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CURRENT ISSUES UNDER THE LOUISIANA LAW OF OIL AND GAS

PATRICK S. OTTINGER†

"The meek shall inherit the Earth, but not its mineral rights."[1]

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1. J. Paul Getty (1892-1976).

I. INTRODUCTION

The issues identified herein as being "current" could just as easily be called today's "Hot Topics in Louisiana Mineral Rights," and, on occasion, your author will so characterize them in the pages that follow.

First, a bit of context and background is in order. As used in the jargon of the industry in Louisiana, the term "mineral rights" is usually understood to mean distinctly a mineral servitude, properly speaking.[2] Hence, it is often said that the "vendor reserved his mineral rights," when it is actually envisioned that a mineral *servitude* was reserved by that seller of land.

For example, the Louisiana Supreme Court in one case noted that, "[o]n March 15, 1926, the Louisiana Central Lumber Company . . . transferred the whole 80,000 acres to the Brown Paper Mill Company, reserving . . . all of the *mineral rights* in the land transferred."[3]

In another case, the court referred to the dispute before it as involving a party's "reserved *mineral rights*," in which the plaintiffs were "seeking a declaratory judgment that the *servitude created by reservations* in the sale included only the right to explore for and exploit oil, gas and kindred minerals and not the right to explore for or strip mine for solid minerals such as lignite."[4]

Finally, another court examined the precursor statute to Article 149 of the Louisiana Mineral Code,[5] describing it as having been "enacted . . . to make imprescriptible mineral servitudes that were created when landowners *reserved mineral rights* in a sale of land to school boards and other named agencies of the state."[6]

With the adoption of the Louisiana Mineral Code, effective January 1, 1975,[7] the term "mineral rights" now embraces three distinct real rights that are classified as incorporeal immovables.[8] In this regard, Article 16 of the Mineral Code provides that the "basic mineral rights that may be created by

---

2. *See* LA. REV. STAT. ANN. § 31:21 (2018) ("A mineral servitude is the right of enjoyment of land belonging to another for the purpose of exploring for and producing minerals and reducing them to possession and ownership."); *see also* Patrick S. Ottinger, *Mineral Servitudes*, *in* LOUISIANA MINERAL LAW TREATISE 99 (Martin, ed., Claitor's Law Books & Publ'n Div., Inc., 2012) [hereinafter Ottinger, *Mineral Servitude Treatise*].

3. Lenard v. Shell Oil Co., 29 So. 2d 844, 845 (La. 1947) (emphasis added).

4. Cont'l Grp., Inc. v. Allison, 404 So. 2d 428, 430 (La. 1981) (emphasis added).

5. LA. REV. STAT. ANN. § 31:149.

6. Anadarko Prod. Co. v. Caddo Par. Sch. Bd., 455 So. 2d 699, 700 (La. Ct. App. 1984) (emphasis added).

7. 1974 La. Acts 1.

8. LA. CIV. CODE ANN. art. 470 (2018) ("Rights and actions that apply to immovable things are incorporeal immovables. Immovables of this kind are such as personal servitudes established on immovables, predial servitudes, mineral rights, and petitory or possessory actions.").

a landowner are the mineral servitude, the mineral royalty, and the mineral lease."[9]

There is yet another mineral right, albeit not characterized by the Code as being "basic," making it somewhat akin to the "Uncola," or the "other white meat" of oil and gas, both of Madison Avenue fame. That is the "executive right," defined in Article 105 of the Code as "the exclusive right to grant mineral leases of specified land or mineral rights."[10]

Mineral Code Article 16 explicitly characterizes the executive right as a mineral right, thus invoking the attributes specified in Article 16 for those interests as being "real rights [that] are subject either to the prescription of nonuse for ten years or to special rules of law governing the term of their existence."[11] Article 18 provides the further characterization of the executive right as being an incorporeal immovable that is alienable and heritable.[12]

Hence, in view of the foregoing, an unnecessarily longer title to this Article might be "Current Issues in Louisiana Mineral Servitudes, Mineral Royalties, Mineral Leases, and Executive Rights," but let's agree to simply stick with the shorter moniker, and just call it "potpourri."[13]

So, we begin our journey, identifying and discussing our "current" topics, followed in each instance with a "Moral of the Story," or "Lessons to be Learned."

II. CURRENT ISSUES INVOLVING MINERAL SERVITUDES

A. Altering a Mineral Servitude's Duration: Fixed Term or Shortening of Prescription?

Louisiana is a civil law jurisdiction, in contrast to Texas and the remaining states that are based in the common law.[14] Accordingly, in Louisiana, it is not possible to own or hold a so-called "mineral estate," as such is incompatible with fundamental principles of the civil law of property, which tend toward certainty and simplicity, and which disfavor the dismemberment or fractionalization of title.[15] Indeed, as long ago as 1853,

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9. LA. REV. STAT. ANN. § 31:16.

10. *Id.* § 31:105; *see* PATRICK S. OTTINGER, LOUISIANA MINERAL LEASES: A TREATISE 800 (Claitor's Law Books & Publ'n Div., Inc., 2016) [hereinafter OTTINGER, LEASES].

11. LA. REV. STAT. ANN. § 31:16.

12. *Id.* § 31:18.

13. THE OXFORD AMERICAN DICTIONARY AND THESAURUS 1165 (Oxford Univ. Press 2003) ("[A] musical or literary medley.").

14. For excellent commentary on the fundamental differences between the two systems of law, see Patrick H. Martin & J. Lanier Yeates, *Louisiana and Texas Oil & Gas Law: An Overview of the Differences*, 52 LA. L. REV. 769, 770–71 (1992).

15. Wemple v. Nabors Oil & Gas Co., 97 So. 666, 668–69 (La. 1923) ("And we therefore conclude that there is in this state no such estate in lands as a corporeal 'mineral estate,' distinct

the Louisiana Supreme Court resisted the introduction or recognition of different regimes of ownership of land, saying, as follows:

> The general idea of property under the Roman Law, and under our system, is that of simple, uniform and absolute dominion. The subordinate exceptions of use, usufruct and servitudes are abundantly sufficient to meet all the wants of civilization, and there is no warrant of law, no reason of policy, for the introduction of any other.[16]

Rather, what one might own with respect to minerals underlying the lands of another, is a "mineral servitude"[17] that is subject to being extinguished if not "used" for a period of ten years.[18] Utilizing a common law notion of "forever," a mineral servitude might actually exist in perpetuity (a term that does not appear in the Louisiana Civil Code), unless ten years elapse without a "use."[19]

However, in one of the few opportunities afforded contracting parties to modify the durational attributes of a mineral servitude, Article 74 of the Louisiana Mineral Code provides:

> Art. 74. Right to fix term or shorten prescriptive period; effect of stipulation for prescriptive period greater than ten years.[20]
>
> Parties may fix the term of a mineral servitude or shorten the applicable period of prescription of nonuse or both. If a period of prescription greater than ten years is stipulated, the period is reduced to ten years.[21]

This limitation on contractual liberality codifies pre-code jurisprudence that disallows the creation or perpetuation of a mineral servitude for more than ten years without operations or production.[22]

---

from and independent of the surface estate; that the so-called 'mineral estate' by whatever term described, or however acquired or reserved, is a mere servitude upon the land in which the minerals lie, giving only the right to extract such minerals and appropriate them.").

16. State v. Ex'rs of McDonogh's, 8 La. Ann. 171, 251 (1853).

17. *See* Ottinger, *Mineral Servitude Treatise*, *supra* note 2, at 107.

18. LA. REV. STAT. ANN. § 31:27(1) (2018) ("A mineral servitude is extinguished by: (1) prescription resulting from nonuse for ten years . . . ."); *see* Ottinger, *Mineral Servitude Treatise*, *supra* note 2, at 107. Louisiana's regime of prescription of nonuse is akin to a sort of statute of limitations, resulting in the termination or extinguishment of rights if no "use" is made of the mineral servitude for the pertinent period of time.

19. *Id.* A "use" of a mineral servitude is the drilling of a well or production. A dry hole can constitute a "use" if it meets the standards for a "good faith operation." *See infra* Section II.B.

20. *Id.* § 31:74.

21. *Id.*; *see* Ottinger, *Mineral Servitude Treatise*, *supra* note 2, at 136.

22. *See, e.g.*, LeBleu v. LeBleu, 206 So. 2d 551, 557 (La. App. Ct. 1967) (holding that an agreement "constitut[ed] a scheme or a device to circumvent or avoid the law and public policy of this state that a mineral servitude will be subject to the prescription of ten years, that contracts which purport to extend such a servitude for a longer period of time without use will not be enforced, and that a party cannot waive or renounce the prescription applicable to a mineral servitude before it has accrued").

If parties "fix the term," the mineral servitude comes to an end upon the accrual of that stated term, even if there then exists an activity that would otherwise perpetuate the servitude.[23]

If, instead, parties merely "shorten the applicable period," the mineral servitude can still be perpetuated by a use accomplished within that shorter period, and so on, but it will thereafter extinguish if the truncated time period accrues without a use.[24]

A few cases in recent years have taken up the issue of whether parties, in availing themselves of this right of "freedom of contract," intended to "fix the term" of the mineral servitude, or to merely "shorten the applicable period of prescription of nonuse."[25]

The case of *St. Mary Operating Co. v. Champagne*[26] was a concursus proceeding that was filed to determine the ownership of proceeds of production allocable to a mineral servitude that had been created "for a period of ten years."[27] As stated by the court, the issue was, as follows: "Under the Louisiana Mineral Code, does the phrase in a cash sale document, 'for a period of 10 years,' create a fixed, ten-year term, not subject to prescription, or is this phrase a reaffirmation of the parties' adoption of the regular ten-year prescriptive period, making it subject to interruption?"[28]

The trial court held that "the reservation clause in the cash sale deed reserved a servitude for a fixed term that was not subject to the rules of prescription."[29] Thus, "it could not be perpetuated beyond ten years by the good-faith exploration for minerals within the ten-year period beginning on the date the servitude was established."[30]

The mineral servitude owners appealed, and the judgment of the trial court was reversed.[31] The appellate court held that "[t]he phrase 'for a period of ten years' was a restatement of the default prescriptive period assumed into all mineral rights created in the State of Louisiana because the parties did not specifically state otherwise."[32] The court further held, as follows:

> The mineral servitude reserved to them in the cash sale deed is still active and valid because the ten-year prescriptive period was

23. OTTINGER, LEASES, *supra* note 10, at 179–80.
24. *Id.* at 179.
25. *Id.*
26. St. Mary Operating Co. v. Champagne, 945 So. 2d 846 (La. Ct. App. 2006).
27. *Id.* at 847; *see* OTTINGER, LEASES, *supra* note 10, at 1317–18 (explaining that a "concursus proceeding" is essentially an interpleader, brought by a stakeholder to judicially resolve competing claims to money or property).
28. *St. Mary Operating*, 945 So. 2d at 848.
29. *Id.*
30. *Id.*
31. *Id.* at 847–48.
32. *Id.* at 851.

> interrupted when mining activities began in March of 2003, within ten years of its creation on June 22, 1993. Accordingly, the mineral servitude will continue to exist until there is a ten-year lapse in the use of the servitude.[33]

At dispute in *Moffett v. Barnes*,[34] was whether a mineral servitude was subject to a ten-year term that was "fixed."[35] The plaintiffs owned two tracts of land that they purchased from the defendants.[36] The act of sale stated, "Vendor retains all oil, gas and other mineral rights in the land herein conveyed for ten (10) years."[37] The defendants granted mineral leases covering the tracts, and the lessees drilled and established production on each tract before the tenth anniversary of the plaintiffs' purchase of the land.[38]

The plaintiffs argued that the act of sale's statement that the defendants retained mineral rights "for ten (10) years" established a ten-year fixed term.[39] Accordingly, the plaintiffs posited that the mineral servitudes terminated on the tenth anniversary of the act of sale, regardless of the existence of production.[40]

The trial court disagreed, ruling that the servitudes were not subject to a fixed term, and that prescription had been interrupted by drilling operations conducted, and production obtained, by the defendants' lessees.[41]

Affirming, the appellate court stated that the act of sale's reservation "merely confirm[ed] the normal 10-year limit for a servitude, and does not reject or renounce the normal operation of nonuse and interruption provided by the law."[42] The court rejected the plaintiffs' contention that they should have been allowed to present evidence regarding the intent of the parties, stating that the act of sale was unambiguous, and therefore evidence of intent was not appropriate.[43]

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33. *Id.*
34. Moffett v. Barnes, 149 So. 3d 475 (La. Ct. App. 2014).
35. *Id.* at 476.
36. *Id.* at 475.
37. *Id.*
38. *Id.* at 475–76.
39. *Id.* at 477.
40. *Id.* at 476; *see also* LA. REV. STAT. ANN. § 31:27(4) (2018) ("A mineral servitude is extinguished by . . . [the] expiration of the time for which the servitude was granted . . . ."); Ottinger, *Mineral Servitude Treatise*, *supra* note 2, at 107–08 (discussing section 31:27(4)).
41. *Moffett*, 149 So. 3d at 476.
42. *Id.* at 478.
43. *Id.*; *see also* OTTINGER, LEASES, *supra* note 10, at 80–83 (discussing the "parol evidence exclusionary rule").

