GORDON ARATA MCCOLLAM DUPLANTIS & EAGAN LLC

Handling Disputes Between Surface and Servitude Owners & Recent Developments

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LORMAN PRESENTATION MATERIALS:

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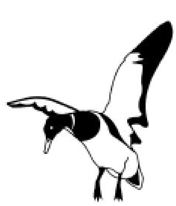

I. FEDERAL COURT

A. UNITED STATES FIFTH CIRCUIT COURT OF APPEAL

1. *Cimarex Energy Co. v. Chastant*, 13-30049 (5^{th} Cir. 8/2/13), 537 Fed.Appx 561[1]

Cimarex involves a dispute between a lessor and lessee regarding calculation of the royalty payable under an oil, gas and mineral lease of Louisiana land. Harold P. Chastant, Jr., et al executed an oil, gas and mineral lease in which Cimarex Energy Co. ("Cimarex") ultimately acquired the leasehold working interest. The lease provided that Chastant would be paid a royalty of 1/8 of the fair market value of the production to be computed "at the mouth of the well" for gas or "f.o.b [free on board] the leased property" for crude oil. The facts indicate that Cimarex engaged in commodities futures trading as a way of hedging against the price fluctuations in oil and gas. Chastant alleged that Cimarex owes additional royalty under the lease as a result of its hedging activities. The district court granted summary judgment in favor of Cimarex and the United States Fifth Circuit Court of Appeal affirmed. The most important point about hedging as it relates to the Cimarex case is that it constituted a purely financial activity. In other words, Cimarex engaged in buying and selling financial positions called “derivatives” and not the actual purchase and sale of oil and gas.

Chastant asserted that the royalty paid by Cimarex under the lease was never adjusted based on the prices realized through Cimarex's hedging activities. Chastant made written demand that Cimarex pay the royalties based on the oil and gas prices it had received through its hedging transactions in addition to the royalty it already paid on the market value of the oil or gas produced. Basically Chastant believed that the calculation of the royalty payments owed was not based on the “total amounts it received related to production” and said calculations should be reformed.

In response to Chastant's demand, Cimarex filed a declaratory judgment action in federal court seeking a judicial declaration that the hedge price Cimarex received was not part of the market value on which the royalty paid to Chastant was calculated under the terms of the lease. Chastant then filed its own suit in state court to recover royalties based on the prices received by Cimarex’s hedging operations. The two suits were consolidated and both parties filed cross motions for summary judgment. Cimarex's motion was granted. Chastant’s was denied. Chastant appealed.

[1] Not selected for publication in the Federal Reporter.

The issue before the Fifth Circuit was whether the lease between Cimarex and Chastant obligated Cimarex to pay royalties on the amounts generated through separate financial transactions in addition to the royalties paid on the fair market value of the oil and gas produced from the property subject to the lease.

In its decision, the Fifth Circuit stated that the district court properly applied Louisiana law. The court found the language of the mineral lease to be clear as to how the royalties were directed to be calculated under the lease. Oil Royalties were to be paid on “the best market price obtainable for the price received f.o.b the leased property;” while royalties on gas were to be paid on “the market price at the mouth of the well.” The court held that this clarity precludes any further contract interpretation. Because the hedging activities by Cimarex were purely financial and used to minimize the risk of market fluctuations in oil and gas prices, they had no effect on the “market” value of the prices for the product.

Additionally, Chastant argued that the hedging activities are part of the market value pursuant to a recent Louisiana case where royalties were due as a result of the lessee’s sale of gas to a third party under a take-or-pay provision. But the Court dismissed the argument noting that "take or pay" is an alternative to actual production, while hedging contracts are supplements to (and not substitutes for) production. Accordingly, the court held that the mineral lease between Cimarex and Chastant required that royalties owed are calculated at the mouth of the well on leased property and that additional amounts generated through separate financial hedging activities are not subject to those calculations.

2. *Temple v. McCall*, 12-30661 (5th Cir. 6/20/13), 720 F.3d 301

Temple involves interpretation of language used in conveyance deeds and whether the language is adequate to reserve mineral rights on behalf of the grantors.

On April 30, 1965, Elizabeth Paul Jenkins and T. J. Paul, Jr. ("Paul") transferred 35.89 acres of a 40-acre tract of land to the Sabine River Authority (SRA), reserving the mineral rights in the land in perpetuity, as allowed by statute. Shortly thereafter, Elizabeth Jenkins transferred all of her interest in the property, including the minerals, to Paul. On April 8, 1969, Paul sold certain of the property that had not been conveyed to SRA and adjacent lands to R. V. Woods, describing the conveyed property as “all that part [within the given coordinates that comprise the original 40-acre tract]...LESS portion sold to Sabine River Authority” (the “1969 Conveyance”). There was no dispute that Paul sold Woods part of the surface of the property not originally conveyed to the SRA, as well as the minerals underlying that property; however, the parties disagreed as to whether Paul also sold Woods his mineral rights in that part of the property previously conveyed to the SRA.

In 2000, Woods sold his interest in the property to Harold Temple. The deed used the identical property description as that used in the 1969 Conveyance. In 2001 and 2004, Temple granted mineral leases covering the surface area property purchased from Woods. And the Paul heirs, including McCall granted leases of the disputed mineral rights in 2001, 2004 and again in 2008. In 2010, after mineral activities in the area began to increase substantially, Temple filed suit against McCall claiming to be owner of the disputed mineral rights based on the fact that he acquired ownership of said minerals through the 1969 and 2000 deeds. After a bench trial, the district court entered judgment against Temple, and in favor of McCall. Temple appealed.

On appeal, Temple argued that the trial court erred in finding that the 1969 conveyance deed contained language sufficient to reserve the disputed mineral interests in favor of T. J. Paul, Jr. According to Temple, the “LESS” language in the 1969 and 2000 conveyance deeds referred only to the surface area property and did not carve out the mineral rights.

In its analysis, the Court found the language used in both conveyance deeds to be ambiguous with no mention of whether the description of the property excluded from the sale was intended to include only the surface-area owned by the SRA, or also the underlying mineral rights. The Court noted that “where the wording of a contract is not specific "Louisiana Courts have looked to 'the usual and customary manner of fulfilling like contracts' as 'persuasive [evidence of] the intention of the parties.'" *Par-Co Drilling, Inc. v. Franks Petroleum Inc.*, 360 So.2d 642, 644 (La. Ct. App. 1978). And therefore consideration of expert testimony to determine “whether there is a received usage in trade which would shed light” on the meaning of ambiguous terms is appropriate. As such, the Court relied on the trial testimony of McCall’s land-conveyancing expert, who opined that the 1969 and 2000 conveyance deeds were not intended not transfer the disputed mineral rights.

