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Do Waivers of Support and Damage Authorize Full Extraction

Mining

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DO WAIVERS OF SUPPORT AND DAMAGE AUTHORIZE FULL EXTRACTION MINING?

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I. INTRODUCTION

In many coal producing areas the ownership of the minerals is separate from the ownership of the surface. Many conveyances severing these estates released the mineral owner from the duty of providing subjacent support to the surface or from liability for damage caused by subsidence. As underground mining technology has ad-

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vanced, resulting in total or near total coal extraction, complaints of subsidence damage appear to be increasing. This has spawned numerous challenges to the continued validity of waivers of subjacent support by surface owners, public interest groups, scholars, and law makers.

This article discusses the general law relating to the right of subjacent support and waivers of that right. Specifically, the authors will focus on (1) recent cases challenging the validity of waivers of the right of subjacent support, especially as to operations employing longwall mining, and (2) limitations on these waivers, including legislative action.

II. SUBSIDENCE AND LONGWALL MINING

Subsidence is the downward movement of the earth resulting from the removal of lower, supporting strata. In coal mining, the removal of the underlying coal and/or loss of the supporting pillars or artificial support results in subsidence. Various factors influence the type, degree, and timing of subsidence. A full discussion of these factors is beyond the scope of this article; however, a brief discussion concerning the effects of particular methods of mining on subsidence is necessary.

Two types of underground mining techniques exist: (1) methods resulting in total or near total extraction of the coal seam and (2) methods resulting in only partial extraction of the seam. Room and pillar mining is by far the most commonly utilized method of underground mining in the United States. This method extracts the coal by a series of parallel and perpendicular entries or rooms, leaving blocks or pillars of coal to support the roof. This type of min-

2. For a general discussion of these factors, see Dahl, supra note 1; Hunt & Jones, Subsidence Regulation Under the Surface Mining Control and Reclamation Act of 1977, 2 J. MIN. L. & POL’Y 63, 72-76 (1986).
5. Id.
ing, without more, results in extraction rates of 35-50% of the seam. While room and pillar mining typically leaves support for the surface, it does not insure the absence of subsidence. In addition, the passage of time may contribute to the degradation and collapse of support pillars. Subsidence from abandoned room and pillar mines can occur within as few as ten and as many as 100 years after mining, although, typically, these subsidence incidents occur 50 or more years after mining.

As coal became more valuable, operators looked to ways of increasing the extraction ratio of room and pillar mining. The first method was to increase the size of the entries or rooms and to decrease the size of the pillars. Later, operators used a two-step process of advance and retreat mining. This method develops the rooms and pillars as the mine advances into the seam of coal. When the mining advance reaches its limit, the retreat phase begins. In this phase, the mine extracts the pillars as it retreats. This method, considered a high or total extraction method, yields an extraction ratio of 70-95%.

Longwall mining utilizes the room and pillar method to develop a large block or panel in the coal seam. Special extraction equipment then completely removes the panel of coal, which may typically measure 500 feet or more wide and one-half mile or longer. Hydraulic jacks support the roof at the site of extraction and advance along with the extraction machinery. As the jacks and equipment advance, the mine roof may collapse into the void created. The extraction ratio of this method of mining is virtually 100%.

Extraction of coal by either longwall mining or room and pillar mining with full pillar removal, in virtually all instances, results in

6. Dahl, supra note 1, at 1.02.
7. Id. at 1.05; Hunt & Jones, supra note 2, at 76.
8. Dahl, supra note 1, at 1.05.
10. Id. at 72; Dahl, supra note 1, at 1.02-1.03.
11. Hunt & Jones, supra note 2, at 72 n.36.
12. Id. at 72; Dahl, supra note 1, at 1.03.
measurable subsidence. Typically, 90% of the subsidence occurs within three months of the extraction process.

Subsidence resulting from mining will occur as one of two types. Room and pillar mining, at shallow depths, can result in "sinkholes." The failure of the roof either above an entry or room or at an intersection of entries creates the sinkholes. The other major type of subsidence is known as "trough" or sag subsidence. This subsidence normally involves full or high extraction mining techniques such as room and pillar mining with complete pillar extraction and longwall mining. It also may involve mining at deeper depths. As the intervening strata cave into the void or fracture and bend, a sag or trough results in the surface, causing a lowering in elevation of the surface.

III. RIGHT OF SUBJACENT SUPPORT

Ownership of the surface of the land and of the minerals or underlying strata can be severed and vested in multiple owners. This severance often creates conflicts between surface owners and mineral owners in the exercise of their respective rights. In the first half of the nineteenth century, the English courts established that the surface of the land must be supported in its natural state by the underlying mineral estate. Courts have held this right to subjacent support to be absolute. That is, removal of the subjacent support subjects the mineral owner to liability without proof of neg-

14. Id.; Dahl, supra note 1, at 1.03.
15. Hunt & Jones, supra note 2, at 77; Dahl, supra note 1, at 1.04.
16. Id.
17. Id.
18. Id.
19. Id.
20. Id.
ligence. The right of subjacent support also exists without reference to the nature of the strata or the comparative values of the two estates or without consideration of the difficulty of supporting the surface. However, the surface owner may waive or release subjacent support expressly or, in some situations, by implication.

The right of subjacent support arose from and, in most respects, is similar to the right of lateral support. Lateral support requires property to support and be supported by adjoining property. In lateral support, the division of property is by a vertical plane while subjacent support is divided horizontally.

A. Nature of the Right of Subjacent Support

Several theories have been advanced as to the origin of the right of support, either subjacent or lateral. One theory defines the right as ex jure naturae—a "natural" right. A second theory applies the doctrine of sic utere tuo ut alienum non laedas. Under that doctrine, if mining will result in damage to the surface, sufficient support must be left or artificial supports must be provided by the mineral owner. A third theory classifies the right of subjacent support as an easement. Under this theory the mineral estate and the right to mine are subservient to the surface owner's right to perpetual support of the surface in its natural condition. Advanced as a fourth theory is the notion that the right is not in the nature of an easement.


26. 5 Powell, supra note 23, ¶ 703, at 311.

27. 1 Am. Jur. 2d, Adjoining Landowners § 37 (1962).


29. Comment, supra note 4, at 239.

30. Id. ("so use your property as not to injure the rights of another").


32. Comment, supra note 4, at 239; Humphries v. Brogden, 12 Q.B. at 742.
but is part of the freehold itself.\textsuperscript{33} It is a proprietary right and a part of the realty just as is the surface soil and the minerals.\textsuperscript{34} Finally, in Pennsylvania, the right of subjacent support is an independent estate in land separate from the surface or the underlying strata.\textsuperscript{35}

As the doctrines of subjacent and lateral support developed, one major difference arose. Originally, the absolute right of support extended only to the supported property in its natural condition.\textsuperscript{36} Generally, to be awarded damages for injuries to improvements, buildings, and structures, it was necessary to prove negligence on the part of the owner of the supporting estate in removing the support.\textsuperscript{37} A mineral owner could avoid liability for removal of support by showing that, without the structures or improvements, the surface would not have been damaged.\textsuperscript{38}

While generally the law of lateral support has retained this distinction between the surface in the natural state and the improvements, subjacent support decisions have held that the weight of structures is normally insignificant relative to the weight of the su-

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\textsuperscript{33} Comment, \textit{supra} note 4, at 239.

\textsuperscript{34} \textit{Id.}

\textsuperscript{35} Chartnetski \textit{v.} Miners Mill Coal Mining Co., 270 Pa. 459, 113 A. 683 (1921). This theory appears to be related to the fourth proprietary right theory. It can result in an interesting situation where the surface, minerals, and support estates are owned by separate persons. While the mineral owner could not remove support without being liable for any resulting damage, the surface owner would have no cause of action having no right to support. The owner of the support estate, while potentially having a claim, has no damages. See 5 \textit{Powell, supra} note 23, ¶ 703, at 316-316.1; R. Donley, \textit{The Law of Coal, Oil and Gas in West Virginia and Virginia} ¶ 29, at 36 (1951). This situation is not limited solely to Pennsylvania and its support estate position. If the owner of the fee conveys the surface reserving the minerals and the right to remove support without liability for damage and then leases the minerals to a third party with a provision that mining shall not remove support, a similar situation occurs. The surface owner may have an argument that he is a third-party beneficiary under the lease or that the lessor of the minerals holds the right to support in a constructive trust for a surface owner. See \textit{Id.} at 34-38; Erwin \textit{v.} Bethlehem Steel Corp., 50 W. Va. 900, 62 S.E.2d 337 (1950).

