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Mines and Minerals--Breach of Covenant--Measure of Damages

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of importance as to the authority of the judiciary to grant relief in actions arising under § 301(a). Initially, § 301(a) was conceived to be merely procedural in nature for the benefit only of the signatory parties to a bargaining agreement; therefore, it seemed that personal rights of the individual union members were unenforceable either by the members or the union. *Ass'n of Westinghouse Employees v. Westinghouse Elec. Corp.*, 348 U.S. 437 (1954). The principal case extends the right to enforce federal substantive law to individual members of a union, thus, laying to rest the implications of the *Westinghouse* case.

In summary, recent Supreme Court decisions clearly indicate that the pre-emption doctrine will not preclude a state court from applying federal substantive law and thereby granting relief for the breach of a collective bargaining agreement even though the action complained is admittedly an unfair labor practice. The NLRB seems to be in accord with this view as the Solicitor General by way of amicus curiae contended that to oust the courts of jurisdiction would obstruct the purpose of national labor policy.

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**Mines and Minerals—Breach of Covenant—
Measure of Damages**

P, lessor under an oil and gas lease, brought this action for an alleged breach of an express covenant to market contained in the lease. The trial court rendered a judgment in favor of *P* and found the measure of damages to be the interest on the royalties *P* would have received had *D* acted diligently. From this decision both *P* and *D* appealed. *Held*, affirmed in part; reversed in part. The judgment in favor of *P* was sustained but the court determined that the proper measure of damages should be the amount of the royalties *P* would have received and not merely the interest thereon. The court further decided that *D* would be entitled to a dollar for dollar offset for the damages so paid when the gas was subsequently marketed. *Cotiga Development Co. v. United Fuel Gas Co.*, 128 S.E.2d 626 (W. Va. 1962).

The principal case illustrates the difficulty that has confronted the courts in dealing with the enforcement of an oil and gas lease. The problem stems from the unusual nature of this type of leasing arrangement. An oil and gas lease is in effect a hybrid instrument.

It partakes of a true leasehold interest, a conveyance, and a contract. 2 TIFFANY, REAL PROPERTY § 589 (1939). The offset feature found in the principal case is unique and might result in a complete change in this area of damages.

The "interest rule" as the proper measure of damages, as followed by the trial court, was introduced in *Grass v. Big Creek Development Co.*, 75 W. Va. 719, 84 S.E. 750 (1915). This action was instituted for a breach of covenant for further development of the leased premises. In the discussion of the measure of damages the court disregarded the view that the amount of the royalties should be awarded. To allow the entire amount of the royalties the court concluded, would permit the lessor to receive a double payment. This double payment would result from the fact that the oil and gas was still in the ground and might subsequently be removed, at which time the lessor would again receive his royalty payments. Consequently, according to the court, the lessors had lost nothing more than interest on the value of production obtainable had the lessee acted with the proper degree of diligence. The principal case in its discussion of the *Grass* decision called attention to the fact that the court did not precisely and in unmistakable language hold that the interest on the royalties should furnish the proper measure of damages.

The royalty concept of damages was recognized in Illinois prior to the decision in the *Grass* case. That court held that it was the duty of the lessee to drill additional wells, market the products, and pay the lessor the royalties thereon. The court further held that it would not be a defense to an action for breach of this duty that oil or gas was still in the ground and might be extracted at sometime in the future by another person. *Daughetee v. Ohio Oil Co.* 263 Ill. 518, 105 N.E. 308 (1914). The West Virginia court specifically considered the decision in this case when deciding the *Grass* case, but failed to follow its reasoning.

The problem concerning the proper measure of damages has also been recognized in cases dealing with coal leases. In *Cawood v. Hall Land & Mining Co.*, 293 Ky. 23, 168 S.W.2d 366 (1943), the court was of the opinion that the lessee's liability for failure to exercise due diligence in the mining of coal was not limited to the interest on the royalties that would have been paid if the coal had been mined, but that the lessors were entitled to recover the amount of the royalties. The court went on to say if the "interest rule" were adopted the result might be an indefinite postponement of the royalties to which the lessors were entitled. The lessor did not contract for an indefinite investment of his royalties at interest but for the royalties themselves.

