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Island Creek v. Rodgers and Mine Subsidence Liability

INTRODUCTION

In October, 1982, the *Island Creek v. Rodgers*¹ decision addressed a new area in Kentucky law: damages from abandoned mine subsidence. The court held that a mine operator was strictly liable for subsidence damage even though superseding causes might have occurred.² This decision demonstrated a willingness on the part of the Kentucky Court of Appeals to extend strict liability for subsidence to any and all damages which might occur as a result of underground mining operations.

While the court's decision seemed appropriate given the facts of *Island Creek*, the general extension of subsidence liability opened the door for unfair imposition of liabilities on underground mining concerns. Since support systems which were effective at the time of abandonment may be rendered ineffective by subsequent mining in the area, a mine operator could be forced to pay for the damage to surface structures unless he can prove that his subjacent support was in fact adequate until damaged by the mining practices of others.

This comment explores the history of mine subsidence liability in the United States and analyzes the *Island Creek* decision's departure from established standards, concluding that the redefinition of "natural state" was unnecessary, since the same result could have been reached while avoiding much confusion and more litigation. This comment will also discuss the new subsidence regulations on underground mining,³ which are designed to lead to better mining practices and a decrease in the likelihood of subsidence damage. Furthermore, the detailed documentation⁴ now required for issuance of mine permits will be addressed to show how companies such as Island Creek Coal can establish that the subsidence damage was caused by other prior mining operations. Finally, this comment will examine the

¹ 644 S.W.2d 339 (Ky. Ct. App. 1982).

² *Id.* at 344.

³ See *infra* notes 59-80 and accompanying text.

⁴ See *infra* notes 64-67 and accompanying text.

impact of Kentucky's new subsidence insurance laws⁵ on the rights and liabilities of affected parties.

I. ORIGINS OF SUBSIDENCE LIABILITY

One of the consequences of underground mining is subsidence.⁶ Subsidence is defined as "any movement of the soil from its natural position."⁷ When coal or other minerals are removed from the subsurface strata, gravity may cause the rock overlying the remaining cavity to collapse, thus leading to a disturbance of the surface soil.⁸ This disturbance causes breaks and cracks in the land itself, and more importantly, may cause damage to buildings, wells, and other structures in or on the overlying strata.⁹

The first case to recognize an absolute right of subjacent support for surface owners was *Harris v. Ryding*¹⁰ in 1839. There, the English court noted that when the surface rights have been severed from the mineral rights, the surface owner retains the right to have his property supported in its natural state.¹¹ Courts in the United States and England continue to recognize this absolute right: if subsidence occurs, the mineral owner is liable for damages caused by his removal of the subsurface support.¹² It is no excuse that the mining operations were conducted with due care or within normal mining practices.¹³ In a suit for damages, it is not necessary for the surface owner to

⁵ See *infra* notes 81-87 and accompanying text.

⁶ Blazey and Strain, *Deep Mine Subsidence - State Law and the Federal Response*, 1 E. MIN. L. INST. 1.1 (1980).

⁷ RESTATEMENT (SECOND) OF TORTS § 817 Comment h (1977). This is the definition of subsidence cited in the *Island Creek* decision.

⁸ Blazey and Strain, *supra* note 6, at 1.1-.2.

⁹ *Id.* at 1.3; see also Comment, *Common Law Rights to Subjacent Support and Surface Preservation*, 38 MO. L. REV. 234, 236 (1973).

¹⁰ 151 Eng. Rep. 27 (Ex. 1839).

¹¹ See, e.g., C. LINDLEY, 3 LINDLEY ON MINES § 818 (1914); Comment, *supra* note 9, at 236-37.

¹² Some authors have referred to this right to subjacent support as a "third estate in land" which may be retained by the surface owner or deeded to the mineral owner. See CASNER AND LEACH, *CASES AND TEXT ON PROPERTY* 1297 (1969).

