CITE AS
24 *Energy & Min. L. Inst.* ch. 8 (2004)

Chapter 8

Adrift on the Implied Covenant to Market: Regulation By Implication

By David W. Hardymon
Vorys, Sater, Seymour and Pease LLP
Columbus, Ohio

Synopsis

§ 8.01. Introduction.

This is an attempt by a practitioner to make sense of the innumerable cases discussing implied covenants in oil and gas leases. It is a premise of this chapter that the law of implied covenants in oil and gas leases has become detached from the bedrock principles of property and contract law upon which it was initially founded. One result is that the force of implied covenants has shifted from the protection, maintenance and development of the leasehold estate to the regulation of the parties' conduct. More significantly, the focus has recently moved from the conduct of the parties with respect to their actions on the leasehold premises to the conduct of the lessee with respect to his actions in the marketplace. This drift away from property and contract law principles toward regulation by implication has been accompanied by the abandonment of long-standing rules for construing written instruments.

This chapter necessarily includes a survey of trends in property and contract law, any one of which could be discussed in exhaustive fashion. It also necessarily contains citations to numerous cases for general propositions, although it is recognized that many of these cases have already been the subject of extensive analysis by various commentators. It is not my purpose to repeat or take issue with what others have written on the subject of implied covenants in oil and gas leases. I seek only to provoke thought and reflection on three points. First, that the contract concept of good faith and fair dealing is not analogous to the implied covenant to market in an oil and gas lease. Second, by their recent expansion of the implied covenant to market, a distinct minority of jurisdictions has broken new ground by requiring of lessees not simply honesty in fact and reasonable commercial conduct, but also, a subversion

of the lessees' own interests to those of the lessor. Third, the invasion of the marketplace by implied covenants derived from instruments of conveyance has brought unpredictability to the law governing the conduct of oil and gas lessees.[1]

§ 8.02. Implied Covenants in Leases.

[1] — Traditional Analysis – Three Covenants Implied to Protect the Reversionary Interest.

Historically, leases were conveyances to be construed under principles of property, not contract law.[2] One difference between property and contract law was that a property conveyance could not contain implied covenants, while unexpressed terms and conditions were frequently read into contracts as implied covenants.[3] The rationale for property law's ban on these covenants "was based on the idea that the landlord sold to the tenant the exclusive right to possess the demised premises, and that the tenant's primary interest was in the land." Hence the cliché "nothing is implied in a conveyance."[4]

---

1 This chapter was written with the assistance of two of my colleagues in the practice of law, Gina R. Russo and Joseph L. Cohen. Their research, drafting, energy and patience made this chapter possible. However, the chapter's premise and conclusions, as well as its errors and omissions, are mine.

2 Robert H. Kelley, "Any Reports of the Death of the Property Law Paradigm for Leases Have Been Greatly Exaggerated," 41 *Wayne L. Rev*. 1563, 1593 (1995).

3 E. Allen Farnsworth, Contracts §§ 7.15-.17, 8.2 (2d ed. 1990).

4 Kelley, *supra* note 2, at 1593 (citing John H. Kennedy, "Nothing's Implied in a Lease, Court Finds," *Boston Globe*, Mar. 12, 1992 at 49, discussing *21 Merch. Row Corp. v. Merch. Row, Inc.*, 587 N.E.2d 788 (Mass. 1992) where the court reversed the lower court's holding that a commercial lease included an implied covenant that the landlord must act reasonably when withholding consent to an assignment. *Cf.* According to Robert Kelley, author of *Any Reports of the Death of the Property Law Paradigm for Leases Have Been Greatly Exaggerated*, this cliché was never true, but was merely an "excuse to justify results that arguably might have made sense in England during the High Middle Ages and early Renaissance, but which made no sense in the United States . . . ," Kelley, *supra* note 2, at 1593. After all, implied covenants are said to have existed in both fee and leasehold conveyances even in medieval England. *Id.* at 1593-94 (providing