



# Ohio Supreme Court Shuts Down ODNR Ability to Nullify Surface Damage and Support Waivers

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In reversing the 10th District Court of Appeals<sup>1</sup> and reinstating the trial court's judgment, the Ohio Supreme Court held in [Columbia Gas Transm. L.L.C. v. Ohio Valley Coal Co.](#), Slip Opinion No. 2020-Ohio-6787 that the ODNR did not have the authority to override surface damage waiver rights (or any common law property rights) by regulation.<sup>2</sup> Between this and the [ODNR's own amendment of its regulation](#) to exclude commercial surface structures, the surface owner's regulatory path to seeking compensation for damages from coal undermining appears closed for good.

## Basic Facts

*Columbia Gas* involved a dispute between Columbia Gas Transmission, as the pipeline owner, and Ohio Valley Coal, as coal owner, over whether Ohio's SMCRA, Chapter 1513, overrode surface and support waivers. Columbia Gas sought to recover the cost of the preventive measures it took to protect its pipeline from Ohio Valley's undermining via R.C. 1513.15(H)<sup>3</sup>—there was no pre-mining agreement between the two. Columbia Gas Ohio Valley<sup>4</sup> argued that the surface damage waivers it acquired via its predecessors in title precluded any liability for the damages Columbia Gas sought to recover.<sup>5</sup>

## The trial court agrees the SMCRA overrides damage waivers, but awards no damages:

Though acknowledging that the surface damage waivers technically had priority, the trial court concluded that the Ohio SMCRA overrode those, meaning Ohio Valley was responsible to ensure Columbia Gas's pipeline wasn't damaged from undermining.<sup>6</sup>

However, the trial court refused to award any damages to Columbia Gas because there was no proof of damage from undermining—preventive measure costs were not the same thing.<sup>7</sup>

### **The 10th District agrees, but finds that preventive measures are reimbursable:**

Via cross-appeals, the 10th District Court of Appeals mostly agreed with the trial court, but using the tort doctrine of avoidable consequences, held that Columbia Gas could be compensated for its preventive measures.<sup>8</sup> It should be noted that Columbia Gas did not challenge the validity, scope, or priority of Ohio Valley's surface damage waivers on appeal.<sup>9</sup>

### **The Ohio Supreme Court shuts it all down:**

The Ohio Supreme Court reversed the 10th District and reinstated the judgment of the trial court, finding that there was no need for further determination of damages—Columbia Gas wasn't entitled to any.<sup>10</sup> In support, the Court recounted the history of the Federal and Ohio SMCRA's and the statute that enabled the ODNR to adopt regulations "to meet" the federal requirements: R.C. 1513.02.<sup>11</sup> And while the Court acknowledged that states are often allowed to provide protection greater than that afforded by the federal law, this doesn't apply when it comes at the expense of common law property rights.<sup>12</sup> For an agency to have authority to override common law rights requires the express intention of the legislature, and the phrase directing ODNR "to meet" federal requirements doesn't do this.<sup>13</sup>

*Columbia Gas* expressly does not address the question of a pipeline owner's ability to recover damages from undermining based upon common law rights—i.e. for the surface damages and/or the loss of subjacent support where there isn't a surface damage waiver in the coal severance deed(s). As mentioned, *Columbia Gas* did not challenge the validity of Ohio Valley's surface damage waivers on appeal. See *supra*. It only addresses the ability—or lack thereof—to seek damages via the ODNR regulation. Given that the ODNR amended its regulation to align with the Federal SMCRA and no longer cover commercial surface structures, the holding here does little more than prevent the ODNR from going back to the old language.<sup>14</sup>

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<sup>1</sup> *Columbia Gas Transmission, L.L.C., 2019-Ohio-1004*, 126 N.E.3d 1203 (10th Dist.)

<sup>2</sup> Former Ohio Adm. Code 1501:13-12-03(F), 2010-2011 Ohio Monthly Record 2-1427, effective Oct. 28, 2010.

<sup>3</sup> This section authorized damages by “any person who is injured in person or property through the violation by an [coal mining] operator of any rule, requirement, order, or permit.” Columbia Gas, ¶ 6 (internal citations omitted).

<sup>4</sup> Id. at ¶¶ 5-6.

<sup>5</sup> Id. at ¶ 6.

<sup>6</sup> Id. at ¶ 7.

<sup>7</sup> Id. at ¶ 8.

<sup>8</sup> Id. at ¶ 10.

<sup>9</sup> Id. at ¶ 7.

<sup>10</sup> Id. at ¶ 27.

<sup>11</sup> Id. at ¶ 24.

<sup>12</sup> Id. at ¶ 25.

<sup>13</sup> Id. ¶ 25.

<sup>14</sup> Id. at ¶ 20.

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