¹³ E.g., *Marchetti v. Lumaghi Coal Co.*, 142 N.E.2d 815 (Ill. App. Ct. 1957); *Elk Horn Coal Corp. v. Johnson*, 249 S.W.2d 745 (Ky. 1952), *modified, reh'g granted*, 263 S.W.2d 124 (Ky. 1953); *James Coal Co. v. Mays*, 8 S.W.2d 626 (Ky. 1928); *Noonan v. Pardee*, 50 A. 255 (Pa. 1901).

prove negligence in mining operations; he need only show that the damages were caused by mine subsidence.¹⁴ This right to subjacent support, however, may be waived by a surface owner if such waiver is incorporated in the deed itself.¹⁵

The law concerning a surface owner's right to support of *buildings* on the mined land is less clear. Early cases held that absolute liability for subsidence only applied to the land in its "natural state"—a term which did not include any buildings or improvements.¹⁶ Later courts extended the "natural state" doctrine to include buildings "in existence or in contemplation at the time the estates were severed."¹⁷ Thus, where no buildings existed at the time of the severance, the surface owner's absolute right to subjacent support only covered support of the unburdened surface.¹⁸

Case law concerning damage to buildings erected after mining has begun is even more confusing. Early cases held that mine operators were not liable for damages to subsequently erected structures.¹⁹ As more mined areas were developed, however, several theories were advanced to allow recovery for a surface owner. Some jurisdictions held the mine owner liable unless he could prove that the weight of the surface structures contributed to or caused the subsidence.²⁰ Others held that it was not necessary for a surface owner to prove negligence in the mining operations, but only that the damages were caused by mine subsidence.²¹ In such jurisdictions, therefore, subsidence itself was *prima facie* evidence of negligence that had to be

¹⁴ *Nisbet v. Lofton*, 277 S.W. 828 (Ky. 1925); see generally 3 LINDLEY, *supra* note 11, at § 819; Beck and Sigwerth, *Illinois Coal Mine Subsidence Law*, 29 DEPAUL L. REV. 383 (1980) (discussion of negligence and subsidence).

¹⁵ In most jurisdictions, the waiver of subjacent support must be expressly stated; however, a few courts have held that the waiver may be implied by the wording of the deed. A waiver of subjacent support does not allow negligent or malicious removal. Marsh, *Liabilities Incident to Mining and Milling Operations*, in 4 AMERICAN LAW OF MINING at § 21.14 (1982) (general discussion of waiver); Annot. 32 A.L.R. 2d 1309, 1311-12 (1953).

¹⁶ See Marsh, *supra* note 15, at § 21.13.

¹⁷ 54 AM. JUR. 2d *Mines and Minerals* § 201 (1971).

¹⁸ See *Nisbet*, 277 S.W. 828; Annot., *supra* note 15 at 1316-17.

¹⁹ See, e.g., *Wilms v. Jess*, 94 Ill. 464 (1880); *Brewster*, 55 N.Y. at 538.

²⁰ *Wilms*, 94 Ill. 464; see *Nisbet*, 277 S.W. 828; see also Annot., *supra* note 15 at 1317-18.

²¹ Annot., *supra* note 15 at 1318-19.

refuted by proof of underground conditions.²² In Pennsylvania, where mining operations causing subsidence are prohibited by statute,²³ a mine operator has even been held liable for damages to homes over a mine which was closed and later reopened.²⁴

Other jurisdictions have been less kind to surface owners. In Colorado, a surface owner must prove actual negligence to recover for damage to surface structures.²⁵ Elsewhere, several cases have held that if the surface owner knew or should have known that subsidence had occurred or was likely to occur, the mine owner has a valid defense for damages to subsequently erected buildings.²⁶ It is obvious, therefore, that a surface owner's ability to recover depends on the views of the particular jurisdiction where the property is located.

Historically, surface owners have been able to recover for damages to the land in its "natural state" on a theory of strict liability. The same theory holds true in most jurisdictions for structures in existence at the time the estates were severed. However, the addition of structures after severance may make it more difficult to recover on a strict liability theory.

II. *Island Creek v. Rodgers*

With the decision of *Island Creek v. Rodgers*,²⁷ Kentucky law concerning strict liability for subsidence was extended and clarified.²⁸ The Kentucky Court of Appeals held *Island Creek Coal Company and Cimarron Coal Corporation* jointly liable for subsidence damage to a surface owner's home. *Island Creek* was held liable, not for subsidence caused by a working mine,

²² *Marchetti*, 142 N.E.2d at 816.

²³ PA. STAT. ANN. tit. 52, § 1406.4 (Purdon 1966).

²⁴ *Wright v. Buckeye Coal Co.*, 424 A.2d 728, 731 (Pa. Super. Ct. 1981).