In analyzing the deeds, McCall’s expert found that the type of property description used “often depicts the 'surface area of a piece of property' being conveyed in situations where the property consists of jagged edges and is not a perfect square.” Additionally, if the sellers would have intended to transfer the disputed mineral rights they "likely would have used words such as 'oil, gas [or] minerals' or would have 'included a specific reference to the servitude.'" The Court found the expert's testimony to be persuasive, particularly his testimony that the phrase “all rights” applies to rights and actions of warranty … not any rights to the property later described in the non pre-printed portions of the deeds.

The Court ultimately agreed with the district court and held that the language used in the 1969 and 2000 conveyance deeds did not transfer the mineral rights to Temple’s predecessor in interest and that McCall is entitled to ownership of the disputed mineral rights.

B. EASTERN DISTRICT OF LOUISIANA

1. *In Re Virgin Offshore USA, Inc.*, 13-79, (E.D. La. Sept. 10, 2013)[2]

In this case, TGS-NOPEC Geophysical Company, LP ("TGSN") granted Virgin Offshore USA, Inc. ("Virgin Offshore") a non-exclusive license to use certain seismic material in exchange for the consideration of a one-time payment. Several years later, Virgin Offshore went into Chapter 11 bankruptcy and the bankruptcy Trustee moved to assume the TGSN license. The bankruptcy judge allowed the Trustee to assume the license and TGSN appealed, arguing that the license is not assumable under 11 U.S.C. § 365(c).

Under 11 U.S.C. § 365(c), the following conditions must be identified by the court in order to find that this provision bars assumption: (1) the license is an executory contract; (2) some non-bankruptcy law applies; (3) the non-bankruptcy law bars assignment of the license; (4) because the law bars assignment, assumption is also prohibited; and (5) TGSN did not consent to the assumption.

First the court found persuasive the arguments by TGSN that these licenses are executory contracts. Second, the court noted the novelty in TGSN's argument that federal copyright law applies, but noted that the industry wide practice is to treat these licenses as trade secrets. Further, the court found that even if copyright law did apply, § 365(c) is not applicable. Third, the court found that if copyright law did apply, the license would be unassignable, but the license was not assigned, it was assumed. Fourth, the court in applying the actual test of whether the trustee has any intention of assigning the lease to a third party, found that the bankruptcy judge properly concluded that the Trustee may assign the license. Finally, with regard to whether TGSN consented to the assumption, the court stated that it was unnecessary to determine the outcome of the foregoing factor analysis as the license explicitly allows the transferee to "use" the seismic material.

The Court stated that under federal jurisprudence, when a pro-assignment/assumption clause is contained within the contract, such clause is dispositive when applying § 365(c). In applying *In re Sunterra Corp.* 03-1193 (4th Cir. 12/4/2003); 361 F.3d 257, the Court found that in order for an assumption by the Trustee to be valid, it must be expressly allowed by the contract. Here, the license states that "a Related Entity shall have the same right to Use the Seismic Material as Licensee without payments to TGSN." Additionally, the license states that a "Related Entity" is "any company or other entity formed after the date of this Agreement as part of a corporate reorganization of restructuring of the Licensee..." Based on these provisions, the Court found that it was clear that TGSN contemplated the possibility of bankruptcy but attempted to use § 365(c) to circumvent.

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[2] Only the West Law citation is currently available.

Ultimately, the Court held that the license was properly assumed by the Trustee and affirmed the order of the bankruptcy court.

II. LOUISIANA STATE COURT

A. LOUISIANA FIRST CIRCUIT COURT OF APPEAL

1. *Midnight Drilling, LLC v. Triche*, 2013-1043 (La. App. 1 Cir. 6/19/13), *writ denied*, 2013-1731 (La. 11/1/13), 125 So.3d 432[3]

In *Midnight Drilling*, the Louisiana First Circuit Court of Appeal addressed the issues of the formality required to confect a valid voluntary unit agreement and whether surface operations for the drilling of a directional well interrupted prescription of non-use on the surface tract. On February 17, 2009, Midnight Drilling, LLC, spudded the MIO RA SUA; C Triche Et Ux #001 (formerly named Claude A Triche Et Ux #001), which was designated as a unit well by Commissioner's Order dated effective August 18, 2009. Shortly thereafter, a dispute arose among alleged mineral servitude owners (the "Cole Group") and land/surface owners (the "Triches") as to ownership of the minerals underlying two tracts of land separated by the Intracoastal Waterway as well as the right to receive payment of royalties from the above-referenced well. In response to the dispute, Midnight Drilling instituted a concursus proceeding in Terrebonne Parish district court.

The parties agreed that title to the minerals and the bed and bottom underlying the Intracoastal Waterway right-of-way were retained by the Cole's predecessor. The Intracoastal Waterway separated two tracts of land north and south of the waterway and therefore the Cole's mineral servitude was composed of two separate non-contiguous mineral servitudes, the "North servitude" and the "South servitude".

The Triches argued that the North servitude prescribed by prescription of nonuse. The Cole group asserted that prescription of non-use on both tracts was interrupted by production and/or drilling operations from the Cotton [Petroleum] Corporation Cole # 2 well and the Midnight Drilling, LLC # 1 Triche Well. Following a two-day bench trial, the trial court held that the North servitude had prescribed.

On appeal, Cole Group alleged that a voluntary unit was established by the actions of the parties in producing the Cole # 2 on a unit basis (encompassing the North and South servitudes) and that operations and/or production from the voluntary unit served to interrupt the running of prescription. The Cole Group's argument was based on a comment to La. R.S. 31:213 which provides for the definition of a “unit” and includes units established by a declaration under a pooling power, by contract or *otherwise*. The Appellate Court held that operating agreements,

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[3] Unpublished opinion.

including voluntary unit agreements, must be in writing to affect title to a real right, and absent such written agreements, parol evidence is not admissible to prove the existence of a unit. Further, mineral interests are incorporeal immovables which require an authentic act or act under private signature to effect a transfer.[4]

The Appellate Court found that the North servitude had prescribed since operations and production from the Cole #2 well did not occur on the actual land burdened by the servitude of the Cole Group. The facts and expert opinions presented indicated that the Cole # 2 was drilled as a directional well, meaning that the bottom hole deviated from the point where drilling was commenced on the surface. The Court narrowed the issue stating "critical to the determination of whether production operations of the Cole # 2 well as a lease well interrupted prescription on the Cole Group's mineral servitude is identification of the bottom home of this directional well." Accordingly, the trial court ruling was affirmed finding a voluntary unit was not established for the North tract nor were there operations sufficient to interrupt prescription thereupon.

2. *Jumonville v. Sunset Petroleum, Inc.*, 13-0895 (La. App. 1 Cir. 9/13/13)[5]

Jumonville involves the issue of notice and pre-cure provisions associated with "legacy" lawsuits pursuant to a mineral lease that has expired pursuant to its terms.

