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Chapter 2

Deals Gone Wrong in the Coal Industry

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Synopsis

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§ 2.01. Introduction and Overview.

Oft derided as the venue where transactions are sketched out on bar napkins, the coal mining industry has become a sophisticated setting for risk allocation through leases, environmental permits, contracts, and purchase and sale agreements or merger agreements. The ability (or rather, the focus and attention to detail) of the lawyers (nay, craftsmen) hired by a mining company to structure its deals (and later, the litigators hired to dismantle them) can dictate riches or rags to the company's owners. Often, a successful outcome is dependent upon the ability of the architect of the deal to fully understand the mining company's operational details and desired outcomes, anticipate the failure modes, and allocate the risk thereof appropriately in the deal documents. The holes left in the structure are fertile ground for voracious litigators to collapse the whole thing.

This chapter looks at commercial and environmental litigation in the coal industry and offers suggestions for avoiding slack in the language of commercial agreements. The entirety of the practice of law is learning from cases decided by courts, where, inevitably, someone won and someone lost. Thus, this presentation is not in any way a second-guessing or critique of any participant to the deal or ensuing litigation, but it is meant to highlight on a go-forward basis the lessons learned from the cases presented.

This chapter tries to imagine examples of the material agreements that are struck from the time an enterprising person decides to make a bet on the coal industry. It walks from the acquisition of mining rights, to the issuance of operating permits, and onward. It visits construction agreements, coal

sales agreements, the ancillary deals that come along as fast moneymakers, and concludes with the exit transaction — where the owner of the business sells its accumulated interests.

§ 2.02. Leases Gone Wrong.

The old adage goes, "If you want to make a small fortune in the coal business, start with a large fortune." Undeterred, you plunge into the coal business, and you start by identifying the coal *in situ* that you'd like to mine. So, let's strike a lease.

[1] — Essence of Coal Leases — Both a Conveyance and a Contract.

A lease of minerals "is both a conveyance and a contract."[2] Basically, this premise means that a coal or other mineral lease lives in the realm of both real property law and contract law. A lease conveys a possessory interest in a separate estate in land. "A conveyance of the underlying coal, with the privilege of its removal from under the land of the grantor, effects a severance of the right to the surface from the right to the underlying coal, and makes them distinct corporeal hereditaments."[3]

However, in order to obtain the estate in land granted by a lease, the lessee makes promises to perform certain acts, and those promises are enforceable in contract in the courts. The contractual promises made are described as follows. The contractual promises are "designed to accomplish the main purpose of the owner of the land and of the lessee (or its assignee) as operator."[4] To wit, the mineral owner wants his subterranean assets converted into cash through a royalty stream, and the operator wants the legal right to accomplish its essential business purpose — to mine, process, and sell the coal along with the assurance that it has sufficient reserves to return a profit on the investment it has made in the infrastructure in the mine.

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2 Bryan v. Big Two Mile Gas Co., 213 W. Va. 110, 117, 577 S.E.2d 258, 265 (2001). [hereinafter cited as *Bryan*]

3 Wallace v. Elm Grove Coal Co., 58 W. Va. 449, 52 S.E. 485 (1905).

4 *Bryan*.