\textsuperscript{36} 5 \textit{Powell, supra} note 23, ¶ 699, at 285-86.

\textsuperscript{37} \textit{Id.}, ¶ 700, at 292.

\textsuperscript{38} \textit{Id.} The operation of this rule can change through the conduct of the parties. Support for the improvements or additions may be expressly granted, granted by implication through a common predecessor in title, or by the nature and use of the property. English law has recognized that lateral support for buildings and other improvements may be acquired by prescription. See Brown \textit{v.} Robins, 157 Eng. Rep. 809 (1859). The American courts have not followed this rule of prescription. See Tunstall \textit{v.} Christian, 80 Va. 1 (1885).
Therefore, the burden of proof is on the mineral owner to show that the weight of the structure caused or contributed to the subsidence. Because this is a nearly impossible burden, courts normally find that the surface would have subsided regardless of the structures. Thus, courts award consequential damages for injury to structures based on the breach of the absolute duty to support the surface in its natural condition. Some courts have found that the natural state of the surface includes contemplated and foreseeable uses at the time of the severance. In Island Creek Coal Co. v. Rodgers, the Court of Appeals of Kentucky interpreted "natural state" as the condition of the surface, including contemplated and foreseeable improvements at the time of the severance of the mineral from the earth, not the severance of the estate.

By definition, the right of support is absolute. However, it is absolute only to the extent that the mineral owner is liable for the direct consequences of the removal regardless of the care utilized, the coal operator's lack of negligence, or mining customs in the area. The right of support does not make the mineral estate owner an insurer of the natural condition of the surface.

Some courts have relied upon this absolute right of support, in both subjacent and lateral support cases, to justify injunctive relief against mining or excavation activities even in the absence of irreparable damage, and despite the end result being permanent ces-

39. 5 Powell, supra note 23, ¶ 703, at 312; Wilms v. Jess, 94 Ill. 464 (1880).
41. Id.
42. Id.
43. Ohio Collieries Co. v. Cocke National Coal Co., 107 Ohio St. 238, 140 N.E. 356 (1923); Collins v. Gleason Coal Co., 140 Iowa 114, 115 N.W. 497 (1908); see also Annotation, Liability of Mine Operator for Damage to Surface Structure by Removal of Support, 32 A.L.R. 2d 1309, 1315 (1953).
44. 644 S.W.2d 339 (Ky. Ct. App. 1982).
45. Id. at 344.
46. See supra note 24 and accompanying text.
48. VIA AMERICAN LAW OF PROPERTY, supra note 25, § 28.39, at 111 n.7 (citing Carrig v. Andrews, 127 Conn. 403, 17 A.2d 520 (1941) (discussing lateral support)).
49. Marquette Cement Mining Co. v. Oglesby Coal Co., 253 F. 107 (N. D. Ill. 1918); Trowbridge v. True, 52 Conn. 190, 52 Am. Rep. 570 (1884); McGurn v. Reichel, 268 S.W. 399 (Mo. App. 1925); VIA AMERICAN LAW OF PROPERTY, supra note 25, § 28.53, at 153.
sation of the operations.\textsuperscript{50} However, in \textit{Large v. Clinchfield Coal Company},\textsuperscript{51} the Virginia Supreme Court held that in the absence of appreciable damage, either caused or threatened to the surface, the absolute right of support would not justify an injunction to halt a longwall mining operation.\textsuperscript{52} In the face of plaintiffs' contention that the absolute right of support gave rise to a cause of action for any subsidence, the court stated, "the 'absolute' nature of the right to subjacent support merely implies strict liability for its violation."\textsuperscript{53} Analogizing the right of subjacent support to lateral support, the court found that without damage being shown to the adjoining property, no cause of action for removal of lateral support could be maintained.\textsuperscript{54} Similarly, because no appreciable damage had been shown by the surface owners, the court did not find a violation of their right of subjacent support.\textsuperscript{55}

\section*{B. Waiver or Release of the Right of Subjacent Support}

While it has been held that the right of subjacent support exists in the ownership of the property without the necessity of contract,\textsuperscript{56} the owner of the surface estate may waive the right by agreement with the owner of the mineral estate.\textsuperscript{57} A waiver of the right of support must either be by express language or by implication, if the language clearly and unequivocally shows the intention of the parties.\textsuperscript{58}

\begin{itemize}
\item \textsuperscript{50} \textit{Marquette Cement Mining Co.}, 253 F. at 107; \textit{Trowbridge}, 52 Conn. at 190, 52 AM. REP. at 570; VIA \textit{AMERICAN LAW OF PROPERTY}, supra note 25, § 28.53, at 153.
\item \textsuperscript{51} 239 Va. 144, 387 S.E.2d 783 (1990).
\item \textsuperscript{52} \textit{Id.} at 786.
\item \textsuperscript{53} \textit{Id.} at 785 (citing \textit{RESTATEMENT (SECOND) OF TORTS} § 820 comment b (1977)).
\item \textsuperscript{54} \textit{Id.} at 786.
\item \textsuperscript{55} \textit{Id.} at 786. The trial court found after hearing testimony that no material damage would occur to the Large's surface property, despite finding that the elevation of the surface would be lowered by approximately three feet. \textit{Id.} at 785.
\item \textsuperscript{56} 1 AM. JUR. 2d \textit{Adjoining Landowners} § 37, at 717 (1971); Humphries v. Brogden, 12 Q.B. 739 (1850); Comment, supra note 4, at 237.
\item \textsuperscript{57} Comment, supra note 4, at 237.
\end{itemize}
1. Express Waivers

A waiver of subjacent support by express contractual language can occur in one of three ways. First, the owner of the property may grant the minerals and the right to remove the minerals without leaving sufficient support for the surface.\(^{59}\) No doubt remains that the surface is not required to be supported by the underlying strata. Secondly, the owner may grant the surface, reserving the minerals and expressly providing that the right of subjacent support does not attach to the surface.\(^{60}\) The third method is by subsequent document, whereby the owner of the surface estate releases the right of subjacent support to the owner or operator of the mineral estate.\(^{61}\)

As the right of subjacent support runs with the supported estate through successive ownerships, a waiver of the right runs with the supporting estate.\(^{62}\) The surface owner cannot abandon or extinguish the waiver on the theory of prescription. Nor should the surface owner recover on an estoppel theory because of the potentially severe damage which may occur to the surface.\(^{63}\) Courts have upheld waivers of the right of subjacent support against arguments that the waivers are contrary to public policy.\(^{64}\) This is true even though the effect of such waiver is to permanently destroy the use of the surface.\(^{65}\)

2. Implied Waivers

Though some jurisdictions have held that the right of subjacent support may be waived or released by necessary implication, courts

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59. Comment, supra note 4, at 241 (citing Paull v. Island Coal Co., 44 Ind. App. 218, 88 N.E. 959 (1909); Continental Coal Co. v. Connellsville By-Product Coal Co., 104 W. Va. 44, 138 S.E. 737 (1927)).

60. Comment, supra note 4, at 241 (citing Madden v. Lehigh Valley Coal Co., 212 Pa. 63, 61 A. 559 (1905)).


62. VIA AMERICAN LAW OF PROPERTY, supra note 25, § 28.38, at 105-06.

63. Id.


are reluctant to imply such waivers.\textsuperscript{66} Therefore, for the right of subjacent support to be waived by implication, the language must be clear, unequivocal, and free from ambiguity.\textsuperscript{67}

In \textit{Griffin v. Fairmont Coal Co.},\textsuperscript{68} the West Virginia Supreme Court of Appeals held that a grant of all the coal with a right to mine and remove all the coal releases the right of subjacent support by necessary implication.\textsuperscript{69} While this rule of construction has been upheld and affirmed as a rule of property in West Virginia in subsequent decisions,\textsuperscript{70} the court has narrowly construed it. For example, the grant of all the coal with the right to remove "such coal" does not operate to release the right of subjacent support.\textsuperscript{71} Without the use of the phrase "all the coal" in the grant of mining rights, the court would not find an implied waiver of the subjacent support.\textsuperscript{72} No other jurisdiction has adopted or followed this rule.\textsuperscript{73}

Several other jurisdictions have held that a grant or reservation of the minerals and the right to remove the minerals without liability for resulting damages waives the right of subjacent support by implication.\textsuperscript{74} Those cases have found that the intention of the parties was to allow removal of all the coal without the necessity of leaving sufficient support for the surface.\textsuperscript{75} Any other construction would change the plain and unambiguous meaning of the words used.\textsuperscript{76}

\textsuperscript{66} VIA \textit{American Law of Property}, supra note 25, \S 28.38, at 107; \textit{54 Am Jur. 2d, Mines and Minerals} \S 203 (1971); Comment, supra note 4, at 241.

