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As coal prices deflated in the 1980s, producers began looking for more efficient methods of mining. Coupled with this trend was the increasing dominance of large coal companies who could afford to install enormous longwall mining systems, capable of producing greater quantities of coal with lower labor costs. The longwall system, by its nature, collapses the mine roof as it retrieves the coal, creating an immediate subsidence of surface land and overlying strata. While the more commonly used room and pillar mining method also creates subsidence, pillars of coal and roofing timbers often support the mine roof for years, so damage to the surface owners' property is less obvious.

Increased use of longwall mining systems has created a flurry of lawsuits that stand to create a new rule of law with regard to deed waivers of subjacent support.[1] In a series of cases from Ohio, Pennsylvania and Virginia,[2] the rule has emerged that if a severance deed contains an express waiver of surface support, the mineral estate owner has the right to use the longwall mining method. Surface owner plaintiffs in these cases have attempted to borrow an argument frequently used with regard to surface mining: that the waiver should not be enforced for mining methods not in existence when the severance was made since such methods would have been outside the contemplation of the parties to the original severance.[3]

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[1] Ball v. Island Creek Coal Co., 722 F. Supp. 1370 (W.D. Va. 1989).

[2] Culp v. Consolidated Pennsylvania Coal Co., No. 8193 (W.D. Pa. May 4, 1989); Porter v. Consolidation Coal Co., No. 86-1396, slip op. (W.D. Pa. August 18, 1988); aff'd, 870 F.2d 651 (3rd Cir. 1989); Wells v. American Electric Power Co., No. 441, slip op. (Ohio Ct. App. July 29, 1988).

[3] Martin v. Kentucky Oak Mining Co., 429 S.W.2d 395 (Ky. 1968); Peabody Coal Co. v. P.C. Pasco, 452 F.2d 1126 (6th Cir. 1971). The same position has been affirmed by the federal courts in Watson v. Kenlick Coal Co., 498 F.2d 1183 (6th Cir. 1974), *cert. denied*, 422 U.S. 1012 (1975).

As the cases from Ohio, Pennsylvania and Virginia demonstrate, such an argument has enjoyed less success for surface owner plaintiffs whose land is being mined by the longwall method than a similar argument used against strip mining. In these decisions the courts have looked to the factual evidence that longwall mining was in use in the early days of the development of the coal industry. But the courts have gone a step further. Even in those states which prohibit surface mining without additional compensation to surface owners when surface mining would not have been in the original contemplation of the parties, the courts have consistently refused to apply this principle to longwall mining. Kentucky courts have always rejected the argument that mineral owners are restricted to mining methods known at the time of the severance.[4] Kentucky has consistently embraced the idea that mineral owners have virtually unlimited power to use newer mining methods to extract coal.[5] However, this longstanding and uninterrupted precedent was challenged when Kentucky voters approved the Broad Form Deed Amendment by more than an 80 percent margin in 1988.[6] Essentially this amendment limits the extraction of minerals to methods commonly known to be in use in Kentucky at the time the instrument which severs the mineral estate was executed.[7] Although courts have not yet ruled on the constitutionality of the amendment, scholars have raised serious questions about its constitutionality. Concern has been expressed about whether the amendment constitutes a taking of property without compensa-

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[4] Buchanan v. Watson, 290 S.W.2d 40 (Ky. 1956).

[5] Akers v. Baldwin, 736 S.W.2d 294 (Ky. 1987).

[6] Lexington Herald-Leader, Nov. 9, 1988, at A1.