At the trial court level, Defendants filed exceptions of prematurity whereby they argued that Plaintiffs failed to give proper notice and opportunity to cure as required under the oil, gas and mineral leases prior to filing suit under the lease. Plaintiffs appealed the courts grant of Defendant's exceptions of prematurity.

The First Circuit held that since operations under the lease terminated prior to filing the action, the trial court incorrectly found that Plaintiff's suit under the now terminated lease was premature. The court remarked that "in the absence of a violation of public policy, a mineral lease constitutes the law of the parties and regulates their respective rights."[6] The Court also stated that the trial court correctly found that the notice provision of the lease between the parties requires that defendants are entitled to notice and opportunity to cure before an action can proceed and rendered judgment finding the trial court's grant of prematurity to be manifestly erroneous.

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[4] Louisiana Civil Code article 470 and 1939.

[5] Unpublished opinion.

[6] La. R.S. 31:3; *B.A. Kelly Land Co., LLC v. Questar Exploration and Production Co.*, 47,509 (La.App. 2 Cir. 11/14/12), 106 So.3d 181, writ denied, 2013-0331 (La. 4/19/13), 112 So.3d 223.

B. LOUISIANA SECOND CIRCUIT COURT OF APPEAL

1. *D.I. Dupree v. Oil, Gas & Other Minerals, Inc., 31, 869 (La. App. 2 Cir 5/5/ 1999), 731 So.2d 1067*

On September 30, 1985, Plaintiff-Landowners purchased a tract of land consisting of 1,724 acres in Natchitoches and Red River Parishes, Louisiana. The land was burdened by a mineral servitude covering 13/16th of the minerals. The servitude was held by several individual parties (collectively referred to as the "Mineral Servitude Owners"). In August 1994, Landowners filed a petition for declaratory judgment against Oil, Gas & Other Minerals, Inc. (the "Company"). In their petition, Landowners alleged that the Company had executed five separate leases on their property and that the Company was attempting to re-enter a well and conduct operations pursuant to these leases. Landowners further alleged that the well had reverted to them as surface owners due to the well's abandonment by its former owners and operators, so therefore, the Company had no right to re-enter the well.

In response, Company filed exception of non-joinder of necessary parties and indispensable parties since the Mineral Servitude Owners, who had granted the Company leases, were not named as defendants in the original petition. The Landowners had never entered into any lease agreement with the company. The Landowners then amended their petition to include the Mineral Servitude Owners (lessors). Upon amending their petition, Landowners further alleged that the Company, their agents, and employees, had entered upon Landowners' property and conducted operations resulting in damage to the landowners' crops, roads, culverts, and used water from a well located on the property without Landowners' permission. Prior to the commencement of any judicial proceeding, Oil, Gas & Other Minerals, Inc. filed for bankruptcy. The Mineral Servitude Owners then filed a motion for summary judgment.

In granting the Mineral Servitude Owners' motion for summary judgment, the trial court concluded that as a matter of law, the Mineral Servitude Owners' cannot be held liable for surface damages caused by their lessee, the Company, because once the Mineral Servitude Owners' executed the servitude lease, only the Company had the right of exploration on the property. Landowners appealed the trial court's judgment and argued that the Mineral Servitude Owners are responsible for damages caused by the Company, because the Company was acting on their behalf.

Upon review, the Louisiana Second Circuit Court of Appeal reversed and remanded the trial court's judgment. The court rejected the Mineral Servitude Owners' argument that the obligation imposed under Mineral Code article 22 to restore the surface to its original condition at the earliest possible time is placed on a servitude owner only when the mineral servitude owner or his agents actually conduct mineral operations. But when the operations are conducted on behalf of the servitude owner (by a lessee), the obligation to restore the land to its previous condition transfers to the lessee or entity who actually exercised the right of exploration of the property. In rendering its opinion, the Court cited to Mineral Code article 42 which states that except in circumstances not applicable to this case, "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." The Court held that when the Company conducted operations on the leased property, this "use" resulted from the lease of the Mineral Servitude Owners' right to explore and produce minerals which, in turn, inured to their benefit by interrupting prescription. The Court also noted that the Mineral Servitude Owners' were well aware that such use was necessary to interrupt prescription and executed the leases to achieve that goal. Moreover, the court noted an indemnity provision in the leases which specifically contemplated the lessor (Mineral Servitude Owner) liability for surface damages resulting from operations pursuant to the leases.

In reversing, the Court asserted that to affirm the trial court judgment and agree with Mineral Servitude Owners' argument would be to allow the Mineral Servitude Owners' to benefit from their lessee's actions in interrupting prescription, while simultaneously allowing them to forego the responsibility placed upon them under Mineral Code art. 22. Therefore, the Court ruled that the Mineral Servitude Owners could be held liable to Landowners for damages to the surface caused by its lessee.

2. *Magee v. Worley*, 47, 565 (La. App. 2 Cir. 11/21/12), 105 So.3d 907, *writ denied*, 13-345 (4/1/13), 110 So.3d 586.

In 1958, Plaintiffs' ("Surface owners") predecessor purchased a tract of land from Defendant's predecessor. Defendant's ("Servitude owners") predecessor reserved a 100% mineral servitude. After several transfers and exploration activities on the property, Surface owners brought action against Servitude owners seeking a declaration that the servitude became extinguished by nonuse between 1987 and 1997. Surface owners sought to have the servitude released. The Servitude owners argued that prescription was sufficiently interrupted by use of a residential gas line pursuant to an Adoption Declaration executed in 1993 between Surface owners' predecessor and Servitude owners' predecessor. The Adoption Declaration stated that Surface owners' predecessor's use of gas from the well, for residential purposes, constitutes a use of the mineral servitude which continually interrupted the running of prescription. Further, Surface owners' predecessor signed a letter to Servitude owners' predecessor in which he noted that his residential use "continually interrupts the running of prescription" and agreed to pay $5.00 per month to Servitude owners' predecessor for his residential use of gas. The trial court awarded summary judgment to the Surface owners. In its ruling, the trial court opined "that residential use of gas alone is not sufficient to interrupt prescription." The Servitude owners appealed this ruling to the Louisiana Second Circuit Court of Appeal.