Taylor v. Morris[44] is a case with facts very similar to those presented in *Moffett*.[45] However, it was decided by a different panel of the same appellate court.

This panel similarly held that an act of sale referring to a "period of ten (10) years" did not establish a fixed term, but instead merely referred to the law's default prescriptive period.[46]

Notably, one judge submitted a concurring opinion stating that, under the court's decision, "the literal words for a term period of years are being avoided and effectively interpreted out of the contract,"[47] but that such a result was justified "[i]n this unusual setting."[48]

The concurring judge identified two conceivable interpretations in cases under Article 74, one being the "Prescription Construction" ("the presumption that the parties were only referring in their contract to such normal prescription"),[49] and the other being the "Literal Construction" ("words as literally expressing a term that could extinguish the servitude.").[50] He ordained the former as the "priority construction," saying, as follows: "However, in the absence of such clarifying extrinsic evidence, I would hold that the near absurdity of a fixed-term mineral servitude on land, undeveloped for oil and gas, should make the Prescription Construction the priority interpretation which a court should apply."[51]

While this approach would certainly be workable, it is discordant with case law that suggests that, in case of two possible constructions, the court should adopt that interpretation that tends to unburden the land.[52] In a close case, the rule of interpretation is that "[d]oubt as to the *existence, extent, or manner of exercise* of a predial servitude shall be resolved in favor of the servient estate."[53]

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44. Taylor v. Morris, 150 So. 3d 952 (La. Ct. App. 2014).

45. *Compare Taylor*, 150 So. 3d at 953–54 (discussing a case in which plaintiffs purchased land subject to a reservation of a mineral servitude and sought a declaration that the mineral servitude expired by operation of a ten-year fixed term found in their deeds), *with Moffett*, 149 So. 3d at 475–76 (examining a case in which plaintiffs purchased land subject to a reservation of a mineral servitude and sought a "declaratory judgment as to the ownership of the minerals" after ten years had passed).

46. *Taylor*, 150 So. 3d at 958.

47. *Id*. at 959 (Caraway, J., concurring).

48. *Id.*

49. *Id.* at 960.

50. *Id.*

51. *Id.* at 961.

52. *See, e.g.*, Whitehall Oil Co. v. Heard, 197 So. 2d 672, 678 (La. Ct. App. 1967) ("Ultimately, we conclude that, where the instrument could as reasonably be interpreted either way, the proper interpretation is that which least restricts the ownership of the land conveyed, as in the case of mineral servitudes.").

53. LA. CIV. CODE ANN. art. 730 (2018) (emphasis added).

The principal consequence of the fixing of a term is that any mineral lease granted by such servitude owner would concomitantly come to an end, regardless of the existence of a well situated on the servitude tract. This is an illustration of the important doctrine of "conditional title."[54]

Moral of the Story—Lessons to be Learned

If a party avails itself of one of the limited opportunities in the Mineral Code to contractually alter the intrinsic features of a mineral servitude, the scrivener should take care to express clearly the intention of the parties—that is, to expressly state whether the servitude is being subjected to a strict, fixed term, or that the prescription period is being shortened (remaining subject to the usual rules of use).[55]

If, for example, parties to a mineral servitude wish to use a six-year period rather than the default period of ten years, this could be accomplished by including language as simple as one or the other of the following alternative constructs, viz.:

> It is the intention of the parties that the prescriptive period is shortened to six years, but is otherwise subject to the usual rules of nonuse.
>
> OR
>
> It is the intention of the parties that the reserved mineral servitude is subject to a fixed term of six years.

B. Interruption of Prescription by Good Faith Operations: Is the Test Objective or Subjective?

Article 29 of the Mineral Code specifies that a "dry hole" may interrupt prescription if it meets the following requirements for a "good faith operation,"[56] to-wit:

> The prescription of nonuse running against a mineral servitude is interrupted by good faith operations for the discovery and production of minerals. By good faith is meant that the operations must be
>
> (1)commenced with reasonable expectation of discovering and producing minerals in paying quantities at a particular point or depth,
>
> (2)continued at the site chosen to that point or depth, and

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54. *See* LA. REV. STAT. ANN. § 31:117 (2018) ("A mineral lease may be granted by the owner of an executive interest whose title is extinguished at a particular time or upon the occurrence of a certain condition, but it terminates at the specified time or on occurrence of the condition divesting the title."); *see also* OTTINGER, LEASES, *supra* note 10, at 177 (discussing section 31:117).

55. *See* Ottinger, *Mineral Servitude Treatise*, *supra* note 2, at 136.

56. *See* LA. REV. STAT. ANN. § 31:29.

(3)conducted in such a manner that they constitute a single operation although actual drilling or mining is not conducted at all times.[57]

To be noted is that the requisites for "good faith" are expressed in the conjunctive, such that each distinct element must be satisfied. While elements (2) and (3) are essentially "mechanical," and are easily discerned as having been met or not, element (1) is different in character in that it requires an evaluation of the *reasonableness* of the *expectation* of the party using the servitude.[58]

Concerning the element of "reasonable expectation" on the part of the party drilling the well, is this to be adjudged on an "objective" or a "subjective" basis? A recent case considered, but did not resolve, this issue.

In *Indigo Minerals, LLC v. Pardee Minerals, LLC*,[59] a mineral servitude was created on 8,000 acres in December 1971; only four sections were at issue in the suit.[60]

Wells were drilled on the lands burdened by the servitude in 1980, 1989, and 1998.[61] While all of the wells were dry holes, of particular relevance was the Famcor Well that was spud on December 4, 1998; drilled to a total depth of 3,563 feet before being plugged and abandoned as a dry hole on December 15, 1998.[62]

The surface owner, and the owner of a servitude that it later created in 2006, challenged the continued viability of the 1971 mineral servitude.[63] In particular, the plaintiffs contested whether two of the dry holes, albeit timely commenced, constituted "good faith operations," as contemplated by Article 29 of the Mineral Code.[64]

Defendants offered expert testimony establishing that the wells in question were drilled with a "reasonable expectation," based essentially on a geological evaluation from distant or remote fields in which production had been obtained—in other words, objective evidence.[65] Defendants did not demonstrate that the wells in the remote fields (in some cases, several

57. *Id.*

58. *See id.* § 31:42 ("Except as provided in Articles 44 through 52, use of a mineral servitude must be by the owner of the servitude, his representative or employee, or some other person acting on his behalf."); *see also* Ottinger, *Mineral Servitude Treatise*, *supra* note 2, at 121 (discussing section 31:42).

59. Indigo Minerals, LLC v. Pardee Minerals, LLC, 37 So. 3d 1122 (La. Ct. App. 2010). In the interest of full disclosure, your author represented the plaintiff in this suit.

60. *See id.* at 1124.

61. *Id.* at 1124–25.

62. *Id.* at 1125.

63. *Id.* at 1124.

64. *See id.* at 1125.

65. *See id.* at 1126.

parishes distant from the tracts involved) were geologically relevant or correlative to the lands in dispute.

Plaintiffs presented deposition testimony and documentary evidence that the driller "had evidence and knowledge in its possession at the time of the drilling of its well which demonstrated that production in the shallower formations was not expected."[66] That is to say, subjective evidence was presented in support of the parties challenging the continued existence of the mineral servitude.

After extensive discovery, cross motions for summary judgment were filed and the trial court granted the defendants' motion for summary judgment and denied the motion by plaintiffs.[67] On appeal, the Second Circuit Court of Appeal reversed the defendants' motion for summary judgment, finding the existence of issues of fact that precluded its entry.[68] At issue was whether the "reasonable expectation" standard of Article 29 is to be evaluated objectively or subjectively.[69] Writs were denied by the Louisiana Supreme Court,[70] and because the case was a reversal of a summary judgment and not a decision on the merits, the resolution of this important issue awaits another day.

Subsequent to this decision reversing summary judgment, certain parties (including the named plaintiff) settled and were dismissed, but the case was ultimately tried by the remaining parties who did not settle. On February 1, 2017, the jury found that the Famcor Well, drilled in December 1998, was not "a good faith operation for the discovery and production of minerals." Since the jury accepted the plaintiffs' subjective evidence, the case is not authority for the proposition that objective evidence would never be considered. As of the date of this Article, the case is not yet final.

Moral of the Story—Lessons to be Learned

Issues not completely resolved, given the procedural context of the case, are the following:

- Whether the "reasonable expectation" standard of Article 29 is to be evaluated objectively or subjectively.[71]

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66. *Id.* at 1127.
67. *Id.* at 1126.
68. *Id*. at 1132 ("As to both the Sutton Well and the Famcor Well, there are genuine issues of material fact as to the reasonable expectation, at the time the wells were commenced, of discovering and producing minerals in paying quantities at the levels to which the wells were drilled.").
69. *Id.* at 1128.
70. *See, e.g.*, Indigo Minerals, LLC v. Pardee Minerals, LLC, No. 210-C-1677, 2010 La. LEXIS 2304 (La. Ct. App. Oct, 8 2010).
71. *See* Ottinger, *Mineral Servitude Treatise*, *supra* note 2, at 114.

- Whether there is a presumption of good faith applicable to the activities of the servitude owner.[72]
- Who has the burden of proof as to compliance with the standards of Article 29?[73]

C. Liability of Servitude Owner for Damages to Land

While the legal right to drill a well on a particular tract of land is indisputably granted by a mineral servitude,[74] and although a landowner may drill a well on his own land in his own right,[75] wells in search of oil and gas are rarely drilled on such a basis. Rather, as was aptly observed by one court: "Not one landowner in a hundred develops his own land. Even if he should be financially able to do so, not being in the oil business, he would not care to assume the risk. The usual and almost universal custom is to lease the land to an oil operator."[76]

But whether a well is drilled by a mineral lessee or the mineral servitude owner, the Mineral Code recognizes a certain affirmative restoration duty as being owed by the latter to the surface owner. Thus, Article 22 of the Mineral Code provides, as follows:

> The owner of a mineral servitude is under no obligation to exercise it. If he does, he is entitled to use only so much of the land as is reasonably necessary to conduct his operations. He is obligated, insofar as practicable, to restore the surface to its original condition at the earliest reasonable time.[77]

Case law is instructive in this regard. For example, in *Dupree v. Oil, Gas & Other Minerals, Inc.*, a suit for damages to growing crops, roads, and culverts was brought by the surface owner against the lessors of a mineral

72. Early cases seem to suggest that the servitude owner who demonstrates the timely existence of a dry hole, is entitled to a "presumption of good faith." Lynn v. Harrington, 192 So. 517, 519 (La. 1939) ("Taking all these things into consideration along with the legal presumption of good faith . . . ."); *see also* Keebler v. Seubert, 120 So. 591, 592 (La. 1929) ("There is nothing justifying the conclusion that the operations were not conducted in good faith."); Kellogg Bros. v. Singer Mfg. Co., 131 So. 2d 578, 580 (La. Ct. App. 1961) ("Without denying the existence of the presumption [of good faith] . . . ."). This author does not believe these cases remain authoritative for this proposition.

73. *See* Ottinger, *Mineral Servitude Treatise*, *supra* note 2, at 121–23.

74. *See* LA. REV. STAT. ANN. § 31:21 (2018); *see also* Ottinger, *Mineral Servitude Treatise supra* note 2 and accompanying text.

75. *See* LA. CIV. CODE ANN. art. 490 (2018) ("Unless otherwise provided by law, the ownership of a tract of land carries with it the ownership of everything that is directly above or under it. The owner may make works on, above, or below the land as he pleases, and draw all the advantages that accrue from them, unless he is restrained by law or by rights of others.").

76. Mohawk Oil Co. v. Layne, 270 F. 851, 854–55 (W.D. La. 1921).

77. LA. REV. STAT. ANN. § 31:22.

lease, and their lessee.[78] After the lessee filed for bankruptcy, the lessee was dismissed by the plaintiff following the joinder of the owners of the mineral servitude.[79]

The trial court granted motions for summary judgment filed by the servitude owners on the basis that, following the execution of a mineral lease, the lessee, as the only party entitled to explore for and produce minerals, is the only party that may be liable for surface damages.[80]

At issue on appeal was the liability of a mineral servitude holder to the surface owner for damages caused by the former's mineral lessee.[81] The appellate court refused to excuse the servitude owners from the statutory obligation to restore the surface imposed by Article 22.[82] The court reasoned that the servitude owners benefited from the lessee's activities, which interrupted the running of prescription on the servitude only several months before its extinguishment.[83]

Moreover, the court noted that the mineral lease expressly obligated the lessee to indemnify the lessors for claims by the landowner, and the court refused to allow the servitude owners to benefit from the interruption of prescription while avoiding the obligations of Article 22 of the Mineral Code.[84] Thus, by reversing the summary judgment in favor of the servitude owners, the court held that an owner of a mineral servitude may be liable for damages to the surface of land burdened by a mineral servitude that were caused by its lessee.[85]

Another court, reversing the trial court's grant of an objection of prematurity, found "nothing in the mineral code that requires a landowner to wait until completion of all mineral production before he can bring a suit to enforce the mineral servitude's restoration obligations."[86]

Moral of the Story—Lessons to be Learned

To the real estate practitioner: Did your client assume that the ownership of a mineral servitude could only be a positive thing, an asset of potential value? Was your client informed of the potentially significant—dare one say,

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78. Dupree v. Oil, Gas & Other Minerals, Inc., 731 So. 2d 1067, 1068–69 (La. Ct. App. 1999).
79. *See id.*
80. *Id.* at 1069.
81. *Id.* at 1068.
82. *Id.* at 1071.
83. *Id.*
84. *See id.*
85. *Id.*
86. Crooks v. La. Pac. Corp., 155 So. 3d 686, 688 (La. Ct. App. 2014).

catastrophic—circumstance arising out of the ownership of a mineral servitude?