\textsuperscript{67} Wilms v. Jess, 94 Ill. 464 (1880); Burgner v. Humphrey, 41 Ohio St. 340 (1884); Stonegap Colliery Co. v. Hamilton, 119 Va. 271, 89 S.E. 305 (1916); Comment, supra note 4, at 242.


\textsuperscript{69} Id.

\textsuperscript{70} Hall v. Harvey Coal & Coke Co., 89 W. Va. 55, 58, 108 S.E. 491, 492 (1921).


\textsuperscript{72} Paul v. Island Coal Co., 44 Ind. App. 218, 88 N.E. 959 (1909); Stonegap Colliery Co., 119 Va. at 271, 89 S.E. at 305; VIA \textit{American Law of Property}, supra note 25, \S 28.38, at 108 n.20; Twitty, supra note 28, at 502.


\textsuperscript{74} Id.

\textsuperscript{75} See \textit{Paul}, 44 Ind. App. at 221, 88 N.E. at 961; Rush, 34 Ohio App. at 43, 170 N.E. at 382.
However, a waiver of damages contained in a conveyance does not necessarily waive the right of subjacent support. Courts have found neither the grant or reservation of coal with certain enumerated mining rights nor the waiver of damages resulting from the proper exercise of those rights to waive subjacent support. A discussion of other examples of language that were held sufficient and insufficient to waive subjacent support follows below.

Because the waiver of support runs with the supporting estate through successive ownerships, any subsequent owner may mine and remove the coal without leaving sufficient support and without liability for damages to the surface. Owners of those rights and immunities may grant them to lessees as owners of an interest in the mineral estate. It would then follow that a contract miner for either the mineral owner or a mineral lessee would also be entitled to those rights and privileges subject to contractual limitations. However, in Johnson v. Junior Pocahontas Coal Co. Inc., the West Virginia Supreme Court of Appeals held the opposite. Relying upon a strained distinction between privity of contract and privity of estate, the court held that a contract mine operator was not necessarily entitled to the mineral owner's right to remove all of the coal without liability to the surface owner for damages.

78. Stilley, 234 Pa. at 497, 83 A. at 479.
79. Sufficient: Sheker v. Jensen. 241 Iowa 583, 41 N.W.2d 679 (1950) (Liquidated damages in conveyance for land used with right to mine without liability for damage, held that liquidated damage clause was for both land used and damaged.); see Culp v. Consol Pennsylvania Coal Co., No. 87-1688 (W.D. Pa. May 4, 1989) (LEXIS, Genfed library, Dist. file). Insufficient: Seitz v. Coal Valley Mining Co., 149 Ill. App. 85 (1909) (Grant of minerals with direction to do as little damage to surface as possible.); Hines v. Union Connellsville Coke Co., 271 Pa. 219, 114 A. 521 (1921) (Grant of coal with usual mining rights and privileges.); Lenox Coal Co. v. Duncan-Spangler Coal Co., 265 Pa. 572, 109 A. 282 (1920) (Right to mine in the most economical method and in accordance with state law.); Drummond v. White Oak Fuel Co., 104 W. Va. 368, 140 S.E. 57 (1927) (Assignment of right to use parts of the surface to mine underlying minerals.).
80. VIA AMERICAN LAW OF PROPERTY, supra note 25, § 28.38 at 105.
81. Id.
82. Id.
84. Id. at 271-74, 234 S.E.2d 314-16. This case was before the court on the defendant's motion for summary judgment. Additionally, allegations of willful and wanton conduct had been made by plaintiffs. This potentially would have taken the case outside of the protection of the waiver. See
3. What Is Waived?

Once it has been determined that the right of subjacent support has been waived, questions arise as to exactly what is waived. As stated earlier, the right of subjacent support is absolute; proof of negligence on the part of the mineral owner or operator is not necessary to establish entitlement to damages.\(^\text{85}\) Some early cases held that the waiver only waived the right to recover for damages without proof of negligence.\(^\text{86}\) However, other cases have held that the waiver applies to all damages whether under the theories of strict liability or negligence.\(^\text{87}\) Some courts, in \textit{dicta}, have left open the question as to whether or not a waiver of subjacent support, either express or implied, would insulate the mineral owner or operator from damages caused by willful or wanton action or intentional torts.\(^\text{88}\) In Kentucky, it would appear that a waiver does not insulate the mineral owner from arbitrary, wanton or malicious actions or gross negligence.\(^\text{89}\)

\(^{85}\) See supra notes 22-25 and accompanying text.

\(^{86}\) See VIA \textit{AMERICAN LAW OF PROPERTY}, supra note 25, § 28.38 at 106 n.9.


\(^{88}\) Eastwood Lands, Inc. \textit{v. U.S. Steel Corp.}, 417 So. 2d 164, 169 (Ala. 1982). \textit{But cf.} Holmes \textit{v. Alabama Title Company, Inc.}, 507 So. 2d 922 (Ala. 1987). (Plaintiffs sued on the grounds of negligence, wantonness, trespass and nuisance. However, the Alabama Supreme Court found plaintiffs' actions barred by the waiver of damages. \textit{Eastwood Lands} was cited as authority for barring all claims in face of a waiver even for willful or wanton conduct.). \textit{See also} Continental Coal Co. \textit{v. Connellsville By-Product Coal Co.}, 104 W. Va. 44, 51, 138 S.E. 737, 742 (1927). \textit{Atherton}, 267 Pa. at 424, 110 A. at 300 (Simpson, J., concurring).

\(^{89}\) Elkhorn Coal Corp. \textit{v. Johnson}, 249 S.W.2d 745, 746 (Ky. 1952). In early cases, it was recognized that the surface owner had an absolute right to support from the mineral estate. \textit{See}, \textit{e.g.},
A waiver of subjacent support does not necessarily waive lateral support. Nor does a waiver of lateral support necessarily waive subjacent support. In *Scranton Coal Co. v. Graff Furnace Co.*, a surface owner was unable to recover for damages to his property allegedly caused by the removal of subjacent support, on the grounds that right of subjacent support had been expressly waived. However, the surface owner was able to maintain an action in federal court for damages from removal of lateral support. The severance deed reserved the minerals with the right to remove the minerals,

as well as the right of passage through or under the granted surface, to mine and remove the coal and minerals from any other lands... without thereby incurring, in any event whatever, any liability for injury caused or damage done to the surface of said lot or to the buildings or improvements which now or hereafter may be put thereon.

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West Kentucky Coal Co. v. Dilback, 219 Ky. 783, 294 S.W. 478 (1927). Courts also enforced waivers of surface support against surface owners, with the limitation that the mineral owner could not exercise its rights in an arbitrary, wanton, malicious or grossly negligent manner. *Elkhorn Coal*, 249 S.W.2d at 746. In a series of cases, the Kentucky courts held that under “broad form deeds” the surface was subservient to the mineral estate. See Watson v. Kenlick Coal Co., Inc., 498 F.2d 1183, 1186 (6th Cir. 1974). The cases allowed the mineral owner to extract coal by strip mining methods, even though strip mining was not mentioned in the deeds nor was strip mining a known process at the time of the severance of the estates. See generally Barton v. Kentucky Oak Mining Co., 429 S.W.2d 395 (Ky. 1968); Buchanan v. Watson. 290 S.W.2d 40 (Ky. 1956). Generally, broad form deeds contained a grant of the coal and all other minerals and then contained a long litany of various rights the mineral owner would have in the surface. See Pfeiffer, *Kentucky’s New Broad Form Deed Law—Is It Constitutional?*, 1 J. Min. L. & Pol’y, 57, 58 (1985). Many of the broad form deeds contained express waivers of subjacent support or waivers of damages for removal of support. However, none of the cases dealt with removal of subjacent support or subsidence damages. While imposing the condition that the mineral could not act arbitrarily, oppressively, wantonly, or maliciously, the court continually held that the mineral owner could utilize strip mining methods without the payment of damages. Finally, in *Akers v. Baldwin*, 736 S.W.2d 294 (Ky. 1987), the Kentucky Supreme Court, in a plurality opinion, found that mineral owners under “broad form deeds” could continue to utilize strip mining methods but would be required to pay the surface owner damages unless “the conveyance expressly sets out the methods of mining that may be employed and a waiver of damages from the use of such methods.” *Id.* at 305. This language would appear to specifically cover waivers of subjacent support or damages for removal of support. It would also appear to remedy a paradox noted by Justice Stephenson who concurred in part and dissented in part in *Akers*. Justice Stephenson noted that under the “broad form deed” cases, the surface owner could have absolute right to have his surface supported by the mineral owner yet at the same time have the entire surface destroyed by the mineral owner by strip mining. *Id.* at 314 (Stephenson, J., dissenting).

