

# The Intersection Of Gas And Coal In Pennsylvania

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## ABSTRACT

*Pennsylvania ranks as the nation’s second largest producer of natural gas and its third largest producer of coal.<sup>2</sup> Because many of Pennsylvania’s most productive coal regions are also its most productive oil and gas regions, finding a balance between coal operations and oil and gas operations has long been essential to the development of these mineral interests. Indeed, in 1913, the Federal Bureau of Mines convened a two-day conference at Pittsburgh’s Engineers Society of Western Pennsylvania that was devoted to addressing the “the increased risks of mine explosions and the waste of coal that result from the present system or lack of system in drilling oil and gas wells in the coal fields.”<sup>3</sup> The principal aim of*

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2. U.S. Energy Information Administration, *Natural Gas Gross Withdrawals and Production, Gross Withdrawals, Annual-Million Cubic Feet, 2011-16*, available at [http://www.eia.gov/dnav/ng/ng\\_prod\\_sum\\_a\\_EPG0\\_FGW\\_mmcfa.htm](http://www.eia.gov/dnav/ng/ng_prod_sum_a_EPG0_FGW_mmcfa.htm); U.S. Energy Information Administration, *Annual Coal Report 2016* (Nov. 2017), at 2-3 (Table 1, Coal Production and Number of Mines by State and Mine Type, 2016 and 2015), available at <http://www.eia.gov/coal/annual/pdf/acr.pdf>.

3. U.S. Department of the Interior, Bureau of Mines, *Oil and Gas Wells through Workable Coal Beds*, Bulletin 65, *Petroleum Technology* 7, at 3, available at [https://digital.library.unt.edu/ark:/67531/metadc12278/m2/1/high\\_res\\_d/Bulletin0065.pdf](https://digital.library.unt.edu/ark:/67531/metadc12278/m2/1/high_res_d/Bulletin0065.pdf).

the conference was “to develop and recommend for general adoption such changes in practice as well as in legislation as might prove to be effective by being both reasonable and enforceable.”<sup>4</sup>

Then, coal was king. Even so, conference participants recognized that a delicate balance needed to be reached between the rights and interests of coal operators and those of oil and gas developers. As explained by George S. Rice, chief mining engineer, Bureau of Mines, Pittsburgh:

The problem of formulating laws is not one that concerns alone the coal operator and the inspector, for it also concerns the gas and oil well operators. The latter must be given the opportunity to search for and obtain the gas and oil they hold under option or ownership.

It is manifest that they wish to take reasonable precautions for safety, but do not wish to be put to unnecessary expense or to be prevented from drilling wells in coal fields; therefore some means must be found by which the wells can be drilled through or in the vicinity of the coal mines without creating dangerous conditions.<sup>5</sup>

While coal may not be the economic juggernaut it once was in Pennsylvania,<sup>6</sup> the need for balance between oil and gas development and coal development remains as important today as ever.

The challenges inherent in developing these two mineral estates may be distilled into two basic questions. First, what recovery operations should coal operators and oil and gas operators be allowed to engage in at any given time? In answering this question, safety considerations are paramount. But due regard must also be given to each party’s right to access its minerals without unnecessary cost or delay.

Second, if one mineral estate owner’s operations detrimentally impact another mineral estate owner’s ability to recover its minerals, should the injured mineral estate owner be entitled to damages? And if so, under what circumstances, and how are they to be measured? For instance, if a coal operator’s longwall mining plans are delayed or otherwise adversely impacted by a new oil and gas well, is the coal operator entitled to damages?<sup>7</sup> Somewhat similarly, if an oil and gas operator’s operations are delayed or it is required to construct its well pad at a more expensive or less desirable location from a production standpoint as a result of a coal operations, is the oil and gas operator entitled to damages? Is an oil and gas operator entitled to damages in the event its facilities are harmed as a result of a mine subsidence event?

**[T]he need for balance between oil and gas development and coal development remains as important today as ever.**

4. *Id.*

5. *Id.* at 10.

6. Coal’s once undisputed position as “king” in Pennsylvania has been called into question in recent years. For instance, spurred by production from the Marcellus Shale, Pennsylvania’s natural gas production increased by a factor of more than thirty from 2006 to 2016. U.S. Energy Information Administration, *Pennsylvania Natural Gas Gross Withdrawals (Million Cubic Feet)*, Annual, 1969-2016, available at <https://www.eia.gov/dnav/ng/hist/n9010pa2a.htm>. On the other hand, coal production in Pennsylvania dropped by 8.6% from 2015 to 2016. U.S. Energy Information Administration, *Annual Coal Report 2016* (Nov. 2017), at 2. Over that same period, national coal production decreased 18.8%, sinking to its lowest level since 1979. *Id.* at 2.

7. Over 85% of Pennsylvania’s underground coal production comes from longwall mining. See U.S. Energy Information Administration, *Annual Coal Report 2016* (Nov. 2017), at 9. However, the technique of longwall mining is somewhat inflexible and is most efficient when there are no obstructions, like oil or gas wells, that the longwall mining machine must avoid. Wesley A. Cramer, *Plugging Oil and Gas Wells: Who’s in Control – Lessor or Lessee? Are Some Pennsylvania Courts Changing the Rules?*, 14 *Eastern Min. L. Inst.* 22, §22.03[3] (1993).

*This article explores these two over-arching questions and provides an overview of Pennsylvania law on the issues related to them. Part I traces the evolution of the law in Pennsylvania concerning the competing interests of coal owners and oil and gas operators. Part II provides an overview of the law as it currently exists in Pennsylvania regarding the first question—what activities should the operators of mineral estates be allowed to undertake to recover their minerals at any given time? Part III addresses whether damages for “interference” caused by competing oil and gas and coal operations may be recoverable.*

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## I. HISTORICAL DEVELOPMENT

### A. *Chartiers Block*

The 1913 Conference did not mark the first time the competing interests of oil and gas operators and coal operators had received careful consideration in Pennsylvania. Twenty years earlier, in *Chartiers Block Coal Co. v. Mellon*<sup>8</sup>—a case recognized by the Court to be one “of very grave importance”<sup>9</sup>—the Supreme Court of Pennsylvania addressed some of the key points of contention between coal operators and oil and gas operators.

The legal proceedings in *Chartiers Block* were initiated by the Chartiers Block Coal Company (“CBCC”), which, in 1881, had acquired the coal underlying a particular property, along with various rights and privileges necessary to mine the coal.<sup>10</sup> Importantly, while the grantor retained the oil and gas, it did not reserve the right to drill through the coal to access the oil or gas beneath the coal seam.<sup>11</sup> Around 1891, oil and gas were discovered in the general area of the property and the surface owner entered into an oil and gas lease with an operator who immediately began drilling oil and gas wells on the property that passed through the coal seam.<sup>12</sup>

CBCC filed a lawsuit to enjoin the oil and gas operator from continuing to drill the wells it had commenced and from drilling any additional wells that would pass through the coal.<sup>13</sup> In support of its position, CBCC argued that: (1) the oil and gas operator did not have the right to drill through the coal seam because the coal severance deed did not reserve that right to the grantor, and (2) the wells could not be drilled safely through the mine.<sup>14</sup>

The trial court found that the surface owner had “a right of way by necessity through the coal to reach his oil and gas lying beneath it[,]” but that the right of way “should be sustained in a reasonable manner, having due regard for the interest and rights of both parties.”<sup>15</sup> The trial court refused to grant an injunction as to the wells that had already been drilled, but did enjoin the oil and gas operator from drilling any new wells that would pass through the coal seam until the operator had posted a \$10,000 bond to protect CBCC’s coal, property and employees from damages that could be caused by the wells.<sup>16</sup> The trial court directed the oil and gas op-

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8. *Chartiers Block Coal Co. v. Mellon*, 152 Pa. 286, 25 A. 597 (1893).

9. *Id.* at 597.

10. *Id.*

11. *Id.*

12. *Id.* at 597.

13. *Id.* at 597.

14. *Id.*

15. *Id.* at 598.