Inasmuch as many mineral servitudes are held by parties who were formerly owners of the land, but who have sold the land and created a mineral servitude by reservation in the sale, the implications on the "servitude owner" could be quite extreme. In other words, a servitude owner is not always—perhaps is virtually never—a Fortune 500 company, but is an individual, a married couple, or the proverbial "Mom and Pop." He or she who is, at one moment, the owner of the land, becomes, after the closing of the transaction, the owner of a mineral servitude (and no longer a landowner), and probably is one who was not educated or informed by the closing lawyer as to the potential consequences or exposure to the owner of the surface.

A lawyer representing a vendor of land, in which a mineral servitude is created by reservation in favor of that lawyer's vendor client, should advise the soon-to-be servitude owner of the potential for restoration liability.

When the servitude owner grants a mineral lease, it should endeavor to exercise its right of "freedom of contact" so as to create a contractual undertaking in its favor whereby the lessee expressly obligates itself to protect the lessor by assuming its obligations to the surface owner under Article 22 of the Mineral Code, and indemnifying the lessor-servitude owner from any claims by the surface owner.[87]

Another "current" issue is the temporal meaning of "original condition" as used in the last sentence of Article 22 of the Mineral Code, quoted above. That is to say, to what point in time is the land's condition to be evaluated if E&P operations had occurred, and had been ongoing, for a period of time *prior* to the establishment of the mineral servitude?

A recent trial court ruling indicates that the servitude owner's responsibility "to restore the surface to its original condition" means the condition of the property at the creation of the servitude—and not the property's condition prior to the conduct of operations.[88]

In *Sterling Sugars Inc. v. Amerada Hess Corp.,* E&P operations on the subject property had been underway and occurring more than forty years before a mineral servitude was created in 1979.[89] Clearly, the condition of the property in 1979 was significantly different than the land's condition prior to the first conduct of drilling operations on the burdened land decades before.

87. *See* OTTINGER, LEASES, *supra* note 10, at 115–20 (discussing the principle of "freedom of contract").

88. Amended Reasons for Judgment, Sterling Sugars Inc. v. Amerada Hess Corp., No. C-100091 (17th Judicial Dist. Mar. 30, 2017).

89. PXP Gulf Coast LLC and PXP La. LLC's Memorandum at 2, Sterling Sugars Inc. v. Amerada Hess Corp., Docket No. C-100091 (17th Judicial Dist. Mar. 30, 2017).

The plaintiff landowner sued the present mineral servitude owner in 2012, and argued that, under Article 22, the servitude owner was required to restore the property to its "original condition" as of the 1930s—before the commencement of oil and gas operations.[90]

The court rejected this argument, concluding that "the phrase 'original condition' in Article 22 is tied to the exercise of a servitude and means the condition in which it was originally found by the servitude owner immediately before the servitude is exercised."[91]

D. Imprescriptible Minerals Arising Out of Expropriation

On first blush, amendatory legislation in 2012[92] would not seem to have much relevance as a "current" issue in the Louisiana law of oil and gas, or mineral rights, in that it amends certain sections of Title 19 of the Revised Statutes, Expropriation, including (relevant for our immediate purposes) Section 2 that identifies the types of juridical persons enjoying the power of expropriation.[93]

This Act made numerous procedural and other changes to the law of expropriation, including a change to the so-called "*St. Julien* Doctrine,"[94] but for our immediate purposes, your author deems it appropriate to highlight only one change made to the statute.

Signed by the Governor on June 11, 2012, Act No. 702 amended Louisiana Revised Statutes Section 19:2 so as to expand the "created for" standard of eligibility for the right to expropriate, in order to now include a legal entity that is "engaged in" certain specified activities.[95]

We must first digress. Article 149 of the Louisiana Mineral Code deals with a mineral servitude that is not subject to the prescription of non-use. Basically, if land is acquired by an "acquiring authority," and the vendor reserves minerals in such transaction, the "prescription of the mineral right is interrupted as long as title to the land remains with the acquiring authority,

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90. *Id.*

91. Amended Judgment at 1, Sterling Sugars Inc. v. Amerada Hess Corp., No. C-100091 (17th Judicial Dist. Mar. 30, 2017).

92. 2012 La. Acts 2921.

93. *See id.* at 2921–23. Expropriation in Louisiana-speak is condemnation or eminent domain in Texas jargon.

94. Taking its name from the decision in *St. Julien v. Morgan Louisiana & Texas R.R. Co.*, 35 La. Ann. 924 (La. 1883), *overruled by Lake, Inc. v. Louisiana Power & Light Co.*, 330 So. 2d 914, 917(La. 1976), this doctrine stands for the proposition that a landowner who acquiesces in the installation of facilities on its property by a party having the power of expropriation forfeits the right to demand the removal of the facilities and is relegated to a claim for money damages. This doctrine is now codified at section 19:14 of the Louisiana Statutes Annotated. LA. REV. STAT. ANN. § 19:14 (2018).

95. 2012 La. Acts 2923.

or any successor that is also an acquiring authority."[96] As stated, these are euphemistically called "imprescriptible minerals,"[97] and constitute a statutory innovation dating back to the acquisition of vast quantities of lands in the '30's and '40's in connection with public works projects. The statutes were intended to put Louisiana landowners on par with their Texas counterparts who had the ability—not enjoyed in Louisiana—to create a perpetual mineral estate.[98]

As defined in Article 149, an "acquiring authority" includes, in addition to the Federal and State governments (and certain political subdivisions thereof), "any legal entity with authority to expropriate or condemn, except an electric public utility acquiring land without expropriation."[99]

Louisiana Revised Statutes Section 19:2 specifies the types of "legal entities with authority to expropriate or condemn,"[100] and, hence, clarifies which non-governmental legal entities would constitute an "acquiring authority" as envisioned by Mineral Code Article 149.[101]

Prior to this legislation in 2012, those juridical persons included certain entities that were "created for" certain specific purposes, *e.g.*, the construction of railroads, toll roads, or navigation canals; the construction and operation of street railways, urban railways, or inter-urban railways; the construction or operation of waterworks, filtration and treating plants, or sewerage plants to supply the public with water and sewerage; the piping and marketing of natural gas for the purpose of supplying the public with natural gas; the purpose of transmitting intelligence by telegraph or telephone; the purpose of generating, transmitting and distributing or for transmitting or distributing electricity and steam for power, lighting, heating, or other such uses, and piping and marketing of coal or lignite in whatever form or mixture convenient for transportation within a pipeline.[102]

In view of the foregoing, prior to 2012, it was both necessary and sufficient to examine the organizational papers of a legal entity involved in such a transaction, a legal entity being a vendee in a sale of land wherein the vendor reserves a mineral servitude, in order to determine with certainty if

96. LA. REV. STAT. ANN. § 31:149(B) (2018).

97. *Id.* One should note the inconsistent terminology employed in Article 149. In one instance, reference is made to the servitude's "imprescriptibility" – that is, that it is *not* subject to prescription at all. In another instance, it states that the "prescription of the mineral right is interrupted as long as title to the land remains with the acquiring authority, or any successor that is also an acquiring authority," a formulation suggestive of the notion that it is afflicted with prescription.

98. Wemple v. Nabors Oil & Gas Co., 154 La. 483, 490 (1923).

99. LA. REV. STAT. ANN. § 31:149.

100. *See* LA. REV. STAT. ANN. § 19:2 (2014).

101. LA. REV. STAT. ANN. § 31:149.

102. LA. REV. STAT. ANN. § 19:2.

the legal entity had been "created for" any of the purposes enumerated in Louisiana Revised Statutes Section 19:2.

As noted, Act No. 702 of 2012 expanded the "created for" standard of eligibility for the right to expropriate, to now include a legal entity that is "engaged in" the specified activities.[103]

Thus, if a corporation was created "for any lawful business or activity,"[104] or if a limited liability company was organized "for any lawful purpose,"[105] and was not "created for" one of the enumerated purposes, but is in fact "engaged in" certain specified activities, a reservation of a mineral servitude in a sale to such entity might be imprescriptible.

Here is where the situation gets a bit unclear or complicated. Prior to the adoption of these amendments to the expropriation law, when the standard was simply whether the entity was "created for" a stated purpose, a title examiner had the actual ability to scrutinize the organizational articles,[106] and make a determination as to whether the vendee was an "acquiring authority,"[107] and hence, to determine if the vendor's mineral servitude was or was not subject to prescription.

Now that the touchstone for the power of condemnation has been expanded to include an entity that is "engaged in" those specified activities, even if the entity is not explicitly "created for" such purpose, this gives rise to a factual matter *not* reflected by the public records and would seemingly require an inquiry as to the activities in which the entity is or has been "engaged."

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103. *Id.* Although section 19:2(11) describes an entity having the right to expropriate as "[a]ny domestic or foreign corporation, limited liability company, or other legal entity *engaged in* any of the activities otherwise provided for in this Section," this subsection, by its explicit terms, does not reach or apply to corporations or partnerships. (emphasis added); *see supra* text accompanying note 97.

104. LA. REV. STAT. ANN. § 12:1-301 (2018) ("Every corporation incorporated under this Chapter has the purpose of engaging in any lawful business or activity unless a more limited purpose is set forth in the articles of incorporation.").

105. *Id.* § 12:1302 ("A limited liability company may be organized under this Chapter and may conduct business for any lawful purpose, unless a more limited purpose is stated in its articles of organization.").

106. The Model Business Corporation Act, effective January 1, 2015, has eliminated the requirement, under prior law, that the articles be filed in "the office of the recorder of mortgages of the parish in which the registered office of the corporation is located." LA. REV. STAT. ANN. § 12:25 (repealed 2015). However, the articles would be available in the office of the Secretary of State. LA. REV. STAT. ANN. § 12:1-123 (2018).

107. *See* Calcasieu & S. Ry. v. Bel, 69 So. 2d 40, 42 (La. 1953) ("The plaintiff *by its charter* is an organization constituted under the laws of this state for the construction of a railroad, and is thus a corporation to which this article gives the right of expropriation.") (emphasis added); Tex. E. Transmission Corp. v. Terzia, 138 So. 2d 874, 875–76 (La. Ct. App. 1962) (rejecting an argument that the plaintiff-corporation failed to prove it had right of expropriation, calling such an argument "so technical and unreasonable as to hardly be worthy of consideration"); Cent. La. Elec. Co. v. Pugh, 96 So. 2d 523, 525–26 (La. Ct. App. 1957).

And worse, the acquisition in question might be for purposes unrelated to the statutory activity, but if that entity is "engaged in" a prescribed activity in another parish or state (unrelated to the transaction at hand), is that sufficient to bring that transaction within the ambit of Article 149 so as to make the reserved servitude imprescriptible? Nothing in the new formulation requires that the land purchase (with attendant reservation of a mineral servitude) actually be effectuated in connection with a qualifying activity in which the vendee is then "engaged."[108]

In other words, a corporation or LLC "created for" the generic purpose of engaging in "any lawful" activity or purpose might actually be "engaged in" a qualifying activity in Bossier Parish, and thereby might enjoy the power of expropriation in Terrebonne Parish, even though its activities in that latter parish (some 300 miles away) are unrelated to the conduct of "engaging in" the specified activity.

So, if one is examining title to land in that southern parish, and finds that the vendee purchased property in a deed in which the vendor reserved minerals, is the mineral servitude prescriptible or not? What inquiry must the title examiner make in order to ascertain the status or character of the reserved mineral servitude?[109]

Admittedly, the concern expressed herein might be assuaged somewhat by the requirement that the "instrument or judgment shall reflect the intent to reserve or exclude the mineral rights from the acquisition *and their imprescriptibility as authorized under the provisions of this Section* and shall be recorded in the conveyance records of the parish in which the land is located."[110]

If there is no reference in the deed to the minerals' "imprescriptibility as authorized under the provisions of this Section," the inquiry should end there. This conclusion is reinforced by the code requirement that the "provisions of this Chapter shall not apply to . . . [a] transfer in which the acquiring authority neither expressly reserves or excludes nor conveys to the transferor a mineral right otherwise subject to prescription."[111]

However, even with compliance with this requirement, it is still necessary to inquire into the underlying facts so as to determine that the vendee is in fact an "acquiring authority" by reason of the circumstance that

108. Seemingly, a large, multi-national, publicly-traded corporation might be "engaged in" the piping of natural gas in North Dakota, but not in Louisiana, and thereby qualify as an "acquiring authority" for purposes of Article 149.