²⁵ *Colorado Fuel and Iron Corp. v. Salardino*, 245 P.2d 461, 464-65 (Colo. 1952). *Salardino* was, however, overruled by *Gladin v. Von Engeln*, 575 P.2d 418 (Colo. 1978).

²⁶ *Cf. Kangas-Jacobsen Dairy v. Lloyd-Smith*, 62 N.W.2d 915, 916 (Minn. 1954) (allegations that plaintiff knew or should have known that subsidence had occurred as a result of mining is good against a demurrer that knowledge does not state a defense). *But cf. Island Creek v. Rodgers*, 644 S.W.2d 339, 342 (Ky. Ct. App. 1982) (fact that plaintiffs built their home over mines, knowing that subsidence had occurred, not material).

²⁷ 644 S.W.2d 339 (Ky. Ct. App. 1982).

²⁸ *See North-East Coal Co. v. Hayes*, 51 S.W.2d 960 (Ky. 1932); *West Kentucky Coal Co. v. Dilback*, 294 S.W. 478 (Ky. 1927); *Nisbet*, 277 S.W. 828 (discussions of Kentucky law prior to *Island Creek*).

but for damage which occurred over an abandoned mine. Cimarron was held liable for blasting damage, although the damage was actually caused by subsidence.

Although Island Creek owned the underground mine situated beneath the Rodgers' home, the company had ceased mining operations in 1963 and had abandoned the mine in 1971.²⁹ The Rodgers' home was built on the surface over the mine in 1966.³⁰ Cimarron, meanwhile, was engaged in strip mining operations near the area³¹ and used blasting to loosen the overlying rock. This blasting was the action that apparently led to the damage to the Rodgers' home.³² Island Creek, however, was also held liable for the damage because its mine underlying the surface had subsided.³³

At trial, Island Creek's experts testified that adequate coal had been left in the seams to support the surface in its natural state,³⁴ and that the subsidence had been caused by the Cimarron blasting.³⁵ Conversely, Cimarron's experts contended that the blasting had no effect on the underground mines, but rather that the subsidence had been caused by Island Creek's failure to leave adequate subsurface support.³⁶ Since there was no undisputed testimony vindicating either company,³⁷ both were found

²⁹ "Abandoned workings" are defined as "excavations, either caved or sealed, that are deserted and in which further mining is not intended," while "inactive workings" are defined as "all portions of a mine in which operations have been suspended for an indefinite period, but have not been abandoned." KRS § 352.010 (1983). Island Creek Coal Co. had purchased the mine from the West Kentucky Coal Co., which had begun the original mining operations at that site in 1905. *Island Creek*, 644 S.W.2d at 342.

³⁰ *Island Creek*, 644 S.W.2d at 342.

³¹ *Id.* Cimarron engaged in strip mining operations within 5,600 feet to 23,000 feet of the Rodgers' home.

³² *Id.* at 343. "The Rodgers testified that . . . there was a shaking and jolting of their home followed by a terrific blast. The next morning they discovered their damage." *Id.*

³³ *Island Creek*, 644 S.W.2d at 342-43.

³⁴ *Id.* at 342. The expert for Island Creek stated that the support should have been sufficient to last for at least 100 years. *Id.*

³⁵ *Id.* at 343 (expert contended that Cimarron's blasting resulted in the fracture of the supporting pillars).

³⁶ *Id.* Cimarron's experts testified that Island Creek used unacceptable mining practices and allowed water to accumulate in the abandoned mine.

³⁷ *Id.* The court noted that every claim or defense made by one defendant was refuted by the other defendant.

strictly liable for the resulting damages³⁸ in keeping with established law.³⁹

The court's definition of the "natural state" of the land is novel and somewhat troublesome. While *Island Creek* argued that the "natural state" of the surface applies to the time when the coal rights were severed,⁴⁰ the court defined "natural state" as "the condition of the surface, including reasonable and foreseeable improvements thereon, *at the time the coal is severed, not from the fee, but from the earth.*"⁴¹ In making this distinction, the court rejected the approach taken by a majority of jurisdictions⁴² and extended the strict liability of mine operators to include even those improvements made subsequent to the time the coal was last removed. Since the time of severance of surface and mineral estates may be far removed from the time of actual mineral removal, the implications of the *Island Creek* decision may have far-reaching effects on mine operators.