16. *Id.* at 597-98.

erator to use “the best methods, devices and appliances in the construction and operation of” its wells and to “securely plug . . . each oil and gas bearing sand” prior to abandoning them.<sup>17</sup>

CBCC appealed the trial court’s decree, and the Supreme Court of Pennsylvania affirmed it. It held that oil and gas owners in Pennsylvania have an implied right<sup>18</sup> to access their oil and gas, even where it exists under the coal and even when its production may interfere with coal operations. It explained:

The owner of the coal must so enjoy his own rights as not to interfere with the lawful exercise of the rights of others who may own the estate, either above or below him. The right of the surface owner to reach his estate below the coal exists at all times. The exercise of it may be more difficult at some times than at others, and attended with both trouble and expense. No one will deny the title of the surface owner to all that lies beneath the *strata* which he has sold. It is as much a part of his estate as the surface. If he is denied the means of access to it, he is literally deprived of an estate which he has never parted with.<sup>19</sup>

It also explained that each owner of a mineral estate underlying a property has an implied right of access to its mineral estate that stems from “the contract of sale, the position of the *stratum* sold, and the impossibility of reaching it in any other manner.”<sup>20</sup>

The Court qualified its holding by providing that the right to drill through the coal “may be suspended during the operation of the removal of the coal to the extent of preventing any wanton interference with the coal mining, and for every necessary interference with it the surface owner must respond in damages.”<sup>21</sup> Thus, the Court differentiated between “wanton interference”—which could be temporarily enjoined while the coal is being mined—and “necessary interference”—which may not be enjoined, but for which the oil and gas operator must pay damages to the coal owner.

The *Chartiers Block* Court continued by encouraging the state legislature to enact a statute to create the mechanism by which a coal owner could secure a proper remedy. It observed:

While the right of the surface owner to reach in some way his underlying *strata* is conceded, it involves too many questions affecting the rights of property, and of injury to the underlying *strata*, to be settled by the judiciary. It is a legislative, rather than a judicial, question. It needs and should promptly receive the interposition of the legislative authority. That body is now in session, and we have no doubt its wisdom will enable it to dispose of this somewhat difficult question in such manner as to protect the rights of the surface owner, and yet do no violence to the rights of others to whom he has sold one or more of the underlying *strata*. With the right conceded, there can be no serious difficulty in the law making power affording a proper remedy. That remedy should be carefully guarded. The owner of the underlying *strata* should not be permitted at his mere will and pleasure to interfere with *strata* lying above him. All this requires an amount of legal machinery that a court of equity cannot supply, however wide its jurisdiction and plastic its process. In all such cases there should be a petition to the court, and a decree regulating the mode of exercise of the right. There should also be a provi-

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17. *Id.* at 597.

18. The Court noted that the difficulty of the case before it was to “so apply the law as to give each owner the right of enjoyment of his property or *strata* without impinging upon the right of other owners, where the owner of the surface has neglected to guard his own rights in the deed by which he granted the lower *strata* to other owners.” *Id.* at 598 (emphasis added).

19. *Id.* at 599.

20. *Id.* at 598.

21. *Id.* at 599.

sion for the appointment of a jury of view to assess the damages. In this way the rights of the surface owner can be preserved without any wrong to the owner of the coal.<sup>22</sup>

Ultimately, while *Chartiers Block* left many unanswered questions for the Pennsylvania Legislature to address, it established the following key principles under Pennsylvania law:

- Oil and gas owners have the right to drill through coal seams to access their oil and gas, even when such a right was not reserved in the relevant severance deed.
- The right to drill through a coal seam may be suspended when coal operations are being conducted and the drilling would result in “wanton” interference with those operations.
- At least where the right to drill through the coal was not expressly reserved by deed, an oil and gas owner or operator is liable to the coal owner for any damages to coal operations that result from “necessary” interferences caused by drilling.

More than 120 years later, *Chartiers’ Block* remains the Supreme Court of Pennsylvania’s last word on these principles.

## B. The 1955 Act

The Pennsylvania Legislature failed to heed *Chartiers Block’s* call to action for over six decades, until 1955, when it passed the Gas Operations Well-Drilling Petroleum and Coal Mining Act (the “1955 Act”).<sup>23</sup> The 1955 Act established a permitting regime for oil or gas wells that were to be drilled in coal areas and required coal operators to leave coal pillars around wells that penetrate a coal seam.

As to new wells, the 1955 Act required oil and gas operators to obtain a drilling permit from the Pennsylvania Department of Environmental Resources (“DER”)<sup>24</sup> before drilling any well that was to pass through a “workable coal seam.”<sup>25</sup> The “owner or operator of all known underlying workable coal seams” was to be notified of the permit application, and was given 10 days to file objections if it believed “the well when drilled or the pillar of coal about the well [would] . . . unduly interfere with or endanger” the mine.<sup>26</sup> If DER or the coal owner or operator timely objected to the permit application, a conference was held at which the parties were to attempt to agree on a location for the well.<sup>27</sup> If no agreement could be reached, DER was to hold a hearing, following which it was to identify “a location on such a tract of land as near to the original location as possible where, in the judgment of the division, the well can be safely drilled without unduly interfering with or endangering

22. *Id.* at 298, 25 A. at 599.

23. 52 P.S. §2101 *et seq.* (repealed). See *Einsig v. Pennsylvania Mines Corp.*, 452 A.2d 558, 561, 565 (Pa. Cmwlth. 1982) (noting that “[s]ome fifty-odd years later, the legislature passed the [1955 Act], which addressed [the] very concerns” that the *Chartiers Block* court had referred to the legislature).

24. DER was the predecessor agency to the Pennsylvania Department of Environmental Protection (“DEP”).

25. *Einsig*, 452 A.2d at 561; 52 P.S. §§ 2201 and 2202(d) (repealed). A “workable coal seam” was defined as “(i) a coal seam in fact being mined in the area in question under [the 1955 Act] by underground methods or (ii) one which in the judgment of the division can be and that it is reasonable to be expected will be mined by underground methods.” 52 P.S. 2102 (repealed).

26. *Einsig*, 452 A.2d at 561; 52 P.S. §§2201(a) and 2202(a)(repealed).

27. 52 P.S. §2202(b) (repealed).

such mine” and to issue a drilling permit authorizing the permit applicant to drill at that location.<sup>28</sup>

The 1955 Act expressly avoided addressing the damages issues raised by the *Chartiers Block* court.<sup>29</sup> It provided:

Nothing in [the 1955 Act] shall be construed to require a well operator to pay for any coal pillar required by the act to be left around any well drilled prior to the effective date of [the 1955 Act]. Nothing contained in [the 1955 Act] . . . shall in any way affect (1) any right which the coal operator would have had prior to the effective date of [the 1955 Act] to obtain payment for such coal nor (2) any duty or right which the well operator, storage operator or land owner may have had prior to the effective date of [the 1955 Act] to pay or not to pay for such coal.<sup>30</sup>

### **C. *Einsig***

In *Einsig v. Pennsylvania Mines Corp.*,<sup>31</sup> the Commonwealth Court of Pennsylvania addressed the interplay between *Chartiers Block* and the 1955 Act. *Einsig* concerned the issuance of a drilling permit under the 1955 Act for a well located within a 2,900-acre area that was covered by an “informal agreement” that had been reached between an association representing coal operators and associations representing oil and gas operators. Under the informal agreement, the oil and operators agreed to space their wells at least 1,000 feet apart, and the coal operators agreed not to challenge drilling permit applications for wells that complied with the agreed-upon spacing restriction.<sup>32</sup> The informal agreement was eventually “breached” by an oil and gas operator who sought, and ultimately was granted, a permit to drill a well within the 2,900-acre area that was less than 1,000 feet from an existing well.<sup>33</sup> The oil and gas operator’s drilling options were very limited, as its oil and gas lease only covered a single acre, and no part of the leasehold was 1,000 feet or more from an existing well.<sup>34</sup>

Upon receiving notice of the permit application, the coal mine owner promptly objected and a conference was held before DER.<sup>35</sup> At the conference, the oil and gas operator agreed to relocate the proposed well site to the location on the one-acre lease that the coal mine owner stated would least interfere with its operations, and DER issued the permit for the relocated proposed well site, finding that the oil and gas operator had made “the maximum accommodation possible under the circumstances[.]”<sup>36</sup>

The coal mine owner appealed to the Pennsylvania Environmental Hearing Board (the “EHB”), contending that the permitted site was unacceptable as it was still within 1,000 feet of an existing well.<sup>37</sup> The EHB found that DER abused its discretion in issuing the permit, and voided it.<sup>38</sup>

28. *Id.*

29. See *Chartiers Block*, *supra* note 8, at 599 (calling on the state legislature to address questions concerning “injury to the underlying *strata*” caused by oil and gas drilling).

30. 52 P.S. §2203(f) (repealed).

31. *Einsig v. Pennsylvania Mines Corp.*, 452 A.2d 558 (Pa. Cmwlth. 1982).

32. *Pennsylvania Mines Corp. v. Department of Environmental Resources*, 1982 EHB 215, 1982 WL 17745, \*5 (Pa.Env.Hrg.Bd. Sept. 9, 1982); *Einsig*, 452 A.2d at 561, n.4; see also *Foundation Coal Resources Corp. v. Department of Environmental Protection*, EHB Docket No. 2006-067-R, 2009 WL 692643, 20 (Pa.Env.Hrg.Bd. Mar. 9, 2009).

