

Chapter 13

Developing Jurisprudence in the Marcellus and Utica Shale

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§ 13.01. Introduction.

Legal issues continue to arise with development of the Marcellus and Utica Shales. One need only look to the region’s first impression cases this past year to see that opportunities for litigation are growing. Those cases ran the gamut from contract interpretation in Ohio to ownership of shale gas in Pennsylvania. The variety highlights the relative infancy of the region’s jurisprudence in the development of “unconventional gas” and the overall lack

of established precedent upon which producers can rely.² Operating in the region not only presents uncertainty for producers, but also provides further incentive for mineral owners, surface owners, environmental interests and their respective attorneys to be creative in their search for the next novel legal theory and big verdict. Consequently, until many more years of precedent like those from 2011 and 2012 are available, producers in the region are left to speculate about the likely outcomes of court decisions.

§ 13.02. Ownership of Marcellus Shale Gas (Pennsylvania).

In what some might eventually call the landmark case of 2012, the Pennsylvania Superior Court issued a decision in *Butler v. Charles Powers Estate*³ that throws into question what was previously thought to be settled law regarding ownership of shale gas. *Butler* revolves around the definition of minerals and whether natural gas trapped in the Marcellus Shale is owned by the owner of the minerals.⁴ Although *Butler* was remanded by the Superior Court for further development and then subsequently appealed to the Pennsylvania Supreme Court of Appeals where it is pending, the implications, if a final ruling affirms the Superior Court's opinion in *Butler*, should not be understated.⁵ The analogous coalbed methane case of *U.S. Steel Corp. v. Hoge*,⁶ which forever changed the ownership and development of that form of "unconventional gas," serves as an example.

The federal district court in *Hoffman v. Arcelormittal Pristine Resources, Inc.* was also confronted with similar issues regarding ownership of unconventional gas, albeit in a less complex set of circumstances relative to *Butler* and resulting in a decision inapposite to *Butler*. In addition, *Hoffman*

² "Unconventional gas" generally includes six main categories of unconventional natural gas: deep gas, tight gas, gas-containing shales, coalbed methane, geopressurized zones, and Arctic and sub-sea hydrates. *Unconventional Natural Gas Resources*, NaturalGas.org, www.naturalgas.org/overview/unconvent_ng_resource.asp (last visited Sept. 6, 2012).

³ *Butler v. Charles Powers Estate*, 29 A.3d 35 (Pa. 2011).

⁴ *Id.*

⁵ *Id.*

⁶ *U.S. Steel Corp. v. Hoge*, 468 A.2d 1380 (Pa. 1983).