Forfeiture: General State of the Law and Movement to Further Confine Its Application in the Coal Lease

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FORFEITURE: GENERAL STATE OF THE LAW AND MOVEMENT TO FURTHER CONFINE ITS APPLICATION IN THE COAL LEASE

Recent case law developments in Ohio and West Virginia have narrowed the application of forfeiture in obtaining the termination of a coal mining lease for breach of express and implied covenants. This Note examines the law of forfeiture generally, and later discusses these recent cases and their ramifications.

I. DISTINGUISHING FORFEITURE FROM ABANDONMENT

A mining lease often contains an express covenant or condition requiring the lessee to mine within a reasonable time with reasonable diligence. If this type of covenant is not expressly provided in the lease, a court will often imply a covenant to mine within a reasonable time and with due diligence. If the lessee fails or neglects to operate the mine or carry on mining activity within a reasonable time, courts have held this breach to be a ground for forfeiture. Similarly, courts have also held that the failure of a lessee to begin mining within a reasonable time constitutes evidence of the lessee's intent to abandon his right in the lease, therefore terminating the lease and deeming it abandoned. The important distinction between termination of a lease by forfeiture and termination by abandonment turns on the question of intention. "[T]he act of the lessee may indicate his intention to abandon the enterprise..."
he has undertaken . . . when it would not be sufficient to show such neglect or failure to develop . . . as to entitle the lessor to a forfeiture of the lease."

The distinction between forfeiture and abandonment is obscured by the courts' use of a single basis for invoking both doctrines. The basis used in both instances is the lessee's breach of the covenant to develop and operate the mine within a reasonable time. Additionally, the holdings of some cases do not distinctly clarify which doctrine is being used to terminate the mining lease, thus adding to the confusion.

A court may characterize the lessee's breach of the covenant to diligently mine as an abandonment which consequently causes a forfeiture of the lease. In so using "forfeiture by abandonment," the court creates a misnomer since there is a fundamental difference between forfeiture and abandonment. Forfeiture involves an involuntary divestment of rights based upon an inquiry as to whether the lease has been complied with whereas abandonment occurs only where the intent to relinquish one's rights is present. "[T]he observation is submitted that occasionally where courts speak of forfeiture for abandonment, they intend in reality to [speak] of forfeiture for failure to develop." Nevertheless, "there is a distinction between failure or neglect of the lessee to develop the leased premises or to operate the mine . . . and the abandonment by him of the enterprise, although in many cases this distinction is obscure."12

II. FORFEITURE OF A MINING LEASE GENERALLY

Forfeitures are normally considered to be harsh remedies and are not favored by courts. Often termed a penalty, a forfeiture will involuntarily

8 Annot., 60 A.L.R. 901, 926 (1929).
7 Iafolla v. Douglas Pocahontas Coal Corp., 250 S.E.2d 128 (W. Va. 1978) (the doctrine of abandonment applicable to mineral leases is based upon an implied covenant to exploit minerals within a reasonable time); Starn v. Huffman, 62 W. Va. 422, 59 S.E. 179 (1907).
6 See Millar v. Mauney, 150 Ark. 161, 234 S.W. 498 (1921); Negauenee Iron Co. v. Iron Cliffs Co., 134 Mich. 284, 96 N.W. 468 (1903); Beer v. Griffith, 61 Ohio St. 2d 119, 399 N.E.2d 1227 (1980) (concerning an oil and gas lease, the court specifically stated that an abandonment of the lease requires the intent to abandon).
9 See supra note 8; see Maxwell v. Todd, 112 N.C. 677, 16 S.E. 926 (1893) (court held a forfeiture, and also held the mining rights of the lessees were lost by "nonuse and abandonment").
13 Sturm v. Crowley, 131 W. Va. 505, 48 S.E.2d 350 (1948) ("it is an elementary rule that a forfeiture is never favored and an equity court will lend its aid only to prevent or relieve from a forfeiture"); Peerless Carbon Black Co. v. Gillespie, 87 W. Va. 441, 105 S.E. 517 (1920); A. CORBIN, CORBIN ON CONTRACTS § 748 (1952); S. WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 887AA, at 490 (3d ed. 1961); R. SCHOSHINSKI, AMERICAN LAW OF LANDLORD AND TENANT § 61 (1980). See generally 51 C.J.S. Landlord and Tenant § 102 (1969).
14 "Although the words 'forfeiture' and 'penalty' are often used as synonyms, the word
divest one of his or her right or interest in property due to some breach of duty or failure to comply with the law. Despite the general legal disfavor for forfeiture, a mining lease can be forfeited. Courts enforce forfeiture with great reluctance, however, and in a case of hardship will often grant relief from the harshness of the doctrine through equity. For example, a court may refuse to enforce a forfeiture where the result would be unduly oppressive.

If a mining lease contains no forfeiture clause, the court generally will not recognize a forfeiture for the breach of a covenant contained in the lease. This has been the long established common law rule. It has been held in some cases, however, that the breach of an implied covenant to mine diligently can result in forfeiture despite the lack of a forfeiture clause. Never-

Forfeiture

‘forfeiture’ carries an implication of deprivation of something previously owned as distinguished from subjection to a liability, but the distinction is often blurred." 5 S. WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 769, at 640 (3d ed. 1961). See, e.g., Associated Cotton Shops, Inc. v. Evergreen Park Shopping Plaza, 27 Ill. App. 2d 467, 170 N.E.2d 35 (1960) (forfeiture is in the nature of a penalty for doing or failing to do a particular thing); see also Howard Cole & Co. v. Williams, 157 Fla. 851, 27 So. 2d 352 (1946) (forfeiture contemplates a loss of property or a right, as a penalty for violating the law or breach of contract). See generally 17 WORDS AND PHRASES FORFEIT; FORFEIT (1958).