109. There are sixty-four parishes in Louisiana. *See About Louisiana*, LOUISIANA.GOV, http://louisiana.gov/Explore/About_Louisiana/ [https://perma.cc/Z845-AVJQ] (last visited June 13, 2018).

110. LA. REV. STAT. ANN. § 31:149 (2018) (emphasis added).

111. *Id.*

the vendee, while not "created for" a certain purpose, has "engaged in" a prescribed activity.

Said differently, merely stating in the deed or judgment that the reserved minerals are "imprescriptib[le] as authorized under the provisions of . . . [Article 149]," does not make it so, unless it is actually so as a factual matter, compliant with the strictures of the relevant article.[112] "Bootstrapping" is not allowed here. This legislation creates an unnecessary burden on a title examiner, and thus results in significant and unnecessary potential uncertainty in the law.

Moral of the Story—Lessons to be Learned

While important, the issue is admittedly academic until 2022 which is ten years after the 2012 amendment, followed by the creation of a qualifying servitude. So, mark your calendar for then! It will be here before you know it.

If the mineral servitude has been used, the issue will still remain academic, but if the servitude is not used within ten years of its post-amendment creation, in a sales transaction confected after August 1, 2012, it would be necessary to ascertain if the servitude is imprescriptible by reason of having been created in a sale of land to an "acquiring authority" that has been "engaged in" a qualifying activity.

E. Right of Servitude Owner Under Non-Compliant Reservation

Article 11 of the Mineral Code was amended in 2006 to add Section B, requiring that language be included in a sale of land in which minerals are reserved, to essentially alert the vendee, as the new landowner subject to the vendor's reserved mineral servitude, of the rights of the servitude owner to utilize the surface of the land.[113] This requirement only applies to a mineral servitude created by reservation, but does not control if the servitude is created by grant.[114] Subsection B(2) of the Article sets forth a "safe-harbor" clause that might be included to accomplish the intent of the Article.

As noted, Article 11B makes no mention whatsoever of the consequences of a failure to comply with the new requirement. Does non-

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112. *Id.*

113. *See* 2006 La. Acts 1828; *see also* LA. REV. STAT. ANN. § 31:11 (2018) ("A reservation of mineral rights in an instrument transferring ownership of land must include mention of surface rights in the exercise of the mineral rights reserved, if not otherwise expressly provided by the parties.").

114. *See* LA. REV. STAT. ANN. § 31:15 ("A landowner may convey, reserve, or lease his right to explore and develop his land for production of minerals and to reduce them to possession.").

compliance with the textual requirements of Article 11 mean that the reserved mineral servitude is not valid? Or might it mean that, while valid, no operations may be conducted on the surface of the burdened land?

If the vendor-servitude owner may not, for that reason, conduct operations on the surface of the burdened tract, may its lessee do so? Must the servitude owner or its lessee seek consent of the landowner to conduct operations? That this might be a concern to the lessee of such vendor is supported by the observation that one may not grant greater rights to another than it itself owns.[115]

Moral of the Story—Lessons to be Learned

Any requirement that the servitude owner, or its lessee, must seek the permission or consent of the landowner to operate on the servitude tract is totally contrary to the essential nature of a mineral servitude, which is that the servitude owner may conduct operations on the burdened land *without the need to secure the consent of the landowner*.[116] Indeed, the servitude itself constitutes the authority to enter the land and drill a well because that is its inherent purpose.

In the view of your author, the 2006 amendment to Article 11 was nothing more than "feel good" legislation. This author's personal preference would be to repeal and remove that amendment, restoring Article 11 to its original verbiage, but if not, one should be mindful of the need to comply with this requirement in the preparation of a sale deed in which minerals are reserved.[117]

III. CURRENT ISSUES INVOLVING MINERAL ROYALTIES

A. "Royalty Acres"

"A mineral royalty is the right to participate in production of minerals from land owned by another or land subject to a mineral servitude owned by another."[118] In contrast to a mineral servitude, a mineral royalty is a passive

115. *See* OTTINGER, LEASES, *supra* note 10, at 148–49 (discussing authority supporting the proposition that a party cannot grant, lease or convey any greater rights than it holds or owns).

116. *Id.* at 196; *see*, *e.g*., Peabody v. Weeks, 129 F.3d 608 (5th Cir. 1997) ("[T]he [trial] court found that Weeks had impermissibly interfered with the mineral owners' reasonable use of the land to reach their minerals, and that their actions were 'plainly contrary to the fundamental tenets of the Louisiana Mineral Code.'").

117. OTTINGER, LEASES, *supra* note 10, at 195.

118. LA. REV. STAT. ANN. § 31:80; *see* Ottinger, *Mineral Servitude Treatise*, *supra* note 2, at 153.

right, conferring on its holder the right to receive revenue in case production is obtained through the efforts and capital of others.[119]

Although it is more typically brought about by a sale of a mineral royalty, called a "Royalty Deed," a mineral royalty may certainly be created by reservation.

A recurring, but regrettable, occurrence in connection with the sale of a mineral royalty is the use of the term "royalty acres." This typically reads: "Grantor is hereby conveying twenty-two royalty acres."

In the event of production, the interest in production to which a royalty owner is due is calculated by the operator, and is customarily expressed in decimals.[120] The accepted formula to calculate a royalty interest in decimals, if one knows the number of royalty acres and the total number of acres in a tract of land, is to divide the royalty acres by the total acreage, and multiply by one-eighth (1/8).[121] However, if the number of acres is shown to be inaccurate by a later survey, the royalty interest will necessarily change, thus arguably not effectuating the intention of the parties.[122]

Courts have recognized that "the term [royalty or] mineral acres has usage in the oil industry but does not have a simple definite meaning which is easily understood by a person who has little or no experience in the field of minerals."[123] The uncertainty of the meaning of this term often leads to conflict, in the event of production, and certainly to the need to undertake curative efforts or the institution of a concursus proceeding.[124]

The term "royalty acres" is often used as a "rule of thumb" basis to calculate the purchase price for the mineral royalty, such as "$200 per royalty acre."[125]

Even if the term is understood by the contracting parties (which is unlikely), if it is determined that the tract involved is of a different size than the parties anticipated or believed it to be, problems may occur.[126] Certainly, the expectation of one party or the other will not be achieved.[127]

Yet another problem is presented when the reservation of a mineral royalty in the sale of land states that the "vendor reserves *all* mineral

119. Spiner v. Phillips Petroleum Co., 94 F. Supp. 273, 277 (W.D. La. 1950).

120. Patrick S. Ottinger, *A Dozen (or so) Oil and Gas Issues and Other Tidbits of Interest to the Real Estate Lawyer* 28–29, Lafayette Bar Association CLE by the Hour (Dec. 15, 2017) [hereinafter Ottinger, *Oil and Gas*].

121. *Id.* at 29.

122. *Id.*

123. Light v. Crowson Well Serv., Inc., 313 So. 2d 803, 806 (La. 1975).

124. Ottinger, *Oil and Gas*, *supra* note 120, at 29.

125. *Id.*

126. *Id.*

127. *Id.*

royalty."[128] This typically occurs when the scrivener takes a form of reservation of a mineral servitude ("Vendor reserves *all* minerals as a mineral servitude"), and merely changes the word "servitude" to "royalty."[129] The former works; the latter does not.

When the vendee who owns the rights to minerals later undertakes to grant a mineral lease, the prior recorded deed of "all" of the mineral royalty, leaves no entitlement to revenue to be enjoyed by either the lessor or its lessee.[130]

Moral of the Story—Lessons to be Learned

This is a simple admonition: The phrase "royalty acres," or (while we are at it) "mineral acres," should be avoided. In like manner, one should not reserve "all" mineral royalty, as to do so necessarily withdraws the revenue feature from the rights in minerals inuring to the vendee in a sales transaction.[131]

B. Recent Legislation — Unsolicited Offers to Purchase Mineral Royalties (or Servitudes)

In 2016, the Legislature enacted the Sale of Mineral Rights by Mail Solicitation Act.[132] Brought about by abuses (perceived or actual) in the Haynesville Shale in Northwest Louisiana, this legislation creates a remedy to a landowner who sells a mineral royalty (or even a mineral servitude) to a purchaser who makes an unsolicited contact with the seller by mail.[133]

Experience indicates that certain companies would send out mass mailings to the parties identified on an interested party list used in connection with compulsory unitization applications.[134] Anecdotally, unsophisticated parties would receive these "fancy-looking papers" in the mail, and sign and return them, thinking that they were necessary in order to place their interest in line for payment. When the sellers would later inquire of the operator as to when they would be paid, they were informed that, by signing those "fancy-looking papers," they had divested themselves of their royalty (or worse, mineral) interest.

These unsolicited offers were typically accompanied by a draft, and a proposed deed with onerous terms, including the following, to-wit:

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128. *Id.*
129. *Id.*
130. *Id.*
131. *Id.*
132. 2016 La. Acts 911 (codified as amended at LA. REV. STAT. ANN. §§ 9:2991.1–2991.11 (2018)).
133. *See* LA. REV. STAT. ANN. § 9:2991.3 cmt.
134. LA. ADMIN. CODE tit. 43, pt. XIX, § 3907(B)(1) (2017).

- The right of the transferee to amend the legal descriptions or other terms.
- Mandatory arbitration in state other than Louisiana.
- Choice of law in a foreign state.
- Duty on transferor to indemnify the transferee in certain respects.
- Making the transferee a mandatary for certain purposes.

Provisions of this type are now invalidated as being against public policy.[135]

The Act gives a right of rescission to the mail-solicited transferor, the duration of which depends on whether or not a certain disclosure is made by the transferee in the deed.[136] If the instrument of transfer contains the disclosure prescribed by law,[137] the transferor has sixty (60) days within which it might rescind the transaction.[138] Otherwise, the offending transaction may be rescinded "within a preemptive period of three years."[139]

Moral of the Story—Lessons to be Learned

The Act was the result of a study committee by the Louisiana State Law Institute at the behest of the Louisiana State Senate.[140]

The statute explicitly excludes mineral leases as being within the ambit or scope of its features and protections.[141] This is an important consideration of security of title to a lessee who otherwise would be at risk in spending significant amounts of money to drill a well on lands covered by a mineral lease granted by a lessor who had been contacted merely by mail. The legislation recognizes the need to protect third parties under the "Public Records Doctrine."[142]

Upon receipt of a timely notice of rescission, the transferee must return to the transferor any royalties or other payments received by the transferee.[143] Significant remedies are available to the transferor if the transferee does not comply with the transferor's written notice of rescission.[144] Included within

135. LA. CIV. CODE ANN. art. 7 (2018) ("Persons may not by their juridical acts derogate from laws enacted for the protection of the public interest. Any act in derogation of such laws is an absolute nullity.").

136. LA. REV. STAT. ANN. § 9:2991.6.

137. *Id.* § 9:2991.5.

138. *Id.* § 9:2991.6(A).

139. *Id.* § 9:2991.6(B).

140. Your author served on this committee of the Louisiana State Law Institute.

141. LA. REV. STAT. ANN. § 9:2991.2 ("As used in this Part, the term 'mineral rights' does not include a mineral lease.").

142. *See* OTTINGER, LEASES, *supra* note 10, at 60.

143. LA. REV. STAT. ANN. § 9:2991.9.

144. *Id.*

the range of remedies is the potential for an enhanced recovery of royalties received by the transferee prior to rescission, but not restored to the transferor after a timely rescission of the transaction.[145]

IV. CURRENT ISSUES INVOLVING MINERAL LEASES

A. Production in "Paying Quantities"

If a mineral lease is maintained in force and effect by production that production must be in "paying quantities."[146] This is so even if the mineral lease is silent in this regard.[147]

Developed jurisprudentially as a matter of public policy,[148] the contours of the requirement are now codified in Article 124 of the Mineral Code that provides, as follows:

> When a mineral lease is being maintained by production of oil or gas, the production must be in paying quantities. It is considered to be in paying quantities when production allocable to the total original right of the lessee to share in production under the lease is sufficient to induce a reasonably prudent operator to continue production in an effort to secure a return on his investment or to minimize any loss.[149]

A production in "paying quantities" inquiry involves a comparison of revenue to expenses and is usually very expert-intensive.[150] But what revenue, and what expenses? And for what period of time is the evaluation to be made? These significant issues are at the heart of the case.