[7] KY. CONST. § 19(2):

> In any instrument heretofore or hereafter executed purporting to sever the surface and mineral estates or to grant a mineral estate or to grant a right to extract minerals, which fails to state or describe in express and specific terms the method of coal extraction to be employed, or where said instrument contains language subordinating the surface estate to the mineral estate, it shall be held, in the absence of clear and convincing evidence to the contrary, that the intention of the parties to the instrument was that the coal be extracted only by the method or methods of commercial coal extraction commonly known to be in use in Kentucky in the area affected at the time the instrument was executed, and that the mineral estate be dominant to the surface estate for the purposes of coal extraction by only the method or methods of commercial coal extraction commonly known to be in use in Kentucky in the area affected at the time the instrument was executed.

tion in violation of the fifth and fourteenth amendments; whether it violates the equal protection clause of the fourteenth amendment and whether it impermissibly interferes with private contracts.[8]

CASES CHALLENGING SEVERANCE DEED WAIVERS IN INSTANCES OF LONGWALL MINING

Four recent cases in three jurisdictions have adopted an emerging rule that the mineral estate owner using the longwall mining method is not liable for damages in cases where the surface owner waived his right to subjacent support. Longwall mining is a method where all coal is extracted along a long, continuous working face. The more common method is known as "room and pillar" in which large blocks of coal are spaced throughout the mine to support the roof.[9] The most recent case challenging the longwall mining method is *Ball v. Island Creek Coal Co.*[10] In that case the plaintiffs complained that the defendant's use of longwall mining on his property caused vibrations, seismic shocks and subsidence. In addition, the plaintiffs alleged that Island Creek's mining released quantities of methane gas which resulted in three gas fires spontaneously igniting on the surface of the land. One plaintiff alleged that his home and dairy building were destroyed by a gas fire that ignited because of Island Creek's mining.[11]

The plaintiffs asked for relief on a number of grounds. They alleged that the damage to their property was due to defendant's negligence, or that the defendants were strictly liable and sought recovery for mental pain and anguish. In addition, the plaintiffs alleged that the defendant's mining constituted a nuisance and violated a Virginia statute that allows a person to recover damages in instances where a coal operator violates mining regulations.[12] Island Creek moved for summary judgment on grounds that the plaintiff had waived his right to subjacent support, effectively waiving any claim for damages.[13]

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[8] *See, e.g.*, Bratt and Greenwell, *Kentucky's Broad Form Deed Amendment: Constitutional Considerations*, 5 J. MIN. L. & POL'Y 9 (1989).

[9] Culp v. Consolidated Pa. Coal Co., No. 8193 (W.D. Pa. May 4, 1989).

[10] Ball v. Island Creek Coal Co., 722 F. Supp. 1370 (W.D. Va. 1989).

[11] *Id.* at 1371.

[12] *Id.*

[13] *Ball*, 722 F. Supp at 1371.

The court granted Island Creek's motion for a summary judgment.[14] First, the court found that a waiver of the right to subjacent support is effective if it is made in "clear and unequivocal language." This standard was established in Virginia in *Stonegap Colliery Co. v. Hamilton*.[15] The court noted in dictum that Virginia courts would consider an exception to this general rule in instances in which the contemplated use of the surface is in conflict with the waiver of that right.[16]

The plaintiffs argued that even if the waiver were upheld, it should not be enforced with regard to longwall mining because the parties to the original agreement could not have foreseen the existence of the longwall method. The court accepted this argument as factually accurate, but rejected the notion that precedents restricting surface mining under a similar argument would apply.[17] The court distinguished surface mining as a different *type* of mining than those types contemplated at the turn of the century, when the original deed severances were executed. Longwall mining, the court said, is the same *type* of mining as other underground mining techniques.

> Modern longwall mining is different from the underground mining techniques available when the severance deeds were executed in the degree of damage, and not the kind of damage, it causes to the surface. Thus, neither the use of modern longwall mining nor the use of any other underground mining technique requires the existence of the right to destroy the surface as the use of strip mining does. Therefore, whether the parties to a deed contemplating the use of underground mining contemplated the use of a particular underground mining technique is irrelevant in regards to the permissibility of the use of that technique.[18]

Finally, the court found that the plaintiffs failed to establish that the property damage they complained of was caused by loss

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[14] *Id.* at 1376.

[15] 89 S.E. 305, 311 (1916).

[16] The court relied on Mullins v. Beatrice Pocohontas Co., 432 F.2d 314 (4th Cir. 1970).