16 See Meers v. Tommy's Men's Store, Inc., 230 Ark. 49, 320 S.W.2d 770 (1959) (lessor was equitably estopped from seeking forfeiture where by words and conduct he caused lessee to believe that he would not enforce a forfeiture provided for in the lease); Ledford v. Atkins, 413 S.W.2d 68 (Ky. 1967) (failure of condition was excused by the lack of willfulness of the breach and the harsh forfeiture which would otherwise result); Wadman v. Boudreau, 270 Mass. 198, 170 N.E. 44 (1930) (equity used by court to relieve against forfeiture where the breach of contract did not go to the essence of the agreement); Westerman v. Dinsmore, 68 W. Va. 594, 71 S.E. 250 (1911) (equity will relieve from forfeiture if fraud, accident, mistake or inequitable conduct by the lessor is present); see also 5 S. WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 793, at 781 (3d ed. 1961).


19 4 D. VISH, COAL LAW & REGULATION § 81.06[3], at 81-50 (1983).

theless, the prevailing view allows the lessor to recover *only damages* for breach of an express or implied condition or covenant when the lease contains no forfeiture provision.21

An implied covenant to develop can be negated by specific language to the contrary contained within a lease,22 as was held by the Supreme Court of Texas in the 1981 case of *Dallas Power & Light Co. v. J. V. Cleghorn.*23 In *Dallas*, the lessor, J. V. Cleghorn, sought a declaratory judgment to cancel eleven no-term coal and lignite leases; in the alternative he sought a decree requiring the lessees to explore and develop the leased land.24 Both remedies sought by Cleghorn were based upon the theory that there was an implied covenant to develop the land in spite of language within the leases to the contrary.

The lease agreements granted the lessees the right to mine coal and lignite, specified no term in which the lessees were to develop the land, and allowed the lessees to maintain the leases so long as an annual delay rental of fifty cents per acre was paid.25 Furthermore the lease provided:

> It is understood between the parties hereto that this lease shall not be forfeited for any failure to prosecute mining operations on the land . . . nor shall any forfeiture be claimed or enforced for the breach of any implied covenant, but the title to the minerals on said land . . . shall not revert to . . . [lessor] or his assigns so long as the annual rentals . . . are being paid.26

The court sustained the lessees' view that "there can be no implied covenant arising out of an instrument which contains express terms negating such a covenant," and that "the leases make clear the express intention of the parties to disclaim any covenant of development by the lessees."27 To support its decision in favor of the lessees, the court reasserted a prior holding28 that courts cannot imply terms contrary to express language written by the parties to a contract, and further that both the language used and the parties' mutual intent were clear under the contract.29

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21 See supra note 18; see also R. Donley, *The Law of Coal, Oil, and Gas in West Virginia and Virginia* § 111 at 137 (1951).
22 *Danciger Oil & Refining Co. v. Powell*, 137 Tex. 484, 154 S.W.2d 632 (1941); *Freeport Sulphur Co. v. American Sulphur Royalty Co.*, 117 Tex. 439, 6 S.W.2d 1039 (1928).
23 623 S.W.2d 310 (Texas 1981).
24 *Id.* at 310.
25 *Id.* at 311.
26 *Id.* (brackets in original).
27 *Id.*
29 623 S.W.2d at 311.
Some courts will characterize a breach of an implied covenant to mine within a reasonable time as a forfeiture by abandonment. If the level of the lessee's breach does not reach abandonment, but is instead a breach of a condition or covenant and there is no express lease provision for forfeiture, the court generally will not terminate the tenancy. The remedy usually will be damages or, where appropriate, injunctive relief, but not forfeiture.

If a mining lease contains an express forfeiture clause, a majority of jurisdictions hold that a tenancy can be terminated upon the lessee's breach of a covenant or condition, provided there is no waiver or estoppel by the lessor which would prevent enforcement of the forfeiture provision. Several

20 See Deerfield Rock Corp. v. McClellan, 121 So. 2d 822 (Fla. App. 1960); George v. Jones, 168 Neb. 149, 95 N.W.2d 609 (1959); Infolla v. Douglas Pocahontas Coal Corp., 250 S.E.2d 128 (W. Va. 1978) (the doctrine of abandonment applicable to mineral leases is based upon an implied covenant to exploit minerals within a reasonable time); Chandler v. French, 73 W. Va. 658, 81 S.E. 825 (1914); Starn v. Huffman, 62 W. Va. 422, 59 S.E. 179 (1907) (lease cancelled for failure to mine, based in equity upon implied covenant to begin work within a reasonable time).

21 See Keller v. Model Coal Co., 142 W. Va. 597, 97 S.E.2d 337 (1957) (in absence of forfeiture provision in mineral lease, forfeiture will not be declared unless facts show an abandonment of enterprise by lessee).

22 Olson v. Pederson, 194 Neb. 159, 231 N.W.2d 310 (1975) (in absence of statute to contrary, tenancy cannot be terminated for breach of covenant, condition or collateral agreement unless there is an express provision in lease for forfeiture or right of reentry); Layne v. Baker, 86 Ohio App. 293, 91 N.E.2d 539 (1949) (in a landlord-tenant eviction case, the court recognized that breach of a covenant in a lease does not work a forfeiture unless there is an express stipulation of such forfeiture); see also Texas & N.O.R. Co. v. Phillips, 196 F.2d 692 (5th Cir. 1952) (breaches of lease normally furnish basis for claim of damage, not forfeiture, unless lease provides for automatic cancellation for breaches).