33. *Einsig*, *supra* note 23, at 560-62.

34. *Id.* at 560-61 and 562, n.7.

35. *Id.* at 561-62.

36. *Id.*

37. *Id.*

38. *Id.* at 562.

On appeal, the Commonwealth Court reversed the EHB's decision and reinstated the drilling permit.<sup>39</sup> The Commonwealth Court found that the evidentiary record did not support the EHB's conclusion that the well would unduly interfere with or endanger the mine.<sup>40</sup>

The Commonwealth Court discussed the relationship between *Chartiers Block* and the 1955 Act, and found that the 1955 Act did not supersede *Chartiers Block*.<sup>41</sup> Construing *Chartiers Block* and the 1955 Act together, the Commonwealth Court found that the oil and gas operator's "right to drill through the coal" was only limited in the following three respects: (1) any rights or duties emanating from its "contract of sale"; (2) safety considerations; and (3) DER's authority to restrain the operator's undue interference with or endangerment of the mine.<sup>42</sup>

The Commonwealth Court defined the rights arising from the "contracts of sale" as the rights between the parties that are not "regulated by the Act,"<sup>43</sup> including those created by means of a severance deed.<sup>44</sup> It found that matters pertaining to those rights should be left to the courts of common pleas, and not to DER.<sup>45</sup> Included in this category are claims for damages. The court explained, "The proper court [*i.e.*, the court of common pleas] could determine to what degree, if any, the surface owner/driller 'must respond in damages' for problems caused by the well."<sup>46</sup>

As to matters pertaining to safety and DER's authority to restrain undue interference with mining operations, the Commonwealth Court recognized that "any well will interfere with or endanger any mine to some degree[]"<sup>47</sup> and held that DER's authority under the 1955 Act was "limited to ascertainment of whether a well can be safely drilled, and, if so, where on the driller's tract of land it can be located where it will least interfere with or endanger the mine."<sup>48</sup> Any location other than the one "where the effect on the mine is least significant[]" as agreed upon by the parties or determined by DER "in the application of its environmental expertise[]" would unduly interfere with or endanger the mine.<sup>49</sup>

The Commonwealth Court also found that the EHB erred in weighing the relative financial impacts that the proposed drilling would have on the parties.<sup>50</sup> It held that DER "cannot issue or deny a permit upon consideration of which entity, the mining company or the well-driller, will be more financially harmed, or proportionately more financially harmed, once it has determined that the well may be safely drilled."<sup>51</sup>

The key legal conclusions reached in *Einsig* may be summarized as follows:

- The 1955 Act did not supersede *Chartiers Block*.
- An oil and gas operator's right to drill through coal may only be limited by (i) any rights or duties emanating from its "contract of sale"; (ii) safety considera-

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39. *Id.* at 560.

40. *Id.* at 564.

41. *Id.* at 565-66.

42. *Id.* at 568.

43. *Id.* at 565.

44. *See id.* at 568.

45. *Id.*

46. *Id.* (quoting *Chartiers Block*, 152 Pa. at 297, 25 A. at 599).

47. *Id.* at 567.

48. *Id.* at 568.

49. *Id.* at 567. The court drew parallels between "wanton interference," as discussed in *Chartiers Block*, and "undue interference," as addressed in the 1955 Act. *See id.* at 566 ("Where, in pre-DER days, a court of equity could have acted to prevent 'wanton' interference with a coal mine by a driller, the [1955 Act] has empowered DER to prevent 'undue' interference with the mine.").

50. *Id.* at 566-67.

51. *Id.* at 567.

tions; and (iii) DER's power to restrain undue interference with, or endangerment of, a coal mine.

- DER may not rule on matters pertaining to the rights or duties flowing from the "contract of sale," including claims for damages. Such matters are to be left to the courts of common pleas.
- DER may rule on matters pertaining to safety and to restrain undue interference with, or endangerment of, a coal mine. But DER's authority to do so is limited to determining whether a well can be safely drilled, and, if so, where on the driller's land it can be located so it will least interfere with or endanger the mine.
- When determining whether to issue or deny a permit, DER may not consider the relative financial harms that may be suffered by the well operator and the coal operator.

As discussed below, while the final conclusion above proved to be short-lived, the others remain good law.

## II. THE CURRENT LAW ON PERMISSIBLE ACTIVITIES

### A. Updating the 1955 Act

In 1984, at least partially in response to *Einsig*,<sup>52</sup> the Pennsylvania Legislature enacted both the Coal and Gas Resource Coordination Act (the "CGRCA")<sup>53</sup> and the Oil and Gas Act (the "1984 OGA").<sup>54</sup> Both statutes have undergone significant changes in recent years in an attempt to address the realities of modern oil and gas operations. More particularly, in 2011, Pennsylvania enacted various amendments to the CGRCA (the "2011 Amendments"),<sup>55</sup> and in 2012, the 1984 OGA was repealed and its terms were substantially revised and expanded through the enactment of the current Oil and Gas Act (referred to as "Act 13").<sup>56</sup>

### B. Well Permit Applications and Objections Under Act 13

Act 13 addresses a host of matters, including the issuance of permits to drill or alter gas, oil, injection, and storage wells.<sup>57</sup> Permit applications must be accompanied by a plat that identifies, among other items: (1) the location of the existing or proposed well; (2) the location of any "workable coal seams"<sup>58</sup> underlying the tract of land on which the well exists or is to be drilled; and (3) the owner or operator of any such workable coal seams.<sup>59</sup> The applicant must send a copy of the plat to various interested parties, including "the owner and lessee of any coal seams" and "each coal operator required to be identified on the well permit application."<sup>60</sup>

52. See *Found. Coal Resources Corp. v. Department of Environmental Protection*, 993 A.2d 1277, 1284 (Pa. Cmwlth. 2010).

53. See 58 P.S. §501 *et seq.*

54. See 58 P.S. §601.101 *et seq.* (repealed).

55. 2011 Pa. Legis. Serv. Act 2011-2 (S.B. 265, Printer's No. 242).

56. 58 Pa.C.S.A. §§3201, *et seq.*

57. 58 Pa.C.S.A. §3211; *see also* 58 Pa.C.S.A. §3203 (defining "well") (certain wells used in connection with solid waste disposal facilities or to vent methane to the outside atmosphere from an operating coal mine or under an abandoned mine reclamation project are exempt from coverage under Act 13).

58. The definition of "workable coal seam" under Act 13 is nearly identical to the term's definition in the 1955 Act. Under Act 13, a "workable coal seam" is a coal seam which "(1) is actually being mined in the area in question under this chapter by underground methods; or (2) in the judgment of [DEP], can reasonably be expected to be mined by underground methods." 58 Pa.C.S.A. §3203.

59. 58 Pa.C.S.A. §3211(b)(2).

60. *Id.*



A coal owner or operator may file objections to a well permit application under Act 13 if: (1) the proposed well “will penetrate within the outside coal boundaries of an operating coal mine<sup>61</sup> or a coal mine already projected and platted but not yet being operated, or within 1,000 linear feet beyond those boundaries[;]” and (2) the coal owner or operator believes “the well or a pillar of coal about the well will unduly interfere with or endanger the mine. . . .”<sup>62</sup>

Objections must be filed within 15 days of the coal operator’s receipt of the plat, and must identify an alternative location for the proposed well, if possible.<sup>63</sup> If (1) neither the coal owner, the coal operator, nor DEP file or raise objections to the well’s location within 15 days after the coal operator or coal owner receives the plat, or (2) the coal operator or owner approves of the location in writing and DEP does not raise an objection within 15 days of the approval’s filing with DEP, DEP must “proceed to issue or deny the permit.”<sup>64</sup>

If DEP or a coal owner or operator timely objects to a permit application, DEP must hold a conference with the parties within 10 days from the date the objection was served, to “allow the parties to consider the objection and attempt to agree on a location.”<sup>65</sup> If the parties cannot reach an agreement, DEP is to “determine a location on the tract of land as near to the original location as possible where, in the judgment of the department, the well can be safely drilled without unduly interfering with or endangering the mine. . . .”<sup>66</sup> The new location, whether agreed upon by the parties or determined by DEP, becomes part of the permit application record “upon which [DEP] shall proceed to issue or deny the permit.”<sup>67</sup>

### C. Additional Requirements for Wells Subject to the CGRCA

The CGRCA only applies to certain wells covered by Act 13. It does not apply to (i) oil wells, (ii) injection wells, (iii) storage wells, or (iv) wells to be permitted under the Oil and Gas Conservation Law (the “OGCL”)<sup>68</sup> that will “in fact, be drilled to a depth which penetrates the onondaga horizon or, in those areas where the onondaga is closer to the surface than 3,800 feet, penetrates deeper than 3,800 feet, even if the well is completed as a gas well which would otherwise be subject to” the CGRCA.<sup>69</sup>

For wells that are not excluded from coverage under the CGRCA and do, or will, penetrate a “workable coal seam,”<sup>70</sup> the CGRCA imposes two important additional permitting restrictions. First, if a proposed well will penetrate an “operating coal

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61. The definition of “operating coal mine” under Act 13 differs from the definition of “operating coal mine” under the CGCRA. Act 13 defines an “operating coal mine” as: “(1) An underground coal mine which is producing coal or has been in production of coal at any time during the 12 months immediately preceding the date its status is put in question, including contiguous worked-out or abandoned coal mines to which it is connected underground[;]” or “(2) An underground coal mine to be established or reestablished under paragraph (1).” 58 Pa.C.S.A. §3203. See *infra* note 78 for the CGCRA’s definition of “operating coal mine.”