[17] Virginia recognizes the right of surface owners to limit surface mining. This right has been upheld on the grounds that the original parties could not have contemplated removing coal by means other than underground mining. Even in cases where the deed specified that the mineral owner could remove coal without liability for injury to the surface, the Virginia Supreme Court has held that the parties contemplated only underground mining. Phipps v. Leftwick, 222 S.E.2d 536 (1976).

[18] *Ball*, 722 F. Supp. at 1373.

of subjacent support. According to Rule 56 of the Federal Rules of Civil Procedure,[19] the party requesting a summary judgment is required to meet a burden of production. Island Creek met this burden by providing affidavits from a real estate attorney showing that the waivers of subjacent support were contained in the original severance deeds. Having met that burden, the plaintiffs were required to make an affirmative showing to refute Island Creek's claim. The court found that the plaintiffs' affidavit that longwall mining was unknown when the severance was made in 1907 was insufficient to demonstrate the real issue: that the plaintiffs' damages were caused by loss of subjacent support. Failing such proof, no genuine issue of material fact remained[20] and a summary judgment was appropriate.[21]

An argument similar to the one raised in *Ball* was addressed in *Culp v. Consol Pennsylvania Coal Co.*[22] *Culp* raises a slightly different twist on *Ball's* argument. In *Culp*, the mineral severance was only for the Pittsburgh seam of coal.[23] Culp sued not only for surface damages, but also for damages to coal seams overlying Consol's Pittsburgh seam.[24] The plaintiffs' allegations involved 55 deeds with 10 variations in wording, but the court found that all the versions had the effect of waiving the right to subjacent support.[25]

Culp argued that the common law right to subjacent support was not waived in some of the severances; that support but not damages had been waived with regard to some of the lands and that Consol could not employ the longwall method of mining. Consol, relying on an argument similar to the one raised by Island Creek Coal in *Ball*, asked for a summary judgment based on the deed language which waived the right to subjacent support and therefore the right to recover damages for the removal of support. The waiver, Consol said, applied to longwall mining as well as to room and pillar mining.[26]

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[19] FED. R. CIV. P. 56.

[20] FED. R. CIV. P. 56(e).

[21] *Ball*, 722 F. Supp. at 1375.

[22] Culp v. Consol Pa. Coal Co., No. 8193 (W.D. Pa. May 4, 1989).

[23] The Culps owned all the surface and all subsurface estates including the coal seams known as the Sewickley and Waynesburg seams, except for the Pittsburgh seam which was owned by the defendant Consol. *Id.* at 18.

[24] Culp v. Consol Pa. Coal Co., No. 8193 (W.D. Pa. May 4, 1989).

[25] *Id.* at 3.

[26] *Id.* at 4, citing Chartiers Black Coal Co. v. Mellon, 152 Pa. 286, 296, 25 A. 597, 598 (1893).

The court began its analysis by noting that Pennsylvania law supported the stratification of property interests.[27] Pennsylvania courts have also upheld the right to waive subjacent support if the language of the waiver is clear.[28] Because the right to subjacent support is a separate interest in land, and the right to damages for removal of support depends on the ownership of the support estate,[29] then even if the waiver did not refer specifically to liability or damages, the general notion of a waiver would encompass such ideas.[30]

Interestingly, the Pennsylvania legislature enacted a law designed to protect surface structures from mine subsidence.[31] However, the courts have strictly construed this statute to apply only to protection of the surface estate.[32] The overlying strata would be protected only to the extent the surface estate was endangered.

Therefore, the court concluded that Culp's predecessors in title waived their right to subjacent support. Culp contended that even if such a waiver had been made, longwall mining should be prohibited because such a method was beyond the contemplation of the parties at the time of the waiver. In contrast to *Ball*, the *Culp* court looked to factual evidence to determine whether the longwall mining method was known at the time of the waiver, and found that longwall mining had been used in Pennsylvania and throughout the world for more than a century. However, even if the *Culp* court found that the longwall method was unknown at the time of the deed waiver, the court would have allowed the longwall method to be used in this instance because the language of the conveyance was clear and unambiguous.[33] Consol's deed provided for the right to

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[27] *Culp*, No. 8193 at 5, citing Charnetski v. Miners Mills Coal Mining Co., 113 A. 683 (1921), Atherton v. Clearview Coal Co., 110 A. 298 (1920), Commonwealth v. Clearview Coal Co., 100 A. 820 (1917); Miles v. Pa. Coal Co., 63 A. 1032 (1906) and Madden v. Lehigh Valley Coal Co., 61 A. 559 (1905).