23 Texas & N.O.R. Co. v. Phillips, 196 F.2d 692 (5th Cir. 1952) (breaches of lease normally furnish basis for claim of damages, not forfeiture); Thompson v. Harris, 9 Ariz. App. 341, 452 P.2d 122 (1969) (covenants in a lease, as a general rule are independent, unless made dependent, and their breach gives rise only to a suit for damages).

24 See Pierce Dev. Co. v. Martin, 218 Ala. 27, 117 So. 312 (1928) (contract giving lessor right to terminate the lease in case of default in performance of covenant or agreement was upheld); Alaska Placer Co. v. Lee, 455 P.2d 218 (Alaska 1969); Cherokee Constr. Co. v. Bishop, 86 Ark. 489, 112 S.W. 189 (1908); Russell v. Johns Manville Co., 20 Cal. App. 3d 405, 97 Cal. Rptr. 634 (1971); Shrewsbury v. Reynolds-Morse Corp., 105 Colo. 30, 94 P.2d 686 (1939) (lease subject to forfeiture where lease gave lessor option to declare forfeiture if lessee insolvent and payroll or other indebtedness was unpaid); Cypress Creek Coal Co. v. Boonville Mining Co., 194 Ind. 187, 142 N.E. 645 (1924) (failure of lessee to pay royalties would make forfeiture optional to the lessor); Island Coal Co. v. Combs, 152 Ind. 379, 53 N.E. 452 (1899) (forfeiture awarded where lessee breached express forfeiture covenant to develop the coal interest within a specific time); Owens v. Waggoner, 115 Ind. App. 43, 55 N.E.2d 335 (1944) (forfeiture for breach of covenant to develop); Wadman v. Bourdreaux, 270 Mass. 198, 170 N.E. 44 (1930) (any breach of a contract which provides that the contract can be revoked and declared null and void on breach of any provision contained therein, would at law give right to end contract); Walnut Run Coal Co. v. Knight, 201 Pa. 23, 50 A. 288 (1901).

25 Big Sandy Co. v. Robinson, 19 F.2d 267 (6th Cir. 1927) (lessor acquiescing in and encouraging receivership of lessee held estopped to claim forfeiture); see Lester v. National Shawmut Bank of
breached covenants which commonly result in forfeiture are covenants to pay royalties, to commence mining within a specified time or within a reasonable time or covenants to mine diligently.

Due to its penal nature, potential for harshness and general disfavor by the courts, an express forfeiture provision is strictly construed against the party invoking the forfeiture (generally the lessor). The West Virginia case of *Iafolla v. Douglas Pocahontas Coal Corp.*, illustrates that court's strict enforcement of the requirements contained within an express forfeiture clause. The West Virginia Supreme Court of Appeals in this 1978 case reversed a trial court's holding that declared forfeiture for a breach of an express provision of a mining lease. The reversal was based upon the lessor's failure to provide thirty days' notice to the lessee before declaring forfeiture. The lessors had given notice to the lessees that they were terminating the lease, but they made no mention of any corrective measures which the lessee could take to alleviate the breach. The lease provision, which provided for the thirty-day

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26 See Cypress Creek Co. v. Boonville Mining Co., 194 Ind. 187, 142 N.E. 645 (1924) (if the lessee fails to pay royalties as agreed, then it is optional with the lessor to treat the lease as forfeited); Walnut Run Coal Co. v. Knight, 201 Pa. 23, 50 A. 288 (1901).

27 Island Coal Co. v. Combs, 152 Ind. 379, 53 N.E. 452 (1899) (lessee breached covenant under penalty of forfeiture to commence development of the lessor's coal interest within a specified time). Cf. Cypress Creek Coal Co. v. Boonville Mining Co., 194 Ind. 187, 142 N.E. 645 (1924) (court construed provision in lease requiring lessee to "begin" operation within six months in favor of the lessee).

33 Owens v. Waggoner, 115 Ind. App. 43, 55 N.E.2d 335 (1944) (holding forfeiture for breach of covenant to develop within a reasonable time).


40 Gould v. Hyatt, 154 N.E. 173 (Ohio App. 1926) ("the conditions as well as the law under which a forfeiture is sought should be strictly construed"); Iafolla v. Douglas Pocahontas Coal Corp., 250 S.E.2d 128 (W. Va. 1978); Marmet v. Watson, 106 W. Va. 429, 145 S.E. 744 (1928); Bickel v. Sheppard, 98 W. Va. 305, 127 S.E. 41 (1925) (forfeiture provisions in contracts are to be strictly construed); R. Schoehn, American Law of Landlord and Tenant § 61-62, at 378, 381, 385 (1980); 4 D. Vish, Coal Law and Regulation § 81.06[5], at 81-52 (1983); see also Texas & N.O.R. Co. v. Phillips, 196 F.2d 692 (5th Cir. 1952) (court, in a landlord-tenant case, stated that the terms of a forfeiture provision must be strictly and precisely complied with).

notice, was strictly enforced despite evidence that the lessees had failed to keep certain equipment in repair.\textsuperscript{44} The court also noted that the forfeiture issue was an extraneous matter in the case.\textsuperscript{45}

Any ambiguities contained within a forfeiture clause are also construed against the lessor since the forfeiture clause is generally added to the lease instrument for his or her benefit.\textsuperscript{46} In addition, it is commonly held that, to obtain a forfeiture, the lessee's breach must be clear and unequivocal.\textsuperscript{47} For example, circumstances beyond the control of the lessee have been held grounds to preclude forfeiture for breach of an express condition or covenant.\textsuperscript{48} The Superior Court of Pennsylvania, in the 1981 case of Williams v. Vesley,\textsuperscript{49} upheld a lower court's finding of no forfeiture where the lessee "made every reasonable and possible effort to commence actual mining operations,"\textsuperscript{50} but was delayed beyond the specified one-year period in the lease through no fault of his own. The evidence established that the Department of Environmental Resources was unduly slow in processing the lessee's application to obtain permits to begin mining operations.\textsuperscript{51}

III. CONSTRAINING THE FORFEITURE CLAUSE

A. Bethlehem Steel v. Shonk Land Company

A recent West Virginia decision\textsuperscript{52} has espoused a minority position which decreases the perimeters in which forfeiture may be utilized to obtain the termination of a coal mining lease and in which an express forfeiture provision may be enforced. This holding will undoubtedly prompt the restructuring of forfeiture provisions in future coal mining leases, as well as restrict their future usefulness.