Upon review, the Second Circuit held that a triable issue existed as to whether the residential use of gas by Surface owners' predecessor was sufficient to interrupt prescription. The Second Circuit Court noted the Surface owners' predecessor's acknowledged that he had "run a small line from the well to his house" and that he intended such use to interrupt prescription by execution of the Adoption Declaration, and that said agreement was recorded in the conveyance records. The Court asserted that this recordation not only served notice to the parties involved of some operations on the surface but also adhered to the requirements of La.R.S. 31:46 for adoption by a mineral servitude owners of the operations or production of another. In determining whether such use is sufficient to interrupt prescription, the court looked to La. R.S. 31:36, which provides, "Prescription of nonuse is interrupted by the production of any mineral covered by the act creating the servitude. The interruption occurs on the date on which actual production begins and prescription commences anew from the date of cessation of actual production." Further, the Court cited to La. R.S. 31:38, which dictates, "To interrupt prescription it is not necessary that minerals be produced in paying quantities. It is necessary only that minerals actually be produced in good faith with the intent of saving or otherwise using them for some beneficial purpose."

The Court distinguished the case cited to by the trial court, *Pan Am. Petroleum Corp. v. O'Bier*, 201 So.2d 861 (La. App. 2 Cir. 1967). In *O'Bier,* residential usage was insufficient to interrupt prescription. In stating its disagreement with the *O'Bier* holding, the Second Circuit noted that the holding was rendered prior to the adoption of the Mineral Code in 1974. Thus, the *O'Brier* court did not have the Mineral Code to rely upon for authority. In reversing the trial court's judgment, the Second Circuit held that the residential usage of gas by Surface owners' predecessor, along with his recorded declaration to interrupt prescription via such use, was arguably sufficient use to interrupt prescription. And, due to the existence of such a material issue of fact, the Second Circuit remanded the matter to the trial court for adjudication.

3. *Davis v. Prescott*, 47,799 (La. App. 2 Cir. 2/27/13), 110 So.3d 625, *writ wanted*, 2013-0669 (La. 5/17/13), 118 So.3d 374, *writ denied*, 2013-0669 (La. 11/5/13)

This case involves the rights and obligations of an independent executor of an estate with regard to obtaining a mineral lease over lands owned by the estate during administration. Shortly after the death of Edward Thomas Davis in 2006, his son-in-law, Elmer E. Prescott, III ("Prescott'), was appointed independent executor of the estate of the decedent. In June of 2007, Prescott entered into a three year mineral lease of certain of the succession property in favor of AIX Energy (the "AIX Mineral Lease") without prior notification to the legatees under Edward Davis' will. Decedent's son, Steven Davis ("Davis") and his four siblings were placed into ownership and possession of the succession property in March of 2008. Later, Davis sold his rights in the property to SOTJ, LLC, which was wholly owned by Prescott's stepson. Shortly after the sale, Davis received two lease royalty checks pursuant to the AIX Lease totaling $29,436.00. Davis claims that prior to receipt of the royalty checks, he had no knowledge of the AIX Lease nor that his property had natural gas.

Davis filed suit alleging that his siblings, Prescott and SOTJ defrauded him and claimed that had he known about the lease, he would not have sold his interest for the amount that he had. Davis also claimed that Prescott violated his fiduciary duty to obtain court approval prior to granting a mineral lease covering the succession property and for failure to obtain the legatees' permission to grant the lease. The trial court found Prescott liable “for failing to obtain consent from all legatees prior to granting a mineral lease on the property greater than one year” and dismissed all other claims. Prescott appealed.

In his appeal, Prescott argued that the trial court erred in holding that Louisiana Code of Civil Procedure article 3226 requires a succession representative to obtain legatee’s consent before executing a mineral lease for a term greater than one year covering succession property. Specifically, Prescott claimed that Paragraph 1 of La. C.C.P. art. 3226 does not apply to the granting of mineral leases and instead the second and third paragraphs of the article apply in these circumstances. Thus, under paragraphs 2 and 3 of Article 3226, which are specific to mineral leases, there is no requirement for obtaining consent of the heirs or legatees prior to entering into a mineral lease covering succession property.

Louisiana Code of Civil Procedure Article 3226 provides:

> When it appears to be in the best interest of the succession, the court may authorize a succession representative to grant a lease upon succession property after compliance with Article 3229. No lease may be granted for more than one year, except with the consent of the heirs and interested legatees.
>
> The Court may also authorize the granting of mineral leases on succession property after compliance with Article 3229. The leases may be for a period greater than one year as may appear reasonable to the court. A copy of the proposed lease contract shall be attached to the application for the granting of a mineral lease, and the Court may require alterations as it deems proper.
>
> The Order of the Court shall state the minimum bonus, if any, to be received by the executor or administrator of the estate under the lease and the minimum royalty to be reserved to the estate, which in no event shall be less than one-eighth royalty on the oil and such other terms as the Court may embody in its order.

The Court considered legislative intent regarding the most recent revisions to Louisiana Code of Civil Procedure Article 3226 being ACTS 1974, NO 131, Section 1, the Court reasoned that had the legislature intended that the heirs or legatees consent prior to grant of a mineral lease on succession property, there would be no need for the second paragraph of Article 3226.

Further, the Court noted that the requirement that a succession representative obtain consent of legatees to execute mineral leases has never been required under Louisiana law.

The Court also discussed independent executorship as enacted by La. C.C.P. art. 3396.15 which states:

Except as expressly provided otherwise in this chapter, an independent administrator shall have all the rights, powers, authorities, privileges and duties of a succession representative provided in Chapters 4 through 12 of this title, but without the necessity of delay for objection, or application to, or any action in or by, the Court.

Since Prescott was an independent executor, he was not required to request permission from the court prior to execution of a mineral lease covering the succession property since the intent behind the creation of independent executorship was to allow succession representatives to perform their duties without having to apply to the court or obtain court approval in order to perform their duties.

Accordingly, the court held that Prescott did not breach a fiduciary duty to the legatees in the succession by granting the AIX Lease without first obtaining legatee consent and/or court approval prior to granting the lease.

4. *Franklin v. Camterra Resources Partners, Inc.*, 48,021 (La. App. 2 Cir. 5/22/13), 123 So.3d 184, *Opinion of Rehearing* (8/14/13)

Franklin involves competing claims for mineral rights. The property at issue was the separate property of George Franklin, husband of Wendy Stuart. In 2000, as part of the divorce decree between he and his wife, Franklin transferred the property at issue to a trust and reserved the mineral rights Both Franklin and his now ex-wife Wendy Stuart were named trustees of the trust. In September 2000, Franklin and Stuart agreed to sell the property to Rodney and Carol Arbuckle. The attorney for the Arbuckles believed that the trust was not executed in authentic form and thus the trust could not own immovable property in Louisiana. In an attempt to cure the defects in the trust instrument, the Arbuckles drafted a three page Cash Sale Deed and an Adoption and Ratification of the Trust. The cash sale consisted of three pages (the "Arbuckle Deed"). On the first page, Franklin and Stuart appeared in their capacity as trustees, conveying all of the trust's rights in the property to the Arbuckles, subject to any and all prior reservations. On the second page, Franklin appeared in his individual capacity, quitclaiming all of his rights in the property to the Arbuckles.