[28] *Culp*, No. 8193 at 5.

[29] *Id.* at 6.

[30] Commonwealth v. Fisher, 72 A.2d 568 (Pa. 1950).

[31] Bituminous Mine Subsidence and Land Conservation Act, 52 PA. CONS. STAT. §§ 1406- (19).

[32] Culp v. Consol Pa. Coal Co., No. 8193 (W.D. Pa. May 4, 1989). The court relies on Culp v. Consol Pa. Coal Co., 506 A.2d 985 (Pa. Comm. Ct. 1986) and George v. Commonwealth, Department of Environmental Resources, 517 A.2d 578 (Pa. Comm. Ct. 1986) for authority on this point.

[33] *Culp*, No. 8193 at 9.

remove all the coal from the Pittsburgh seam without regard to support:

> The plaintiffs' argument does not serve to clarify an amgibuity with the deeds rather, it attempts to inject ambiguity where none exists. They contend that the grantor did not really mean all coal, only part of it. Had the grantors wished to prevent removal of 'all' of the coal or to require leaving 'any' support for overlaying strata, this easily could have been accomplished. Instead, the deeds used language uniquely and powerfully opposed to any such inference.[34]

Like the Virginia court in *Ball*, the Pennsylvania court refused to analogize longwall mining with surface mining. Pennsylvania's seminal case with regard to surface mining is *Stewart v. Chernicky*.[35] In that case, language of the severance clearly contemplated underground mining. Because the language peculiarly applied to underground mining, the court refused to extend those rights to surface mining. Echoing language similar to that used in *Ball*, the court distinguished strip mining as a different type of mining than deep mining. Because the references to procedures such as ventilation in the severance deed are unique to deep mining, and the court concluded that the parties could not have contemplated surface mining.[36]

Finally, the court noted that its decision was consistent with two other recent decisions in Pennsylvania and Ohio. In *Porter v. Consolidation Coal Company, Inc.*,[37] the court upheld the notion that when deeds are not ambiguous but clearly convey a mineral estate in which the more common room and pillar mining would have been permitted, longwall mining must also be permitted.[38] Faced with facts essentially the same as those in *Culp*, the court refused to apply case law principles adopted in strip mining to longwall mining, rejecting the idea that longwall mining is a novel mining technique.[39]

Faced with a nearly identical situation in *Wells v. American Electric Power Co.*,[40] the Ohio Court of Appeals upheld the

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[34] Culp v. Consol Pa. Coal Co., No. 87-1688 at 9.

[35] Stewart v. Chernicky, 266 A.2d 259 (1970).

[36] *Culp*, No. 87-1688 at 9, 10.

[37] Porter v. Consolidation Coal Co., Inc., Civ. No. 86-1396, (W.D. Pa), *aff'd*, 870 F.2d 651 (3rd Cir. 1989).

[38] *Id.* at 3.

[39] *Id.*

[40] Wells v. American Elec. Power Co., No. 441, slip op. (Ohio Ct. App. July 29, 1988).

defendant's motion for summary judgment. Ohio case law supports an assumption that the surface owner has an absolute right to subjacent support.[41] However, Ohio has long acknowledged that such a right may be waived.[42] The existence of such a waiver turns on the clear language of the conveyance. In *Wells v. American Electric Power Co.*, the court held, "If the grantee of the mineral estate is liable for all damages, and if the grantor waives all damages, it cannot be contended that the language of the contract is unclear. All means all."[44] The *Wells* court notes the irony of the plaintiffs' position, which would allow damages due to subsidence caused by longwall mining, but would not allow subsidence damages due to room and pillar mining.[45]