62. 58 Pa.C.S.A. §3212(b). A coal mine is not “projected and platted” until the coal owner or operator has filed a “technically complete coal mining application.” *Foundation Coal Resources*, 993 A.2d at 1288 (citation omitted).

63. 58 Pa.C.S.A. §3212(b).

64. *Id.*

65. 58 Pa.C.S.A. §3212(c).

66. *Id.*

67. *Id.*

68. 58 P.S. §401 *et seq.*

69. 58 P.S. §503(b).

70. The CGRCA’s definition of “workable coal seam” is consistent with the term’s definition in Act 13. See 58 P.S. §502, 58 Pa.C.S.A. §3203.

mine,”<sup>71</sup> a drilling permit can only be issued if the coal mine operator has consented in writing to the well’s proposed location.<sup>72</sup> Second, the CGRCA prohibits DEP from issuing a permit for any well that is subject to the CGRCA that is not located at least 1,000 feet from any “other well”<sup>73</sup> unless the permit applicant and the owner of the workable coal seam consent in writing to the proposed location.<sup>74</sup> Thus, the CGRCA effectively adopts the 1,000-foot minimum spacing requirement that was the subject of the “informal agreement” addressed in *Einsig*.

To allow multiple horizontal wells to be drilled from a single well pad without violating the 1,000-foot minimum spacing requirement, the 2011 Amendments recognize a new category of wells—wells that are within a “well cluster.” A “well cluster” is an area on a well pad, no larger than 5,000 square feet, that is “intended to host multiple horizontal wells[.]”<sup>75</sup> Wells located on the same well cluster are not required to comply with the 1,000-foot minimum spacing requirement as to each other.<sup>76</sup> However, a well cluster must be at least 2,000 feet from the nearest well cluster, “as measured from the center of the well bore of the nearest well,” unless the permit applicant and the owner of the workable coal seam consent in writing to a different well cluster spacing.<sup>77</sup>

## D. Objections under the CGRCA

The CGRCA provides a more elaborate procedure for handling objections. When a proposed well or well cluster subject to the CGRCA is located above an “active coal mine,”<sup>78</sup> the coal owner has 10 days from DEP’s receipt of the plat to file written objections that set out “in detail the ground or grounds upon which the objections are based.”<sup>79</sup> When a proposed well cluster subject to the CGRCA “will penetrate a workable coal seam which is not part of an active mine,” the coal owner has 15 days from receipt of the plat to “provide recommendations” to the applicant for the gas well on the location of the well cluster.<sup>80</sup>

If the permit applicant and the owner of the workable coal seam cannot agree on a drilling location or on the spacing of well clusters, their differences are to be submitted to a panel consisting of one person selected by the objecting coal owner or operator, one person selected by the permit applicant, and a third person selected by the other two members of the panel.<sup>81</sup> The panel is to “convene a meeting” within

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71. The CGRCA defines an “operating coal mine” as “[t]hat portion of a workable coal seam which is covered by an underground mining permit issued by [DEP].” 58 P.S. §502.

72. 58 P.S. §506(f).

73. 58 P.S. §507(a). The term “other well” does not include (i) oil or gas wells or injection wells that do not penetrate a workable coal seam; (ii) oil or gas wells that have been plugged in accordance with applicable laws; (iii) non-producing oil or gas wells that were drilled and abandoned prior to November 30, 1955; or (iv) storage wells. 58 P.S. §507(a)(1)-(4).

74. 58 P.S. §507(a)-(c); *see also* 58 P.S. §506(a) (requiring permit applications for gas wells covered by the CGRCA to include a certification that the gas well will be located so that it will comply with the minimum spacing requirements or that the well is subject to an exception).

75. 58 P.S. §507(f).

76. 58 P.S. §507(d).

77. *Id.*

78. An “active coal mine” is defined under the CGRCA, in pertinent part, as “[t]hat portion of a workable coal seam which is shown on the five-year timing map prepared by the mine operator and provided to [DEP] upon issuance of a new permit, an amendment to an existing permit adding additional area to be mined, or renewal of an existing permit, and which is contiguous to the permit area of any operating coal mine. . . .” 58 P.S. §502.

79. 58 P.S. §512(a).

80. 58 P.S. §507(e).

81. 58 P.S. §§507(e) and 512(c).

10 days of a request to do so by either party.<sup>82</sup> The parties are to submit their positions to the panel within the time and in the form (written or oral) specified by the panel.<sup>83</sup>

Within 10 days of the close of the meeting, the panel is to “choose the location, if any, on the permit applicant’s tract” that both (1) allows the proposed gas well to be drilled without endangering the safety of persons working in any coal mine; and (2) allows for the “maximum recovery of gas and removal of coal.”<sup>84</sup> The panel must weigh the additional cost, including the value of any oil or gas that will be lost, that the permit applicant would incur if the well was required to be drilled in a different location against the costs, including the value of any coal that will be lost, that the coal owner/operator would incur if the drilling was allowed to take place at the location specified in the permit application.<sup>85</sup>

Once DEP receives the panel’s recommendation, it has 20 days to issue a well permit based on the location recommended by the panel, unless it finds that the well cannot be safely drilled at the recommended location.<sup>86</sup> If the panel’s recommendation is rejected, DEP must notify the panel of its reasons for rejecting the recommendation and direct the panel to submit another recommendation within 10 days.<sup>87</sup>

Given the significant procedural and substantive differences between the objection processes under Act 13 and the CGRCA, where objections may be pursued under either statute, a coal owner or operator should carefully consider under which statute to file any objections. For instance, while the procedure under the CGRCA offers the parties a more rigorous and comprehensive process than the one provided under Act 13, the process is also likely to be more time consuming and costly. Any additional time and cost may be more than justified, however, where the coal owner or operator believes its position would benefit from the appointment of at least one panelist with specialized knowledge and experience in a field deemed to be particularly important to the objections.

Additionally, because objections under the CGRCA require consideration of the relative economic impacts that the well would have on the parties while objections under Act 13 only allow consideration of whether the well will “unduly interfere with or endanger” the mine, where a coal owner or operator intends to raise objections related to safety but not economic impacts, it may be prudent for the coal owner or operator to file its objections under Act 13 rather than under the CGRCA to avoid unnecessary litigation on economic matters.

## E. Revised Restrictions on Mining Around Wells Under Act 13

Act 13 includes requirements for a coal operator who desires to remove any coal or cut any passageway within five hundred feet of an oil or gas well or an approved

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82. 58 P.S. §512(c).

83. 58 P.S. §512(d).

84. 58 P.S. §512(d) and (e). DEP’s regulations purport to limit the scope of the panel’s inquiry to “the financial considerations of the parties” and to reserve to itself all matters pertaining to safety. 25 Pa. Code §§ 78.32(a) and 78a.32(a). To the extent the regulations are materially inconsistent with Act 13 and the CGRCA, their application and enforceability may be susceptible to legal challenge. See *Lancaster County v. Pennsylvania Labor Relations Board*, 626 Pa. 70, 81, 94 A.3d 979, 986 (2014); *Gardner v. W.C.A.B. (Genesis Health Ventures)*, 585 Pa. 366, 381, 888 A.2d 758, 767 (2005) (citations omitted).

85. 58 P.S. §512(d). The CGRCA’s requirement that the panel consider the relative economic impacts to be borne by the parties is in stark contrast to *Einsig’s* holding that the 1955 Act did not authorize DEP to consider the potential economic impacts of its permitting decisions. That said, neither Act 13 nor the CGRCA authorizes DEP to require a well permit applicant or objector to pay damages to the other party as a condition for the granting or adjustment of a well permit. In that regard, the two statutes are consistent with *Einsig’s* finding that the awarding of damages should be left to the courts. See *Einsig*, 452 A.2d at 568.