On April 4, 2008, Camterra Resources Partners, Inc. ("Camterra") acquired a mineral lease of the subject property from the Arbuckles. A few months later, Franklin assigned his mineral rights in the subject property to Claudia Franklin, his current wife. In 2009, Mrs. Claudia Franklin filed suit against Camterra and the Arbuckles, seeking a declaratory judgment that she was the owner of the mineral rights. Mr. Franklin intervened in the suit, claiming that he reserved the mineral rights in the subject property in the Arbuckle Deed, or in the alternative, the Arbuckle Deed should be reformed or rescinded based on error inasmuch as it was his intention to reserve his mineral rights therein. In response, defendants filed motions for summary judgment. The trial court granted all of defendants' motions for summary judgment holding that the Arbuckle Deed clearly transferred both surface and mineral rights in the Subject Property. Mrs. Claudia Franklin filed a Motion for a new trial which was granted. Defendants then filed motions for summary judgment which were granted. On appeal, the Court affirmed the trial court's ruling and found the quitclaim deed signed by Mr. Franklin in his individual capacity clearly and unambiguously conveyed his mineral rights to the Arbuckles. The Franklin's applied for rehearing which was granted.

Upon further consideration, the Court of Appeal held that the Arbuckle Deed was ambiguous in that the first page of the instrument included "subject to" language making the clauses mutually inconsistent. This ambiguity allowed the Court to go beyond the instrument and analyze evidence which showed that there was no discussion in the negotiations regarding conveyance of minerals, nor any explanation why Mr. Franklin was asked to execute the Arbuckle Deed in his individual capacity. Moreover, the evidence showed that the Arbuckles believed that Mr. Franklin owned the disputed mineral interest. Thus, the Court held there to be genuine issues of material fact regarding "proof of motive or intent in the contract which requires the trier of fact to choose from competing inferences" and which made the case unworthy of summary judgment.

5. <u>*Ross v. Enervest Operating, L.L.C.* 48,229 (La. App. 2 Cir. 6/26/13); 119 So.3d 943; *rehearing denied* (812/2013); *writ denied*, 2013-2034 (La. 4/15/13), 125 So.3d 1110</u>

This case arises out of a failure to pay amounts due Lessors successor in title to a 1916 oil, gas and mineral lease. Plaintiffs are owners of an undivided interest in land located in Morehouse Parish, Louisiana burdened by a 1916 mineral lease (the "Sandidge Lease"). Plaintiffs claimed that the Sandidge Lease had terminated and filed suit seeking a release of the lease. Defendants are the four current lessees of the Sandidge Lease.

The Sandidge Lease was first amended in 1921 (the "1921 Amendment") as follows:

> The Lessee shall pay to the Lessors jointly the sum of Two Thousand Dollars ($2,000.00) for the gas and gas rights in the lands embraced in said lease for the year 1.20 [*sic*] and Three Thousand Dollars ($3,000.00) for each subsequent year during the continuation of said lease; and all payments shall be made to the Bastrop State Bank of Bastrop, Louisiana as Trustee for the lessors... and all payments shall be amde [*sic*] annually in advance on or before the 10th day of January each year…the said lease as

> to all of the rights of the lessee herein shall remain in full force and effect until January 10, 1922; and the said lease as to all of the rights of the Lessee herein shall remain in full force and effect continuously thereafter so long as the Lessee pays in the manner aforesaid the said sum of three thousand dollars ($3,000.00) on or before the 10th day of January each year; provided that if the Lessee should fail to make said payments annually as aforesaid all of his rights under said lease shall terminate; and the lands therein described shall revert to the Lessors free from any claims or demands or rights of the Lessee. The true intent and purpose being that the Lessee shall pay to the Lessors for all of the gas and gas rights in or under the lands embraced in said lease the sum of two thousand dollars ($2,000.00) for the year 1920 and the sum of three thousand dollars ($3,000.00) for each subsequent year-all future payments to be made on or before January 10 of each year beginning with the year 1922 as aforesaid; *and that the failure of the Lessee to so make said payments shall ipso facto terminate all of his rights title and interest to the gas and gas rights in or under said lands; and the said lands, with all of the gas and gas rights, shall revert to the Lessors from any claims in demands or rights of ownership interest as possession or the party of the Lessee* . . .

The Sandidge Lease was amended again in 1935 (the "1935 Amendment"), which provided, in pertinent part as follows:

> That the royalties and rentals and considerations provided in said lease as amended by said agreement with S.S. Hunter [referencing the original lease and the 1921 Amendment] for the gas and gas rights, shall no longer be effective but hereafter payments therefore should be made as follows:
>
> 1. Subject to the conditions hereinafter set out, the Lessee shall pay to the Bastrop Bank & Trust Company, as Trustee, for the joint account of the Lessors herein according to their respective interests in said described lands, annually in advance on or before the 10th day of January, in each year, the sum of $3,000.00 which shall be a minimum yearly payment as herein provided (the "annual payment").
>
> 2. Subject to the above minimum and the conditions herein contained, the Lessee shall pay to the Lessors a royalty of one-eighth of the value of the gas used or marketed from any well on said property at .03 cents per thousand cubic feet. . . .

Sometime after execution of the 1935 Amendment, the lessees mailed checks in order to make the minimum annual payment, but inadvertently, checks were sent to the wrong individuals. In 1996, Gas Masters, the Lessee responsible for making all payments of royalties due under the lease, wrote a letter asking royalty owners if they knew the whereabouts of other lessors. Gas Masters was informed that some lessors' addresses could be found in the Morehouse Parish court house records. Later, in 2008, a new owner wrote to Enervest, one of the lessees, notifying it of their purchase of the property and directing that royalty payments be made to their attention. Enervest responded that it was the operator, but that Gas Masters actually made all royalty payments. In 2009, the plaintiffs' attorney sent a letter to Enervest, notifying the lessee of his clients' ownership interest in the leased land and demanding royalty payments. Enervest promptly forwarded the letter to Gas Masters. Within thirty (30) days of receipt of that letter, the plaintiffs received payment for the full amount owed, plus interest. Plaintiffs refused to accept the payment and filed suit seeking a declaratory judgment that the lease had terminated by operation of the resolutory condition contained in the 1921 Amendment.

The trial court entered judgment for the plaintiffs, finding that the annual payment in the 1935 Amendment was "primarily a rental/lease payment" as the money was due Lessors regardless of the amount of production, and under the language of the 1921 Amendment, failure to make the rental payment resulted in termination of the Sandidge Lease as the result of the automatic termination clause.

Defendants appealed and the Appellate Court reversed the trial court, holding that the 1935 Amendment had eliminated the resolutory condition of the 1921 Amendment, and moreover that the characterization of the payment as a rental, rather than a royalty, was inaccurate.