In 1982, the West Virginia Supreme Court of Appeals stringently limited the usefulness of forfeiture as a means of cancelling a coal lease in Bethlehem Steel Corp. v. Shonk Land Co.\textsuperscript{53} The appellant, Bethlehem Steel Corporation,
brought the case to the supreme court after the trial court directed a verdict against it and declared a forfeiture of all improvements, equipment and personal property.\textsuperscript{14} Bethlehem Steel had leased the coal mining property, the processing plant and the appurtenances upon the land originally through a series of sub-leases dating from 1914.\textsuperscript{15}

The 1968 expiration date of the original lease was extended to 1978 by an amendment of lease between Bethlehem Steel and the property owner, Shonk Land Company, Ltd.\textsuperscript{16} The amendment of lease also contained a renewal provision allowing the lessee to give the lessor written notice to renew or extend the lease, provided the lessee performed its covenants under the lease.\textsuperscript{17}

Near the end of the expiration period, Bethlehem Steel sent a renewal notice to Shonk which attempted to extend its lease until 1987. Shonk responded that Bethlehem Steel had breached several conditions and covenants contained within the lease, and that if these were not corrected within a specified period of time, Shonk would "declare a forfeiture, re-enter, take possession of all improvements and pursue all its legal and equitable remedies."\textsuperscript{18} Furthermore, Shonk refused to renew the lease for an additional ten-year period due to the breaches by Bethlehem Steel.\textsuperscript{19}

Bethlehem Steel then sought a declaratory judgment from the circuit court after attempting to cure its defaults.\textsuperscript{20} Shonk counterclaimed for damages and a declaration of forfeiture. The trial court awarded Shonk $10,344,219.82 in damages and declared a complete forfeiture of equipment, personal property, and more than six and one-half million dollars in improvements which had been made by Bethlehem Steel to modify the processing plant in 1971 and 1975.\textsuperscript{21}

Reversing the trial court's declaration of wholesale forfeiture, the court held that Shonk, the lessor, could be "made whole by monetary damages" and by non-renewal; therefore, forfeiture was not justified.\textsuperscript{22} The monetary test espoused by the court to determine whether relief could or could not be had in equity was "to consider whether compensation can or cannot be made."\textsuperscript{23}

To reconcile its holding with the forfeiture clause provided in the amendment of lease, the court characterized the forfeiture clause as a "catch-all"

\begin{itemize}
\item \textsuperscript{14} Id. at 141.
\item \textsuperscript{15} Id.
\item \textsuperscript{16} Id.
\item \textsuperscript{17} Id. at 152.
\item \textsuperscript{18} Id. at 141.
\item \textsuperscript{19} Id.
\item \textsuperscript{20} Id.
\item \textsuperscript{21} Id. at 141-42.
\item \textsuperscript{22} Id. at 142.
\item \textsuperscript{23} Id. (quoting Klein v. Insurance Co., 104 U.S. 88, 90 (1881)).
\end{itemize}
clause which was neither specific nor definite enough to be a valid forfeiture clause. The forfeiture clause contained in the amendment of lease provided:

> If . . . default shall be made by Lessee in the performance of any other covenant or condition herein contained to be performed by it and any such default shall continue for a period of sixty (60) days after written demand by Lessor for the performance thereof . . . then Lessor, at its option, may . . . declare a forfeiture of all the right, title and interest of Lessee to all the property forming the subject matter of this lease.

The nonspecific references made to breached covenants within the forfeiture provision were held insufficient to constitute a valid forfeiture clause. The court re-emphasized its language in *Easley Coal Co. v. Brush Creek Coal Co.*, stating that when a covenant is relied upon for raising forfeiture, the language must be "clearly and definitively expressed in the forfeiture clause." Subsequent to the *Shonk* and *Easley* decisions, it would appear that in order to obtain any judicial enforcement of a forfeiture provision based upon breaches of covenants or conditions in a coal mining lease, it is necessary that the lease state explicitly within the forfeiture clause the breached covenants meriting forfeiture. This provision would be in addition to the usual stating of conditions and covenants in another provision of the instrument. In other words, the forfeiture clause cannot incorporate covenants and conditions from the instrument as a whole, but must specifically state the covenants and conditions within itself.

Even with an expressed statement of covenants and conditions within a forfeiture clause, the court's liberal use of equity to avoid forfeiture is strongly foreshadowed in the *Shonk* case. In the case of forfeiture for nonperformance of pecuniary covenants, the court in *Shonk* reaffirmed its prior holding that "equity goes as a matter of course, where compensation may be made." The court's use of monetary damages and compensation would effectively avoid forfeiture in many cases despite an express forfeiture provision meeting the strict standards set forth in *Shonk* and *Easley Coal*, if it is utilized by the court in cases where the forfeiture clause is deemed to be valid.