86. 58 P.S. §512(e).

87. *Id.*

well location of which the coal operator has knowledge.<sup>88</sup> The requirements are substantially the same as they existed under the 1955 Act.<sup>89</sup> More particularly, before removing the coal, the coal operator must send DEP and the well operator a copy of its maps and plans showing the pillar that the coal operator proposes to leave in place around the well.<sup>90</sup> Once it does so, it may proceed with its operations, except that it may not remove any coal or cut any passageway within 150 feet of the well location until it receives a permit from DEP.<sup>91</sup> If the well operator believes the pillar proposed to be left “is inadequate to protect either the integrity of the well or public health and safety,” it must first “attempt to reach an agreement with the coal operator on a suitable pillar,” subject to DEP’s approval, and if that attempt proves unsuccessful the well operator may, within 10 days after receipt of the proposed plan, file objections.<sup>92</sup> If objections are filed, DEP is to hold a conference, at which the well operator and the coal operator are to again attempt to agree on a proposed plan, showing the pillar to be left around each well.<sup>93</sup> If no agreement is reached, DEP is to “determine the pillar” to be left with respect to the well.<sup>94</sup> DEP may not require the coal operator to leave a pillar in excess of 100 feet in radius unless it is established that “unusual conditions exist requiring the leaving of a larger pillar[,]” and even under those circumstances, DEP may not require the coal operator to leave a pillar exceeding 150 feet in radius.<sup>95</sup> Act 13 expressly avoids addressing liability for coal required to be left in coal pillars around wells.<sup>96</sup>

## F. Plugging Requirements and Obligations

Statutes have existed in Pennsylvania since at least 1881 to require oil and gas well owners and operators to plug their wells before abandoning them.<sup>97</sup> Currently, the laws governing the plugging of wells in Pennsylvania are found in Act 13 and the CGRCA, which includes specific plugging requirements for gas wells drilled through workable coal seams.

Under Act 13, plugging obligations are triggered once a well has been “abandoned.”<sup>98</sup> A well is deemed to have been “abandoned” if it has not been granted

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88. Unlike the requirements set forth in the CGRCA, these requirements apply to all gas wells, oil wells, injection wells and storage wells in Pennsylvania. 58 Pa.C.S.A. §3203 (defining “well”); see 58 P.S. §503(b).

89. See 52 P.S. §2203 (repealed).

90. 58 Pa.C.S.A. §3224(a).

91. *Id.*

92. *Id.*

93. 58 Pa.C.S.A. §3224(b).

94. *Id.*

95. *Id.* The coal pillar radius requirements are based on the findings of a Joint Coal and Gas Committee Gas Well Pillar Study, commissioned by Pennsylvania’s Department of Mines and Mineral Industries in 1956. The 2011 Amendments to the CGRCA directed DEP to commission a new study to evaluate and update the prior study, and authorized the Environmental Quality Board to promulgate regulations modifying certain pillar radius requirements based on the findings of the new study. 58 P.S. §§507(e) and 512.1. After the new study was completed, DEP concluded that it “did not provide results supporting changes” to the earlier study. See Commonwealth of Pennsylvania, Dep’t of Environmental Protection, *Proposed Revised Coal Mine Pillar Dimensions and Alternative Natural Gas Well Construction Methods in Mining Areas Rejected Due to Safety Concerns*, Press Release, January 19, 2017, available at <http://www.ahs.dep.pa.gov/NewsRoomPublic/articleviewer.aspx?id=21133&typeid=1>.

96. 58 Pa.C.S.A. §3224(e). The federal Mine Safety and Health Act (“MSHA”), 30 U.S.C.A. §801 *et seq.*, also places restrictions on a coal operator’s ability to mine in close proximity to an oil or gas well. It requires underground coal mine operators to “take reasonable measures to locate oil and gas wells penetrating coalbeds or any underground area of a coal mine[,]” and grants the Secretary of Labor discretion to require a coal operator to leave a pillar around an oil or gas well that is larger than the pillar required by DEP where particular safety concerns exist. See 30 U.S.C.A. §877(a); 30 C.F.R. §75.1700.

97. Wesley A. Cramer, *Plugging Oil and Gas Wells: Who’s in Control – Lessor or Lessee? Are Some Pennsylvania Courts Changing the Rules?*, 14 Eastern Min. L. Inst. 22, §22.06[1] (1993).

98. See 58 Pa.C.S.A. §3220(a); see also 25 Pa. Code §§78.91 and 78a.91.

inactive status<sup>99</sup> and either: (1) it “has not been used to produce, extract or inject any gas, petroleum or other liquid within the preceding 12 months[.]” (2) equipment necessary for production, extraction or injection oil or gas from the well has been removed; or (3) it is “considered dry” and “is not equipped for production within 60 days after drilling, redrilling or deepening.”<sup>100</sup>

Act 13 provides specific plugging requirements for gas wells that penetrate a workable coal seam and were either drilled prior to January 30, 1956, or were permitted after that but were not plugged in accordance with Act 13, if a coal operator intends to mine through the well.<sup>101</sup> It also provides pre-plugging notification requirements for wells located in an area “underlain by” a workable coal seam.<sup>102</sup> The CGRCA includes additional plugging requirements for gas wells permitted under Act 13 that penetrate a workable coal seam.<sup>103</sup> Failure to adhere to the plugging requirements set forth in Act 13 and the CGRCA may result in criminal and civil penalties.<sup>104</sup>

### III. THE CURRENT LAW ON DAMAGES

As discussed in Parts I and II, in the 125 years since *Chartiers Block* was decided, various statutes and regulations have been adopted to prevent, or at least minimize, the safety risks associated with competing drilling and mining operations, and to ensure that neither operator unduly interferes with the other’s operations. Matters pertaining to damages arising from those competing operations have been left almost entirely to Pennsylvania’s courts and common law.

#### A. Allegheny Enterprises

*Allegheny Enterprises, Inc. v. J-W Operating Co.*<sup>105</sup> is the only case that has addressed an oil and gas operator’s potential liability to a coal owner for damage to its coal since *Einsig*. While limited in both its coverage of the damages issue and its precedential value (being an unpublished federal court decision), it would almost certainly receive careful consideration by any court called upon to address a coal owner’s claims for damages in Pennsylvania and, consequently, is worthy of discussion.

The essential facts in *Allegheny Enterprises* are as follows. The plaintiff, a coal company, initially owned all of the coal and oil and gas rights underlying nearly 9,000 acres of land, known as the Pardee Tract.<sup>106</sup> The coal company assigned the “deep

99. To be granted “inactive status,” the owner or operator must submit an application to the DEP and must satisfy DEP that the well is able to meet certain environmental criteria, the operator anticipates “construction of a pipeline or future use of the well for primary or enhanced recovery, gas storage, approved disposal or other appropriate uses related to oil and gas well production[,]” and the applicant satisfies the applicable bonding requirements. 58 Pa.C.S.A. §3214(a); *see also* 25 Pa. Code §§78.101-78.103, 78a.101-78a.103. Once a well has been granted “inactive status” it must be plugged or returned to active status within 5 years of the date inactive status was granted, unless the owner or operator applies for an extension of inactive status, which may be granted on a year-to-year basis. 58 Pa.C.S.A. §3214(d); *see also* 25 Pa. Code §§78.104 and 78a.104.

100. 58 Pa.C.S.A. §3203 (defining “abandoned well”). Well operators are required to file an annual report with DEP declaring the status of each well and specifying, among other things, the amount of production “on the most well-specific basis available” for the well. 58 Pa.C.S.A. §3222(a).

101. 58 Pa.C.S.A. §3220(a); *see also* 25 Pa. Code §§78.92(c), 78.93(c), 78a.92(c) and 78a.93(c).

102. 58 Pa.C.S.A. §3220(b) and (d).

103. 58 P.S. §513; *see also* 25 Pa. Code §§78.91(g), 78.92-78.93, 78.96-78.98, 78a.91(g), 78a.92-78a.93, 78a.96-78a.98.

104. 58 Pa.C.S.A. §§3255, 3256; 58 P.S. §§515, 516.

105. *Allegheny Enterprises, Inc. v. J-W Operating Co.*, Case No. 4:10-cv-02539, 2014 WL 866478 (M.D. Pa. Mar. 5, 2014).