The Court reasoned that gas had been produced from the leased premises for the life of the lease and that based on the "very definition of royalty as any interest in production of its value" the annual payment was an advance due on production attributable to the lease. Further, under the language of the 1935 Amendment to the lease, the ipso facto termination clause of the 1921 Amendment, which was not specifically restated in that portion of the 1935 Amendment regarding royalty payments, was not incorporated by reference. Finally, in its analysis of Mineral Code articles governing royalty claims, the Court held that lease termination was improper because Lessees had a reasonable explanation for failure to pay and said failure was not willful or fraudulent. Further, because the lessee had paid the full amount due within 30 days of receiving notice and demand for nonpayment in accordance with La. R.S. 31:138 the judgment of the final court was reversed. Plaintiffs' application for writs to the Supreme Court were denied.

6. <u>*Wagoner, et al v. Chevron USA, Inc.*, 48,119 (La. App. 2 Cir. 7/24/13), 121 So.3d 727, *writ denied*, 126 So.3d 470 (La. 11/15/2013; 129 So.3d 523 (La. 11/15/2013)</u>

This case involves a claim for damages to a 193 acre tract of land in Concordia Parish, Louisiana. Plaintiffs owned only surface rights in the land at issue and none of the transfers in the plaintiffs' chain of title include an assignment of the right to sue for property damage. Plaintiffs filed suit in 2008 and alleged that the property was contaminated by oil and gas exploration and production activities that commenced on the property in 1945 and named various defendants ("*Wagoner I*"). Defendants argued that under the subsequent purchaser doctrine, Plaintiff, as surface owner, had no right to recover for damages which were caused on the property before its purchase. The trial court granted the defendants' exceptions of no right of action holding that Plaintiff was not expressly assigned the right to sue mineral lessees for damages to the property caused prior to its purchase. The Second Circuit affirmed the trial court's ruling.

The "subsequent purchaser" doctrine is best explained by the Louisiana Supreme Court in *Eagle Pipe & Supply, Inc. v. Amerada Hess Corp.*, 2012-2267 (La. 10/25/11), 79 So.3d 246. It provides as follows:

> The subsequent purchaser rule is a jurisprudential rule which holds that an owner of property has no right or actual interest in recovering from a third party for damage which was inflicted on the property before his purchase, in the absence of an assignment or subrogation of the rights belonging to the owner of the property when the damage was inflicted.

Additionally, the court pointed out that the plaintiff in *Wagoner I* was not party to the original lease and the lease did not contain any provision allowing the surface owner to bring its claim as a third party beneficiary. And since the right to damages conferred by a lease is a personal right, not a property right, such personal rights do not pass to new land owners absent a specific conveyance of such rights.

After the district court sustained defendants' exceptions, plaintiff obtained an assignment from the mineral servitude owners of 99% of their rights to seek damages caused by exploration and production activities on the land in question. Plaintiffs then filed a second suit against defendants setting forth the same allegations, but now in the capacity as mineral servitude owners ("*Wagoner II*"). Defendants Chevron, Merit and Devon filed exceptions of *res judicata* which were granted by the trial court and the suit was dismissed with prejudice.

The question before the Second Circuit on appeal was whether *res judicata* barred plaintiff from suing again to recover damages which occurred prior to their 2004 acquisition of the property since the case had already been litigation in *Wagoner I*.

In its analysis, the Court discussed the five elements that must be satisfied in order for *res judicata* to bar a second action (1) the judgment in the first action is valid, (2) the judgment in the first action final; (3) the parties are the same; (4) the cause(s) of action asserted in the second suit existed at the time of the final judgment of the first; and (5) the cause(s) of action asserted in the second suit arose out of the transaction or occurrence that was the subject matter of the first. Citing the Supreme Court in *Ketty v. Brumfield*, 93-1142 (La. 2/25/94), 633 So.2d 1210, the Court noted all five elements must be satisfied, and any doubt must be resolved against its application.

Here, the Court found that the first two elements for application of *res judicata* were satisfied because both parties agreed that the judgment in Wagoner I was both final and valid. Under the third element, "the identical parties must appear in the same capacity in both suits"[7] *res judicata* would not bar a subsequent claim between the same parties if the parties appeared in different capacities.

In *Wagoner I*, plaintiff filed suit in its capacity as surface owner. In *Wagoner II*, plaintiff asserted claims in its capacity as assignee of the rights of the mineral servitude owners "via the assignment, the [plaintiffs] have essentially stepped into the shoes of the prior mineral servitude owners/lessors." Defedants asserted that under *Minvielle v. Atlantic Refining Co*., 05-1312,2007 WL 2668715 (W.D. La. 2007) *res judicata* should apply. But the court found that since the mineral owners had not assigned Wagoner their rights to sue for damages from contamination at the time of the original sale, Wagoner could not have asserted claims for damages to the property prior to the sale in *Wagoner I*. Thus, the Appellate Court concluded that plaintiff did not appear in *Wagoner II* in the same capacity as *Wagoner I* as to those claims made as assignees of the rights of the mineral servitude owners. Because the five elements laid out above could not be met, the Court ultimately held that (as to the claims brought in the capacity of mineral servitude owners) *res judicata* did not apply.[8]

The Court also entertained an exception of Lis Pendens filed by Denbury, Smith, LSJ, Diamond and Oil & Ale who had not been dismissed in *Wagoner I* as had Devon, Chevron had Merit based on the subsequent purchaser doctrine and granted the exception in part as to the claims as surface owners and reversed and remanded as to the plaintiffs' claims as mineral servitude owners.

[7] ***Burguieres v. Pollingue***, 2002-1385 (La. 2/25/03), 843 So.2d 1049.

[8] Note that the court affirmed that the trial courts grant of the exception of ***res judicata*** as to plaintiff's claims as surface owner.

7. *<u>Questar Exploration and Production Co. v. Woodard Willa, Inc.</u>*<u>, 48,401 (La. App. 2 Cir. 8/7/13), 123 So3d 734,</u> *<u>rehearing denied</u>* <u>(9/19/13);</u> *<u>writ denied</u>*<u>, 2013-2467 (La. 2/21/14)</u>

In August 2004, Woodard granted a mineral lease to QEP's predecessor in interest covering approximately 1,480 acres in Sections 22, 23, 26, 27 and 35, Township 15 North, Range 9 West, Bienville Parish, Louisiana.[9] The lease had a primary term of three years and was later extended for one year to August 5, 2008. The lease contained a Pugh clause and a depth severance clause (also known as a horizontal Pugh clause). The horizontal Pugh clause provided as follows:

> This lease shall cover and affect the land described herein from the surface of the earth down to one hundred feet (100') below the stratigraphic equivalent of the deepest depth to which the deepest well shall be drilled on the leased premises <u>or on a unit(s) embracing some part of the leased premises during the primary term, plus one (1) year</u>. Provided, however, that is a productive formation is discovered and the same is producing when the depth limitation takes effect, this lease shall extend to the base of such formation so as to include all of such formation under the lease plus one hundred feet, though no well shall have been drilled to the depth of said base or lower limit of such formation.