It is appropriate to note the conflicting interests of the lessor and the lessee.[151] On the one hand, the lessor will want to consider as many items of expense as possible, so as to require a greater amount of production to meet or exceed that amount.[152] The lessor will also want to focus on the period of time when expenses were greater in comparison to revenue. On the other hand, the lessee will want to eliminate those items of expense that are not recurring in nature, so as to require a lesser amount of production to meet or

145. *Id.* § 9:2991.9(C); see *infra* Section IV.H as to the statutory formulation by which this remedy is provided.

146. LA. REV. STAT. ANN. § 31:124 (2018).

147. *See* Patrick S. Ottinger, *Production in "Paying Quantities" – A Fresh Look*, 65 LA. L. REV. 635, 663–64 (2005) [hereinafter Ottinger, *Paying Quantities*].

148. The comments to Article 124 indicate that "[t]he manner in which the test for production in paying quantities is stated in Article 124 is articulated well in the decision of the Texas Supreme Court in *Clifton v. Koontz*, 325 S.W.2d 684, 691 (1959) . . . ." LA. REV. STAT. ANN. § 31:124, cmt.

149. *Id.* § 31:124.

150. *See* OTTINGER, LEASES, *supra* note 10, at 250.

151. *See id.* at 250.

152. *See* Lege v. Lea Expl., Co., 631 So. 2d 716, 718 (La. Ct. App. 1994). In the interest of full disclosure, your author represented the defendant in this case.

exceed that amount.[153] The lessee will also want to make certain that the period of time that is studied by the court, will include periods of greater production relative to costs incurred.

The following diagram illustrates these features of the test for production in "paying quantities," viz.:

A "PIPQ" Case Involves a Comparison of Two Baskets

A Basket of Bills ***versus*** **A Basket of Revenue**

A Basket of Bills	A Basket of Revenue
The lessor will want this basket to be "full to the brim," including every expense incurred.	This basket is always the revenue allocable to1.0 minus royalty under the mineral lease -- Article 124.
The lessee will want to limit this to "lifting expenses," eliminating capital or extraordinary, non-recurring expenses.	Since this basket is a simple function of math, the battle in a "PIPQ" case essentially concerns the content of the other basket.

If the value of the basket of revenue exceeds the value of the basket of bills (even by a little), the lessee wins; the lease is producing in "paying quantities."

A critical issue is the period of time during which the comparison is made; courts tend to view the matter in a longer time frame to avoid anomalies.

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Moral of the Story—Lessons to be Learned

The "current issue" pertaining to the subject of production in "paying quantities," is the impact of historically low commodity prices on this subject.[154] Courts continue to apply the traditional tenets of this subject but remain mindful of the volatility of pricing for oil and gas as a relevant consideration.[155]

One of the more recent cases in this regard is *Middleton v. EP Energy E&P Company, LP*,[156] where the court noted, as follows:

> In determining whether the Keatchie Well produced in paying quantities, the fact finder will need to consider all of the factors which would influence a reasonably prudent operator to continue production, *including the market price available*, the relative profitability of other

153. *See* OTTINGER, LEASES, *supra* note 10, at 250.
154. *See* Ottinger, *Paying Quantities*, *supra* note 147, at 662–63.
155. *Id.*
156. Middleton v. EP Energy E&P Co., 188 So. 3d 263 (La. Ct. App. 2016). In the interest of full disclosure, your author represented a defendant in this suit.

nearby wells, the operating costs, the net income and the reasonableness of the expectation of profit.[157]

B. "Post-production Costs"

This is probably the hottest of "hot topics," due principally to the significant amounts of natural gas discovered and produced in the shale plays, particularly the Haynesville Shale in Northwest Louisiana.[158]

While the lessee is solely liable for all costs of exploration and production,[159] the issue presented is whether the lessor has any responsibility for "post-production costs."[160] "Post-production costs" are those expenses incurred by the lessee operator after the gas is brought to the surface of the earth, and "reduced to possession" (the wellhead being the point of production), and that are necessitated in order to render the product marketable.[161]

Relevant in this regard is Article 7 of the Mineral Code that instructs that "[m]inerals are reduced to possession when they are under physical control that permits delivery to another."[162] This "reduction to possession" occurs at the wellhead.[163]

The wellhead is a device that controls the pressure of the well, and allows the operator to control the flow of the oil and gas.[164] As to oil, it might be immediately directed to a tank battery. With respect to gas, it will be channeled to a pipeline. Regardless of the product, the wellhead is where the oil or gas is "reduced to possession."[165]

Four things occur at the wellhead.[166] First, the produced oil and gas ceases to be governed by the law of immovable property, and gains its status of mobility, becoming subject to the law of movable property.[167] Secondly, under an "at the well" lease,[168] the royalty interest of the lessor attaches, and

157. *Id*. at 267 (emphasis added).
158. *See* OTTINGER, LEASES, *supra* note 10, at 526.
159. *See id.*
160. *See id*. at 529–30.
161. *See id*. at 536.
162. LA. REV. STAT. ANN. § 31:7 (2018).
163. OTTINGER, LEASES, *supra* note 10, at 538.
164. *See id.* at 535.
165. *Id.* at 538.
166. *See id*. at 534.
167. Southport Petroleum Co. v. Fithian, 13 So. 2d 382, 383 (La. 1943) ("It is well settled in this State that there is no title to oil so long as it remains in the earth; consequently, no lien could attach to it as the property of anyone until it is brought to the surface, and when brought to the earth, it is clearly no part of the well.").
168. Wall v. United Gas Public Serv. Co., 152 So. 561, 563 (La. 1934) (emphasis added) ("The reason why the division and delivery is made *at the well*, in cases where there is to be a division in kind, is that there is where the parties come into ownership of the commodity, there is where title

is fixed to the oil or gas, as produced. Thirdly, the responsibility for severance taxes attaches at "severance," which occurs at the wellhead when the production is "reduced to possession."[169] Finally, "the royalty attaching and being 'fixed' at that point, the 'market value' 'at the well' is applied or, if there is no value 'at the well,' is determined through a 'net back,' or 'reconstruction,' method of valuation, so as to 'reverse determine' the 'market value at the well.'"[170]

Moral of the Story—Lessons to be Learned

Legions could be written on this topic. The default rule in Louisiana is that the lessor's royalty bears proportionately its share of "post-production costs," unless the parties have agreed otherwise.[171] The lessor's responsibility for "post-production costs" is *in rem* only, never "out of pocket."[172]

In the exercise of "freedom of contract,"[173] parties might elect to include in their mineral lease a "No Deductions Clause," but provisions of this type have been the subject of significant litigation to interpret them.[174]

It is the experience of your author that many operators based in Texas, but operating in Louisiana, are surprised that the "default" rule of *Heritage Resources, Inc. v. NationsBank*[175] does not prevail in Louisiana.

C. Transfers — Assignment or Sublease?

When a mineral lease is transferred, the transfer document is either an assignment or a sublease.[176] The name affixed to the instrument is immaterial; rather, its true character is discerned from document itself.[177]

If the lessee conveys all of its interest in the lease, without a reservation of overriding royalty interest, or a consequential provision benefitting the

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vests. The lessor and lessee are vested with title to the gas *at the well* or in the field in the same proportion as the oil is owned.").

169. *See* LA. REV. STAT. ANN. § 47:631 (2018); LA. REV. STAT. ANN. § 31:7 cmt. (2018).

170. *See* OTTINGER, LEASES, *supra* note 10, at 534.

171. Merritt v. Sw. Elec. Power Co., 499 So. 2d 210, 214 (La. Ct. App. 1986).

172. *See* OTTINGER, LEASES, *supra* note 10, at 540.

173. *See id*. at 115.

174. *See id*. at 707–08.

175. *See* Heritage Res., Inc. v. NationsBank, 939 S.W.2d 118, 121–22 (Tex. 1996) (finding that post-production costs may be charged to royalty owners); *see also* Chesapeake Expl., LLC v. Hyder, 483 S.W.3d 870, 872–73 (Tex. 2016) (noting that royalty owners are not required to pay post-production costs where the lease clearly manifests a contrary intent).

176. *See* Patrick S. Ottinger, *What's in a Name? Assignments and Subleases of Mineral Leases under Louisiana Law*, 58 ANN. INST. ON MIN. L. 283, 284 (2011); *see also* OTTINGER, LEASES, *supra* note 10, at 936 (emphasizing certain factors that must be considered to determine if a transfer is classified as an assignment or a sublease).

177. *See* OTTINGER, LEASES, *supra* note 10, at 932.

transferor in terms of the future administration of the mineral lease, it is an assignment.[178]

However, if the lessee reserves an economic interest—most usually an ORRI—or if the lessee imposes on the transferee a consequential duty, it is a sublease.[179]"Every sublease is, in a sense, an assignment, but every assignment of a lease is not a sublease."[180]

In contrast to other oil and gas producing states, there are an array of significant consequences arising from the distinction between an assignment and a sublease.[181] These include (but are not limited to) the following, to-wit:

- Warranty of grantor.
- Authority of succession representative to grant.
- Ability to grant a complete release to a landowner.
- Remedy to the grantor if purchase price not paid.
- Duties owed by the grantee to the grantor.
- Prescriptive period applicable to claim for unpaid revenue due to the grantor.
- Divisibility of the mineral lease.

Moral of the Story—Lessons to be Learned

Parties preparing instruments by which a mineral lease is to be transferred should be cognizant of the consequences that might arise if the transfer is structured as an assignment or a sublease. The next section discusses one particular consequence arising out of the distinction.

D. Division of Mineral Leases

One of the more significant "sleeper" issues arising out of the distinction between an assignment and a sublease is the potential that a mineral lease might be "divided" by a partial assignment (but not by a sublease),[182] if the mineral lease contains a "Division of Rental Clause."[183]

178. *See id*. at 994.
179. *See id.*
180. Smith v. Sun Oil Co., 116 So. 379, 380 (La. 1928).
181. *See* OTTINGER, LEASES, *supra* note 10, at 963.
182. *See id*. at 604.
183. *See id*. at 596.

To "divide" a mineral lease is to turn one mineral lease into two or more leases, each standing alone and having separate lease maintenance obligations.[184]

A "Division of Rental Clause" provides, in essence, that, "[i]n the event of an assignment of the lease as to a segregated portion of the land, delay rentals shall be apportioned among the several leasehold owners according to the surface area of each, and default in payment by one shall not affect the rights of others."[185]

Particularly in connection with the purchase and sale of producing mineral leases, the purchaser, in conducting its due diligence, should be mindful of this possibility, and investigate the leasehold history of the leases in order to discern if any prior partial assignment in the chain of title has resulted in lease division.[186]

In the seminal case on this subject,[187] the court relied upon the "Division of Rental Clause" as giving rise to a division of the lease in case of a partial assignment.[188]

This author questions the court's reliance on this provision to find a division, since the principal purpose of this clause is of a different focus, viz., the apportionment of delay rentals among two or more assignees of a segregated portion of the leased premises, and the consequences of default in payment by one such assignee.

The Second Circuit Court of Appeal, in *Hoover Tree Farm, L.L.C. v. Goodrich Petroleum Co.*,[189] seems to have embraced this observation when it noted, as follows:

> While the contractual provision itself [*i.e.*, the "Division of Rental Clause"] contemplated only a type of limited lease division upon the nonpayment of a portion of the lease rentals during the primary term, both *Sun Oil* and *Roberson* without explanation interpreted the clause broadly and by implication ruled that a lease containing such provision would be divided for all purposes into two leases upon the transfer of the entirety of the leasehold rights to a specific geographical portion. Such broad interpretation therefore moved the clause beyond merely the subject of rental payment default to effect a stringent modification of the typical habendum clause principle for maintenance of the entire

184. LA. REV. STAT. ANN. § 31:130, cmt. (2018) ("The unarticulated premise of these cases is that in the absence of such provisions the lease would be indivisible in the sense that a partial assignment would not have the effect of creating two leases where but one existed before.").

185. *See* OTTINGER, LEASES, *supra* note 10, at 595.

186. See Patrick S. Ottinger, *Closing the Deal in the Bayou State: The Purchase and Sale of Producing Oil and Gas Properties*, 76 LA. L. REV. 691, 738 (2016).

187. Swope v. Holmes, 124 So. 131 (La. 1929).

188. *See id.* at 132.