106. *Id.* at 3.

rights” in the oil and gas underlying the Pardee Tract to the defendant, an oil and gas operator.<sup>107</sup> Two years later, the coal company applied to DEP for a permit to mine coal under a specific portion of the Pardee Tract, and approximately four months after that, the oil and gas operator applied to DEP for a well permit to drill a well in the same part of the Pardee Tract.<sup>108</sup> While the coal company was waiting for its coal mining permit to be issued, DEP issued the oil and gas operator’s well permit, and the oil and gas operator began drilling its well.<sup>109</sup>

The coal company sued, alleging that under the terms of various agreements between the parties, its right to mine the coal was superior to the oil and gas operator’s right to produce the oil and gas.<sup>110</sup> The coal company argued in the alternative that even if its rights to mine the coal were not superior, the oil and gas operator was nevertheless required to compensate it under a claim of “interference with coal interests” for the 13,300 tons of coal on approximately 4.5 acres that the coal company alleged would be rendered inaccessible by the oil and gas operator’s drilling operations.<sup>111</sup>

In ruling on the parties’ cross-motions for summary judgment, the court rejected the coal company’s contractual superior rights argument,<sup>112</sup> but ruled in its favor on its “interference with coal interests” claim. The court predicted that “the Pennsylvania Supreme Court would hold that an oil and gas lessee must compensate the owner of an above-located coal estate for otherwise useful coal rendered inaccessible by oil and gas drilling.”<sup>113</sup> The court found that its conclusion was “supported (if not compelled) by *Chartiers Block*” and was also consistent with *Einsig’s* interpretation of *Chartiers Block*.<sup>114</sup>

The court rejected the oil and gas operator’s argument that “statutes such as” the OGA (and presumably, the CGRCA) “have entirely displaced the common law” with respect to liability for damages to coal caused by oil and gas operations.<sup>115</sup> It also rejected the oil and gas operator’s argument that under *Einsig*, a coal owner can only be entitled to damages if the “contracts of sale” expressly provide for such damages.<sup>116</sup> It found the oil and gas operator’s reading of *Einsig* to be contrary to *Chartiers Block*, which, the federal court explained, “involved the parties’ rights . . . in the absence of specific contractual provisions setting forth the relationship of owners of various strata”<sup>117</sup>—or, as the court in *Chartiers Block* expressed it: “where the owner of the surface has neglected to guard his own rights in the deed by which he granted the lower strata to other owners.”<sup>118</sup>

*Allegheny Enterprises* is persuasive authority reaffirming the notion that when an oil and gas operator is relying on an implied right to drill through the coal, the oil

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107. *Id.* at 4.

108. *Id.*

109. *Id.*

110. *Allegheny Enters.*, 2014 WL 866478 at 4.

111. *Id.* at 1 and 8.

112. *Id.* at 7-8.

113. *Id.* at 9-10 and 12. Although the court granted summary judgment for the coal company as to liability on its “interference with coal interests” claim, it found that genuine issues of disputed material fact existed with respect to the amount of damages to be awarded. *Id.* at 12. A bench trial was held on the issue of damages and post-trial briefs were submitted to the court, but the case settled before a verdict was rendered. See *Allegheny Enters., Inc. v. Endeavor Operating Corp.*, Civ. Action No. 4:10-CV-2539-MWB, Docket Entry 146 (Order Approving Stipulation of Dismissal) (May 7, 2015).

114. *Allegheny Enters.*, 2014 WL 866478 at 9.

115. *Id.* at 11.

116. *Id.*

117. *Id.* (emphasis in original).

118. *Id.* at 11 (quoting *Chartiers Block*, *supra* note 8, at 598).

and gas operator may be liable to the coal owner for “useful coal rendered inaccessible by oil and gas drilling.”<sup>119</sup>

## B. The “Contracts of Sale”

As recognized in *Chartiers Block*, *Einsig*, and more recently, *Allegheny Enterprises*, claims for damages arising from interference caused by competing mineral operations are generally governed by the “contracts of sale” between the parties.<sup>120</sup> The “contracts of sale” include the instruments in the parties’ respective chains of title, the most important of which are typically the severance deeds, and any other agreements concerning the property that may be binding on the parties.<sup>121</sup>

## C. Oil and Gas Operators’ Potential Liability

As *Chartiers Block* and *Allegheny Enterprises* make clear, where a coal severance deed or other controlling “contract of sale” does not include language making the conveyance of coal subject to the grantor’s right to drill through it, the oil and gas owner or operator will be liable to the coal owner or operator to the extent oil and gas operations interfere with the coal mining operations.<sup>122</sup>

However, where the coal severance deed or other contract of sale expressly provides that the grant of the coal is subject to the grantor’s right to drill through the oil and gas without liability to the coal owner, consistent with the principles of deed interpretation stated above and the conclusions reached in *Chartiers Block* and *Einsig*, a court must give effect to the instrument’s language and decline to impose liability on the oil and gas owner for interference with coal operations.<sup>123</sup> That result could even extend to damages caused by negligent or reckless oil and gas operations. The Supreme Court of Pennsylvania has held that a similar provision in a coal severance deed barred a surface owner’s claim that the coal operator “negligently and carelessly used . . . large quantities of dynamite and other high explosives in blasting, thereby causing concussions which broke, cracked, disturbed, and damaged the land and the buildings.”<sup>124</sup>

A more difficult situation arises when the grant of coal is subject to the grantor’s right to drill through the coal, but the deed or agreement is silent as to liability for damages caused by drilling. A court could construe the absence of language insulating the oil and gas operator from liability as evidence that the parties intended the oil and gas owner or operator to be liable for any interference to the coal operations. Such a construction would be bolstered if the instrument expressly disclaimed liability for damage caused by the grantee’s coal operations. In that event,

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119. *Id.* at 12.

120. See *Chartiers Block*, *supra* note 8, at 598; *Einsig*, *supra* note 23, at 568; *Allegheny Enters.*, *supra* note 111, at 11.

121. See *Chartiers Block*, *supra* note 8, at 598 (construing coal severance deed); *Einsig*, *supra* note 23, at 568 (“The consideration of rights flowing from *contracts of sale* are best addressed by a court of common pleas, and not by DER, whose expertise does not extend to *the analysis of chains of title and the limitations therein.*”) (emphasis added); *Allegheny Enters.*, *supra* note 105, at 4, 9 and 11-12 (construing agreements related to the assignment of the “deep rights” in oil and gas).

122. *Chartiers Block*, *supra* note 8, at 599; *Allegheny Enters.*, *supra* note 105, at 9-10 and 12.

123. As discussed in footnote 53, the coal severance deed at issue in *Einsig* included just such a provision. See also *U.S. Steel Corp. v. Hoge*, 468 A.2d 1380, 1382 (1983) (discussing coal severance deed that reserved to the grantor the “right to drill and operate through said coal for oil and gas without being held liable for any damages” and explaining that such language was “common to most coal severance deeds executed in 1920 and in later years. . .”).

124. See *Atherton v. Clearview Coal Co.*, 110 A. 298, 299-300 (1920).

the interpretation would be supported by the rules of construction providing that (1) when interpreting a deed, the entirety of its language must be considered<sup>125</sup> and (2) courts are to construe deed reservations against the grantor.<sup>126</sup>

## D. Coal Operators' Potential Liability

Damages that an oil and gas operator may incur as a result of coal mining may be divided into two separate categories—those caused by mine subsidence, and those caused by other events and circumstances. As the categories are treated somewhat differently under the law, they are discussed separately below.

### 1. Interference Caused by Mine Subsidence

#### a. The Right to Subjacent Support

Pennsylvania law recognizes three distinct “estates” in land—the surface estate, the mineral estate, and the right to subjacent support.<sup>127</sup> Each of the three estates is severable, consequently each may be owned by a different owner.<sup>128</sup> The right to subjacent support is essentially the right to vertical support. It is created by operation of common law whenever the surface estate is severed from the mineral estate, or when different mineral estates are severed from each other.<sup>129</sup> The right is possessed by the owners of all superincumbent estates—*i.e.*, the owners of the surface estate and all mineral estates located above subjacent mineral estates.<sup>130</sup> Where the right to subjacent support is violated, the holder of the right is generally entitled to damages for any resulting harms.<sup>131</sup>

When considering whether a party possessed a right to subjacent support, two questions must be answered. First, was the right to subjacent support waived in the coal severance deed?<sup>132</sup> And second, if not, did the right to subjacent support pass to the party through its chain of title?

