

CHAPTER 10

The Continuing Viability of Subjacent Support and Subsidence Damage Waivers: Fact or Myth?

Jeff A. Woods⁽¹⁾

Wyatt, Tarrant & Combs

Lexington, Kentucky

Synopsis

§ 10.01. Common Law Rights of Support.

[1]--Nature of Subsidence and Support.

[2]--Rights of Support at Common Law.

§ 10.02. Waivers of Support Rights and Subsidence Damages at Common Law.

[1]--Express Waivers Are Enforceable at Common Law.

[2]--Implied Waivers Are Recognized in Some Jurisdictions.

[a]--Pennsylvania.

[b]--West Virginia.

[c]--Kentucky.

[d]--Ohio.

[3]--Implied Waivers Have Been Rejected in Some Jurisdictions.

§ 10.03. Common Law Exceptions Affecting Support Waivers.

[1]--Kentucky.

[2]--West Virginia.

[3]--Illinois.

[4]--Alabama.

§ 10.04. Provisions of the Federal Surface Mining Control and Reclamation Act Diminish the Viability of Surface Support Waivers.

[1]--Applicable Provisions of SMCRA.

[2]--Regulatory Encroachments on Subsidence Waivers.

[a]--The Historical Background.

[b]--30 C.F.R. § 817.121(a) -- Subsidence Control.

[c]--30 C.F.R. § 817.121(c)(1) -- Restoration of Land.

[d]--30 C.F.R. § 817.121(c)(2) -- Repair or Compensation for Subsidence-Damaged Structures.

[e]--30 C.F.R. § 817.121(d) -- Prohibition of Subsidence of Public Buildings, Impoundments, and Aquifers.

§ 10.05. The Energy Policy Act of 1992.

[1]--Repair or Compensation for Subsidence-Damaged Structures.

[2]--Study of Pipeline Subsidence.

§ 10.06. The Struggle for Supremacy: Common Law Waivers or Subsidence Legislation and Regulation?

[1]--West Virginia.

[a]--*Rose v. Oneida Coal Co., Inc.*

[b]--*Smerdell v. Consolidation Coal Co.*

[c]--*Giza v. Consolidation Coal Co.*

[2]--Illinois.

[a]--*Melvin v. Old Ben Coal Co.*

[b]--*Old Ben Coal Co. v. Department of Mines.*

[c]--*Rocking M. Ranch, Inc. v. Sahara Coal Co.*

[3]--Virginia.

§ 10.07. Support Waivers Remain Viable Against Overlying Mineral Owners.

§ 10.08. Constitutional Considerations.

[1]--The Broad Police Power.

[2]--Takings Without Just Compensation.

[a]--Protected Property Rights.

[b]--Public Purpose.

[c]--Reasonable and Permissible Infringement.

[d]--A "Takings" Analysis of SMCRA and Energy Policy Act Provisions.

[3]--The Contracts Clause.

[4]--Other Constitutional Considerations.

[a]--Equal Protection.

[b]--Vagueness.

§ 10.09. The Remaining Viability of Subjacent Support and Subsidence Damage Waivers.

[1]--Waivers Remain Viable Against Overlying Mineral Owners.

[2]--Waivers for Longwall Mining Remain Viable.

[3]--Protection Afforded to Room-and-Pillar Operators.

[4]--Remedial Provisions May Not Be Applicable to Planned Subsidence Operators.

[5]--A Right to Subside Undeveloped Land May Not Be Impaired.

[6]--Constitutional Challenges.

[7]--Status of Waivers in Some Eastern States.

[a]--Illinois.

[b]--Ohio.

[c]--Pennsylvania.

[d]--West Virginia.

[7]--A Valid Subsidence Waiver Will Not Currently Foreclose

Application of Remedial Regulations in the Other Eastern States.

§ 10.01. Common Law Rights of Support.

[1]--Nature of Subsidence and Support.

Subsidence is the sinking or lowering of the earth's strata caused by the removal of coal from an underlying seam. Subsidence usually appears as a sinkhole, trough, or fissure. Common law principles dealing with subsidence and a surface owner's right of subjacent support have developed over the years as a result of the severance of the surface and the mineral estates. The right to mine has generally been held to be subservient to the right of surface owners to have the surface maintained free from the effects of subsidence. In the context of the right of subjacent support, the word "surface" has been held to mean "that part of the earth or geologic section lying over the minerals in question, unless the contract or conveyance otherwise defines it. It is not merely the top of the glacial drift, soil, or the agricultural surface."⁽²⁾ As a result of this broad definition, owners of superincumbent seams of coal also typically enjoy the right of support, absent any agreement to the contrary.⁽³⁾

[2]--Rights of Support at Common Law.

At common law, the owner of the surface has a right of subjacent support, an absolute right to have the