189. Hoover Tree Farm, LLC v. Goodrich Petroleum Co., 63 So. 3d 159 (La. Ct. App. 2011).

> lease beyond the primary term by the operations and production of one well.[190]

In *Roberson v. Pioneer Gas Co.*,[191] the Louisiana Supreme Court again considered the issue of whether a certain transfer was an assignment or a sublease. It articulated the following distinction between the two types of transfer, to-wit:

> The distinction between an *assignment of a lease* and a *sublease* is that, in an assignment, the assignor transfers his entire interest in the lease in so far as it affects the property on which the lease is assigned; whereas, in a sublease, the original lessee, or sublessor, retains an interest in the lease in so far as it affects the property subleased—by imposing some obligation upon the sublessee in favor of the sublessor, such as an obligation to pay additional rent to the sublessor.[192]

The mineral lease covered 125 acres, and the lessee assigned the lease as to twenty-five acres, with no reservation sufficient to render the transaction a "sublease."[193]

The mineral lease contained a "Division of Rental Clause," and the court noted that such a clause "made the lease a divisible one," citing *Swope v. Holmes*.[194] Thus, the partial assignment divided the lease, and the drilling of a well on one portion of the lease did not have any effect as to the other portion of the lease.[195]

In *Noel Estate, Inc. v. Murray*,[196] the plaintiff-lessor sought cancellation of mineral lease on the whole of sixty acres.[197] The lessee had obtained production on ten acres, and then later assigned the lease on the other fifty acres, but no production was secured on the fifty-acre tract.[198] The court canceled the lease as to the fifty-acre tract, but not as to the ten-acre tract on which a well was located, and both parties appealed.[199]

The mineral lease contained a clause that "recited that the rights of either party thereunder could be assigned in whole or in part."[200] By assigning the lease on the fifty-acre tract, the court held that the lessee "divided a divisible lease, creating in favor of Smith an independent lease on the north ten

190. *Id.* at 174.
191. Roberson v. Pioneer Gas Co., 137 So. 46 (La. 1931).
192. *Id.* at 48.
193. *See id.* at 46.
194. *See id.* at 47.
195. *See id.* at 48.
196. Noel Estate, Inc. v. Murray, 65 So. 2d 886 (La. 1953).
197. *Id.* at 887.
198. *Id.*
199. *Id.*
200. *Id.*

acres."[201] Production never having been obtained on fifty acres, the lease as to that tract was properly canceled.

Moral of the Story—Lessons to be Learned

One should be aware of the potential of lease division, and of the consequences on lease maintenance. While Article 130 of the Louisiana Mineral Code provides that a "partial assignment or partial sublease does not divide a mineral lease,"[202] it is not a statement of public policy that cannot be modified in the exercise of "freedom of contract."

This is particularly so in the Haynesville Shale in Northwest Louisiana, in which many old mineral leases are held by production (HBP) from shallow production and have been subject to numerous instruments of transfer at various subsurface depths over many years. The potential that the rule of divisibility would be held applicable to a horizontal transfer of a mineral could lead to significant (arguably catastrophic) consequences, in that shallow production might not hold deeper rights or vice versa.[203] Such a ruling would clearly result in a new "Gold Rush" as lessees would be faced with lease expiration and significant accounting issues to lessors.

E. Rights Under the Well Cost Reporting Statute

Louisiana law is well established that an unleased mineral owner (UMO) is not entitled to share in production from a compulsory unit until the operator has been reimbursed the costs of drilling, testing, completing, equipping, and operating the unit well, out of production.[204] This point of time is called "payout."

The dilemma of the UMO is that—lacking both the staff and sophistication of an E&P company—it has no way of ascertaining when "payout" occurs for this purpose. It is often at the mercy of the operator in this regard.

The Well Cost Reporting Statute, Louisiana Revised Statutes sections 30:103.1, *et seq.*, affords the UMO the opportunity to call upon the operator to certify as to the amount of costs being recouped, and to thereby permit it to track the status of "payout."

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201. *Id.* at 888.

202. LA. REV. STAT. ANN. § 31:130 (2018).

203. *See, e.g.*, Guy v. Empress, LLC, 193 So. 3d 177, 184 (La. Ct. App. 2016) (denying a horizontal division of a mineral lease).

204. *See, e.g.*, Patrick S. Ottinger, *After the Lessee Walks Away – The Rights and Obligations of the Unleased Mineral Owner in a Producing Unit*, 55 ANN. INST. ON MIN. L. 59 (2008).

Should the operator fail to properly and timely report to the UMO, it would incur the penalty prescribed by Louisiana Revised Statutes Section 30:103.2, reading as follows:

> Whenever the operator or producer permits ninety calendar days to elapse from completion of the well and thirty additional calendar days to elapse from date of receipt of written notice by certified mail from *the owner or owners of unleased oil and gas interests* calling attention to failure to comply with the provisions of R.S. 30:103.1, such operator or producer shall forfeit his right to demand contribution from *the owner or owners of the unleased oil and gas interests* for the costs of the drilling operations of the well.[205]

What is meant by "the owner or owners of *unleased* oil and gas interests?" Recent litigation addresses the issue of whether the Well Cost Reporting Statute may be availed only by a UMO (one who is truly unleased to any party), or also by a mineral lessee of an interest not under lease to the operator. Recent decisions have considered this issue.

In *TDX Energy, LLC v. Chesapeake Operating, Inc.*, the plaintiff (TDX) sued the operator, claiming the operator forfeited its rights to recover well costs by failing to provide well-cost information under the Well Cost Reporting Statute.[206] TDX was a mineral lessee, not "the owner . . . of unleased oil and gas interests."[207] It was not a UMO, certainly not in the industry understanding of the term.[208]

The court granted Chesapeake's motion for summary judgment, holding that the Well Cost Reporting Statute only inures to the owner of a truly unleased mineral interest, and may not be availed by a lessee under a mineral lease in which the operator owns no interest.[209]

The Fifth Circuit Court of Appeal reversed,[210] adopting the view of a Louisiana appellate court in another case.[211] In that state case, the court also held that a lessee under a mineral lease, who had no contractual relationship with the operator and who did not agree to share in the cost, risk and expense of drilling the unit well, is an owner of a valid oil, gas, or mineral lease.[212]

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205. LA. REV. STAT. ANN. § 30:103.2 (2018) (emphasis added).

206. TDX Energy, LLC v. Chesapeake Operating, Inc., No. 13-1242, 2016 WL 1179206, at *1 (W.D. La. Mar. 24, 2016). In the interest of full disclosure, your author represented the defendant-operator in this suit.

207. *Id.* at *5.

208. *See id.* at *5–6.

209. *See id.* at *11.

210. TDX Energy, LLC v. Chesapeake Operating, Inc., 857 F.3d 253, 267 (5th Cir. 2017).

211. *See* XXI Oil & Gas, LLC v. Hilcorp Energy Co., 206 So. 3d 885 (La. Ct. App. 2016). In the interest of full disclosure, your author represented the defendant–operator in this case to prepare and prosecute a writ application to the Louisiana Supreme Court but did not represent the defendant at the trial or appellate level.

212. *Id.* at 888.

Additionally, the court held that the penalty to which the non-compliant operator was subject was not limited to "the costs of the drilling operations of the well," but also forfeited the right to recover (out of production) "the costs of 'drilling, completing, and equipping the unit well.'"[213]

Moral of the Story—Lessons to be Learned

It has been held that that the Well Cost Reporting Statute, being penal in nature, "should be construed strictly against the party seeking to impose the penalty."[214] This means, at a minimum, that, if two interpretations of the statute are available, the court should choose the *narrow* one, not an *expansive* interpretation. Yet, the Fifth Circuit in *TDX* elected to follow the *XXI* decision, which "followed the latter, more expansive view."[215] This is clearly contrary to the rule of strict construction of a penal statute.

Until clarification by the Louisiana Supreme Court, if your operator-client receives a proper demand for well-cost information from a lessee, one needs to evaluate the risk of non-compliance. Prudence would suggest that failing to comply with a demand from a lessee, despite the legal arguments to the contrary, is too risky a proposition to the operator.

F. Payment of Royalties Under Louisiana Risk Fee Act

The Louisiana Risk Fee Act, codified at Louisiana Revised Statutes Section 30:10A(2)(a), permits a party intending to drill a unit well to call upon other lessees in the unit to make an election to participate, or not, in the cost, risk and expense of the well.[216]

If a party does not affirmatively elect to participate, its interest would be subject to the operator's right of recoupment of allocated expenses, *plus* a risk charge of 200% of certain costs.[217]

Prior to 2012, while the operator could recoup its cost *plus* the risk charge, the non-participating lessee remained solely responsible for paying its royalties "out of pocket."[218]

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213. *Id.* at 890.

214. Scurlock Oil Co. v. Getty Oil Co., 324 So. 2d 870, 877 (La. Ct. App. 1975).

215. *TDX Energy*, 857 F.3d at 259.

216. *See* Patrick S. Ottinger, *It's a Risky Business, but There's an Act for That: The Louisiana Risk Fee Act*, delivered to the 63rd Institute on Mineral Law, Paul M. Hebert Law Center, Louisiana State University, Baton Rouge, Louisiana, on March 31, 2016.

217. *Id.* at 29.

218. *See, e.g.*, Gulf Explorer, LLC v. Clayton Williams Energy, Inc., 964 So. 2d 1042, 1045 (La. Ct. App. 2007) ("Clayton Williams has no contractual relationship with Gulf's lessors; under the facts presented herein, Clayton Williams has no obligation to pay Gulf's royalty and overriding royalty owners before it legally recoups its expenses from production pursuant to LSA-R.S. 30:10A(2)(b)(i).").

This changed in 2012 when significant amendments were made to the Risk Fee Act.[219]

The most significant—and controversial—amendment is to now impose on the operator the duty to pay royalties to the lessor(s) of the non-participating party.

This radical amendment upset a century's worth of jurisprudence, and results in the diminution of the revenue stream to which the operator has historically been entitled. Worse than that, it represents a public policy that encourages, rather than discourages, a "free ride."

In 2016, the Senate adopted a resolution calling upon the Louisiana State Law Institute to study the 2012 amendments and to make recommendations for possible repeal, amendment or clarification.[220]

Moral of the Story—Lessons to be Learned

Stay tuned for future amendments or clarifications to the Risk Fee Act, particularly the 2012 amendments that were so controversial. If, in the meantime, your client is complying with its terms by paying the royalties for the benefit of the non-participating owner, one might evaluate the possibility of enforcing reimbursement from that lessee after payout is achieved. Although neither recognized nor disallowed by the amendments to the Risk Fee Act, theories of recoupment do exist, but have yet to be tested.

G. Does the Lessee Owe a Duty of Disclosure to its Lessor?

A recent case took up the issue of whether the lessee owed to its lessor a duty to disclose potential transactions with respect to the sale of its working interest.

In *McCarthy v. Evolution Petroleum Corp.*, the lessee purchased its lessors' royalty interest for $40,000.[221] After it was publicly announced that the lessee then sold its working interest to Denbury for $50 million, the lessors sued to rescind the royalty sale based upon error or fraud.[222] The trial court sustained the defendants' peremptory exception raising the objection of

219. *See* 2012 La. Acts 3030.

220. S. Res. 31, 2016 Leg., 2d Extraordinary Sess. (La. 2016). Your author is serving as the Reporter for the Risk Fee Act Committee of the Louisiana State Law Institute, tasked with evaluating the legislation (particularly the 2012 amendments), and making legislative recommendations in connection therewith.

221. *See* McCarthy v. Evolution Petroleum Corp., 180 So. 3d 252, 255 (La. 2015). In the interest of full disclosure, your author represented certain *amicus curiae* in support of the defendant's writ application in this suit.

222. *See id.* at 254.

no cause of action, but the Second Circuit Court of Appeal reversed.[223] After the lessor amended its petition, in response to the appellate decision, the trial court again dismissed it, granting a second objection of no cause of action.[224]

The Second Circuit Court of Appeal again reversed, expressing the view that the plaintiffs could allege facts supporting a "novel and untested cause of action by a mineral lessor that has never been specifically addressed and decided in our law."[225]

The Louisiana Supreme Court granted the defendants' writ application (that was supported by numerous *amici* briefs), reversed the appellate court, and reinstated the trial court's dismissal of the twice-amended petition.[226] The court stated: Although "[f]raud may . . . result from silence or inaction, in order to find fraud from silence or suppression of the truth, there must exist a duty to speak or to disclose information."[227]

Further, the court observed that a mineral lessee's duty "to develop and operate as a reasonably prudent operator has no component of disclosing the information about which the plaintiffs complain. . . . Certainly, the information of the lessee gained through geological data and technical developments involving the lease premises remains proprietary information."[228]

Although *dicta*, the Louisiana Supreme court stated that a cause of action based on fraud by silence in a purchase of royalty rights by a lessee from its lessor might be sustainable if the mineral lease at issue required disclosure of pertinent information that was withheld.[229]

The last sentence of Article 122 allows the parties to stipulate what shall constitute reasonably prudent conduct on the part of the lessee.[230] The Louisiana Supreme Court noted that the lessor could expand on the lessee's duties so as to include a duty to disclose information, but it did not do so in this case.[231]

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223. McCarthy v. Evolution Petroleum Corp., 111 So. 3d 446, 449 (La. Ct. App. 2013), *rev'd*, 180 So. 3d 252 (La. 2015).

224. *McCarthy*, 180 So. 3d at 255.

225. McCarthy v. Evolution Petroleum Corp., 151 So. 3d 148, 159–60 (La. App. Ct. 2014), *rev'd*, 180 So. 3d 252 (La. 2015).

226. *McCarthy*, 180 So. 3d at 253.

227. *Id.* at 258 (internal quotations omitted) (quoting Greene v. Gulf Coast Bank, 593 So. 2d 630, 632 (La. 1992)).

228. *McCarthy*, 180 So. 3d at 259.