Although dealing with the breach of a covenant to protect against drainage, the Texas Supreme Court considered whether the "interest rule" of the *Grass* case was the proper measure of damages. In rejecting the theory of that case the court held that the "interest rule" would be impractical in actual application because of the difficulties in fixing the period for which the interest should be computed and also that the adoption of the rule would invite intolerable litigation. This decision placed Texas in accord with the jurisdictions adhering to the concept that the amount of royalties the lessor would have received constituted the proper measure of damages. The court went on to say, by way of dicta, that the lessee might be able to invoke the aid of equity in such a way as to obtain the benefit of the unmined minerals on which the lessee had been required to pay royalties should he desire to comply with his obligations under the lease. *Tex. Pac. Coal & Oil Co. v. Barker*, 117 Tex. 418, 6 S.W.2d 1031 (1928). In support of this royalty concept and considering the contractual aspect of an oil and gas lease, it has been stated that the purpose of the law to give compensation for breach of contract has been complied with by allowing the injured party to have the value of the contract's performance as damages. 5 WILLISTON, CONTRACTS § 1338 (1937).

It is arguable that the principal case overrules the "interest rule" and places West Virginia in line with the case law holding that the royalties the lessor should have received would be the measure of damages for breach of a covenant for development in an oil and gas lease. The court, however, has added to this view the offset feature for the benefit of the lessee. If this offset idea is carried to a logical conclusion, it would seem that the lessee is not being punished for breaching his obligations under the lease. It appears that the lessee could fail to comply with the terms of his agreement and any resulting liability could be offset by him at a later date when he might decide to perform his obligations. In the *Grass* case the court was concerned with the lessor's receiving a double payment as a result of the lessee's breach, but under the view of the principal case it may be argued that the lessor would not receive any compensation for the lessee's breach.

A possible solution to this vexing question might be to allow the lessor the interest on the royalties in addition to the royalties themselves. If both were given as damages the lessor would still retain the interest in the event the lessee would take advantage of the offset provision.

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Procedure—The Sufficiency of the Record in Opposing a Motion for Summary Judgment

The government brought a civil antitrust suit against *D*, a truck manufacturer. The principal practices charged as violations of the Sherman Act, 15 U.S.C. § 1, 3 (1958), were limitations on the territories within which distributors could sell and limitations on the persons or classes of persons to whom they could sell. The government moved for summary judgment and filed depositions and exhibits in support of its motion. *D* filed a brief in opposition and alleged therein that the limitations were fair and reasonable and did not violate the Sherman Act. *D* filed no affidavits, depositions, or other evidence showing facts on which its allegations were based. The district court granted the motion. *D* appealed. *Held*, reversed. *D* made allegations concerning factual matters which were relevant to a decision on the merits. More economic and business data from which such limitations emerged must be shown before the court could determine whether the arrangement stifled competition or had any redeeming virtue. A dissenting opinion held that on the facts presented there was no genuine issue of fact and the moving party was entitled to a summary judgment. *White Motor Co. v. United States*, 83 Sup. Ct. 696 (1963).

"While it is true that every simile limps, the motion for summary judgment is not unlike the unveiling of a statute. The motion requires the opposition to remove the shielding cloak of formal allegations and demonstrate a genuine issue as to a material fact." *United States v. Dollar*, 100 F. Supp. 881, 884 (N.D. Cal. 1951). This statement succinctly states the real purpose of summary judgment procedure under Rule 56 of the Federal Rules of Civil Procedure. Rule 56(c), 28 U.S.C. 5177 (1958), provides, *inter alia*, that a summary judgment shall be rendered if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show