In addition, the court in *Shonk* emphasized the principle that before a lessor may obtain forfeiture, action must be taken upon the underlying breach. Equity may prevent the forfeiture claim if the lessor delays assert-

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64 *Id.* at 143.
65 *Id.* at 157-58.
66 *Id.* at 143.
67 91 W. Va. 291, 112 S.E. 512 (1922).
68 288 S.E.2d at 143.
69 *Id.* (quoting Wheeling & E.G. Ry. Co. v. Triadelphia, 58 W. Va. 487, 516, 52 S.E. 499, 511 (1905)).
70 91 W. Va. 291, 112 S.E. 512 (1922).
71 288 S.E.2d at 143.
ing it. Failure to enforce the lease early in its term may make subsequent forfeiture an unconscionable result. The lessor may not "[lull] the lessee into a feeling of security and [throw] him off guard." Additionally, the court held that the lessor may be estopped from prevailing in his forfeiture claim if he takes no steps to enforce the lease until after the lessee has detrimentally changed his position. Shonk's failure to enforce the covenants under the lease during the tenancy was viewed by the court as acquiescing to Bethlehem Steel's actions. Therefore, Shonk was estopped from asserting the forfeiture claim after Bethlehem Steel had relied upon Shonk's acquiescence. Finally, the court held that the lessor may waive the lessee's default by failing to enforce the lease early in its term. Negligence by one party in conjunction with injury to the other party resulting from that negligence was asserted by the court as a ground for denial of relief.

The court's decision in Shonk gives more stability to the coal mining leasehold. Protection for the lessee is heightened as the difficulty in obtaining forfeiture rises for the lessor. As in the Shonk case, where Bethlehem Steel had invested more than six and one-half million dollars in improvements to the leased property, the lessee's investment may be substantial. Decreasing the likelihood of wholesale forfeiture, even when a forfeiture provision has been included within the lease, will add an additional positive factor for business consideration. Increased stability encourages coal industry investment and development, and, of course, the eventual rewards of a healthy, growing business are reaped by many.

Even with the comfort given to lessees by the Shonk decision, the lessor still retains recourse for breaches of lease covenants through monetary damages. The remedy of monetary damages can be a persuasive tool to encourage conformity with the lease covenants and in many cases can adequately compensate the lessor for most injuries. Of course, the Shonk decision did not eliminate the use of forfeiture when necessary to achieve justice, but instead makes the remedy significantly more difficult to obtain.

B. Ionno v. Glen-Gery Corporation

The Ohio Supreme Court, in January, 1983, also adopted a monetary test, akin to that used in Shonk, to be applied before forfeiture of a mining lease may be invoked. The court, in Ionno v. Glen-Gery Corp., stepped beyond the judicially determined monetary test in Shonk, however, and placed an affirm-
ative burden upon the lessor to prove that money damages would be inadequate before forfeiture will be awarded by the court.

In Ionno, the lessors, John M. and Lucinda S. Ionno, sought forfeiture and cancellation of a coal and clay mining lease because of the lessee's non-performance of the lease and failure of consideration. In so doing, three issues were presented for determination by the court: first, whether a lessee is under an obligation to reasonably develop the leased land; second, whether a lessee is relieved of the obligation to reasonably develop if payment of an annual royalty is made; and third, whether the breach of an implied covenant to reasonably develop is a proper ground for forfeiture.

The lease between the Ionnos and Glen-Gery Corporation granted the lessee right to "mine, let, and lease" coal and clay upon the lessors' property in exchange for a royalty on the product mined or a "minimum rent or royalty" to be paid to the lessors. The minimum royalty consisted of $300.00 each year for the first two years and $600.00 each year thereafter. Pursuant to the lease, any minimum royalty paid to the lessors would be credited against future royalties upon mining of the product. The lease also contained a forfeiture provision which provided:

Lessee agrees that in the event payment of the rent or royalty due . . . is not made . . . or if the Lessee shall fail to keep and perform any of the covenants on its part to be kept and performed, . . . then this Lease shall, at the option of the Lessors, become null and void and of no further force or effect.

The lessee tendered all payments as required pursuant to the lease, but, since 1960, the inception of the lease, had not undertaken any mining activity or operations. The trial court concluded that there was no implied duty to perform the mining lease within a reasonable time and ruled in favor of the lessee. The appellate court, finding that there was an implied duty upon the lessee, reversed and ordered forfeiture and cancellation of the lease.

The Ohio Supreme Court initially addressed the question of whether there was an implied duty upon the lessee to develop the land. The court noted that there was no provision within the lease which required the lessee to begin mining operations within a specified period of time, but found this

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Id. at 506.
Id.
Id. at 505.
Id.
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Id. at 506.
Id. at 508.
Id. at 506.
Id.
Id.
of no consequence, since the court had long ago established and followed the principle that there is an implied duty upon the lessee to develop.8 The court concluded that, absent an express disclaimer within the lease, there is an implied covenant in a mineral lease to develop the land within a reasonable time.9

The second issue addressed by the court was the lessee's contention that its payment of an annual minimum royalty relieved it of the obligation to diligently mine.10 To evaluate the validity of the lessee's argument, the court examined the language in the lease. The lease provided that the annual payment made by the lessee would be "credited against the amount or amounts that shall thereafter become due for or on account of the removal, mining, or hauling of coal and/or clay."11 Viewing the minimum payments not as independent and non-refundable consideration for rent but as offsets of the production royalties, the court found the actual consideration for the lease to be the expected return from the mining of the land. As such, the annual payments made by the lessee for a period of more than eighteen years were held not to abate the lessee's duty to develop the land within a reasonable time.12 Furthermore, the court held that long-term leases which encumber a lessor's property in perpetuity through annual payments, but under which there is no development of the mineral property, are against public policy. The public policy enforced by the court is based upon the importance of the mining of mineral lands.

