

ENERGY ALERT

**BUTLER V. CHARLES POWERS ESTATE AND THE
IMPACT ON PENNSYLVANIA'S MARCELLUS SHALE
INDUSTRY**

Recently, the Pennsylvania Superior Court signaled that changes to the common law may be made in connection with the development of the Marcellus shale. On September 7, 2011, the Pennsylvania Superior Court remanded a Marcellus shale land rights case back to the Susquehanna County Court of Common Pleas to determine whether the term “mineral” in a deed reservation includes Marcellus shale gas. Butler v. Charles Powers Estate, 2011 PA Super 198 (2010). On October 7, 2011, the Butlers appealed the case directly to the Pennsylvania Supreme Court. The decision on this issue may have an immense impact on the booming natural gas industry in Pennsylvania. If it is determined that Marcellus shale gas is a mineral under Pennsylvania law, then existing gas leases will need to be scrutinized to ensure that the proper individuals are parties to said leases. For instance, if a company purchased a lease from a land owner whose deed contained an exception for all “mineral rights,” then the company would be unable to drill under the terms of the lease. Instead, the company would need to track down the owners of the land’s mineral rights and execute a new lease.

RECOMMENDED ACTION STEPS: Review your oil and gas deeds and chain of title to determine if they include any reservations, conveyances or exceptions of “minerals” or “mineral rights.” If they do, and you do not want to wait until the Pennsylvania appellate courts provide more direction, you may consider renegotiating your agreement or filing a quiet title action. The Eckert Seamans oil and shale gas attorneys are always ready to assist clients in this important matter. Our firm will continue to stay on top of this matter and will track any new court or agency developments.

The situation playing out in Butler harkens back to a common law rule established by the Pennsylvania Supreme Court in 1882 – known as the “Dunham rule.” Under this rule, the Pennsylvania Supreme Court has determined that a reservation in a deed of the “minerals” does not include the rights to oil and gas, which must be separately designated. The court in Dunham v. Kirkpatrick, 101 Pa. 36 (1882) reached its decision by asking whether the “plain, ordinary and popular sense” of the term “mineral” includes petroleum. The court concluded that the “mass of mankind” does not consider petroleum a “mineral” because a “mineral” was metallic in nature. Id. Indeed, the Dunham rule, a minority view, provides that the term “mineral” does not include oil or gas unless the evidence is clear that the parties intended oil and gas rights to pass. Highland v. Commonwealth, 161 A.2d 390 (Pa. 1960).