The Horizontal Pugh was to take effect one year after the expiration of the primary term. At least one well on each of the five units comprising the subject property was drilled and completed to the Cotton Valley formation prior to the end of the primary term.

On May 23, 2009, QEP spud the JW#1 as the unit well for ta Section 27 Haynesville unit on a surface location that was neither on the leased premises nor in a unit containing any of the leased property. The well was horizontally drilled and entered into the Haynesville Shale unit underlying Section 27 on July 16, 2009 about three weeks before he horizontal pugh clause was to take effect.

In August and in September 2009, Woodard notified QEP that as of August 5, 2009, the lease had expired as to all depths below the Cotton Valley formation, including the Haynesville Shale formation.

QEP filed suit in February 2010. In a motion for summary judgment, QEP claimed the lease had been maintained as to Cotton Valley depths during the primary term and that, by

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[9] Each section was ultimately designated by the Department of Conservation as an individual unit for the Hosston, Cotton Valley and Haynesville Shale formations.

virtue of the JW#1 well, the entirety of the leased property had been maintained to a depth of 12,556 feet (the Haynesville Shale formation). Woodard responded with a cross motion for summary judgment seeking a declaration that the JW#1 well did not maintain the lease as to depths below the Cotton Valley formation. Or, in the alternative that the well only maintained the lease below the Cotton Valley formation as to those portions of the lease that participated in the Haynesville unit in Section 27. The trial court granted QEP's motion for summary judgment finding that although the JW#1 well was drilled only in the Section 27 unit, based on the language of thr Lease's Horizontal Pugh clause[10] the court was compelled to find that the entire lease was maintained to the Haynesville Shale formation. Lessor appealed.

The issue before the Second Circuit was whether a well drilled off of the lease premises and not on unitized lands, but reaching horizontally into a formation under the lease, maintains the lease as to all, or at least part, of the lease.

First Woodard argued that the trial court erred in finding that the Pugh clause did not act to separate the maintenance requirements of the lease such that each of the five units created, which make up the leased property, had a separate maintenance obligation. In its analysis, the Court stated that although a Pugh clause may provide for the subdivision of a lease based on production by units covering portions of the leased property, in this case, the language contained in the Pugh clause did not. The Court found that "the Pugh clause's specific reference to *this lease* and the absence of any mention of separate leases or division of the lease shows that the parties did not intend for the clause to separate or divide the lease." The Court held that the Pugh clause at issue did not prevent QEP from maintaining the entirety of the lease by production from one well.

Woodard next argued that the trial court erred in finding that the JW#1 well maintained the leased premises below the base of the Cotton Valley formation because the lease specifically, provided for maintenance beyond the primary term by a well "drilled on the lease or in a unit embracing leased land." In its analysis, the Court relied on the rationale of *Peironnet v. Matador Resources'* stating "with the advent of horizontal drilling, operators may access leased property or units remotely." This serves to benefit Lessors by development of a unit in which their property is located even if the well is drilled off-site.

Lastly, Woodard argued that the trial court erred in denying its alternate claim that the JW # 1 well only maintained the lease below the Cotton Valley formation as to those portions of the lease located in the Section 27 unit. Plaintiff argued that QEP had the opportunity to drill deeper wells into each unit for an entire year after the depth severance provision was triggered,

[10] The Pugh Clause states that operations from any well situated on lands included within a unit or units embracing a portion of the lease premises will maintain the lease only "as to that portion of the leased premises embraced in such unit or units," but further states: This lease may be maintained as to acreage not included in such unit or units in any other manner provided for herein, including continuous development as provided for in paragraph 6 of the body of the lease form.

but failed to do so. The Court was not persuaded since QEP or its predecessors had performed operations on all five units encompassing the leased premises and that consequently, there was no issue of a lessee ignoring large portions of the lease. "Moreover, the Horizontal Pugh Clause does not operate on a unit-by-unit basis" and therefore QEP was entitled to summary judgment. Woodard's appeal for rehearing was denied.

8. *Harter v. Harter*, 48,426 (La. App 2 Cir. 10/2/13), 127 So.3d 5, *rehearing denied*, Nov. 14, 2013, *writ denied*, 2013-2900 (La. 2/21/14)

Harter involves the requirements for a valid oral transfer of immovable property. Here, plaintiffs, David Harter and Jan Harter Pipkin, filed a breach of contract action against defendant, Mike Harter and his business, Harter Oil, claiming ownership of 25% each working interest in certain mineral leases formerly belonging to their mother's estate (the "Estate Lease").

Plaintiffs and defendant are brothers and sister. Harter Oil is owned 100% by Mike. The entities agreed that Harter Oil would sell to each David and Jan a 25% interest in the estate lease, for $250,000 each. The $500,000 purchase price would be financed by loans from Harter Oil with 7% interest. The loans were to be paid out of the working interest revenues assigned to plaintiffs. In exchange, Plaintiffs agreed to file suit against David, Jan and Mike's brother, Steve, for mishandling the money from their mother's estate. Plaintiff sent several written requests to defendant asking that the parties finalize the purchase documents; however, no written assignments or promissory notes were ever executed by the parties.

In 2008 during defendant negotiations with Voyager Energy to buy two of the leases in which plaintiffs' alleged they owned an interest, Voyager's due diligence uncovered that there were four additional working interest owners: plaintiffs together had 50%, while two other parties had a 7.5% interest each. Harter Oil's acquisition assignment was the only assignment of record. Defendant then removed plaintiffs from its internal records and finalized the sale of the leases to Voyager. Subsequently, defendant sold the remaining leases in which plaintiffs alleged they owned a working interest to RYCA Energy.

Plaintiffs filed suit claiming that they were not paid their share of the proceeds from either the sale to Voyager or RYCA of their working interest percentages of the estate leases. The trial court granted defendant's motion for directed verdict. Plaintiff appealed.

Under Louisiana Civil Code article 1839, a valid oral transfer of immovable property requires that the property actually have been delivered and the transferee have taken physical possession. Additionally, the transferor must recognize the transfer under oath. These requirements are necessary to effect an oral transfer of immovable property. First, plaintiffs demonstrated actual delivery. Harter Oil's internal records reflected that both plaintiffs were working interest owners to the tune of 25% each, as had been agreed upon. Specifically, Harter Oil's accounting books reflected plaintiffs' working interest ownership, the purchase price loans, credits for their monthly loan payments and the interest charged. Additionally plaintiffs were issued regular monthly reports such as joint interest billing and lease operating expense reports. Finally, 1099s showing compensation were sent to plaintiffs in 2007 and 2008. Second, defendants contend that the evidence reflects his unequivocal denial of the transfer of the property in sworn testimony.