In approaching the final issue of forfeiture, the court recognized forfeiture as an extreme measure which would not be found unless there is a violation of a clear right. In addition, the court noted that forfeiture must be necessary to achieve justice between the parties before it is invoked.13

Reasserting its past holding in Beer v. Griffith,14 which concerned an oil and gas lease, the court emphasized that "the remedy for a breach of implied covenant, without more, is damages, and not forfeiture of the lease."15 Ignoring the forfeiture clause contained within the lease, the court held that relief

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8 Id. (citing Beer v. Griffith, 61 Ohio St. 2d 119, 399 N.E.2d 1227 (1980); Venedocia Oil & Gas Co. v. Robinson, 71 Ohio St. 302, 73 N.E. 222 (1905), and Harris v. Ohio Oil Co., 57 Ohio St. 118, 48 N.E. 502 (1897)).
9 443 N.E.2d at 506.
10 Id. at 507.
11 Id.
12 Id. at 508.
13 Id.
14 61 Ohio St. 2d 119, 399 N.E.2d 1227 (1980).
15 443 N.E.2d at 508 (quoting Beer v. Griffith, 61 Ohio St. 2d 119, 399 N.E.2d 1227 (1980) (since certain causes of forfeiture were specified in the oil lease, the remedy for breach of an implied covenant is not forfeiture, but damages); Harris v. Ohio Oil Co., 57 Ohio St. 118, 48 N.E. 502 (1897) (the breach of an implied covenant in an oil lease leads to an action for damages not forfeiture).
will be granted to achieve justice even if specific grounds for forfeiture are set forth in the lease. The only exception to this rule recognized by the court occurs where legal remedies are inadequate. Furthermore, the court held that "the lessor has the burden of proving that damages are inadequate before such forfeiture may be declared." Since the Ionnos made no claim nor offered any proof that damages were inadequate and instead sought forfeiture as their sole relief, the court reversed the holding of the appellate court. In summary, the court held that, despite a forfeiture clause within the lease, forfeiture based upon an implied covenant to diligently mine will only be enforced as a remedy if monetary damages are inadequate and proved as such.

The court's holding in Ionno followed the general rule that a court will imply a covenant to mine diligently if it is not expressly provided in the lease. However, the ruling retreats from the view that leases may be deemed forfeited or abandoned where an express forfeiture clause is provided and no mining activity has been done for a number of years. Although the court did not abandon this view in toto, it has placed a sizeable obstacle in the path of a lessor who seeks to obtain forfeiture: proof that monetary damages are inadequate to compensate the injury is necessary.

C. The Monetary Test

Both Shonk and Ionno set forth a threshold monetary test which must be overcome before forfeiture will be enforced by the court. The tests espoused by the courts are similar in that neither will permit forfeiture if monetary damages are adequate to restore and compensate the lessor. In Shonk, however, it is not definitively expressed that the court will utilize the

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96 443 N.E.2d at 508.
97 Id.
98 Id. at 508-09.
99 See supra note 3.
100 See Russell v. Johns Manville Co., 20 Cal. App. 3d 405, 97 Cal. Rptr. 634, reh'g denied, 20 Cal. App. 3d 413, 98 Cal. Rptr. 181 (1971) (failure of lessee to develop mining property may be considered an abandonment and result in forfeiture); Deerfield Rock Corp. v. McClellan, 121 So. 2d 822 (Fla. 1960) (lease subject to cancellation due to unreasonable delay of four years before beginning to mine); Chapman v. Continental Oil Co., 149 Kan. 822, 89 P.2d 833 (1939) (lease considered abandoned where lessee failed to start work for more than 40 years after the lease's execution).
101 In Shonk, the court held that forfeiture was not justified since the lessor could be made whole by monetary damages and non-renewal of the lease. In addition, the court based the availability of equitable relief upon the consideration of whether compensation could or could not be made. 288 S.E.2d at 142. In Ionno, the court placed a burden of proof upon the lessor to prove that monetary damages would be inadequate before forfeiture would be considered as a remedy by the court. 2 Ohio St. 3d at 135, 443 N.E.2d at 508.
102 Although neither court defined its application of monetary damages as a test per se, the author takes that liberty for ease of reference.
103 288 S.E.2d at 142; 2 Ohio St. 3d at 134-35, 443 N.E.2d at 508.
monetary test if a valid forfeiture clause is contained in the lease, although the decision may implicate that conclusion. This is based upon the fact that, subsequent to the court’s holding that forfeiture was not justified because the lessor could be made whole by monetary damages and non-renewal of the lease, the court declared the lease forfeiture provision invalid.

The leases in both Shonk and Ionno contained a forfeiture clause. Each clause gave the lessor the ability and option to declare a forfeiture upon the lessee’s failure to perform the required covenants under the lease. Both forfeiture provisions imposed upon the lessor a specified period of written notification to the lessee prior to declaration of forfeiture. But neither forfeiture clause expressly set forth the exact covenants which would result in forfeiture if breached.

In Shonk, the court declared the forfeiture clause invalid because of the provision’s failure to expressly set forth the covenants which would give rise to a forfeiture. The court’s opinion, however, initially states only that forfeiture is not justified because the lessor can be made whole by monetary damages and non-renewal of the lease; only afterwards does the court discuss the invalidity of the forfeiture clause. This may indicate that the determination of the validity or invalidity of the forfeiture clause is not a condition precedent to the court’s use of the monetary test. If so, the usefulness of the forfeiture provision within the coal mining lease is severely restricted.

The restriction of the forfeiture provision is two-fold. First, to obtain forfeiture, the court must determine that money damages are inadequate to fully compensate the lessor. This alone is a formidable threshold, since damages are likely to be adequate in many instances. Second, the court, as detailed in Shonk, will closely scrutinize the forfeiture clause. If the clause does not meet all standards espoused by the court, as established in Shonk and Easley Coal Co., it will be declared invalid and unenforceable.