DEED WAIVERS UNDER KENTUCKY LAW

Kentucky, with its long history of mining, has established some unique features with regard to the rights of mineral estate owners as they pertain to surface estate owners. Surface and mineral rights can be separated into legally distinct estates in land.[46] Severance can be achieved either by lease or by a fee simple title to the minerals. Such separate estates can also be created by sale of the surface, with a reservation of the minerals by the grantor.[47] The mineral estate is considered the dominant estate and the surface estate is the subservient estate.[48]

Some of the early conveyances severing mineral from surface estates were in the form of a broad form deed.[49] The broad form deed, common at the turn of the century, generally had three unique features. First, all minerals were conveyed to the grantee. Second, such a deed contained a grant of surface rights that the mineral owner deems "necessary or convenient" for the

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[41] Ohio's absolute right to subjacent support is expressed in Ohio Collieries v. Cooke, 107 Ohio St. 238 (1923).

[42] Burgner v. Humphrey, 41 Ohio St. 340 (1881) (right of the surface owner to waive such a right).

[43] Wells v. American Elec. Power Co., No. 441, slip op. (Ohio Ct. App. July 29, 1988).

[44] *Id.* at 5.

[45] *Id.* at 6.

[46] *See* Kinkaid v. McGowan, 4 W.W. 802 (1887) and Duncan v. Mason, 239 Ky. 570 (19).

[47] VISH, COAL LAW AND REGULATION § 80.02 (1983).

[48] McIntire v. Marian Coal Co., 227 S.W. 298 (Ky. 1921).

[49] See Pfeiffer, *Kentucky's New Broad Form Deed Law—Is It Constitutional?* 1 J. MIN. L. & POL'Y 57-60 (1985).

enjoyment of the mineral estate. Third, broad form deeds typically contain an express waiver of liability for damages caused by mining operation.[50]

The grantor may specifically reserve agricultural uses when the mineral rights are conveyed. However, Kentucky courts have decided that a mineral grantee may use as much of the surface as it deems necessary or convenient to its mining business, including use and occupancy of the entire surface, even that occupied by the surface owner's house and garden not withstanding such a reservation.[51] However, the *McIntire* court added satisfaction or adjudged compensation for such improvements had to have been made before any taking of the improvements is allowed.[52] Additionally, the injured surface owner can recover damage awards from the surface estate owner.[53]

The mineral owners' use of the surface was limited to uses which were not oppressive, arbitrary, wanton or malicious.[54] As if to demonstrate just how narrow the limitations on mineral owners were, the court allowed a mineral estate owner in *Wells v. North East Coal Co.*[55] to build a railway across the surface even though all the coal conveyed had been mined.

By 1930 the court recognized rights of mineral owners to use methods of mining other than room and pillar mining. In *Rudd v. Hayden*[56] the mineral owner was granted the right to use the surface for methods which may include open cut, strip or hydraulic methods of mining.[57] Surface mining of coal was presented in *Treadway v. Wilson*.[58]

Surface mining techniques were permitted under the rationale of dominance of the mineral estate with the limitation that the mineral owner's conduct not be oppressive, arbitrary, wanton or malicious.[59] The Kentucky Supreme Court relied on the precedent and the language presented in *Case*.[60]

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[50] Bratt and Greenwell, *supra* note 8, at 12.

[51] McIntire v. Marian Coal Co., 227 S.W. 300 (Ky. 1921).

[52] *Id.* at 300.

[53] *Id.*

[54] Case v. Elk Horn Coal Corp., 210 Ky. 700 (1925).

[55] 255 Ky. 62 (1934).

[56] 265 Ky. 495 (1930).

[57] Id. at 499.

[58] 192 S.W.2d 949 (Ky. 1946).

[59] *Id.* at 950.

[60] Treadway, 192 S.W.2d at 950, citing Case v. Elkhorn Coal Co., 210 Ky. 700 (1925).