With respect to the first question, the right to subjacent support may be waived in a coal severance deed either expressly or by implication.<sup>133</sup> Although waiver by implication may only be found where language “clearly” indicates that the parties intended to waive the right,<sup>134</sup> Pennsylvania courts have consistently found waiver to have occurred where a coal severance deed includes language disclaiming liability for harm to the surface.<sup>135</sup>

Other language in a coal severance deed has also been deemed sufficient to waive the right to subjacent support. The Supreme Court of Pennsylvania’s decision in

125. See *Ralston v. Ralston*, 55 A.3d 736, 742 (Pa. Super. 2012); *Neuling v. Natoli*, 434 A.2d 187, 190 (Pa. Super. 1981).

126. See *Vosburg v. NBC Seventh Realty Corp.*, 122 A.3d 394, 407 (Pa. Super. 2015).

127. *Commonwealth v. Fitzmartin*, 102 A.2d 893, 895 (1954) (citations omitted); *Consolidation Coal Co. v. White*, 875 A.2d 318, 326 (Pa. Super. 2005) (citing *Hetrick v. Apollo Gas Co.*, 415 Pa. Super. 189, 608 A.2d 1074, 1077 (1992)).

128. See *Fitzmartin*, *supra* note 127, at 895; *Consolidation Coal*, *supra* note 127, at 326.

129. See *Commonwealth v. Fisher*, 72 A.2d 568, 571 (1950); see also *Lenox Coal Co. v. Duncan-Spangler Coal Co.*, 109 A. 282, 283 (1920); *Penman v. Jones*, 100 A. 1043, 1046 (1917).

130. See *Fisher*, *supra* note 129, at 571; *Lenox Coal*, *supra* note 129, at 283.

131. See *Penman*, *supra* note 129, at 1044.

132. Stated alternatively, was the right to subjacent support conveyed to, or retained by, the coal owner in the coal severance deed? See *Patton v. Republic Steel Corp.*, 492 A.2d 411, 413-14 (Pa. Super. 1985).

133. *Fitzmartin*, *supra* note 127, at 895; *Pa. Servs. Corp. v. Texas E. Transmission, LP*, 98 A.3d 624, 629 (Pa. Super. 2014).

134. *Consolidation Coal*, *supra* note 127, at 327; see also *Fisher*, *supra* note 129, at 571.

135. See, e.g., *Fitzmartin*, *supra* note 127, at 897; *Weakland v. Cymbria Coal Co.*, 105 A. 558 (1918); *Penman*, *supra* note 138, at 1046; *Commonwealth ex rel. Keater v. Clearview Coal Co.*, 100 A. 820, 820 (1917); *Stilley v. Pittsburgh-Buffalo Co.*, 83 A. 478, 480 (1912); *Kellert v. Rochester & P. Coal & Iron Co.*, 74 A. 789 (1909); *Madden v. Lehigh Valley Coal Co.*, 61 A. 559 (1905); *Pa. Servs. Corp.*, *supra* note 133, at 631.



*Com. v. Fisher*, is particularly noteworthy given its finding of waiver based on deed language that the Court interpreted as emphasizing coal mining rights over surface rights. The provision read:

“[R]eserv[ing] . . . the full entire complete and exclusive ownership and right as though the present conveyance had not been made to all . . . minerals . . . which are or may be in or upon or which may at any time be discovered in or upon any part of the [property]. And the said parties of the first part hereto do hereby reserve forever the full free absolute exclusive right and authority . . . to enter into and . . . to explore search for and excavate any and every kind of . . . mineral . . . and to dig excavate or penetrate any part of the [property] and . . . to dig mine raise and take remove and carry away any and every kind of . . . mineral . . . which may be found or discovered in or upon any part or parts of the [property] provided always that such digging explorations or searches shall be conducted with as little injury or damage to the [grantees] . . . as shall be practicable consistently with the success of the same and [grantees] . . . promise and agree . . . that neither of them shall and will at any time or times or in any manner hinder impede delay or in anywise obstruct the full and free exercise of all any and every the rights and privileges herein reserved . . . and that neither of them shall or will at any time or times or in any manner interfere with the property and ownership hereby reserved. . . .”<sup>136</sup>

The Court found the “cumulative effect” of the above-quoted language to impliedly waive the right to surface support.<sup>137</sup> It found that the parties intended that “the success of the digging and removal of the coal was to be the *paramount objective*, and the grantors were to have the right to conduct their enterprise successfully and to the fullest extent no matter what the injury or damage to the surface provided it be as little as practical.”<sup>138</sup>

Given the willingness of Pennsylvania courts to find subjacent support rights to have been waived, coal severance deeds must be carefully analyzed, and, even then, certainty may not be possible short of litigation.<sup>139</sup>

The second question, whether the right to subjacent support has passed to the party through its chain of title, requires consideration of all the documents in the party’s chain of title that post-date the severance deed. Because the right to subjacent support is severable from the surface and mineral estate, it does not necessarily follow the surface or mineral rights. In *Penman*, the Supreme Court of Pennsylvania addressed a situation in which a coal severance deed excepted and reserved to the grantor the coal and minerals “without . . . liability for injury caused or damages done to the surface[,]” but a subsequent deed from the same grantor conveyed the coal to a third party without including the language waiving liability for harm to the surface.<sup>140</sup> The Court held that the right to remove the coal without liability for injury to the surface did not pass to the third party, but that the grantor had retained it and “was at liberty thereafter to abandon the right, or to transfer it directly or indirectly to the owner of the surface.”<sup>141</sup>

136. See *Fisher*, *supra* note 124, at 569.

137. *Id.* at 571-72.

138. *Id.* at 571 (emphasis in original).

139. At least one court in Pennsylvania has held that a reservation to drill through the coal seam for oil and gas in a coal severance deed does not invalidate or otherwise affect a waiver of the right to subjacent support. See *Burrows v. Pittsburgh Coal Co.*, 2 Pa.D.&C. 291 (Wash. Cnty. 1922).

140. See *Penman*, *supra* note 129, at 1044.

141. *Id.* at 1046.

### **b. The Lateral Support Doctrine**

Pennsylvania law also recognizes a surface owner's right to lateral support, although it is not characterized as a separate estate.<sup>142</sup> The lateral support doctrine "is the right to have land in its natural state supported by adjoining land."<sup>143</sup> The right exists even where it is not expressly included in a deed.<sup>144</sup> Although adjoining landowners have a duty not to withdraw lateral support from neighboring properties, they do not have an affirmative duty to provide lateral support to them.<sup>145</sup> Parcels need not necessarily be adjoining to be owed the duty of support.<sup>146</sup>

Unlike the duty of subjacent support, in Pennsylvania, the duty of lateral support "ordinarily extends only to land in its natural state, not to artificial improvements erected" on the land, such as buildings and other structures.<sup>147</sup> An adjoining landowner who removes lateral support is strictly liable for damages to the neighboring property in its natural state.<sup>148</sup>

Absent negligence, malice or wantonness, the right of support does not extend to buildings and other improvements on the land.<sup>149</sup> The adjoining landowner's only duty is to "give notice to the adjoining owner of his intention to excavate and thus afford the latter an opportunity of protecting his buildings from all likely injury."<sup>150</sup>

In situations involving mining activities, to recover for damages to structures under the lateral support doctrine, there "must be positive negligence or want of due care in mining or excavating."<sup>151</sup> The applicable standard of care is "skillful and careful mining," and it "is applied to the manner of taking out, not to the fact of taking out; all the coal may be taken out without violating this stipulation."<sup>152</sup>

As with the right to subjacent support, a surface owner can waive the right to lateral support. Again, waiver may either be express or implied, and it may be implied from language granting a release of all damages which may be occasioned by mining, or otherwise.<sup>153</sup> In litigation, the party asserting a waiver of lateral support bears the burden of proving the waiver.<sup>154</sup> "[I]n determining whether the particular

142. *Com. v. Solley*, 121 A.2d 169, 171 (1956). A reasonable argument exists that the doctrine of lateral support covers mineral estates as well as surface estates. See, e.g., *Wilkes-Barre Twp. School Dist. v. Corgan*, 170 A.2d 97, 99 (1961) ("The term 'surface,' when used in law, is seldom, if ever, limited to mere geometrical superficies. Where, however, the surface is granted to one and the underlying coal to another, the 'surface' includes whatever earth, soil or land which lie above and is superincumbent upon the coal[.]").

143. See *Solley*, *supra* note 151, at 171.

144. *Valley Smokeless Coal Co. v. Mfrs.' Water Co.*, 144 A. 740, 741 (1928).

145. See *Beal v. Reading Co.*, 87 A.2d 214, 217 (1952) ("A landowner incurs no liability for subsidence of his neighbor's land so long as he does nothing to change the contour of his own property."). See also *Morewood Point Cmty. Ass'n v. Port Auth. of Allegheny Cnty.*, 993 A.2d 323, 330 (Pa. Cmwlth. 2010) ("a landowner 'is under no duty affirmatively to supply lateral support'") (emphasis in original; citation omitted).

