earth's crust, sought for and removed for their own sake. Moreover, "minerals" in that context is not limited to metallic substances only, said that court, but includes salt, coal, clay, stone, and others. In *McCombs*, the language of the subject deed conveying all the rights to coal, ores, and all other metals and minerals found in the land per force included the conveyance of shale.

In sharp contradistinction, Judge Gantman also pointed out the differing holding issued in Virginia in *Beury v. Shelton*.¹⁰ That court decided that a reservation of all rights to metals and minerals of every kind and character whatsoever in and under the subject parcel nonetheless

did not include limestone, where the land was in what was historically regarded as "limestone country." Thus, a reservation of rights to the underlying limestone and the concomitant right to remove it would reserve practically everything and transfer away nothing to the buyer. In refusing to countenance such an absurd result, the *Beury* court placed heavy emphasis upon a three-pronged analysis of the subject deed's language, the surrounding circumstances, and the grantor's intentions when deciding the scope of a deed's reservation of mineral rights.

Likewise, the courts of neighboring West Virginia ruled in *Rock House Fork Land Co. v. Raleigh Brick & Tile Co.*¹¹ that a conveyance of all coal and minerals of every kind and description, except natural gas and oil, did not include the transfer of rights to clay, where the intent of the parties was to grant mining rights for the listed minerals. Similar to the court's Virginia peers, the West Virginia court decreed that the complaining party bore the burden of presenting affirmative evidence that the substance in question, in this case clay, was intended to fall within the terms of the conveyance of mineral rights.

Shale's Status Yet to Be Determined

Unmistakably, the differing views of other state courts were in an elegant counterpoise, and therefore not much help to the Pennsylvania judge. As aforementioned, Judge Gantman gave no hint as to which camp the Superior Court might eventually side with, understandably because the contrasting decisions were so evenly divided.

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Seeking to reconcile all this to the present case, the Superior Court acknowledged that its paramount role in interpreting a deed is to ascertain, and then enforce, what the parties intended, its findings to be scrupulously based upon what the parties themselves wrote down in that instrument. And should that deed be less than clear, any ambiguity is to be resolved against the party that drafted the document.

Pennsylvania has long held that "mineral" is a very broad term, particularly in commercial settings. The courts of the commonwealth adopted as the cardinal rule that the intent of

the parties determines the exact meaning to be ascribed to the terms in their deeds.¹² *Dunham* specifically rejected an argument that a reservation of minerals in fact also reserved petroleum oil; that court of more than a century ago faulted the claiming party for its imprecise use of the term “minerals.” Subsequent cases similarly found that natural gas is not reserved, lacking an explicit reference to that valuable resource.¹³

A great deal of law, to be sure, and so long-standing as to in all likelihood be beyond question. But did it resolve the instant dispute between the Butlers and the Powers faction? Regrettably, no.

Judge Gantman succinctly declared that “Pennsylvania has yet to determine whether shale [and therefore shale gas] is analogous to coal in this context.” Without giving any hints, the Superior Court judge goes on to note that “at least one other jurisdiction has found similarities between the two substances in this context,” referencing the Indiana state court case of *Cimarron Oil Corp. v. Howard Energy Corp.*¹⁴ But Pennsylvania’s intermediate appellate court made known that this was not the end of its analysis but merely the beginning.

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With the question obviously unsettled, the Superior Court ruled it required “a more sufficient understanding” of just what was at issue here. The crucial questions remaining included: (a) whether the Marcellus Shale is itself a “mineral”; (b) whether Marcellus Shale gas is a “conventional” gas, as contemplated under the long-standing teaching of *Dunham* and its progeny; and, of possibly the greatest import, (c) whether or not the Marcellus Shale is similar enough to coal to adhere to the established precept that whomever owns the shale owns the shale gas that may be extracted from it.

We cannot determine this today, said Judge Gantman, without further factual development from the trial court. And so, the controversy was returned to the court below, with the very explicit instruction that the parties must bring forth experts to testify as to “whether Marcellus Shale constitutes a type of mineral such that the gas in it” was reserved for in the subject deed or

not. Accordingly, any judgments of the Court of Common Pleas were vacated, and an essentially fresh start to the litigation was ordered.

And so there rests *Butler*, as of this writing. As you can see, this is why we emphasized that the judicial rulings thus far are very preliminary, and there should not be any undue concern that the law of mineral rights in Pennsylvania or elsewhere is about to unravel. Likewise, this is why we were exceedingly clear that this controversy has a long way to go. One can only wait and see the nature and persuasiveness of the forthcoming expert testimony that the feuding Butlers and assigns of Powers will bring to court in the next round.

Nevertheless, it is for those very reasons that the entire energy industry, from explorers and producers to landowners and royalty owners, needs to monitor this case *very* closely. It does indeed have the ability to impact the vast and vital energy industry, not necessarily for deeds already written but for deals yet to be made. Just as the precedents of over a century ago brought these litigants to the present day, what results from their conflict will set new legal precedents for generations to come. ○

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NOTES

1. ___ Pa. Super. ___ (September 7, 2011), available at 2001 Pa. Super. LEXIS 2710.
2. Pennsylvania’s trial court is the Court of Common Pleas, where *Butler* started. Appeals, such as *Butler*, are taken next to the Superior Court of that state, and the court of last resort is the Pennsylvania Supreme Court. See www.courts.state.pa.us/Links/Public/AboutTheCourts.htm (schematic of Pennsylvania state court system).
3. See <http://geology.com/articles/marcellus-shale.shtml> for a detailed map of the extent of the Marcellus Shale fields of the Appalachian Basin.
4. *Ibid.* See also Barrett, Paul. (2011, November 3). Shale gas reserves could reignite US economy, <http://www.bloomberg.com/news/print/2011-11-03/shale-gas-reserves-have-potential>.
5. 101 Pa. 36 (1882).
6. See also *Highland v. Commonwealth*, 400 Pa. 261 (1960), *cert. denied* 364 US 901 (1960).
7. 503 Pa. 140 (1983).
8. 282 Ky. 430 (1940).
9. 154 Ala. 109 (1907).
10. 151 Va. 28 (1928).
11. 83 W. Va. 20 (1918).
12. See *Silver v. Bush*, 213 Pa. 195 (1906).
13. See also *Bundy v. Myers*, 372 Pa. 583 (1953).
14. 909 N.E.2d 1115 (Ind. App. 2009).