90. 289 F. 305 (3rd Cir. 1923). In Graff Furnace Co. v. Scranton Coal Co., 266 F. 798 (3rd Cir. 1920), the court held that res judicata did not apply to the decision of the Pennsylvania Supreme Court since the allegations of damage due to removal of lateral support were not litigated nor were they before the state courts.

91. 266 F. at 803. The surface owner additionally released and discharged the mineral estate owner from any liability for injuries to the surface or improvements from the “removal of said coal or other minerals.” *Id.* at 804.
Reasoning that the coal and minerals excepted and reserved were beneath the surface property conveyed, the court held the waiver of surface support applied only to vertical or subjacent support, not to lateral support.  

IV. RECENT WAIVER LITIGATION

Although courts have historically upheld and strictly enforced waivers of subjacent support and liability according to their terms, surface owners have recently attacked the waivers on numerous fronts. The surface owners have based their challenges on public policy arguments, regulatory interpretations and various legal theories of liability. Additionally, scholars, public interest groups, and damaged surface owners have increasingly questioned the validity of longwall mining under early severance deeds waiving support and damages. With one notable exception, courts have continued to uphold waivers in the modern era.

A. Waivers of Support and Damages

In Stamp v. Windsor Power House Coal Co., the West Virginia Supreme Court of Appeals construed the effect of language in a severance deed that granted a particular seam of coal and waived both support for the overlying strata and liability for damages to the overlying strata resulting from the mining. Claiming extensive

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92. 289 F. at 308.
93. A discussion of recent subsidence-related regulatory challenges to mining operations, particularly longwall mining, is beyond the scope of this paper. However, the reader is directed to Citizens Against Longwalling v. Division of Reclamation, 41 Ohio App. 3d 290, 535 N.E.2d 687 (1987); George v. Commonwealth of Pennsylvania. 102 Pa. Commw. 87, 517 A.2d 578 (1986).
94. See, e.g., McGinley, Does The Right To Mine Coal Under Lease or Deed Include The Right To Extract By Longwall Mining Methods?, 5 E. Min. L. Found. 5-1 (1984).
95. See supra note 1.
96. See infra notes 99-103 and accompanying text.
99. Id. at 579, 177 S.E.2d at 147. The deed granted: All the Pittsburgh Number Eight or River Vein of coal underlying [the described property] . . . together with all the rights and privileges necessary and useful in the mining and removal of said coal, including the right of mining the same with or without leaving any support for the overlying strata, and without liability for any injury which may result to such overlying strata or to the surface, or to water courses or roads or ways by reason of the mining and removal of said coal . . . .

Id.
damage to their property, the surface owners brought suit alleging "gross, willful and wanton negligence" on the part of the coal company.\textsuperscript{100} Upon denying the company's motion for summary judgment based on the waivers, the circuit court certified questions of whether the waivers barred damage claims under theories of strict liability, negligence and gross negligence. The West Virginia Supreme Court of Appeals answered each question in the affirmative. Noting the long history of litigation concerning waivers of subjacent support in West Virginia, the court held that the express waivers clearly barred the strict liability claim. Similarly, relying on earlier decisions, the court held that the waivers precluded recovery for negligence. Finally, the court refused to distinguish between "negligence" and "gross negligence," finding this distinction "too vague and shadowy to be of any practical importance."\textsuperscript{101} Hence, the deed language barring claims under a theory of negligence would similarly bar a claim of gross negligence. However, the court noted that it merely considered whether the waivers precluded recovery for negligence. In \textit{dicta}, the court indicated it would not uphold a waiver of support and damages in the face of willful and wanton acts on the part of the mineral producer.\textsuperscript{102}

Despite its \textit{dicta} in \textit{Stamp}, the West Virginia Supreme Court of Appeals upheld waivers against allegations of willful and wanton conduct in \textit{Rose v. Oneida Coal Co., Inc.}\textsuperscript{103} There, the surface owners alleged that "Oneida 'willfully, negligently and wantonly' caused their water supply to disappear and their land to subside."\textsuperscript{104} In addition to compensatory damages for injury to their property, the surface owners sought to recover for mental anguish and demanded punitive damages. The 1915 severance deed construed in \textit{Rose} reserved the right to remove support and waived liability for injuries to the surface.\textsuperscript{105}

\textsuperscript{100} \textit{Id.} at 581, 177 S.E.2d at 148.
\textsuperscript{101} \textit{Id.} at 585, 177 S.E.2d at 150.
\textsuperscript{102} \textit{Id.}
\textsuperscript{103} 375 S.E.2d 814 (W. Va. 1988).
\textsuperscript{104} \textit{Id.} at 815.
\textsuperscript{105} \textit{Id.} at n.1. The deed granted:
\ldots the right to enter upon and under said land to mine and remove all of the said coal.
Again noting a long line of decisions upholding waivers of liability for subsidence damage, the court affirmed the entry of summary judgment on all common law claims. However, the court noted that the West Virginia Surface Coal Mining and Reclamation Act may give rise to a statutory claim and indicated in dicta that the Act and its regulations "changed many of the old common law rules concerning the rights and remedies of surface owners vis a vis mineral owners."  

In *Eastwood Lands, Inc. v. U.S. Steel Corp.*, the Alabama Supreme Court upheld a summary judgment in favor of the mineral owner in a suit alleging strict liability, negligent mining and violation of public policy. The severance deed reserved the right to mine the coal without leaving support for or preventing damages to the surface. The deed also stated that the reservation created a covenant running with the land.

Observing that the right to subjacent support is absolute unless expressly waived, the court enforced the express waiver in the deed to bar the surface owners' theories of strict liability and negligence. As to the public policy claim, the court found that the surface owners' position ignored constructive notice of matters in recorded deeds, and further held that to find for the surface owners would deprive the mineral owner of its property without due process of law.

In *Holmes v. Alabama Title Co., Inc.*, the Alabama Supreme Court again reviewed a summary judgment entered in favor of the mineral owner. There, 128 surface owners brought suit against the

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under the tract ... without being liable for any injury to said land, or to any thing [sic] therein or thereon, by reason of the mining and removal of said coal therefrom, and the coal from neighboring lands, without being required to provide for the overlying strata or surface.

106. *Id.* at 816 (discussing *W. Va. Code* § 22A-3-1 to -3-40 (1985 repl. vol.).)

107. 417 So. 2d 164 (Ala. 1982).

108. *Id.* at 168. The deed reserved "the right ... to mine and remove the coal and other minerals contained in said land without leaving supports necessary for sustaining the surface of said land or for preventing damages thereto ... ."

109. *Id.* at 169. The court noted that its holding was limited to the facts of the case before it and specifically did not express an opinion on the applicability of waivers to intentional torts or "unreasonable uses of the estate reserved."

110. 507 So. 2d 922 (Ala. 1987).
mineral owner and five title insurance companies. The 1943 severance deed construed in *Holmes* reserved the right to remove the coal without leaving support or preventing damage to the surface.\textsuperscript{111} Like the deed in *Eastwood Lands*, the deed in *Holmes* also stated that the rights retained would constitute a covenant running with the land.