146. *Home Brewing Co. v. Thomas Colliery Co.*, 117 A. 542, 544 (1922) ("The right to lateral support exists and extends to the . . . property, though there are intervening parcels owned by other parties.").

147. See *Solley*, *supra* note 142, at 171.

148. *Matulys v. Phila. & Reading Coal & Iron Co.*, 50 A. 823, 824 (1902) ("The right to such lateral support is an absolute one, and the adjoining owner who withdraws it, whether negligent or not, in excavating or mining his land, is liable for injuries resulting to his neighbor's ground.").

149. See *Solley*, *supra* note 151, at 171; *Warfel v. Vondersmith*, 101 A.2d 736, 737 (1954). Some exceptions exist to this general principle. See, e.g., *Durante v. Alba*, 109 A. 796, 797 (1920) (negligence need not be shown where a property owner constructs a building and later subdivides the property and conveys the portion on which the building is situated); *Pollock v. Pittsburgh, B. & L. E. R. Co.*, 119 A. 547, 548 (Pa. 1923) (an adjoining landowner owes a duty of support to a highway as an obligation to the community, and that duty extends to the highway in its improved condition).

150. *Id.* at 737-38.

151. *Home Brewing Co.*, *supra* note 146, at 543-44.

152. *Id.* (citations omitted; emphasis added).

153. *Valley Smokeless Coal*, *supra* note 144, at 742.

154. *Id.*

words in question are to be construed as necessarily implying a waiver of the right of support, the intention must be gathered from the language used in the conveyance, and parol evidence to aid in its construction cannot be considered.”<sup>155</sup> “When the right to lateral support has been released or surrendered, the grantor is relieved from obligation to furnish it, unless such burden is thereafter voluntarily assumed.”<sup>156</sup>

Even where a deed waives the right to lateral support, the waiver only applies to the operations on the land conveyed, not to activities on adjoining lands. Thus, in *Matulys*, despite a waiver of lateral support contained in the deed from the defendant to the plaintiff, the Court upheld the award of damages to the plaintiff whose property, in its natural state, was damaged by mining activities conducted by the defendant underneath an adjoining parcel.<sup>157</sup>

### **c. Subsidence Acts**

Both the federal government and Pennsylvania have enacted statutes governing coal operators’ rights and responsibilities to address mine subsidence and any resulting damages. As discussed below, however, in most situations neither of these statutes provides a viable basis for a damage claim by an oil and gas operator in Pennsylvania.

The Surface Mining Control and Reclamation Act of 1997 (the “SMCRA”)<sup>158</sup> requires a coal operator to “correct any material damage resulting from subsidence caused to surface lands, to the extent technologically and economically feasible”<sup>159</sup> and to repair or compensate the owner for subsidence damage to “non-commercial buildings, occupied residential dwellings and related structures.”<sup>160</sup> But as to structures or facilities that are not “non-commercial buildings, occupied residential dwellings or related structures,” such as oil and gas wells and wellbores, gas pipelines, compressor stations, and other oil and gas-related surface facilities, the SMCRA only requires the coal operator to correct, repair or compensate the owner for subsidence damage to the extent state law requires it to do so.<sup>161</sup>

Pennsylvania has enacted the Bituminous Mine Subsidence and Land Conservation Act (the “Pennsylvania Subsidence Act”).<sup>162</sup> Prior to its enactment in 1966, “coal owners had the right to mine, if they so chose, all coal without legal liability for damage caused to any surface structures” so long as a coal severance deed granted the coal owner the right to remove the coal without liability for harm to the surface.<sup>163</sup>

The Pennsylvania Subsidence Act and its associated regulations require coal operators to repair or provide compensation for mine subsidence damages to certain types of structures, including schools, churches, hospitals, residential dwellings, barns and various other types of structures.<sup>164</sup> None of the structures covered under the Subsidence Act are typically associated with oil and gas operations.

As neither state statutory law nor the SMRCA requires a coal operator to restore or compensate an oil and gas operator for damages to its wells and equipment caused by coal operations, except in limited situations such as where an oil and gas

155. *Heningkamp v. Valley Smokeless Coal Co.*, 118 A. 2d 28, 29 (1922) (quotations and citations omitted).

156. *Valley Smokeless Coal*, *supra* note 144, at 742.

157. *Matulys*, *supra* note 148, at 824.

158. 30 U.S.C.A. §1201 *et seq.*

159. 30 C.F.R. 817.121(c)(1).

160. 30 C.F.R. 817.121(c)(2).

161. 30 C.F.R. 817.121(c)(3).

162. 52 P.S. §§1406.1, *et seq.*

163. *Appeals of Mathies Coal Co.*, 255 A.2d 906, 907 (Pa. 1969).

164. *See* 52 P.S. §1406.5d(a); 25 Pa. Code §89.142a(f)(1).

operator happens to own a residential dwelling that is damaged by subsidence, any relief for such damages must come from Pennsylvania's common law. As discussed above, the common law provides minimal relief for oil and gas operators where the rights of subjacent and lateral support have been waived.

## 2. Non-Subsidence Interference with Oil and Gas Operations

Coal severance deeds often include language expressly disclaiming all liability for damage arising from coal operations.<sup>165</sup> These types of provisions are given effect in Pennsylvania, even where the coal operator is alleged to have acted negligently or carelessly, assuming the damage is not within the scope of a subsidence act.<sup>166</sup> On the other hand, where a coal severance deed does not include language disclaiming liability for damage arising from coal operations, the coal operator may be liable to the extent its operations harm the oil and gas, or make it impossible or more expensive to recover.<sup>167</sup> For instance, if an oil and gas operator is required to construct its well pad at a more expensive location due to subsurface coal operations, the oil and gas operator may have a valid claim for damages against the coal owner or operator for its additional well pad construction costs, so long as the coal severance deed does not expressly disclaim liability for damages caused by coal operations.

Finally, if, through DEP proceedings or otherwise, a coal operator succeeds in requiring an oil and gas operator to relocate its pipelines or other equipment to accommodate coal operations, the coal owner or operator may be legally required to pay the costs associated with removing or relocating the equipment under the accommodation doctrine, as recognized in Pennsylvania.<sup>168</sup>

## CONCLUSION

Conflicting interests between coal and oil and gas operations have been a part of Pennsylvania mineral rights development for well over a century. Given the dearth of case law addressing such matters, it appears that, historically, the parties interested in developing these resources have resolved their conflicts through negotiation rather than litigation. *Allegheny Enterprises* may signal a broader move towards litigation and attempts to recover damages under common law claims. Owners and operators (whether of coal or oil and gas) will improve their bargaining positions if they understand the statutes, regulations and common law principles that govern the issues presented by competing mineral operations. If litigation is necessary, whether before DEP or the courts, such knowledge will be critical to securing a prompt and fair resolution.

165. See, e.g., *Pa. Servs. Corp.*, 98 A.3d at 630 (quoting language of coal severance deed expressly disclaiming liability for damages arising from coal operations); *Stewart v. Chernicky*, 439 Pa. 43, 49, 266 A.2d 259, 263 (1970) (same); *Kennedy v. Consol Energy, Inc.*, 116 A.3d 626, 630 (Pa. Super. 2015) (same).

166. See *Atherton v. Clearview Coal Co.*, 267 Pa. 425, 430, 432-34, 110 A. 298, 299-300 (1920) (holding that the surface owner's claim that the coal operator "negligently and carelessly used . . . large quantities of dynamite and other high explosives in blasting, thereby causing concussions which broke, cracked, disturbed, and damaged the land and the buildings" was barred due to waiver); *Patton*, 492 A.2d at 416-19 (allowing homeowners' statutory subsidence claim based on alleged negligent coal operations to proceed despite express waiver of right to subjacent support in coal severance deed).

167. *Chartiers Block*, 152 Pa. at 296, 25 A. at 599 ("The grantee of the coal owns the coal, but nothing else, save the right of access to it and the right to take it away.")

168. See *Minard Run Oil Co. v. Pennzoil Co.*, 419 Pa. 334, 214 A.2d 234 (1965) (holding that a surface owner could require the holder of a pipeline easement to "sink" a portion of its pipeline to a greater depth so that the surface owner could construct a roadway over that portion of the pipeline, but that the surface owner was required to bear the cost of sinking the pipeline); *Columbia Gas Transmission, Corp. v. Limited Corp.*, 951 F.2d 110, 114 (6th Cir. 1991) (applying the accommodation doctrine as set forth in *Minard Run* to require a coal operator to bear the costs of relocating an oil and gas lessor's pipelines to accommodate the coal operator's surface mining activities).