The court's redefinition of "natural state" seems unnecessary.⁴³ The idea of structures being "in existence" or "contemplated" is not so limiting that the court needed to change established Kentucky law to reach the same decision. By merely expanding the definition of the "future structures" clause, the court could have held that the building of a home on what was farmland at the time the surface and mineral estates were severed was not completely inconceivable.⁴⁴ The court, however, chose to hold the mine operator liable for damage to structures dating from the time that coal was last taken from the earth.

³⁸ *Id.* at 342. Each defendant was assessed \$25,000, but Cimarron was also assessed \$45,000 in punitive damages.

³⁹ *Island Creek*, 644 S.W.2d at 344 (citing *West Kentucky Coal Co. v. Dilback*, 294 S.W. 478 (Ky. 1927)).

⁴⁰ *Id.*

⁴¹ *Id.* (Emphasis added.)

⁴² See *supra* notes 16-19 and accompanying text.

⁴³ See *Wright v. Buckeye Coal*, 434 A.2d 728 (Pa. Super. Ct. 1981). Buckeye Coal operated a mine which first opened in 1920. The mine was closed, but reopened in 1968. In the interim, several homes were built over the mine. After reopening, subsidence occurred during retreat mining, damaging several of the overlying homes. Buckeye was held liable for the damage under common law strict liability and under Pennsylvania's Mine Subsidence and Land Conservation Act, 52 PA. STAT. ANN. § 1406.4 (Purdon 1966). Although this case is not identical to *Island Creek*, the time frame is approximately the same, and "natural state" was not redefined.

⁴⁴ See *Island Creek*, 644 S.W.2d at 343 (discussing the condition of the farmland where the Rodgers' home was eventually built).

Since a mine may be in operation over a long period of time, a mine operator can never be certain as to what standards will be applicable. Indeed, what are considered appropriate measures today may be totally unacceptable fifty years from now. It is therefore necessary to give mine operators a more definite rule. Perhaps "natural state" should be defined to include a specific time limit for subsidence damage strict liability. Surface owners should be notified of this time limit when purchasing the property or selling the mineral interests. This "statute of limitations" would serve a twofold purpose: to notify surface owners of the existence of the subsurface mine and its possible consequences, and to give mine operators a specific time frame in which to study possible uses of the surface.

Although it may be difficult to accomplish this legislatively or judicially, it would be possible for a mine operator to include such a clause in his agreement with the surface owner when purchasing or leasing the mineral estate.⁴⁵ If mine operators are merely leasing the mineral estate, they should provide that the time limit will run with the land so that subsequent surface owners will be aware of and party to the agreement.⁴⁶ In any case, the boundaries of the "natural state" definition should be more clearly defined by the courts to insure more uniform treatment.

The second troublesome element of the *Island Creek* decision is the application of strict liability concepts to a situation where subsidence damage was not caused by faulty extraction, but rather was caused by another mining operation in the area. *Island Creek* contended that Cimarron's blasting had caused the remaining support to collapse—even though that support would have otherwise been adequate.⁴⁷ Although the court concluded that there was insufficient evidence to prove that Cimarron's blasting had indeed caused the subsidence,⁴⁸ one must note that Cimarron was held liable for one-half of the subsidence dam-

⁴⁵ See *supra* note 12 and accompanying text. Since waivers of all rights to subjacent support have been upheld, it would seem logical that a waiver after a certain period of time would also be upheld.

⁴⁶ The mineral lessor or owner needs to provide that the waiver runs with the land, and is not personal to the present owner/lessor.

⁴⁷ *Island Creek*, 644 S.W.2d at 342-43.

⁴⁸ *Id.*

age.⁴⁹ Therefore, the fact-finder must have believed that Cimarron's blasting had at least contributed to the subsidence.⁵⁰

The primary issue then becomes how an underground mine operator can protect himself against subsequent mine practices by others which may cause his once-adequate supports to fail. With the *Island Creek* decision resulting in increased liability for underground mine operators for surface damages, an added burden is placed on underground mining operations. In making plans to control or avoid subsidence, such operations must take into consideration all future uses of the surface directly above and near the mine site. Furthermore, since it is nearly impossible for one mine operator to dictate the practices of another,⁵¹ underground miners will have to leave support which will not only withstand the ravages of time, but which will also withstand the possible effects of other mining operations in the area.⁵²

Although the decision reached by the Kentucky Court of Appeals may be the proper outcome given all facts and circumstances of this particular case, application of the general rule of strict liability to include abandoned mines affected by other mining is far too broad. While the surface owners' interests in having adequate support are superior to the mineral owners' right to mine,⁵³ the mine operators deserve some protection against liability for damages not caused by their own negligence. However, now that strict liability principles have been combined with a liberalized definition of "natural state," an operator's potential liability is greatly increased, and it will be difficult for a mine operator to shift this liability to other miners.