In contrast to the court’s careful scrutiny of the forfeiture clause and subsequent declaration of invalidity in Shonk, the court in Ionno set forth the forfeiture provision, but did not discuss or scrutinize it. Instead, the court specifically provided that “relief will be granted when necessary to do justice to the parties, even though specific grounds for forfeiture are set forth in the

104 288 S.E.2d at 143; 2 Ohio St. 3d at 131, 443 N.E.2d at 506.
105 See supra note 104 (A 30-day time period was provided in the Ionno lease; a 60-day time period was provided in the Shonk lease).
106 288 S.E.2d at 143; 2 Ohio St. 3d at 131, 443 N.E.2d at 506.
107 288 S.E.2d at 143.
108 Id. at 142-43.
109 Easley Coal Co. v. Brush Creek Coal Co., 91 W. Va. 291, 297, 112 S.E. 512, 514 (1922) (“the broken covenant or condition relied upon for forfeiture must be found not only in the instrument, by clear and definite expression, but also within the forfeiture clause, by such expression”).
lease."112 Bypassing the forfeiture provision, the court was not willing to raise forfeiture until the lessor proved that his injury could not be satisfied by monetary damages.111

The courts' use of a monetary damages or compensation test, in Shonk and Ionno, to relieve a lessee from forfeiture of a coal mining lease is not a new test within the general realm of forfeiture law and equity. The maxim, "equity suffers not advantage to be taken of a penalty or forfeiture where compensation can be made,"113 has long been recognized in contract law.114 Likewise, in general landlord-tenant law, some courts have long held that if the lessor can, by compensation or otherwise, be placed in the same condition as if the breach of a covenant had not occurred, then equity will relieve the lessee from forfeiture of the lease.115 Although not the first cases116 to have done so, the Shonk and Ionno decisions have applied these equitable principles to the mining lease.

The significant aspect of the monetary test in both Shonk and Ionno is not that money damages will be awarded to avoid forfeiture generally, but that the monetary damages test will be applied before forfeiture will be allowed even where a forfeiture provision for breach of covenants is included within the lease agreement.

The general rule followed in most jurisdictions allows damages as the only remedy for breach of covenants when no forfeiture clause is included within the mining lease.117 When an express forfeiture provision is included in the lease, however, most courts will allow forfeiture so long as there has been no waiver or estoppel by the lessor,118 a clear breach of the covenant119 or a result which would not be unduly oppressive.120 The Shonk and Ionno deci-
sions rank as minority holdings because, even with a lease provision prov-
ing for forfeiture upon the breach of a lease covenant, the courts in those jurisdictions will first decide whether monetary damages are adequate; only then will they apply the contract provision. Even then the contract provision still must pass muster as a valid forfeiture provision which will be strictly construed—the lessor must not be guilty of waiver or estoppel, the breach must be clear and the result must not be unduly oppressive or uncon-
scionable.

The lessee gains security because of the heavy burden upon the lessor who seeks to obtain forfeiture. Under the minority view, what began as a general abhorrence of forfeiture has evolved into a view which makes forfeiture a near impossibility. The *Shonk* decision sets forth many avenues of forfeiture avoidance, including monetary damages, waiver, estoppel, unconscionability and invalidation of the forfeiture clause. A definitive clarification of the opinion's implication that adequate money damages may restrict and define the activation of all forfeiture provisions will be an interesting development to look for in future coal lease cases in West Virginia.

D. Restricting Freedom of Contract

Both the *Shonk* and *Ionno* decisions may be viewed as restricting freedom of contract if, regardless of an agreement between the parties to a contract to include a forfeiture provision for breach of a condition or covenant, the court chooses not to enforce the forfeiture provision if monetary damages will suffice. In addition, as in *Shonk*, if the forfeiture provision is not sufficiently explicit in its terms, the court may also refuse to enforce it.

A court's failure to enforce a forfeiture provision on the basis that monetary damages will be sufficient to compensate the injury is contrary to the language that the parties themselves have bargained for and written into the contract. Query whether a valid forfeiture clause, mutually agreed upon and inserted in a lease by the parties after arm's-length bargaining, can, consistent with the policies underlying contract law (including freedom of contract), be set aside in favor of monetary damages?

By use of the monetary test, the court in effect drafts a revised lease agreement between the parties. Through the court's use of equity, the lessee is allowed to make a better bargain than he was able or chose to make at the time of the execution of the lease. Consider the statement written by Summers in his treatise on oil and gas concerning oil and gas leases:

[If the parties have deliberately, and without fraud or mistake, entered into a valid lease . . . in terms of plain and unmistakeable meaning, a court does not

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110 See 288 S.E.2d at 142-44; 2 Ohio St. 3d at 135, 443 N.E.2d at 508.
111 288 S.E.2d at 142-43.
have the power to place a different interpretation upon the contract on
grounds of policy that it would be better ... generally to have the contract dif-
ferent.\textsuperscript{122}

In addition, the United States Supreme Court has held that courts of equity
do not ordinarily provide relief against harsh or unfair contracts.\textsuperscript{123} Barring
contracts of adhesion and assuming contracts bargained for by the lessee and
lessor at arm’s length, it seems the lessee should not be aided by the court in
obtaining relief from a bad bargain which includes a forfeiture provision.