Kentucky courts have also insisted on interpreting contracts from the plain language of the conveyance itself. Extrinsic evidence is not admissible except where the language of the instrument is "ambiguous or obscure".[61]

These cases set the stage for a direct challenge to the mineral owner's right to take coal by surface mining. In 1956 the Kentucky Supreme Court faced such a challenge in *Buchanan v. Watson*.[62] The court issued one opinion, then withdrew it and replaced it with a second opinion.[63] The first *Buchanan* opinion said that in cases where parties would not have contemplated surface mining, a mineral owner would have to pay reasonable compensation as damages to the extent the mineral owner destroys in the strip mining process the surface owner's interest in surface and timber.[64]

The second *Buchanan* opinion took the opposite tack. The court reasoned that strip and auger methods were known at the time of the conveyance and were not specifically excluded.[65] To deny a mineral owner the right to remove coal by the only feasible process available, surface mining, would defeat the express purpose of the deed. The *Buchanan* court held that the waiver of damages clause could not be questioned.[66] Finally, the court said the right of the mineral estate to use the surface was a firmly ingrained rule of property in Kentucky and to reverse it would create "great confusion and much hardship in a segment of an industry that can ill-afford such a blow."[66]

Since *Buchanan* Kentucky courts have continued to enforce the dominance of the mineral owner's right to conduct surface mining despite destruction of the surface owner's land.[67] The *Blue Diamond* court held that the mineral owner is entitled to a directed verdict on the subject unless its right to mine was exercised in an oppressive, arbitrary, wanton or malicious manner.[68] Mineral owners were not required to use underground

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[61] Gibson v. Sellars, 252 S.W.2d 911 (Ky. 1952).

[62] 290 S.W.2d 40 (Ky. 1956).

[63] In *Buchanan v. Watson*, the original slip opinion was rendered on September 30, 1955, withdrawn, modified and published at 290 S.W.2d 40. The second—and final—opinion was rendered on May 4, 1956.

[64] Buchanan v. Watson, orig. slip op., 3-4, cited in Akers v. Baldwin, 736 S.W.2d 294 (Ky. 1987).

[65] *Buchanan*, 290 S.W.2d at 42.

[66] *Id.* at 43.

[66] *Buchanan*, 290 S.W.2d at 43-44.

[67] Blue Diamond Coal Co. v. Neace, 337 S.W.2d 725 (Ky. 1960).

[68] Id.

mining even if it were just as practical and would not destroy the surface; the surface can be destroyed by a mineral holder even if another method was practical.[69]

However, some limitations to this right of use have been acknowledged. Dumping mine waste from another mine on a surface owner's property was judged an oppressive, arbitrary wanton or malicious act and was not permitted.[70] The virtually unlimited rights of the mineral owners to use and destroy the surface estate were restricted to those estates conveyed by broad form deeds.[71]

Despite the courts' enforcement of the legality of surface mining under broad form deeds, the U.S. Congress, acting on negative public opinion of surface mining, enacted a sweeping mine reclamation law in 1977.[72] Kentuckians who opposed surface mining were not satisfied with the new reclamation law, and thus persuaded the Kentucky General Assembly to enact the Mineral Deed Act in 1984.[73] The Mineral Deed Act received its first and last challenge in *Akers v. Baldwin*.[74]

Akers filed suit to prevent Baldwin from issuing surface mining permits where the right to strip mine was claimed under an instrument which severed the minerals and the surface did not specifically give the mineral owner the right to mine in such a manner, and where the surface owner objected to or did not consent to such method of mining.[75] Falcon Coal challenged the applicability and constitutionality of the Mineral Deed Act. The Kentucky Supreme Court held that mineral owner under broad form deed must pay damages to surface owner to compensate for injury to surface as result of removal of minerals.[76] The court overruled the holding in *Buchanan* that upholds the waiver of damages provision in broad form deeds. The *Akers* court said this doctrine leads to the total destruction of surface without compensation to the surface owner.[77] The court created a win-

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[69] Kodak Coal Co. v. Smith, 338 S.W.2d 699 (Ky. 1960).

[70] Croley v. Round Mountain Coal Co., 374 S.W.2d 852 (Ky. 1964).

[71] Commerce Union Bank v. Kinkade, 540 S.W.2d 861 (Ky. 1976).