Undoubtedly there will be other cases with facts similar to those in *Island Creek* which will give the Kentucky courts the opportunity to reevaluate this court's rationale. Hopefully, these future cases will lead to a narrower construction of the rule. Alternatively, an evidentiary element could be added to the ruling, whereby courts could create a rebuttable presumption of

⁴⁹ *Id.* at 342.

⁵⁰ *Id.* at 347.

⁵¹ This is particularly true when the mine in question has been abandoned before the other operations begin.

⁵² Leaving enough coal in place to protect against all subsidence, however, could lead to a surface owner action against the mine operator for failure to mine in a reasonable and workmanlike manner.

⁵³ *West Kentucky Coal Co. v. Dilback*, 294 S.W. 478 (Ky. 1927).

strict liability for subsidence damage, allowing a company to avoid liability if it could demonstrate that the mining practices of another caused the damage. With sufficient evidence, a mine operator could thus shift the liability burden to the responsible party.

Another problem, however, would face the underground mine owner: the availability of evidence which would prove that adequate subjacent support had been provided but had been damaged by another subsequent mining activity. Where the mine is old or has been abandoned, it is difficult to prove the former adequacy of such supports. Current legislation⁵⁴ requiring documentation of the underground support systems for new mining operations should alleviate this problem in the future. Such documentation will only be useful, however, in cases where a co-defendant can be found whose mining practices adversely affected the underground support. If there is no co-defendant, strict liability will still apply to hold the underground mine operator liable for subsidence of surface areas over his mining operation.

Perhaps the justice of such an outcome is best viewed in light of public policy. In recent years, public awareness of mining's effects on the environment has led to the passage of legislation greatly increasing the regulation of mining operations.⁵⁵ The demand for more stringent standards culminated in the passage of the Surface Mining Control and Reclamation Act of 1977 (SMCRA),⁵⁶ which places tighter restrictions on surface mining and the surface effects of underground mining.⁵⁷ Even the court's decision in *Island Creek* reflects the growing attitude that mine operators who profit while damaging the land should be required to bear the consequential costs.

III. RECENT LEGISLATION CONCERNING SUBSIDENCE

In the past several years, numerous pieces of legislation have been passed concerning coal mining and its effects on the envi-

⁵⁴ See *infra* notes 59-80 and accompanying text.

⁵⁵ See generally Blazey and Strain, *supra* note 6 at 1.11-.15 (discussion of federal and state regulations).

⁵⁶ See, e.g., Surface Mining Control and Reclamation Act of 1977 (SMCRA), Pub. L. No. 95-87, 91 Stat. 445 (codified at 30 U.S.C. §§ 1201-1328 (1982)).

⁵⁷ 30 U.S.C. §§ 1265 and 1266 (1982).

ronment.⁵⁸ Although mine operators initially complained about the great financial burden which such massive state and federal regulations placed on them, these regulations should lead to better mining practices which should in turn, lead to a decrease in future litigation.

Although SMCRA deals primarily with the effects of strip mining, there are portions of the act which deal specifically with the surface effects of underground mining.⁵⁹ Contained in these provisions are special references to subsidence. SMCRA requires that states "adopt measures consistent with known technology in order to prevent subsidence . . . except in those instances where the mining technology used requires planned subsidence in a predictable and controlled manner."⁶⁰ The Act also requires an operator to obtain a permit, secure a performance bond on all operations,⁶¹ and cease mining if there is evidence of subsidence.⁶²

The permit requirements of SMCRA are stringent.⁶³ In the permit application, the operator must determine whether structures or renewable resource lands exist within the area.⁶⁴ If these structures or areas do exist, the operator must detail what type of mining will be used.⁶⁵ A map must be provided which shows where planned subsidence will occur,⁶⁶ and a detailed description of the subsidence control measures to be taken must be given.⁶⁷ Mine operators must also publish an advertisement of the intent to mine which shows the precise areas to be affected.⁶⁸ The public is then allowed to raise objections or call for a department conference.⁶⁹ It is only after all of these conditions are met that

⁵⁸ See *supra* note 56.

