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Notwithstanding Anything to the Contrary Contained Herein

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Most written contracts have many moving parts. Sometimes at the end of negotiations, the parties agree on something that might vary from something else they previously agreed to. They drop the new provision into the document, and they want the provision to supersede anything else inconsistent in the document.

In these cases, lawyers often use a phrase like: "Notwithstanding anything to the contrary contained herein." Then they add whatever especially important provision needed a special buildup. This common writing technique invites trouble. It means that the contract might say two different and inconsistent things. The reader might read the wrong one and rely on it, believing that the parties really meant it. By not reading the entire document, the reader might miss whatever provision really governed and superseded the wrong one, the one the reader believed.

The "notwithstanding" phrase can also create a different sort of confusion, as demonstrated in *Pronschinske Trust Dated March 21, 1995 v. Kaw Valley Co*., 899 F.2d 470 (7th Cir. 2018). In 2012 a landowner signed a Mining Lease Agreement with a mining company, allowing but not requiring it to extract various sand, stone, and rock products. The mining company agreed to pay option fees and key money but did not obligate itself to do any mining at all. It could freely abandon the property.

In a paragraph of the agreement dealing with payment, the mining company agreed to pay production royalties based on the amount of materials it extracted. The paragraph that covered production royalties then said: "Notwithstanding anything to the contrary contained herein, Lessee shall pay to Lessor an annual minimum Production Royalty of $75,000." Id. at 472. The paragraph went on to say that if production royalties in a particular year fell short of $75,000, then the mining company would make a catch-up payment at the end of the year.

In 2016, the mining company exercised its right to abandon the property and the agreement. The landowner sued for minimum production royalties for the short life of the agreement. The landowner argued that the "notwithstanding" language in the middle of the production royalties paragraph required the mining company to pay at least $75,000 a year whether or not it mined the land, i.e., the annual catch-up language implied that if, in any year, no mining occurred and as a result the mining company paid zero in production royalties, it would still owe $75,000 per year.

The mining company disagreed. It argued the paragraph on production royalties stood on its own and activated only if the mining company started to mine. Until then, the minimum production royalty never applied.

The dispute boiled down to the sentence that started "Notwithstanding anything to the contrary contained herein," dropped into the middle of the paragraph on production royalties. What did "herein" mean? If it referred to the entire agreement, then the mining company owed $75,000 a year no matter what. But if "herein" referred only to the paragraph on production royalties, in the absence of mining no liability for production royalties ever arose, and thus the mining company had no obligation to pay the minimum production royalty.

The court ruled for the mining company, concluding that "herein" referred only to the paragraph on production royalties. The court emphasized that the "Notwithstanding" sentence appeared in the middle of a long paragraph on production royalties. It wasn't a stand-alone paragraph somewhere else in the agreement: "If the provision was meant to provide a minimum payment due each year on the anniversary of the effective date, one would expect that to be set forth separately." Id. at 473.

The court also noted that another paragraph said production royalties "shall be payable based on the removal [of materials] from . . . the Property." Id. at 474. The "notwithstanding" clause apparently didn't overcome that language. Some other less interesting bits and pieces of the agreement also drove the court's conclusion, and the landowner lost.

This case teaches that "notwithstanding" clauses are lousy tools to use when trying to tie together a contract without creating surprises. The case also demonstrates the perils of the word "herein." "Herein" could refer to anything—the entire agreement, just a paragraph, or just a particular concept within the agreement. It's a lazy way to make a point.

Whenever a lawyer feels tempted to drop a "notwithstanding" clause into an agreement, he should step back and figure out how to make the point correctly, once, and in a way that any reader (i.e., the court) will understand. And if the lawyer still can't resist the temptation, he should at least make it clear what "herein" means. n