The surface owners in *Holmes* resided in a subdivision overlying the mine.\textsuperscript{112} Claiming damages under theories of negligence, wantonness, trespass and nuisance, they contended that the exculpatory provisions in the severance deed did not bar actions predicated under these theories. The court held that its earlier decision in *Eastwood Lands* was not limited to negligence actions. Finding that the waiver unambiguously barred any and all claims arising from mining activities, the court held that even if landowners could provide evidence of nuisance, trespass or negligent, willful and wanton mining, the unambiguous deed language barred any such claim.\textsuperscript{113}

**B. Waivers Applied to Longwall Mining**

While the Alabama and West Virginia courts have upheld waivers of support and damages against various common law claims for subsidence-related damages, other jurisdictions have recently addressed the particular application of waivers of support and damages to longwall mining. In addition to the policy arguments and common law damage theories used to attack waivers in general, surface owners have objected to the application of waivers to longwall mining on grounds that this form of extraction and its resulting damages could not have been contemplated by the parties at the time of the severance.

\textsuperscript{111} *Id.* at 923. The deed stated:

... no right of action for damages on account of injuries to the land above-described or to any buildings, improvements, structures, wells or water courses ... resulting from past or future mining operations ... or resulting from removal of coal and other minerals or coal seam roof supports ... shall ever accrue to or be asserted by the grantee herein ....

*Id.*

\textsuperscript{112} Mining beneath the subdivision had terminated shortly before the surface owners began buying their properties.

\textsuperscript{113} 507 So. 2d at 925.
In *Wells v. American Electric Power Co.*, the Ohio Court of Appeals construed severance deeds of 1958 and 1959 that conveyed the right to mine underground without liability for damages. The surface owners sought declaratory judgment and injunctive relief, arguing that the damage waivers did not include subsidence damages and that the parties did not contemplate the use of modern longwall mining at the time of the severance. The court granted summary judgment in favor of the coal company. Addressing the argument that the waiver of damages did not include damages from subsidence, the court found that the deed obviously contemplated underground mining. Noting that the deed neither authorized strip mining nor allowed any specific surface use, the court found subsidence damage was the "most obvious" and "most likely" damage to arise and thus must have been contemplated.

Additionally, the court looked to earlier decisions construing the right to subjacent support and noted that, without waivers, the owner of the mineral estate would be liable to the surface owner for any damage resulting from the removal of subjacent support regardless of the care exercised in that removal. Applying the waiver to this rule of law, the court stated "[i]f the grantee of the mineral estate is liable for all damages, and if grantor waives all damages, it cannot be contended that the language of the contract is unclear. All means all."  

Turning to the surface owners' argument that the parties did not contemplate longwall mining at the time of the severance, the court stated that "the longwall mining process, as such, is only relevant here to the extent it contributes to subsidence." The court found implicit in previous subsidence cases the proposition that the removal of support causes subsidence. Because the possibility of subsidence

115. Id., 548 N.E.2d at 996 (The deed granted "[t]he right to mine and remove the said coal by underground mining processes" and waived "all damages in any manner arising from the mining and removal of the coal.").  
116. Id., 548 N.E.2d at 999.  
117. Id., 548 N.E.2d at 997-98 (citing Burgner v. Humphrey, 41 Ohio St. 340 (1884); Ohio Collieries v. Cocke, 107 Ohio St. 238 (1923)).  
118. Id., 548 N.E.2d at 998.  
119. Id., 548 N.E.2d at 999.
damages was known, the court found it was contemplated and addressed. The court also noted that the plural "underground mining processes" mentioned in the deed supported the use of modern underground mining techniques.\textsuperscript{120}

The issues raised before the Ohio court in \textit{Wells} were brought before the U.S. District Court for Western District of Pennsylvania in \textit{Porter v. Consolidation Coal Co.}\textsuperscript{121} There, the surface owners sought declaratory and injunctive relief as well as damages under counts for negligence, intentional trespass, conversion and nuisance. The severance deeds in question, dated 1900 and 1901, conveyed the right to remove the coal and waived damages caused by the removal of the coal.\textsuperscript{122} The owners of the surface and superjacent coal seams argued that modern longwall mining could not have been contemplated under the severance deeds, that the deeds did not waive support for other coal seams, and that the deeds should be construed most strongly against the grantee, who drafted them.

Finding the language unambiguous, the court held the deeds clearly waived support for both the overlying coal and the surface. Moreover, the court found that the surface owners offered no evidence to buttress their contention that the grantee drafted the deeds.

\textsuperscript{120} \textit{Id.}
\textsuperscript{121} No. 88-3637 (W.D. Pa. August 8, 1988) \textit{aff'd}, 870 F.2d 651 (3rd Cir. 1989) (decision reported without a published opinion).
\textsuperscript{122} \textit{Id.}, slip op. at 5-6. The deeds involved stated:
\begin{quote}
... together with the free and uninterrupted right of way into, upon and under said land at such points and in such manner as may be proper and necessary for the purpose of digging, mining, draining and ventilating and carrying away, and coaking [sic] said coal (hereby waiving all surface damages, or damages of any sort arising therefrom, or from the removal of all of said coal,) ... together with said coal appurtenant thereto the full and uninterrupted right of way into and under the said land at such points and in such manner as may be necessary and proper for the purpose of digging, mining and transporting said coal, and the privileges and easements necessary for the convenient draining, ventilating, depositing waste and operating the mines, without liability for damages that might arise from the removal of all of said coal without leaving support for the land above that coal ... together with the free and uninterrupted right of way into, upon, and under each and both of said tracts of land at such points and in such manner as may be proper and necessary for the purpose of digging, mining, coaking and carrying away said coal, hereby waiving all damages arising therefrom or from the removal of all of said coal ....
\end{quote}
\textit{Porter v. Consolidation Coal Co.}, Brief of Appellee at 6-7.
Hence, the narrow issue for discussion was whether longwall mining was permitted under the provisions of the deeds.\textsuperscript{123}

The surface owners relied on \textit{Stewart v. Chernicky}\textsuperscript{124} to support their proposition that the parties could not have contemplated longwall mining at the time the severance deeds were executed. In \textit{Stewart}, the Pennsylvania Supreme Court determined that a deed including the language "a full release of and without liability for damages for injury to the surface, waters or otherwise arising from any of said operations . . ."\textsuperscript{125} did not allow the operator to utilize strip mining methods. Based on the language of the deed, taken as a whole, the court held that the parties contemplated only underground, not strip mining. The court focused on deed language granting "the right to drain and ventilate said mines by shafts or otherwise . . .,"\textsuperscript{126} and held that draining and ventilating mines were features applicable to underground mining.\textsuperscript{127} The comparison of longwall mining to strip mining did not persuade the \textit{Porter} court. It found, as a matter of fact, that "longwall mining is not similar to strip mining in the sense asserted by the plaintiffs."\textsuperscript{128} Further, finding the deed to be unambiguous in waiving support and damages, and finding that the language in the deeds did not suggest an intention to \textit{restrict} the form of underground mining employed, the court granted summary judgment in favor of the mineral owner.\textsuperscript{129}

In \textit{Culp v. Consol Pennsylvania Coal Co.},\textsuperscript{130} decided approximately nine months after \textit{Porter}, the District Court for the Western District of Pennsylvania again upheld an operator's right to utilize longwall technology under severance deeds waiving support and

\textsuperscript{123} \textit{Porter}, \textit{slip op.} at 7-8. The court noted the parties' agreement that Pennsylvania statutory provisions governing subsidence and subsidence-related damages were not applicable, and hence were not addressed.

\textsuperscript{124} 439 Pa. 43, 266 A.2d 259 (1970).

\textsuperscript{125} \textit{Id.} at 49, 266 A.2d at 263.

\textsuperscript{126} \textit{Id.} at 50, 266 A.2d at 263.

\textsuperscript{127} \textit{Id.} at 52, 266 A.2d at 264.

\textsuperscript{128} \textit{Porter}, \textit{slip op.} at 8.

\textsuperscript{129} \textit{Id.} In a "Not for Publication" decision, the Third Circuit affirmed on the basis of the "unambiguous" terms in the deed. Additionally, the Court stated that the utilization of a new technology was "irrelevant" in light of the "absolute language of the deeds." No. 88-36, 37, \textit{slip op.} at 3-4, (3d Cir. Feb. 17, 1989).

\textsuperscript{130} No. 87-1688 (W.D. Pa., May 4, 1989) (LEXIS, Genfed library, Dist. file).
In *Culp*, the court construed 55 severance deeds executed in the early 1900’s, which either granted or reserved the Pittsburgh seam of coal along with waivers of support and damages. The court distilled ten separate language variations waiving support and damages from the 55 deeds. The surface and superjacent coal own-

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131. While both Porter and Culp were decided in the same district, different judges presided. Senior District Judge McCune decided *Porter; Culp* was decided by Judge Simmons.