Long before the \textit{Shonk} and \textit{Ionno} decisions, however, several punctures
were made by the needle of equity into the sphere of freedom to contract for
forfeiture. Courts have held that forfeiture may be avoided through equity
where the result would be unduly oppressive,\textsuperscript{124} or where forfeiture is “so
grossly disproportionate to any actual damage” that “enforcement of the pro-
vision would shock the conscience,”\textsuperscript{125} or where the result of the forfeiture
would be unconscionable.\textsuperscript{126} The use of equity to avoid forfeiture in these cir-
cumstances is consistent with the general view of forfeiture as a “harsh, coer-
crave and disfavored” remedy, the use of which should be limited.\textsuperscript{127}

In the \textit{Shonk} decision, the court was undoubtedly influenced by the six
and one-half million dollars in improvements made by the lessee to the
leasehold property. Wholesale forfeiture of the lease would have provided
the lessor with a windfall of the valuable improvements, while penalizing the
lessee with the loss of more than six and one-half million dollars. At the trial
court level, the six and one-half million dollars would have been in addition to
the $10,344,219.82 in damages awarded to the lessors.\textsuperscript{128}

The unjustness of forfeiture in the \textit{Shonk} case seems self-evident when
one compares the results of forfeiture with the breaches alleged to have been
committed by Bethlehem Steel. Although the breached covenants and condi-
tions were not insubstantial, the trial court’s award, totaling almost seven-
ten million dollars in damages and property value, was a windfall for the
lessee. The breached covenants included “(1) failing to pay royalties on raw

\textsuperscript{122} 2 W. Summers, \textit{The Law of Oil and Gas} § 373 (1959).
\textsuperscript{123} Sun Printing & Publishing Assoc. v. Moore, 183 U.S. 642 (1902); 5 S. Williston, \textit{A
\textsuperscript{124} Hyman v. Cohen, 73 So. 2d 393, 400 (Fla. 1960) (equity afforded relief from forfeiture
where full compensation could be made in money and forfeiture would place a great hardship on
\textsuperscript{125} 5 S. Williston, \textit{A Treatise on the Law of Contracts} § 775, at 656 (3d Ed. 1961).
\textsuperscript{126} \textit{See Hasden v. McGinnis, 54 Tenn. App. 39, 387 S.W.2d 631 (1964) (stating the underly-
ing principle of a court of conscience permitting nothing within its jurisdiction
which is unconscionable); Hukill v. Myers, 36 W. Va. 639, 15 S.E. 151 (1892).}
\textsuperscript{127} \textit{See generally} 54 Am. Jur. 2d \textit{Mines and Minerals} § 141 (1971); 17 \textit{Words and Phrases,
\textsuperscript{128} 288 S.E.2d at 141.
coal as opposed to processed coal; (2) failing to pay any royalties on two mines; (3) using a deep mine royalty rate, instead of a strip mine rate, for coal removed by punch mining; (4) trespassing on a 30.1 acre tract not included in the lease; (5) failing to provide mine and operation maps, and (6) failing to conduct mining operations in a workmanlike and legal manner."\(^{129}\)

It seems that the court in *Shonk* could have solely characterized the trial court's award as unduly oppressive and thereby have avoided the issue of whether forfeiture was justified because the lessor could be made whole by monetary damages and non-renewal. In fact, the court went beyond its initial holding by discussing waiver, estoppel and unconscionability. Yet the court chose instead to begin the forfeiture section of its decision on the premise that wholesale forfeiture was not justified because the lessor could be made whole by monetary damages and non-renewal of the lease.\(^{130}\)

The use of the monetary test in both *Shonk* and *Ionno* goes beyond the general abhorrence of forfeiture and the result-oriented observance of whether forfeiture will be unduly oppressive or unconscionable under the circumstances. The determination of whether monetary damages will be adequate to compensate the lessor for breach of covenants is made *ab initio*, before the remedy of forfeiture will even be considered. If damages are sufficient to make the lessor whole, forfeiture will not be invoked.\(^{131}\)

These courts have, in effect, taken away a substantial portion of the lessor's and lessee's freedom to contract for a forfeiture provision within the lease. Even when a forfeiture clause is added to a mining lease, the court may initially ignore it until determination has first been made whether monetary damages will be adequate compensation for the lessor. The decisions seem to reflect that the sphere of freedom to contract for forfeiture provisions is enveloped by the much larger concern of equity. The monetary damages test is another tool used by the courts to achieve equitable results.

**IV. CONCLUSION**

In a majority of jurisdictions, forfeiture may be obtained if (1) an express forfeiture provision is provided in the coal mining lease, (2) the lessee has breached a covenant or condition of the lease, (3) there has been no waiver or estoppel by the lessor,\(^{132}\) (4) there is no language within the lease specifically negating the covenant which has been breached,\(^{133}\) and (5) the result of the forfeiture is not unduly oppressive or unconscionable.\(^{134}\) In addition, the

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\(^{129}\) *Id.*

\(^{130}\) *Id.* at 142.

\(^{131}\) *Id.*: 2 Ohio St. 3d at 135, 443 N.E.2d at 508.

\(^{132}\) See *supra* notes 34-35.

\(^{133}\) See *supra* notes 22-29 and accompanying text.

\(^{134}\) See *supra* note 17.
language of the forfeiture clause will be strictly construed against the party invoking the forfeiture.125

A recent minority of jurisdictions, including West Virginia126 and Ohio,127 seem to have added a significant threshold inquiry to the above list. Before any forfeiture of a coal mining lease can be obtained in these jurisdictions, a determination must be made as to whether monetary damages are inadequate to compensate the lessor for the lessee’s breach of a lease covenant. In Ohio, an affirmative burden of proof is placed upon the lessor to prove that monetary damages are inadequate before the court will consider forfeiture as a remedy for a breached covenant.128 In West Virginia, the court will determine whether the lessor can be made whole by monetary damages,129 and no burden of proof is placed upon the lessor. The Shonk court’s act, however, of invalidating the forfeiture clause contained within the lease may prompt the further issue of whether the monetary determination will be made if a valid forfeiture clause is included within the lease. If monetary damages are determined adequate to restore the lessor, forfeiture will neither be justified nor enforced by the court.

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125 See supra note 40.
128 2 Ohio St. 3d at 135, 443 N.E.2d at 508.
129 288 S.E.2d at 142.