229. *Id.* at 262.

230. LA. REV. STAT. ANN. § 31:122 (2018) ("Parties may stipulate what shall constitute reasonably prudent conduct on the part of the lessee.").

231. *McCarthy*, 180 So. 3d at 258.

Moral of the Story—Lessons to be Learned

It is often stated that "bad facts make bad law." The facts of this case come very close to embracing that tenet. Purchasing its lessor's royalty position is rarely a good idea on the part of the lessee. Certainly, under all circumstances, the lessee must be truthful and candid with its lessor so as to avoid misunderstandings such as led to this litigation.

H. Authorized Damages for Unpaid Royalties[232]

Several articles of the Louisiana Mineral Code provide authority for the award, in a suit for nonpayment of royalties, of damages double the amount of royalties owed.[233] In Article 138.1, the award of "double damages" is mandatory ("the court shall award"), while, in all other articles, it is permissive ("the court may award").[234]

With respect to those articles stating that the court "may award" damages, the courts have recognized that the award of damages is discretionary, and not mandatory.[235] One court has stated that, "generally, such a maximum penalty should be reserved for the most blameworthy conduct."[236]

Where the award of double damages addresses itself to the discretion on the part of the court as set forth in Articles 139, 140 and 212.23 of the Mineral Code, each providing that the "court may award as damages double the amount of royalties due," the court's discretion pertains to whether damages will be awarded at all, as well as to the amount of the award, which should be capped at double the amount due.

Prior to the decision of the Louisiana Supreme Court in *Gloria's Ranch*,[237] an unsettled issue was whether the Mineral Code envisions a maximum award of "double," or actually "treble," the amount of unpaid

232. The following is an adaptation of OTTINGER, LEASES, *supra* note 10, at 1249.

233. *Id.*

234. *Id.*; *see also* LA. REV. STAT. ANN. § 1:3 (2018) ("The word 'shall' is mandatory and the word 'may' is permissive.")

235. OTTINGER, LEASES, *supra* note 10, at 1249; *see*, *e.g*., Matthews v. Sun Expl. & Prod. Co., 521 So. 2d 1192, 1196 (La. App. Ct. 1988) ("LSA-R.S. 31:140 provides the trial court with great discretion in awarding damages. It does not mandate that any award be given in excess of the royalties due."); Wegman v. Cent. Transmission, Inc., 499 So. 2d 436, 451 (La. App. Ct. 1986) ("Under R.S. 31:140 if the lessee fails to pay royalties due or fails to inform the lessor of a reasonable cause for failure to pay in response to the required notice, the court *may* award as damages double the amount of royalty due. Hence the award is discretionary.").

236. Samson Contour Energy E & P, L.L.C. v. Smith, No. 49,494-CA, No. 49,495-CA, 2015 La. App. LEXIS 1180, at *3 (La. App. Ct. June 10, 2015) (emphasis omitted).

237. Gloria's Ranch, L.L.C. v. Tauren Expl., Inc., 2017-C-1518 C/W 2017-C-1519 C/W 2017-C-1522, 2018 La. LEXIS 1694 (La. June 27, 2018).

royalties as damages. One school of thought was that the lessor is always entitled to its unpaid royalties, and the award of "double the amount of royalties due" is in addition to the royalties which are due, such that, in essence, the lessor might recover three times the royalties due.

While many courts have interpreted the codal provisions as authorizing, in essence, "treble" damages, Justice Knoll, in a dissenting opinion, expressed a contrary view.

Thus, in *Cimarex Energy Co. v. Mauboules*,[238] Justice Knoll offered the following view on this issue, to-wit:

> The trial court awarded Orange River unpaid royalties of approximately $3.2 million dollars, plus statutory damages of approximately $6.4 million dollars. The court held Mineral Code art. 212.23(B), which allows an award of "damages double the amount due," permits a court to award both the unpaid royalties and penalty damages in the amount of double the unpaid royalties, thereby effectively trebling the damages award. I would reverse the damages award as excessive.
>
> The far more natural reading of article 212.23(B) is to permit the plaintiff a total award of double the amount of unpaid royalties. As a simplified example, if the unpaid royalties total $100, the court has discretion to "double" the award by adding an additional $100 in statutory damages, for a total of $200.
>
> If the Legislature had intended article 212.23(B) to permit a treble damages award, it would have said so. Several Louisiana statutes unambiguously permit an award of treble damages. This is not one of them. Moreover, as Mineral Code article 212.23(B) is in the nature of a penal statute, it must be strictly construed in favor of the defendant. . . . I would remand for a recalculation of damages consistent with the statute.[239]

Justice Knoll gave numerous examples of "[s]everal Louisiana statutes [which] unambiguously permit an award of treble damages,"[240] to indicate that the Legislature is fully aware as to how to provide for such recovery, if that were its intention in adopting these provisions of the Louisiana Mineral Code.[241]

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238. Cimarex Energy Co. v. Mauboules, 40 So. 3d 931 (La. 2010).

239. *Id.* at 952.

240. *Id*.

241. *See id.* at 952 n.9 ("La. Rev. Stat. § 3:4278.1 (Unlawful cutting of timber leads to damages "for three times the fair market value of the trees cut"); LA. REV. STAT. § 22:1023(F) (permitting "treble damages" for unlawful disclosure of private genetic information); LA. REV. STAT. § 30:2027 (Employee may recover "triple damages" for retaliatory termination for environmental whistleblowing); LA. REV.STAT. § 39:2163 (Employee may recover "treble damages" for retaliatory termination for uncovering employers' fraud in claiming hurricane relief monies); LA. REV. STAT. § 51:444 (Sales representative may recover "treble damages" for

The decision in *Gloria's Ranch*, discussed in Part IV.H hereof, also concerned the issue of the proper interpretation of "double damages" as a remedy for unpaid royalties, and now resolves the conflicting view on the topic. The court has now clarified this issue, holding, as follows:

> Based on this generally accepted definition of damages as compensation for the loss sustained, we interpret La. Mineral Code art. 140 as authority to award up to double the amount of royalties due. Clearly, an award of the amount of royalties due is the compensation for the failure to perform that obligation. The use of the permissive word "may" gives the court the authority to double that amount if the court, in its discretion, finds the defendant's conduct so warrants. A contrary reading that assumes the unpaid royalties are something separate from "damages" ignores the plain meaning of the word "damages." We do not believe the law, as written, leads to any absurd results, and, thus, we conduct no further investigation as to the legislative intent. Accordingly, we amend the judgment to reflect that the damages due under La. Mineral Code art. 140 are equivalent to two times the amount of royalties due ($242,029.26 x 2 = $484,058.52).[242]

Moral of the Story—Lessons to be Learned

In a case involving a suit by a lessor against its lessee for damages for non-payment of royalty, the Louisiana Supreme Court has now clarified that the statutory scheme set forth in the Mineral Code contemplates a potential recovery of twice, rather than thrice, the amount of royalties due.

I. Liability of Mortgagee-Bank for Faults of its Mortgagor-Borrower

Energy lenders to the upstream sector released a collective sigh of relief, thanks to the Louisiana Supreme Court. In a highly anticipated ruling, the court, on June 27, 2018, reversed the controversial decision of the Second Circuit Court of Appeal, in *Gloria's Ranch v. Tauren Exploration*.[243]

The underlying operative facts in the case are not particularly controversial or unusual for a case arising out of Haynesville Shale formation, but the ruling of the trial court, as modified and affirmed by the

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nonpayment of commissions). LA. REV. STAT. § 51:1409 (Permitting recovery of "three times the actual damages sustained" in unfair trade practice claim.).").

242. *Gloria's Ranch*, 2018 La. LEXIS 1694, at *32–33.

243. *Id.* at *35. In the interest of full disclosure, your presenter represented American Bankers Association and Texas Bankers Association as *Amici Curiae* in support of Wells Fargo's position. Brief for Am. Bankers Ass'n & Tex. Bankers Ass'n as Amici Curiae Supporting Applicants, Gloria's Ranch, L.L.C. v. Tauren Expl., Inc., No. 2017-C-1519, 2018 WL 1950804 (La. Jan. 24, 2018).

appellate court, was both extreme and unprecedented in Louisiana law. It certainly was problematic, and a cause for significant concern to the energy lending industry.

The basic facts are these. Three companies held the mineral lease granted by Gloria's Ranch: Cubic Energy, Inc. (Cubic), Tauren Exploration, Inc. (Tauren), and EXCO USA Asset, Inc. (EXCO).[244] Cubic borrowed money from a Wells Fargo affiliate, which debt was secured by a mortgage containing, among other customary provisions, an assignment of production proceeds.[245] The mortgage and the credit agreement were typical of most documentation in a reserve-based loan transaction, commonly called an "RBL."[246]

The mineral lease participated in production from the Cotton Valley and Haynesville zones, but production diminished to the point that the lessor asserted that the lease had lapsed due to lack of production in "paying quantities."[247]

Gloria's Ranch issued a demand to the defendants for a release of the expired lease, but the defendants resisted, contending that the mineral lease had not lapsed.[248] Additionally, royalties from a certain well completed in the Haynesville zone were not paid to Gloria's Ranch by the lessees.[249]

Suit was filed by Gloria's Ranch against the three companies, and Wells Fargo, the mortgagee of Cubic, to declare the mineral lease to have expired by its own terms; for damages for failure to release the expired lease,[250] and for unpaid royalties from a well in Section 15.[251]

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244. *Id.* at *3–4.

245. *Id.* at *3.

246. *See* Michael P. Marek & Robert A. Wilson, *A Future For Reserve-Based Lending in Emerging Markets? Limitations on the Traditional Model*, 10 TEX. J. OIL GAS & ENERGY L. 149, 150 (2014) ("At its core, the traditional reserve-based loan is little more than an asset-backed loan, a mortgage secured by oilfield reserves rather than a home.").

247. *Gloria's Ranch*, 2018 La. LEXIS 1694, at *3–4; *see* Patrick S. Ottinger, *Production in "Paying Quantities"–A Fresh Look*, 65 LA. L. REV. 635 (2005) [Ottimger, *Paying Quantities*]; *see also* OTTINGER, LEASES, *supra* note 10, at 1201 ("A mineral lease terminates at the expiration of the agreed term or upon the occurrence of an express resolutely condition.")

248. *See Gloria's Ranch*, 2018 La. LEXIS 1694, at *5; *see generally* LA. REV. STAT. ANN. § 31:206 (2018) ("[W]hen a mineral [lease] is extinguished by . . . expiration of its term, . . . the former owner shall, within thirty days after written demand by the person in whose favor the right has been . . . terminated, furnish him with a recordable act evidencing the extinction or expiration of the [mineral lease].").

249. *See Gloria's Ranch*, 2018 La. LEXIS 1694, at *4, *6–7.

250. *See id*. at *5–6; *see generally* LA. REV. STAT. ANN. § 31:207 (emphasis added) ("If the former owner of the . . . expired mineral [lease] fails to furnish the required act [evidencing the termination of the mineral lease] within thirty days of receipt of the demand[,] . . . he is liable to the person in whose favor the . . . lease has been . . . expired for *all damages resulting therefrom* and for a reasonable attorney's fee incurred in bringing suit.").

251. *Gloria's Ranch*, 2018 La. LEXIS 1694, at *6 (noting that Exco settled with the plaintiff prior to trial, leaving only Tauren, Cubic, and its mortgagee, Wells Fargo, as defendants).

The trial court found that the mineral lease had lapsed due to the failure to produce in "paying quantities," and awarded damages for lost-leasing opportunities at $18,000 per acre ($22,806,000) due to the unreleased lease.[252] It further awarded $726,087 for unpaid royalties for the well in Section 15 pursuant to article 140 of the Louisiana Mineral Code ($242,029.26 in royalties due plus $484,058.52 in "double royalties" as damages). Attorney's fees in the amount of $936,803 were also awarded. This judgment was rendered against all three remaining defendants (including Wells Fargo), *in solido*.[253]

Whatever can be said about the propriety of the court's determination as to lease termination, the basis of damages "resulting from" the failure to release expired the lease, and the assessment of double royalties as damages,[254] the most radical aspect of the decision is that the mortgagee-lender of the one of the lessees, Cubic, was held co-extensively liable along with the defaulting lessees.

Of particular relevance to this topic, with regard to Wells Fargo, was the trial court's holding that the mortgage granted to it by Cubic contained an "assignment," sufficient to make Wells Fargo some sort of lessee, and thus liable for the failure to release the expired mineral lease, for unpaid royalties, and codal damages.[255]

On appeal, the appellate court disagreed with that specific ruling, finding that the language of the mortgage on which the trial court relied was not an assignment of an interest in the Gloria's Ranch lease, but, rather, an assignment or pledge of production, in the nature of a security interest.[256]

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252. *Id.* at *6–7; *see also* OTTINGER, LEASES, *supra* note 10, at 105–06 (discussing the volatility in bonus prices in the Haynesville Shale in Northwest Louisiana in the year 2008, documenting per acre bonus payments ranging from $150 (February 2008) to $25,000 (July and August 2008)).