[72] Surface Mining Control and Reclamation Act. of 1977 [hereinafter SMCRA] Pub. L. No. 95-87, 91 Stat. 445 (codified at 30 U.S.C. §§ 1201-1328 (1988)).

[73] KY. REV. STAT. ANN. § 381.930-945 (Bobbs-Merrill)(1990 Supp.)[hereinafter KRS].

[74] 736 S.W.2d 294 (Ky. 1987).

[75] *Id.* at 296.

[76] *Id.* at 305-306.

[77] *Id.* at 306.

dow of May 4, 1956 and July 2, 1987. Conveyances made between those dates are excluded from the ruling as are all broad form deeds.[78]

Akers then held that the Mineral Deed Act unconstitutionally infringed on judicial power.[79] This Act requires a court to find that the parties to a deed intend coal to be mined by methods commonly known in area at time of execution of deed, unless the deed specifically describes the method to be employed.

The court found that the Act was flawed for three reasons. First, it interfered with judicial power to interpret past transactions under separation of powers doctrine.[80] Second, because the Act functioned retroactively to determine the meaning of a pre-existing deed or lease, it was constitutionally impermissible because such a function impairs the obligation of contract. Third, the Act was flawed because although the General Assembly can specify prospectively what rights are granted or denied by use of certain language in contracts written in the future, it is without power to affect vested property rights.[81]

KENTUCKY'S BROAD FORM DEED AMENDMENT

After the *Akers* opinion, opponents of surface mining decided to take an even more aggressive measure by proposing an amendment to Kentucky's constitution which would limit mining methods used to those known at the time of the conveyance of the mineral estate if the method of mining was not specified in the instrument creating the conveyance.[82] This amendment, approved by 83 percent of the voters in 1988, has yet to be tested in Kentucky's courts.[83] Yet some commentators have already questioned whether the amendment can survive a challenge on grounds of unconstitutional taking of property without just compensation, impermissible interference with private contracts and violation of due process guarantees of the fourteenth amendment to the United States Constitution.[84]

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[78] *Id.* at 307.

[79] *Id.* at 310.

[80] *Id.* at 309, citing Legislative Research Commission v. Brown, 664 S.W.2d 904, 911-914 (Ky. 1984)

[81] *Akers*, 756 S.W.2d at 310.

[82] KY. CONST. § 19 (2).

[83] According to "Presidential Preference Primary" published by the Office of Bremer Ehrler, Secretary of State on March 8, 1989, the vote was 882,960 for and 187,119 against.

[84] Bratt and Greenwell, *supra* note 8, at 11.

Carolyn Bratt and Karen Greenwell, writing for the Journal of Mineral Law and Policy, concluded that Kentucky's Broad Form Deed amendment violates the fifth amendment's prohibition against the taking of private property for public use without compensation.[85]

> The pre-Amendment right of a Kentucky mineral owner under a broad form deed to mine coal by later developed mining methods is a property right created by state law and protected by the fifth amendment. *The Amendment does not further a valid public interest.* Its real purpose is to achieve the constitutionally impermissible objective of changing the economic bargaining positions of the surface and mineral owners by mandating the reinterpretation of contracts entered into at the turn-of-the-century.[86]

The fifth amendment also protects a property owner's reasonable investment-backed expectations.[87] Those mineral owners who have come to rely on nearly 100 years of Kentucky law have a state-created and constitutionally protected property interest: that a mineral owner can employ modern mining methods to extract its coal.[88]

Bratt and Greenwell argue that the Broad Form Deed Amendment violates the contracts clause of the United States Constitution, defying the express intent of the parties to private contracts.[89] State law is rarely overturned on a contracts clause argument, yet the wording of most broad form deeds allow the mineral owner to use the surface of the mineral property for all purposes "necessary or convenient" to mining. The Broad Form Deed Amendment would impair that right.[90]

Plaintiffs might argue that such a violation might be excused for a valid exercise of the state's police power. Bratt and Greenwell reject the idea that the Amendment is a valid exercise of police power because it does not serve a general public purpose. Because the Amendment provides that surface owners can waive its provisions, any supposed public purpose is undermined.[91]