133. *Id.* at 3-5, 7-8. The waiver variations were as follows:

I. Together with free and uninterrupted right of way into, upon and under said land, at such points, and in such manner as may be proper and necessary for the purpose of draining and ventilating the mines and of digging, mining, coking and carrying away said coal, without leaving any support for the overlying strata or surface, hereby waiving all damages arising therefrom, or to anything therein or thereon from the removal of all said coal . . . .

II. Together with free and uninterrupted right of way into, upon and under said land, at such points, and in such manner as may be proper and necessary for the purpose of draining and ventilating the mines, and of digging, mining, coking and carrying away the said coal, without leaving any support for the overlying strata and without liability for any injury which may result to the surface from the removal of all said coal; hereby waiving all damages arising therefrom, or to anything therein or thereon by reason thereof . . . .

III. Together with free and uninterrupted right of way into, upon and under said land, at such points, and in such manner as may be proper and necessary for the purpose of digging, mining, coking, ventilating and carrying away said coal hereby waiving all damages arising therefrom or thereon or from the removal of all of the said coal . . . .

IV. Together with the right to mine and remove all and every part of the said coal without being required to provide for the support of the overlying strata or surface and without being liable for any injury to the same or to anything therein or thereon by reason thereof . . . .

V. Together with all the rights and privileges necessary and useful in the mining and removing of said coal, including the right of mining the same without leaving any support for the overlying strata and without liability for any injury which may result to the surface from the breaking of said strata . . . .

VI. Together with free, uninterrupted use and enjoyment of the right of way into, upon and under said land at such points, and in such manner as may be considered proper and necessary for the advantageous and economical operation thereof, and in the digging and mining of said coal; and without liability therefore, and waiving any and all damages that might or could arise therefrom by reason of such digging, mining, coking and carrying away all said coal, . . . generally freed, clear and discharged of any servitude whatever to the overlying land or anything therein or thereon . . . .

VII. Together with free and uninterrupted right-of-way into, upon and under said lands at such points and in such manner as may be proper and necessary to mine and remove all and every part of said coal without being required to provide for the support of the overlying strata or surface and without being liable in any event for any injury or damage done to the same or to anything therein or thereon by reason thereof . . . .

VIII. Together with . . . the full and uninterrupted right of way into, and under the said land at such points and in such manner as may be necessary and proper for the purpose of digging, mining and transporting said coal, and the privileges and easements necessary
ers sought declaratory judgment that they retained support rights, an injunction against longwall mining activities, and damages under theories of nuisance and trespass. They argued that some of the deeds did not waive support, other deeds waived support but not damages, and that under all of the deeds the coal company was not entitled to utilize longwall mining.

Finding that all the deeds clearly waived the right of subjacent support, the court addressed the surface owners’ contention that they were entitled to damages for portions of their property where support had been waived. As noted above, plaintiffs owned not only the surface, but also all superjacent coal seams. Most of the severance deeds specifically waived support and liability for both the overlying strata and the surface. One variation of waiver language, however, mentioned only injury to the surface. The plaintiffs argued that since only damages to the surface were specifically waived, they were entitled to damages for injury to superjacent coal seams.

The court characterized this argument as a misperception of the legal nature of subjacent support. Where the right is not waived, the subjacent owner has a duty to provide adequate support. Under Pennsylvania law, the right to damages for removal of support depends on ownership of the support estate. Where the support estate has been waived, however, the right upon which an action for subsidence damages is premised no longer exists. The court found that no particular form of language was necessary to waive support,

for the convenient draining, ventilating, depositing waste and operating the mines without any liability for damages that may arise from the removal of all the said coal, with [sic] leaving any support for the land above that coal . . . .

IX. Together with free and uninterrupted right of-way under said land, hereby waiving all damages arising therefrom to the surface or to anything thereunder or thereon, from the removal of all of the said coal . . . .

X. Together with the free and uninterrupted use and enjoyment of the right of way into, upon and under said land at such points, and in such manner, as may be proper and necessary for the advantageous and economical digging, mining, operating and carrying away of said coal, without any liability therefore, and hereby waiving any and all damages that might or could arise to any strata or to the surface above said coal or to anything therein or thereon . . . .

134. Id. at 2.
135. Id. at 9; see supra note 133, variation V.
136. Id.
137. Id. at 10. See also supra notes 29-35 and accompanying text.
but rather that "apt words" would suffice.\textsuperscript{138} Hence, the court concluded that the language "without leaving any support for the overlying strata and without liability for any injury which may result to the surface from the breaking of said strata" employed apt words to waive support for both the surface and the intervening strata.\textsuperscript{139}

Like the surface owners in \textit{Porter}, the owners of superjacent strata in \textit{Culp} contended that the waivers of support and damage in the severance deeds were not applicable to longwall mining technology. The owners in \textit{Culp} contended this because longwall mining did not exist and could not have been contemplated at the time of the severance, and because longwall mining was analogous to strip mining in its potential damages to the surface and overlying strata. However, finding the deed language conveying the right to remove all the coal without support for overlying interests and without liability for damages to be unambiguous, the court refused to consider extrinsic evidence supporting a different intention. The court found as a matter of fact that subsidence would result from the removal of all the coal whether longwall or room and pillar mining was utilized.\textsuperscript{140} The court noted that, between the two, longwall mining was preferable "because it is safer, more economical, and predictable."\textsuperscript{141}

Turning to the surface owners' argument that longwall mining, like strip mining, was not a permissible technological advance under the severance deeds, the court found that longwall, as a form of deep mining, was fundamentally different from strip mining.\textsuperscript{142} The

\textsuperscript{138} \textit{Id.} at 17.

\textsuperscript{139} \textit{Id.} The court cited Pennsylvania's Bituminous Mine Subsidence and Land Conservation Act, 52 PA. CONST. STAT. § 1406 (1987) as additional support for the proposition that a waiver of surface damages includes damages to the strata lying between the coal seam conveyed and the surface. \textit{Id.} at 19-20 (discussing \textit{Culp} v. Consol Pennsylvania Coal Co., 96 Pa. Commw. 94, 506 A.2d 985 (1986); George v. Commonwealth Department of Environmental Resources, 102 Pa. Commw. 87, 517 A.2d 578 (1986) (Subsidence Act offers no protection to unimproved surface lands or superjacent strata)).

\textsuperscript{140} \textit{Id.} at 13. The court noted that upholding the plaintiffs' argument would, in effect, prohibit longwall mining in Pennsylvania.

\textsuperscript{141} \textit{Id.} The court stated that the plaintiffs' contention that longwall mining was uncontemplated because it was unknown at the time of severance was totally baseless. Citing numerous engineering treatises, the court found that the longwall mining technique was known in America and elsewhere long before the turn of the century. \textit{Id.} at 17-21.

\textsuperscript{142} \textit{Id.} at 14.
court construed the rule from *Stewart v. Chernicky* to be "not that strip mining was disallowed, and, therefore, that full extraction longwall mining should similarly be disallowed. Rather, it is that what is permissible or not should, whenever possible, be derived from the language of the instrument itself." *Chernicky* held that strip mining was not permissible under a deed which, by the language used, appeared to contemplate only underground mining. The *Culp* court relied on *Chernicky* for the proposition that, "as compared to deep mining, strip mining introduced a difference in kind, not merely a difference in degree." 

In *Ball v. Island Creek Coal Co.*, the District Court for the Western District of Virginia addressed issues similar to those raised in *Wells, Porter* and *Culp*. The court construed a 1907 severance deed which conveyed all the coal and waived support and damages. The surface owners sought to enjoin further longwall mining by the coal company and requested damages under counts for strict liability, negligence, emotional distress, nuisance and punitive damages. The surface owners also sought injunctive and monetary relief under the citizen's suit provision of the Virginia Coal Surface Mining Control and Reclamation Act of 1979.

Finding the waivers in the severance deeds to be enforceable under Virginia law, the court turned to the plaintiffs' arguments that the parties did not contemplate longwall mining at the time of severance and that, like strip mining, longwall mining was an impermissible advance in technology. Based on the evidence before it, the court found that longwall mining was unknown in the area at the time of severance. Noting that Virginia had addressed the effect of waivers of subjacent support with regard to strip mining, the

144. *Culp*, No. 87-1688, slip op. at 15-16.
145. *Id.* at 16.
147. *Id.* at 1371. The deeds granted "the right to remove all the coal and other minerals without leaving any support for the overlying strata, and without any liability for damage which may result from the breaking of said strata."
149. 722 F. Supp. at 1372. The court noted, however, the finding in *Culp* that longwall mining has been known for at least a century. *Id.* at 1372 n.3.

https://researchrepository.wvu.edu/wvlr/vol92/iss4/5
court determined that Virginia recognized a distinct difference between strip mining and underground mining.