⁵⁹ 30 U.S.C. § 1266 (1982).

⁶⁰ 30 U.S.C. § 1266(b)(1) (1982).

⁶¹ 30 U.S.C. § 1259 (1982).

⁶² 30 U.S.C. § 1266(c) (1982).

⁶³ 30 U.S.C. § 1256 (1982).

⁶⁴ 30 C.F.R. § 784.20 (Supp. 1984).

⁶⁵ 30 C.F.R. § 784.20(a) (Supp. 1984).

⁶⁶ 30 C.F.R. § 784.20(b) (Supp. 1984).

⁶⁷ 30 C.F.R. § 784.20(d) (Supp. 1984). Several measures designed to control subsidence are listed, including a monitoring of subsidence levels within the mine.

⁶⁸ 30 C.F.R. § 817.122 (Supp. 1984). This notice must be given at least six months before mining begins.

⁶⁹ 30 U.S.C. § 1263(b) (1982). Any person with an interest may make comments on the permit application and request an informal conference.

a permit to begin mining can be issued.⁷⁰

SMCRA further provides that any state may assume control over its mining regulations by submitting its own program.⁷¹ The state program may impose more stringent requirements than does SMCRA, but any state regulations found to be inconsistent are superseded by federal standards.⁷² Kentucky has implemented such a program.⁷³ While the Kentucky statute does not specifically address subsidence issues,⁷⁴ such issues are addressed in the regulations promulgated under the statute.⁷⁵ These regulations, which closely follow the language found in SMCRA,⁷⁶ impose stringent requirements for mitigating the effects of subsidence on surface structures.⁷⁷ In addition to showing how they plan to control subsidence, mine operators must either make provisions to repair or replace damaged structures or purchase insurance policies which will fully compensate surface owners for subsidence damage.⁷⁸ Furthermore, mine operations must be periodically inspected by state officials to insure compliance with the regulations.⁷⁹ As an added guarantee of accountability, each company must post a bond which will not be released until all permit requirements have been fulfilled.⁸⁰ Thus, both state and federal agencies impose thorough controls on mining operations in an attempt to decrease subsidence damage.

The Kentucky General Assembly recently passed another piece of legislation which should have a substantial impact on subsidence damage litigation. Kentucky Revised Statutes (KRS) section 304.44 establishes a fund for mine subsidence insurance.⁸¹ This fund, which will be administered by the state,⁸² is intended to "cover losses arising out of or due to mine subsidence within

⁷⁰ 30 U.S.C. § 1256(a) (1982).

⁷¹ 30 U.S.C. § 1253(a) (1982); *see* 30 C.F.R. § 732.15 (Supp. 1984).

⁷² 30 U.S.C. § 1266(a) (1982).

⁷³ KY. REV. STAT. § 350.151 (1983) [hereinafter cited as KRS].

⁷⁴ *Id.*

⁷⁵ 405 KY. ADMIN REGS. 8:040E § 26 (1982) [hereinafter cited as KAR].

⁷⁶ *See* KRS § 350.151 (1983); 405 KAR 3:010-050E (1982).

⁷⁷ 405 KAR 8:040E § 26(c) (1982).

⁷⁸ *Id.* at § 26(c)(4).

⁷⁹ 405 KAR 10:040E § 1(g)(4) (1982).

⁸⁰ KRS § 304.44 (Supp. 1984).

⁸¹ KRS § 304.44-020(2) (Supp. 1984).

⁸² KRS § 304.44-050 to -080 (Supp. 1984). Payments are to be made within ninety days of the filing of the claim.

this state."⁸³ Under the statute, insurance policies issued for a home or other structure must contain separate premiums for insurance covering subsidence damage. As a result, most property insurance policies issued in Kentucky will contain coverage for subsidence damage.

Such coverage is not guaranteed, however; certain Kentucky counties are exempt from this policy if they meet the stated requirements,⁸⁴ and policyholders may waive this coverage in writing.⁸⁵ Once the policy is issued, the insurer must enter into a reinsurance agreement with the state for the total amount of the policy.⁸⁶ While the specific provisions of this act have yet to be completed, their implementation should certainly lead to fewer law suits between coal companies and aggrieved surface owners.⁸⁷

IV. EFFECT OF REGULATION ON THE *Island Creek* DOCTRINE

The remaining consideration concerns what effect these new legislative measures will have on the *Island Creek* doctrine. Although the Kentucky Court of Appeals held *Island Creek* strictly liable for subsidence damage even though superseding causes had occurred, the result may have been different under SMCRA and the corresponding Kentucky statutes.⁸⁸ *Island Creek's* downfall was its lack of evidence.⁸⁹ The company could not *prove* that adequate support had been left in the mine underlying the Rodgers' home; thus, it could not *prove* that *Cimarron's* blasting had caused the subsidence.