253. *Id.* at *6. Liability *in solido* is the rough equivalent to "joint and several liability."

254. *See* Section IV.I hereof on the maximum award of damages for non-payment of royalties.

255. *Gloria's Ranch*, 2018 La. LEXIS 1694, at *7.

256. Gloria's Ranch, L.L.C. v. Tauren Expl., Inc., 223 So. 3d 1202, 1222 (La Ct. App. 2017), *rev'd in part*, *aff'd in part*, 2018 La. LEXIS 1694 (La. June 27, 2018). This typical mortgage provision read, thusly:

2.03 Assignment. To further secure the full and punctual payment and performance of all present and future Indebtedness, up to the maximum amount outstanding at any time. . . . Mortgagor does hereby absolutely, irrevocably and unconditionally pledge, pawn, assign, transfer and assign to Mortgagee all monies which accrue after 7:00 a.m. Central Time . . . to Mortgagor's interest in the Mineral Properties and all present and future rents therefrom . . . and all proceeds of the Hydrocarbons . . . and of the products obtained, produced or processed from or attributable to the Mineral Properties now or hereafter (which monies, rents and proceeds are referred herein as the "Proceeds of Runs"). Mortgagor hereby authorizes and directs all obligors of any Proceeds of Runs to pay and deliver to Mortgagee, upon request therefor by Mortgagee, all of the Proceeds of Runs . . . accruing to Mortgagor's interest[.]

Id. at 1220–21.

Nevertheless, the appellate court found that the various covenants and provisions in the recorded mortgage (as well as the unrecorded credit agreement) constituted some indicia of "control," sufficient to justify a finding that Wells Fargo "owned" an interest in the lease that supported its liability along with Cubic.[257]

Most important to the court seemed to be a mortgage provision that required the bank's consent to the release by the lessee of an item of collateral, in this case, a mineral lease. As to this common clause, the court noted, as follows:

> Wells Fargo exercised control over Cubic's oil and gas operations on the lease, and controlled Cubic's ability to release the lease for failure to produce in paying quantities. As such, Wells Fargo shared coextensive liability with Cubic to provide a recordable act evidencing the release of its interest in the lease, and we discern no manifest error in the trial court finding Wells Fargo solidarily liable with the remaining defendants.[258]

In its analysis leading to the determination that Wells Fargo "exercised control over Cubic's oil and gas operations on the lease, and controlled Cubic's ability to release the lease for failure to produce in paying quantities," the appellate court evaluated this novel theory under the definition of "ownership" under civil law as being composed of the rights of *usus, fructus* and *abusus*.[259]

When the appellate panel seemed to recognize that it was entering uncharted legal territory, with significant implications to the sanctity and utility of a mortgage, it attempted to limit its ruling with the following admonition, to-wit: "We note this case is highly fact-intensive and should not be construed as governing other cases that may follow unless the same facts exist."[260]

After affirming the trial court's award of damages, and awarding the additional award of attorney's fee of $125,000, the defendants applied to the court for rehearing, which was denied. However, two of the five judges[261] dissented vigorously from the denial of rehearing, stating, as follows:

> Devastating economic repercussions might possibly develop throughout the lending industry if the original opinion of this court is

257. *See id.* at 1223–24.

258. *Id.* at 1224.

259. *Id.* at 1223–24; *see generally* LA. CIV. CODE ANN. art. 477A ("Ownership is the right that confers on a person direct, immediate, and exclusive authority over a thing. The owner of a thing may use, enjoy, and dispose of it within the limits and under the conditions established by law.")

260. *Gloria's Ranch*, 223 So. 3d at 1225.

261. A panel of an appellate court is composed of three judges, but in order to consider an application for rehearing, two additional judges are randomly assigned. LA. CONST. art. V, § 8(B).

> maintained. Serious and harmful impact on the oil and gas industry is foreseeable. At a minimum, confusion will develop inside the legal community, as well as to other advisors to the respective companies within those industries if the original pronouncement of this court is maintained. Notwithstanding a generally well written and analyzed original opinion and the instructive language therein that this is a somewhat isolated fact setting, cautious managers and decision makers within those industries will incur a most chilling effect on their businesses. All of these developments can be potentially harmful in a broader sense; e.g. the potential impact on the financial condition of this state resulting from lost revenue.[262]

The defendants next sought writs from the Louisiana Supreme Court, supported by significant *amici curiae* briefing.[263] Writs were granted,[264] the case was briefed, and it was argued on March 13, 2018. The court issued its opinion on June 27, 2018, and unanimously reversed the Second Circuit's decision as it relates to the liability of a mortgagee for the faults or inactions of its borrower-lessee.[265]

Justice Marcus Clark, writing for the court, noted that the mortgagee was not an "owner" for purposes of Article 207 of the Mineral Code and, therefore, was not liable for damages "resulting" from the lessee's failure to release the expired mineral lease.[266] Additionally, it found the mortgagee was not a "lessee" for purposes of Article 140 of the Louisiana Mineral Code and was not liable for failure to pay royalties that were due.[267]

Finding that a mortgage was expressly authorized by Articles 203 and 204 of the Louisiana Mineral Code, the court concluded, as follows:

> Based on the foregoing, we find no authority for the court of appeal's holding that a mortgage and a credit agreement, which are both legally provided for in the La. Mineral Code, can be methods by which ownership of a mineral lease are conveyed simply because they assert some control over the collateral described therein. We find the "bundle of rights" controlled by Wells Fargo are not traits of ownership, but of

262. *Gloria's Ranch*, 223 So. 3d 1225, 1225 (Bleich, J., dissenting)

263. As noted previously, your presenter filed an *amici curiae* brief on behalf of American Bankers Association and Texas Bankers Association.

264. Gloria's Ranch, L.L.C. v. Tauren Expl., Inc., 231 So.3d 639 (La. 2017) (mem.); Gloria's Ranch, L.L.C. v. Tauren Expl., Inc., 231 So.3d 640 (La. 2017) (mem.); Gloria's Ranch, L.L.C. v. Tauren Expl., Inc., 231 So.3d 642 (La. 2017) (mem.).

265. Gloria's Ranch, L.L.C. v. Tauren Expl., Inc., 2017-C-1518 C/W 2017-C-1519 C/W 2017-C-1522, 2018 La. LEXIS 1694, at * 35 (La. June 27, 2018).

266. *See id.* *9–13.

267. *Id.* at *24–25.

> security rights. The mortgage and credit agreement contain provisions typical of security contracts, all designed to protect the collateral.[268]

The decision of the Louisiana Supreme Court was both authoritative and comprehensive in rejecting the novel theory embraced by the appellate court. Had the court not reversed the decision of the Second Circuit, the implications to lending practices in the upstream sector of the E&P industry would be far reaching and potentially problematic. If there were merit to the theory embraced by the appellate court (and the Louisiana Supreme Court correctly held there was not), there would be no reason what a bank could not be held co-responsible with its borrower for other faults or inactions of the latter, including personal injury or death on the rig floor, unpaid vendors, "legacy lawsuits," and other claims encountered by the mineral lessee. Additionally, notwithstanding the Second Circuit's attempt to limit its decision, the ruling, while arising in the oil and gas context, would certainly be argued as applicable in other commercial contexts in which the loan documentation imposed covenants that could be assimilated to "control."

Moral of the Story—Lessons to be Learned

The Louisiana Supreme Court's decision in *Gloria's Ranch* was cogent and precise in rejecting the rationale of the courts below, restoring the mortgage to its historic role of being merely a security device with great commercial efficacy. The various covenants and provisions contained in the mortgage granted by the mineral lessee to its lender are matters between the parties to the mortgage only, and are designed to allow the lender to be informed as to the operations and activities of its borrower in order to be fully informed as to the borrower's ability to repay the loan.[269] There is no basis in the law to allow a third party, such as a mineral lessor, to avail the various provisions contained in the mortgage.

V. CURRENT ISSUES INVOLVING EXECUTIVE RIGHTS

The Executive Right is a Mineral Right, with Attendant Consequences.

Although Article 16 states that the "basic" mineral rights are the mineral servitude, the mineral royalty, and the mineral lease, the executive right is

268. *Id.* at *34–35. Among other authority, the court cited OTTINGER, LEASES, *supra* note 10, at section 12-10, for the proposition that it is "customary in the oil and gas industry" to include covenants and provisions of the type as found in the Wells Fargo mortgage. *Id.* at *17–18.

269. Covenants of this type are typically contained in a mortgage in an RBL transaction, and are encouraged by Federal regulator. *See* OFF. OF THE COMPTROLLER OF THE CURRENCY, COMPTROLLER'S HANDBOOK: OIL AND GAS EXPLORATION AND PRODUCTION LENDING 11 (2016).

explicitly stated in Article 106 to be a "mineral right."[270]An executive right is "the exclusive right to grant mineral leases of specified land or mineral rights."[271] Being a mineral right, it is "alienable and heritable."[272]

The fact that the owner of an executive right is free to alienate it, or that the exclusive leasing right would be subject to the law of inheritance, ought to give concern to the party creating the right.

An executive right is a "thing," and could actually be a "thing" of great value.[273] As held by a deceased, it constitutes part of his estate.[274] As such, it devolves upon the heirs or legatees of the decedent.[275]

An undesirable situation might arise if the executive right owner bequeaths his estate in general, or the executive right in particular, to a multitude of parties. The need to deal with a vast number of parties in order to grant a mineral lease defeats the very purpose of the executive right, which often is to facilitate ease of leasing by a competent, experienced person.

Equally undesirable is the situation where the executive right is bequeathed, or falls by intestacy, to a person or persons who are totally unfit to serve in such capacity. One who creates an executive right obviously has a degree of faith, confidence and trust in the person to whom this right is initially granted, but may not have the same level of faith, confidence or trust in a stranger to whom it might be alienated, or in the heirs or legatees of the executive right owner. This is particularly so if the heirs or legatees of the executive right owner are minors or are impaired or incapable of managing their own affairs, not to mention having absolutely no talent or experience in the leasing of minerals.

Moral of the Story—Lessons to be Learned

In order to obviate this possibility, the party creating the right should either negate or deny the owner's ability to transfer it,[276] or make it "strictly

270. *See* OTTINGER, LEASES, *supra* note 10, at 813.

271. LA. REV. STAT. ANN. § 31:105 (2018).

272. *Id.* § 31:18.

273. *See* LA. CIV. CODE ANN. art. 448 ("Things are divided into common, public, and private; corporeals and incorporeals; and movables and immovables.").

274. *See id*. art. 872 ("The estate of a deceased means the property, rights, and obligations that a person leaves after his death.").

275. *See id.* art. 880 ("In the absence of valid testamentary disposition, the undisposed property of the deceased devolves by operation of law in favor of his descendants, ascendants, and collaterals, by blood or by adoption, and in favor of his spouse not judicially separated from him, in the order provided in and according to the following articles.").

276. *See id.* art. 1984 ("Rights and obligations arising from a contract are heritable and assignable unless the law, the terms of the contract or its nature preclude such effects."); *see also* Bryan v. Griggs, 128 So. 3d 1255, 1264 (La. App. Ct. 2013) ("Based upon the entire record in this case, it is clear that the obligations created by the letter agreement were strictly personal on the part

personal" to the original grantee,[277] and subject to termination at the death of the executive. One might consider language such as the following in order to achieve this objective, to-wit:

> Grantor has designated and appointed Grantee as [her] [his] executive right owner based upon Grantee's ability, talent and experience in matters concerning mineral leasing. Anything herein contained to the contrary notwithstanding, it is expressly understood and agreed that the rights conferred upon Grantee, as owner of the executive right herein [granted] [reserved], (i) are strictly personal to Grantee; (ii) shall not be conveyed, delegated or otherwise transferred by Grantee without the prior written consent of Grantor (which consent may be withheld for any reason whatsoever), and (iii) shall terminate upon the death or incapacity of Grantee; *provided*, *however*, that the termination under such circumstances shall be without prejudice to any lawful acts taken by Grantee pursuant to such executive right, prior to such event of termination.

VI. CONCLUSION

At any point in time, the question of what is a "current issue" in the law of oil and gas in the Bayou State is determined by either economic or market conditions in the industry. While it is difficult to quarrel with this truism, it is equally true that legislative or regulatory actions, or jurisprudential developments, can also give rise to issues with which industry participants and the practicing bar must be concerned.

It is obvious that any identification of these "hot topics" at any particular point in time is more subjective than objective, and reasonable minds can certainly disagree on the litany of these issues. Perhaps this is a case of beauty *vel non* being in the eyes of the beholder.

Nevertheless, it is the hope of this author that a review of the issues and matters examined herein will provoke thought as to pitfalls in legislation, as well as providing a glance into future issues that might be presented.

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of the obligor, Bryan, and required the special skills or qualifications that he represented that he possessed.").

277. *See, e.g.*, LA. CIV. CODE ANN. art. 1766 ("An obligation is strictly personal when its performance can be enforced only by the obligee, or only against the obligor.").