The surface owners relied on *Phipps v. Leftwich*\(^{150}\) to support their argument that longwall mining was not permitted under the deeds. In *Phipps*, the Virginia Supreme Court held that the parties must have specifically contemplated strip mining before its use would be permitted on the basis of a surface damage waiver. However, it distinguished underground mining from strip mining on the basis of the physical destruction of the surface attendant to strip mining technology.\(^{151}\) The Virginia court stated that although strip mining would be prohibited, the mineral owner could "take advantage of developments in the operation of underground mines which modern technology may make available."\(^{152}\) Applying this *dicta* from *Phipps*, the district court held that Virginia would allow the use of longwall technology under severance deeds waiving subjacent support and liability for damages.

Upon holding that the waivers were enforceable and that longwall mining was permissible, the court determined that the only issue of fact before it was whether the damages of which the plaintiffs complained resulted from the breaking of the strata overlying the coal seam.\(^{153}\) As the evidence on causation was uncontroverted,\(^{154}\) the court applied the waiver and entered summary judgment in the coal company's favor in all common-law claims.\(^{155}\)

V. LIMITATIONS ON WAIVERS

Although courts generally uphold waivers against claims for subsidence-related damages, some limitations on the enforceability of

\(^{150}\) 216 Va. 706, 222 S.E.2d 536 (1976).

\(^{151}\) Id. at 713, 222 S.E.2d at 541; Ball, 722 F. Supp. at 1373.

\(^{152}\) 216 Va. at 713, 222 S.E.2d at 541.

\(^{153}\) Ball, 722 F. Supp. 1370. Interestingly, the deed language in *Ball* presented the inverse situation from that presented by the "Category V" deed language in *Culp*. See note 133. Where the *Culp* deed specifically mentioned damages to the surface in the waiver, and not damages to the intervening strata, the *Ball* deed mentioned damages from the breaking of the overlying strata, and did not specifically mention the surface.

\(^{154}\) Ball, 722 F. Supp. at 1374.

\(^{155}\) Id. The court dismissed the plaintiffs' statutory claim for injunctive relief on jurisdictional grounds. The statutory claim for damages was dismissed because the plaintiffs failed to demonstrate that their damages resulted from a violation of the Virginia Coal Surface Mining Control and Reclamation Act. See *id.* at 1375-76.
waivers have developed, and others may adversely impact high extraction underground mining techniques. Courts have yet to apply these limitations with any regularity, but the limitations may in the future serve to support injunctions or the imposition of damages in spite of clear waivers of support and liability.

A. Regulatory Limitations

The Surface Mine Control and Reclamation Act of 1977\(^ {156} \) applies to the surface effects of underground mining as well as surface mines. Subsidence is one such surface effect. Pursuant to SMCRA and its state counterparts,\(^ {157} \) regulatory bodies may prohibit or suspend underground mining beneath various areas upon a finding that material damage will likely occur\(^ {158} \) or that imminent danger exists.\(^ {159} \) These regulations would apparently apply without regard to the contractual arrangements addressed in waivers of support and damages.

In addition to prohibitions and suspensions of underground mining beneath certain surface areas, the regulations promulgated under

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157. 30 U.S.C. § 1253 allows each state to assume exclusive jurisdiction over the regulation of surface coal mining operations (including the surface effects of underground operations) by creating its own regulatory program patterned after the federal program. The state program must be at least as effective (i.e., stringent) as the federal program.

158. 30 C.F.R. §§ 817.121(d) and (e) require that:
[d] underground mining activities shall not be conducted beneath or adjacent to (1) public buildings and facilities; (2) churches, schools, and hospitals; or (3) impoundments with a storage capacity of 20 acre feet or more or bodies of water with a volume of 20 acre-feet or more, unless the subsidence control plan demonstrates that subsidence will not cause material damage to, or reduce the reasonably foreseeable use of, such features or facilities. If the regulatory authority determines that it is necessary in order to minimize the potential for material damage to the features or facilities described above or to any aquifer or body of water that serves as a significant water source for any public water supply system, it may limit the percentage of coal extracted under or adjacent thereto, (e) if subsidence causes material damage to any of the features or facilities covered by paragraph (d) of this section, the regulatory authority may suspend mining under or adjacent to such features or facilities until the subsidence control plan is modified to insure prevention of further material damage to such features or facilities.

159. 30 C.F.R. § 817.121(f) mandates that "[f] the regulatory authority shall suspend underground mining activities under urbanized areas, cities, towns, and communities, and adjacent to industrial or commercial buildings, major impoundments, or perennial streams, if imminent danger is found to inhabitants of the urbanized areas, cities, towns, or communities."
SMCRA require mine operators to undertake remedial measures to restore surface lands which are materially damaged by subsidence. Current federal surface owner protection regulations mandate the restoration of surface lands, but subordinate to state law any liability for restoration or compensation for damages to structures resulting from subsidence. One court has approved the compulsory requirement to restore land as a legitimate interpretation of congressional intent on the part of the Secretary of the Interior. The Secretary of the Interior predicated separate treatment for damage to structures on a probable impairment of contracts and the lack of a clear congressional indication that damages to structures and facilities were intended to be protected irrespective of state law.

The initial version of the federal surface owner protection regulations apparently required repair of or compensation for surface structures materially damaged by subsidence without regard for the state law. While most state programs mirror the initial regulations,

160. 30 C.F.R. § 817.121(c) states that:
(c) the operator shall (1) correct any material damage resulting from subsidence caused to surface lands, to the extent technologically and economically feasible, by restoring the land to a condition capable of maintaining the value and reasonably foreseeable uses which it was capable of supporting before subsidence; and (2) To the extent required under applicable provisions of State law, either correct material damage resulting from subsidence caused to any structures or facilities by repairing the damage or compensate the owner of such structures or facilities in the full amount of the diminution in value resulting from the subsidence. Repair of damage includes rehabilitation, restoration, or replacement of damaged structures or facilities. Compensation may be accomplished by the purchase prior to mining of a non-cancellable premium-prepaid insurance policy.


162. See 52 Fed. Reg. 4860 (1987). The subordination to state law of any duty to repair damage to structures has been rejected by the D.C. District Court. National Wildlife Federation v. Lujan, Nos. 87-1051, 87-1814, 88-2788 (D.D.C. Feb. 12, 1990), appeal filed April 12, 1990. In remanding the regulation District Judge Flannery relied upon 30 U.S.C. §§ 1202(b) and 1265(b). The Judge held that the distinction drawn by the Secretary requiring repair of the land but leaving damage to improvements to remedies of state law was irrational and inconsistent with congressional intent. Id.

163. Former 30 C.F.R. 817.124 stated:
(b) each person who conducts underground mining which results in subsidence that causes material damage or reduces the value or reasonably foreseeable use of the surface lands, shall, with respect to each surface area affected by subsidence - (1) restore, rehabilitate, or remove and replace each damaged structure, feature or value, promptly after the damages suffered, to the condition it would be in if no subsidence had occurred and restore the land to a condition capable of supporting reasonably foreseeable uses it was
some jurisdictions have adopted language similar to the current federal regulations. However, even in those jurisdictions, subsidence related damages to structures occurring prior to the effective date of the revised state regulation would, arguably, continue to be governed under the earlier regulation. Thus there may be a window of potential liability for damages to structures caused by subsidence at that time.

