

## **CHAPTER 12**

### **Title Matters Associated with the Purchase and Sale of Coal Lands**

**Douglas C. McElwee  
Robinson & McElwee  
Charleston, West Virginia**

#### **Synopsis**

**§ 12.01. Introduction.**

**§ 12.02. Nature of Transaction.**

**[1]--Unrecorded Documents.**

**[2]--Recorded Documents.**

**§ 12.03. Report on Title Work.**

**[1]--Title Opinion.**

**[2]--Title Report.**

**[3]--Title Abstract.**

**§ 12.04. Length of Title Examination.**

**§ 12.05. Organization and Interpretation of Title Work.**

**[1]--Ownership.**

**[2]--Description.**

**[3]--Out-conveyances.**

**[4]--Easements.**

**[5]--Coal Severance.**

**[6]--Coal Leases.**

**[7]--Oil and Gas Severance/Leases.**

**[8]--Timber.**

**[9]--Liens.**

**[10]--Environmental Matters.**

**[11]--Taxation.**

**§ 12.06. Seller's Perspective.**

**§ 12.07. Conclusion.**

## **§ 12.01. Introduction.**

A major area of concern in acquiring or selling coal lands is the status of the title to the property. Generally, the seller will make representations and warranties on the marketability of that title in the acquisition agreement. Some have suggested that if the seller is financially sound and the representations and warranties sufficiently broad, there may not be a need to perform title work, even for a "substantial real estate transaction."<sup>(1)</sup> However, in most instances, a buyer will conduct its own examination of title to the property rather than rely on the seller's representations.

There are numerous reasons for performing title work. The most obvious is for the buyer to confirm that the seller can convey all rights necessary for the buyer to develop the identified coal reserves. Another significant reason is to identify any unforeseen costs (e.g., relocations or lack of access or necessary surface rights) which might require a renegotiation or revaluation of price or allow the buyer an "out" under the representations and warranties in the acquisition agreement. The process can also uncover potential environmental and other liabilities which might not otherwise be apparent from a physical review of the property. Finally, as an important by-product of the title review process, the buyer can insulate itself from liability for title defects by obtaining title opinions from legal counsel.

## **§ 12.02. Nature of Transaction.**

The nature of the transaction must be considered when assessing the title work to be performed. Most transactions are structured in one of two ways. The buyer may have contracted to purchase only the coal reserve properties and associated improvements of the seller (asset purchase). Alternatively, the contract may provide for the buyer to purchase all of the stock of an operating company or land holding company (stock purchase). The difference between these two forms of acquisition is that, with an asset purchase, a new corporate entity acquires title to the property, while, with a stock purchase, the corporate identity of the title holder is maintained. This difference can have a significant impact on the buyer's exposure to title defects and, consequently, on the assessment of the scope of the title work to be performed.

### **[1]--Unrecorded Documents.**

The significance of the structure of the transaction to the buyer's exposure is most apparent in the case of unrecorded documents. In a stock purchase, the corporate entity being sold will have actual knowledge of all unrecorded documents to which it was a party. Once charged with notice of these documents, the corporation continues to be affected by that notice regardless of whether there is a change in stock ownership.<sup>(2)</sup> Accordingly, in a stock purchase, the buyer's review of the seller's unrecorded document files should be thorough since knowledge of the existence of these documents will be imputed to the buyer after the transaction has been completed. Conversely, the buyer in an asset purchase will be considered a bona fide purchaser for value and will acquire title to the property free of the burden created by any unrecorded documents of which it had no actual knowledge or notice<sup>(3)</sup> when the sale was consummated.<sup>(4)</sup>

### **[2]--Recorded Documents.**

There is no such thing as a bona fide purchaser without notice in the case of recorded documents. Under the recording acts in most states, recordation of an instrument in the appropriate public office is constructive notice to all subsequent purchasers and creditors of the matters set forth therein.<sup>(5)</sup> Regardless of whether the transaction is structured as a stock purchase or an asset purchase, the buyer will, as a matter of law, be deemed to have notice of all recorded documents. It is, therefore, important for the buyer to conduct a thorough review of the record title to determine whether the seller can convey good and marketable title to the property.