Under the new regulations, mining companies such as *Island Creek* would have documented evidence concerning the mine's condition when closed. At trial, reports made by mine inspectors could be introduced. Furthermore, mine owners could show that

⁸³ KRS § 304.44-030 to -060 (Supp. 1984).

⁸⁴ *Id.* Counties may be excluded if there are no underground coal mines, or if the availability of mine subsidence insurance has not been voted upon.

⁸⁵ *Id.*

⁸⁶ KRS § 304.44-050 (Supp. 1984).

⁸⁷ While this program does result in homeowners bearing part of the liability costs, it will afford greater protection when a mine has been abandoned and the record owner cannot be located.

⁸⁸ The Rodgers' cause of action occurred in 1977; SMCRA was passed in 1977, and the Kentucky act became effective in 1982. Thus, these regulations had no effect on the outcome of *Island Creek*.

⁸⁹ See *supra* note 32 and accompanying text.

their performance bond had been returned, indicating compliance with established standards.⁹⁰ Armed with this evidence, companies could more easily prove that adequate support existed in the mine and could therefore shift total liability to the co-defendant.

Unfortunately, however, all of these new regulations apply only to mining operations begun after the laws were passed.⁹¹ For subsidence damage resulting from any pre-1977 mining operations, the mine operators are still liable under the *Island Creek* rule. In such cases, the Mine Subsidence Insurance Act⁹² becomes extremely important. Since litigation can be costly and time-consuming, most surface owners would rather avoid it. Under the subsidence fund, a property owner can simply file a claim with the state and completely avoid a battle with the coal company.⁹³ This is not to say that mine owners are completely relieved of liability under the act: the mine owner remains responsible for restitution if the surface owner has chosen not to receive subsidence insurance or if the amount of repair exceeds the policy coverage.

The effects of the new regulations concerning subsidence have yet to be tested. If the rules serve their purpose, the incidence of subsidence in connection with new mines should decrease significantly. Furthermore, the subsidence insurance fund should decrease subsidence litigation in Kentucky. For those cases, however, which fall outside the legislative spectrum, the *Island Creek* rule will continue to apply, forcing mine operators to be prepared to pay for subsidence damage which may occur through no fault of their own.

⁹⁰ Under 405 KAR 10:040E (1982), a performance bond will not be returned until the mine operator shows substantial compliance with its permit. *But cf.* In re: Permanent Surface Mining Regulation Litigation II, No. 79-1144 (DDC October 1, 1984) (bonding does not apply to coverage for subsidence damage).

⁹¹ 405 KAR 3:020E § 1 (1982).

⁹² KRS § 304.44-010 to -130 (Supp. 1984).

⁹³ However, if the claim exceeds \$50,000, the surface owner must litigate for the excess amount. See KRS § 304.44-030 (Supp. 1984) which reads in part: "The total insured value reinsured by the administrator shall not exceed fifty thousand dollars (\$50,000) per structure. The insurer shall not be required to write a policy for mine subsidence coverage in excess of the amount reimbursable from the fund as authorized by this subtitle."

V. CONCLUSION

The *Island Creek* decision demonstrates the Kentucky courts' eagerness to extend surface owners' protection at the mining companies' expense. The Court of Appeals ignored the traditional definition of an area's "natural state" in order to expand the theory of strict liability in subsidence litigation. Although the decision may have been equitable and just in this particular case, the general rules laid down in *Island Creek* are too broad. Such an ill-defined area of liability will almost certainly be misconstrued and carried beyond reasonable and just bounds. An effort should be made by the courts to narrow this definition and make provisions for consideration of evidence of superseding causes in order to curtail increased litigation between surface owners and mine operators. The recent legislation should help control the incidence of subsidence through better mining techniques. In addition, subsidence litigation may decrease as alternative sources of recovery become available. Whatever the impact of this legislation, however, mine operators must be prepared to assume additional liability as long as the *Island Creek* doctrine remains viable.

S. Michele Manning