



News & Types: Commercial, Competition & Trade Update

"Notwithstanding Anything to the Contrary" Language Disputed in Recent Case

8/15/2018

Practices: Commercial, Competition & Trade, Corporate, Finance & Acquisitions, Litigation

Drafters frequently use language such as “Notwithstanding anything [in this section] or [in this agreement]” to emphasize and make clear the importance and priority of the provision that follows. But sometimes the intent is not so clear. Recently, the 7th Circuit Court of Appeals issued an opinion on just this type of language and its interpretation. (*Pronschinske Trust Dated March 21, 1995 v. Kaw Valley Companies, Incorporated, and KC Proppants, LLC*, 7th Circuit Court of Appeals, No. 17-2889, August 10, 2018)

The Pronschinske Trust Dated March 21, 1995 (“Pronschinske”) owned land in Wisconsin that contained frac sand, used in gas and oil fracking operations. In June, 2012, Pronschinske entered into a Mining Lease Agreement (“Lease”) with Kaw Valley Companies (“Kaw Valley”). The Lease gave Kaw Valley the right, but not an obligation, to mine the sand, stone and rock products on the land. Kaw Valley spent approximately \$750,000 in preparing to operate the mine. These costs were incurred for surveys, soil borings, entering into a contract for upgrade of the county highway, and widening the road to the land. Ultimately, Kaw Valley decided not to mine the land and terminated the Lease.

Under separate paragraphs in the Lease, Kaw Valley was to pay Pronschinske payments at various stages. Kaw Valley paid an Initial Royalty Credit of \$20,000 under paragraph 3.

A Commencement Royalty Credit of \$45,000 was to be paid upon commencement of mine or quarry operations under paragraph 5. Kaw Valley did not pay this amount. Both the Initial Royalty Credit and the Commencement Royalty Credit would be used to offset future amounts owed by Kaw Valley to Pronschinske.

The dispute arose over the Production Royalties under paragraph 6. Production Royalties were calculated based on the tonnage mined from the land by Kaw Valley. After describing the calculation of Production Royalties, the following sentence was included in paragraph 6:

“Notwithstanding anything to the contrary contained herein, Lessee shall pay to Lessor an annual minimum Production Royalty of \$75,000.00 (the “Minimum Production Royalty”).

Pronschinske claimed \$400,000 under the Lease as the Commencement Royalty Credit and Minimum Production Royalties by Kaw Valley. Pronschinske's position was to emphasize the “notwithstanding” language. So the Minimum Production Royalty of \$75,000 was to be paid, no matter what.

Kaw Valley argued that the “notwithstanding” language only applied to the Production Royalties under paragraph 6. So once Kaw Valley began mining, it would owe at least \$75,000 per year regardless of the tonnage extracted from the land. But since there was no mining, Kaw Valley did not owe any Minimum Production Royalty.

The Wisconsin district court supported Kaw Valley’s position and granted summary judgment to Kaw Valley. Pronschinske appealed the denial of Minimum Production Royalties (but not the denial of the Commencement Royalty Credit). The Court of Appeals affirmed the district court.

Judge Rovner, the author of the Appeals Court opinion, found several reasons to support Kaw Valley’s interpretation.

First, the placement of the “notwithstanding” sentence was in the middle of paragraph 6 after the tonnage pricing calculation was set forth. So the “herein” in “Notwithstanding anything to the contrary contained herein” referred to paragraph 6, not to the entire agreement.

Second, if the parties intended to provide a minimum payment regardless of mining activity, that would normally be in a separate paragraph.

Third, paragraph 6 provided for a “minimum Production Royalty” and not a “minimum payment.” Judge Rovner even emphasized that “minimum” was not capitalized (although the defined term was “Minimum Production Royalty”). So the “minimum Production Royalty” was a subset of the Production Royalty and, if there was no mining and no Production Royalty, then there was no Minimum Production Royalty. The Minimum Production Royalty set a floor for the Production Royalty and did not set a minimum annual payment regardless of the circumstances.

Fourth, the structure of the Lease supported Kaw Valley’s position and the district court’s summary judgment. The separate payments (Initial Royalty Credit, Commencement Royalty Credit, and Production Royalties) were each set out in separate paragraphs. It would seem that if the intent was to provide for a separate independent payment, regardless of mining activity, the Minimum Production Royalty would also be in a separate paragraph. Judge Rovner called it “nonsensical” to place a minimum payment provision in the middle of a paragraph that concerned only Production Royalties.

Fifth, recall that the Initial Royalty Credit and the Commencement Royalty Credit, totaling \$65,000, would offset payments due Pronschinske by Kaw Valley. If so, the first year’s Minimum Production Royalty would almost entirely be offset by the other credits, a result not even mentioned in paragraph 6. To Judge Rovner, this seemed implausible.

Finally, paragraph 9 of the Lease provided that the royalty payments in paragraphs 6 and 7 “shall be payable based on the removal from (or transportation across) the Property.” There was no exception for the Minimum Production Royalty in paragraph 6. So, to Judge Rovner, it reinforced the conclusion that the Minimum Production Royalty would not apply until there was actual mining activity.

The *Pronschinske* case illustrates the danger of using “notwithstanding” language in an agreement. Usually, the risk is inadvertently overriding another provision in the agreement that should have remained in effect. *Pronschinske* was a different problem. Since there were no provisions in the Lease that related to the

“notwithstanding” language, the Court of Appeals had to focus on the section in which the language appeared. So the lesson is to use “notwithstanding” language carefully, confirm what provisions are being overwritten and whether the “notwithstanding” language is necessary in the particular case.