In Melvin v. Old Ben Co., the District Court for the Southern District of Illinois refused to enforce waivers of support and damages in the face of actions brought by the owners of damaged surface structures. The court held that the surface owner protection regulations promulgated under the Illinois permanent coal mining reclamation program (patterned after the initial federal regulations) disturbed prior state law upholding waivers of damages caused by the removal of support. Because it construed subsequent state law as being inconsistent with the enforcement of damage waivers, the court refused to dismiss the surface owners' claims for relief based on statutory provisions, negligence and willful and wanton misconduct. On reconsideration, the court held that while the mine operator was required to repair and compensate as provided by the rules and

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164. See, e.g., Virginia Coal Surface Mining Reclamation Regulations 480-03-19.817.121(p)(2); West Virginia Surface Mine Reclamation Regulations 38 CSR 2 § 16.2(c)(2); Alabama Proposed Rule 880-X-10D-.583(a) (Approval by Secretary of Interior pending). Some states have not yet acted to amend their rules, despite specific statutory language mandating that the state program be no more stringent than the federal act. See KRS § 350.069 (Ky. Supp. 1988); Ill. Rev. Stat. ch. 96-1/2, para. 7901.02(c) (1985); Old Ben Coal Co. v. OSM, No. CH 6-1-PR, IBLA 88-8, (Interior Board of Land Appeals June 23, 1989).

regulations promulgated by the Department of Mines and Minerals, the court would not enjoin it from utilizing longwall mining technology.\textsuperscript{166}

No other court has followed the lead of Melvin. However, in Rose v. Oneida Coal Co.,\textsuperscript{167} the West Virginia Supreme Court of Appeals, while upholding waivers against common-law claims, stated in \textit{dicta} that the West Virginia Surface Coal Mining and Reclamation Act may have "changed many of the old common-law rules concerning the rights and remedies of surface owners \textit{vis a vis} mineral owners, [although] the dimensions of those changes are as yet uncertain."\textsuperscript{168} Melvin and Rose indicate that the effect of legislation and regulation upon common-law applications of waivers of support and damages has not been fully developed.

Another potential limitation on the applicability of support and damage waivers is the lands unsuitable for mining provision in SMCRA and its state counterparts.\textsuperscript{169} In Cogar v. Sommerville,\textsuperscript{170} the West Virginia Supreme Court of Appeals found that waivers of subjacent support created in severance deeds dated 1904 and 1914 did not waive the statutory prohibition on mining within 300 feet of occupied dwellings. Rather, the court found the statutory language to contemplate a specific waiver of the 300 foot requirement. The court reasoned that a previously non-existent right could not have been knowingly waived.\textsuperscript{171} Moreover, the court stated that "a severance deed is to be construed in light of the conditions and reasonable expectations of the parties at the time it is made. As a consequence, mining methods not contemplated at the time of the

\textsuperscript{166} Melvin, 612 F. Supp. at 1205.
\textsuperscript{167} 375 S.E.2d 814 (W. Va. 1988).
\textsuperscript{168} Id. at 816.
\textsuperscript{169} 30 U.S.C. § 1272(e). Under this statute:
... subject to valid existing rights no surface coal mining operations except those which exist on August 3, 1977, shall be permitted—... (5) within three hundred feet from any occupied dwelling, unless waived by the owner thereof, nor within three hundred feet of any public building, school, church, community, or institutional building, public park, or within one hundred feet of a cemetery.

Since the phrase "surface coal mining operations" includes the surface effects of underground mining, these prohibitions could apply to areas expected to subside.
\textsuperscript{170} 379 S.E.2d 764 (W. Va. 1989).
\textsuperscript{171} Id. at 769.
severance deed may not be utilized." To date, courts have not regularly applied the lands suitable for mining prohibitions to the surface areas overlying underground mines. However, future rule-making may pose dire implications for high extraction techniques.

B. Common-Law Limitations

Aside from potential regulatory limitations on the effectiveness of support and damage waivers, numerous cases have indicated that willful, wanton or oppressive acts by a mineral owner will not be protected by waivers. While few cases have found the degree of misconduct necessary to abrogate clearly expressed waivers of support and liability, the potential for successful damage claims based on misconduct exists. However, it is unlikely such a claim could be based on the mere fact that a particular technology was utilized. Rather, the misconduct would have to involve the manner in which the operation was conducted.

Additionally, at least one court has interjected a rule of "reasonableness" in a mining company's activities while operating pursuant to a clear waiver. In Mullins v. Beatrice Pocahontas Co., the court reversed summary judgment in favor of the operator, and remanded for a factual determination of whether the operator's activity was "reasonably necessary for the production of coal in the ordinary manner, or whether it has been caused by improper operating procedures or ineffective equipment." The company operated a preparation plant in the vicinity of a subdivision, which subjected the surface owners to large amounts of dust. Title to the surface tracts was derived from four severance deeds, all of which granted the surface estate but reserved the coal, support rights and various surface rights. One of the deeds contained a specific waiver of damages arising from the pollution of the air or the emission of

172. Id. The court relied on earlier cases holding strip and auger mining methods to be impermissible mining techniques under early severance deeds.
174. See Elkhorn Coal Corp. v. Johnson, 249 S.W.2d 745 (Ky. 1952).
175. 432 F.2d 314 (4th Cir. 1970).
176. Id. at 320.
dust.\textsuperscript{177} Despite the clear language of the waiver, the court held that the deed did not allow the deposition of "more dust than is normal in the ordinary processing of coal."\textsuperscript{178}

The court found that the severance deeds, considered as a whole, plainly showed that the company intended to create the subdivision and intended people to live there. Hence, it found the parties did not contemplate that the grantor could seriously impair the rights it had granted through the emission of unnecessary dust. The court imposed a rule of reasonableness and remanded for a determination of whether the level of dust emitted by the company was commensurate with the ordinary management of the plant.\textsuperscript{179}

Whether the fourth circuit's position in \textit{Mullins} will have any effect on actions for subsidence-related damages where waivers of support and damages appear in the chain of title remains to be seen. The district court in \textit{Ball v. Island Creek Coal Co.}\textsuperscript{180} distinguished \textit{Mullins} on its facts, finding that the exception to the enforceability of waivers noted in \textit{Mullins} was limited to a situation where "the face of the deed in question reveals that the contemplated use of the surface is in conflict with the waivers of that right."\textsuperscript{181} However, in \textit{Johnson v. Junior Pocahontas Coal Co., Inc.},\textsuperscript{182} the West Virginia Supreme Court of Appeals denied summary judgment on grounds that the evidence might show a nuisance situation similar to that in \textit{Mullins}. The court added that the exculpatory clauses would not shield the mine operator from all liability. Although \textit{Johnson} con-

\begin{enumerate}
  \item \textsuperscript{177} \textit{Id.} at 317. The deed stated:
  \begin{quote}
    . . . said party of the first part therefore excepts and reserves unto itself, its successors, lessees and assigns the right and privilege of conducting mining operations and incidental activities in the vicinity of the said Oakwood Subdivision and the lots hereby conveyed; and the party of the second part . . . hereby waives and relinquishes all claims or demands for damages . . . by reason of any such coal mining operations and incidental activities, including but not restricted to, all claims or demands for damages arising from noise, . . . the pollution of air, or the emission of dust, smoke, fumes or noxious gases.
  \end{quote}

  \item \textsuperscript{178} \textit{Id.} at 319.
  \item \textsuperscript{179} See also Kentland-Elkhorn Coal Co. v. Charles, 514 S.W.2d 659 (Ky. 1974) (rule of "reasonableness" imposed upon implied waiver of surface rights as measure of "oppressiveness" where a surface owner complained of unreasonable dust emission from preparation plant).
  \item \textsuperscript{180} 722 F. Supp. 1370 (W.D. Va. 1989).
  \item \textsuperscript{181} \textit{Id.} at 1372.
  \item \textsuperscript{182} 160 W. Va. 261, 234 S.E.2d 309 (1977).
\end{enumerate}
cerned surface rights in relation to strip mining, the court clearly indicated that expansive waiver provisions were subject to limitations. 183

VI. CONCLUSION

Courts have generally continued to uphold the validity of waivers of subjacent support and liability for damages, even as to mining operations employing longwall or other high extraction mining technologies. Courts have rejected attempts to define longwall mining as an unknown or unanticipated mining method and attempts to analogize longwall mining to strip mining. This is not to say that mineral owners whose severance deeds contain waivers of subjacent support may mine with impunity. Some common-law limitations exist. Moreover, while not fully developed as to its effect upon waivers of subjacent support, the Federal Surface Mining Control and Reclamation Act of 1977 and its regulations may serve as significant restrictions on waivers.

183. Id. at 270, 234 S.E.2d at 314. ("[T]he [waiver] clauses may not be raised as a complete shield from all liabilities which may be indicated by evidence showing defendant's violations of rules, regulations and laws, its wilful, wanton and reckless actions and conduct, or its creation of hazardous or nuisance conditions . . . .")