**Butler v. Charles Powers Estate:**
Owners of Marcellus Shale Gas May Now Rest Easily

By Joel R. Burcat

**SUMMARY**

The Dunham Rule is alive and well in Pennsylvania and thousands of titles to Marcellus shale gas will not be impacted by any change in the law. Pennsylvania’s peculiar rule of property law—that says that oil and gas are not minerals—had been challenged and questioned in a 2011 decision of the Superior Court. On April 24, 2013, the Pennsylvania Supreme Court released its much anticipated opinion in Butler v. Charles Powers Estate, and reversed the Superior Court, upholding Pennsylvania’s unique Dunham Rule. For owners of Marcellus shale gas, the Butler decision slammed the door on arguments that might have resulted in a reexamination of thousands of titles.

On April 24, 2013, the Pennsylvania Supreme Court released its much anticipated opinion in Butler v. Charles Powers Estate, ___ A.3d ___, 2013 WestLaw 1749828, No. 27 MAP 2012 (Pa., April 24, 2013), reversing the decision of the Pennsylvania Superior Court, 29 A.3d 35 (Pa. Super. 2011), and upholding Pennsylvania’s ancient property law.

The Superior Court appeared to have opened the door to a change or modification of an important rule of Pennsylvania property law, called the Dunham Rule. That rule held that oil and gas are not “minerals” for purposes of the sale or reservation of subsurface property rights. Had the Superior Court’s determination stood, owners of property may have been able to argue that neither Marcellus shale nor the gas it contains were conveyed in certain deeds. Simply put, the Pennsylvania Supreme Court reversed the Superior Court and upheld Pennsylvania’s unique rule.

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**Summary of the Supreme Court’s Opinion**

In 1882, the Pennsylvania Supreme Court in Dunham and Shortt v. Kirkpatrick, 101 Pa. 36 (Pa. 1882), ruled that in a real property transaction, a sale or reservation of “minerals” did not convey or reserve the oil or gas. The court based this determination on “the common understanding of mankind … that oil is not a mineral.” Id. at 44. Later decisions expanded the rule to include natural gas.

Pennsylvania’s Dunham Rule, as it is known, is unique among states in which oil and gas may be found. In other states, oil and natural gas generally are included within a grant of mineral rights. (Indeed, Justice Saylor, in his concurring opinion, found the Dunham Rule to be “cryptic, conclusory, and highly
debateable.” Butler, Saylor, J., concurring, slip op. at 1.) While the Dunham Rule has been the subject of a number of rulings of the Pennsylvania Supreme Court over the ensuing 130 years, the court has consistently abided by the rule and clarified it. The Superior Court’s determination in Butler called into question the validity of the rule.

As the Supreme Court noted, “Innumerable private, real property transactions for nearly two centuries,” in Pennsylvania have relied on the Dunham Rule “and its long-standing progeny” when conveying or reserving minerals and oil and gas. Butler, slip op. at 20. Likewise, thousands of deeds and leases conveying Marcellus shale gas could have been upset by a change in the Dunham Rule. Owners of Marcellus gas rights across Pennsylvania expressed considerable alarm and filed amicus briefs seeking to preserve the rule. In its Butler determination, the Supreme Court reversed the Superior Court and upheld Pennsylvania’s ancient rule.

The Dunham Rule survives—indeed thrives—in Pennsylvania.