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[85] *Id.* at 89.
[86] *Id.* (Emphasis added).
[87] Pennsylvania Coal v. Mahon, 260 U.S. 393 (1922).
[88] Bratt and Greenwell, *supra* note 8, at 90.
[89] *Id.* at 66-70.
[90] *Id.* at 67.
[91] *Id.*

Finally, Bratt and Greenwell entertain the idea that the Amendment violates the guarantees to equal protection and due process found in the fifth and fourteenth Amendments to the United States Constitution.[92] They admit that esoteric arguments based on such claims might be made, but would probably not overcome the United States Supreme Court's reluctance to overturn a state's constitutional amendment.[93]

CONCLUSION

With longwall mining systems already installed in Harlan, Letcher and Perry counties,[94] the state's courts can expect to encounter complaints from surface owner plaintiffs regarding mine subsidence. But applying precedents from adjoining states may be a problem for Kentucky courts for two reasons. First, Kentucky courts have consistently and unequivocally enforced the dominance of the mineral owner's estate through 70 years of court opinions. Such a consistent line of decisions creates a reasonable, investment-backed reliance by the purchasers of mineral estates. Such a reliance is constitutionally protected.[95]

Buchanan has held that unless the mineral estate holder mines in an oppressive, arbitrary, wanton or malicious manner, the courts will enforce an express damage waiver typical in broad form deeds.[96] Current mineral owners have paid for the right to extract mineral, and that right has been affirmed for decades by the Kentucky courts.

The second problem in applying precedents from *Culp* and *Ball* is that Kentucky's broad form deed waivers are unique in their provision to the mineral estate owner of the right to use the surface of the mineral property for all purposes necessary or convenient to mining, transporting or preparing coal removed from that property.[97] Pennsylvania, Virginia and Ohio courts were not willing to add surface mining to the bundle of rights under early severance deeds because the deeds clearly referred to underground mining and made no reference to the mineral estate owner's use of the surface.

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[92] U.S. CONST. AMEND. V and XIV.
[93] Bratt and Greenwell, *supra* note 8, at 91.
[94] Lexington Herald-Leader, Aug. 15, 1990, at B3.
[95] *See* Keystone Bituminous Coal Ass'n. v. DeBenedictis, 480 U.S., 499 (1987).
[96] *Buchanan*, 290 S.W.2d at 43.
[97] *Akers*, 736 S.W.2d 294.

In *Culp* and *Ball*, the courts insisted on relying on the plain language of the conveyance. Kentucky has also adopted such a rule.[98] But applying the same rule in Kentucky would yield the opposite result: it would allow for surface damage due to mine subsidence from longwall mining just as it would for surface mining.

The Broad Form Deed Amendment, if enforceable, would prohibit such uses by its express language. But if surface owners began insisting that all mineral owners use only the methods of extraction which were in use at the time of the conveyance, almost all contemporary mining techniques would be prohibited. "Absent clear and convincing evidence to the contrary, the Amendment prohibits mineral extraction by surface mining, augering, long wall mining, and continuous seam mining since those techniques were developed well after most broad form deeds were executed."[99]

Such a profound upheaval in mineral owners' reasonable expectation that longwall mining is allowable would almost certainly provoke a challenge to the Broad Form Deed Amendment. The question would then become: how easily can the Broad Form Deed Amendment survive a constitutional challenge based on the "takings" clause of the U.S. Constitution?

Bratt and Greenwell point out that it is impossible to argue that the Broad Form Deed amendment serves a public purpose when the surface owner himself can permit mining, ostensibly if he is paid enough to persuade him to do so. But this contingency in the Amendment is clearly a distinctive feature of private property ownership. If the mineral estate is private property, Bratt and Greenwell are skeptical that the Broad Form Deed Amendment can survive a "takings" clause challenge.

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[98] Gibson v. Sellars, 252 S.W.2d 911 (Ky. 1952).

[99] Bratt and Greenwell, *supra* note 8, at 10 n.3.