In determining what constitutes a valid delivery under Louisiana Civil Code article 1839, the Second Circuit has held that the court must look to the circumstances of each case.[11] The Court noted that "article 1839 requires the recognition of the transfer or delivery by the transferor under oath, not necessarily that the transferor judicially confess the ultimate conclusion."[12] In this matter, the Court found that the defendant's admissions concerning the events surrounding the agreement during defendant's trial testimony were sufficient to satisfy article 1839's requirement of "recognition under oath." The Court held that "since [defendant's] actions evidence an actual delivery of the interests and he subsequently recognized such delivery under oath, the requirements for a valid oral transfer found in Article 1839 have been met."

Alternatively, the defendants argued that the sale of the leasehold working interest was never perfected because the parties had agreed to reduce the agreement to writing at a later date and that writing never took place. Under Louisiana jurisprudence "the courts have held that when parties substantially comply with an oral agreement, neither one can subsequently withdraw on the basis that they failed to execute a writing despite the fact that all parties had initially agreed to reduce their agreements to writing."[13] Ultimately, the Court determined that the parties' actions constituted performance and found that the agreement to transfer the working interests in the leases was completed and reversed the trial court ruling.

9. *Barham v. St. Mary Land & Exploration Co.*, 48,603 (La.App 2 Cir. 11/20/2013), 129 So.3d 705, *writ denied*, 2013-294 (La. 2/21/2014)

In *Barham*, landowners sought a declaratory judgment against lease operators declaring that a 1966 mineral lease had lapsed and was novated by a 1990 lease pursuant to which landowners were due unpaid royalties. The district court ruled in favor of the operators and landowners appealed, urging that the district court erred in holding that a novation did not occur and that the 1966 lease remained in effect.

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[11] *Martin v. Brister*, 37,011 (La. App 2d Cir. 07/23/03), 850 So.2d 1106, *writ denied*, 03-2374 (La. 11/21/03), 860 So.2d 550.

[12] *Langevin v. Howard*, 363 So.2d 1209 (La. App. 2 Cir. 1979).

[13] *Southern Scrap Materials Co., v. Commercial Scrap Materials Corp.*, 239 La. 958, 120 So.2d 491 (La. 1960); *O'Glee v. Whitlow*, 32, 955 (La. App. 2 Cir. 4/07/00), 756, So.2d 1288.

Mavis and Fannie Barham executed a mineral lease covering 80 acres of land in Bienville Parish, Louisiana in favor of John Copeland.[14] The 1966 lease provided for a standard one-eighth lessor's royalty. A well was drilled and completed in approximately 1968 and the Barhams received royalty payments pursuant thereto. In 1990, the Barhams discovered that there had been a gap in production on the 1966 lease (approximately from July 1986 through January 1987). The Barhams' attorney contacted Sonat, the lessee at the time advising that the lease may have terminated and requesting information as to any re-working or additional drilling on the lease during the suspected gap. Based on concerns that the 1966 lease may have lapsed, Sonat sent a landman to obtain a new lease from the Barhams. The new lease was executed in December of 1990 naming Sonat as lessee. The new lease covered the same land as the 1966 lease but contained an addendum with an increased lessor's royalty of one-fifth instead of one-eighth, a Pugh clause and a surface damage clause. Shortly thereafter, Sonat discovered receipts showing quarterly shut-in payments that would explain the seven month gap in production. Thus, Sonat deemed the 1966 lease effective and continued paying the one-eighth royalty pursuant thereto, in effect treating the 1990 lease as a "protection lease" that never took effect. In 2006, the Barhams filed suit against Sonat's successor, St. Mary Land and Exploration, Cypress Operating and El Paso E&P alleging that the 1990 lease was a novation of the 1966 lease and seeking an award of all unpaid royalties pursuant to the 1990 lease. The Barhams motion for summary judgment focusing on whether a novation occurred was denied by the trial court.

Plaintiff's appealed arguing that *Placid Oil Co. v. Taylor*, 325 So.2d 313 (La. App. 3 Cir. 1975), "mandates a finding of novation when the 'top lease' makes no reference to the underlying lease and states a higher royalty payment to the lessors." However, the Court distinguished Placid based on the fact that the lease at issue in that case was not suspected of having lapsed. Additionally, the court noted that Sonat's concern that its predescessor entitled had allowed the 1966 lease to lapse coupled with its intent to protect its status as lessee with 24 years' compliance with the 1966 lease clearly indicated a "common purpose" of protection – execution of a top lease–rather than an intent to novate.

Novation is defined as the extinguishment of an existing obligation by the substitution of a new one (Louisiana Civil Code Article 1879). And the intent to novate need not be expressly declared in writing, however, the intent to novate must be clear and unequivocal and may not be presumed.

In considering the actions of the parties, the court noted that Sonat's internal records reflected the validity of the 1966 lease rather than the 1990 lease. In 2005 the Barhams were

[14] Copeland assigned the lease to Sonat Exploration in 1967; Sonat assigned the lease to Frank's Petroleum in 1970; Frank's Petroleum assigned its interest back to Sonat in 1989; Sonat assigned its interest to Cypress Operating Company in 1995.

notified that the 1990 lease had been taken "in error" by a Cypress Operating land manager, and the Barhams were receiving royalty in the amount of one-eighth as provided in the 1966 lease from Cypress Operating. The Court noted that while these facts may seem self-serving from the lessee's standpoint, they support the district court's finding that the parties had no intent to extinguish the 1966 lease and therefore affirmed the trial court's ruling.

10. *Walsworth v. Chesapeake Louisiana, L.P.*, 48,588 (La. App 2 Cir. 11/20/2013), 128 So.3d 1266

In *Walsworth*, plaintiff Lessors brought action against defendant Chesapeake, as lessee, alleging breach of contract by repudiation of a lease seeking a declaratory judgment that the lease was valid and an order requiring specific performance, or, in the alternative, damages. The trial court granted summary judgment in favor of defendant Chesapeake and the Second Circuit affirmed holding that no enforceable agreement to lease existed between the parties and Chesapeake was free to remove itself unilaterally. Plaintiff appealed.

On July 8, 2008, defendant Chesapeake proposed and delivered to Plaintiff an "Agreement to Lease" setting forth the basic terms of its offer - $20,000 per acre bonus, three year primary term, and one-fourth (25%) royalty. The Agreement to Lease also included a provision that the offer was subject to the execution of a mutually agreed upon paid up form of Oil and Gas Lease, in the form as attached herein as Exhibit 'A.'"

On September 10, 2008, plaintiff sent Chesapeake his own form of lease which included several lessor-friendly obligations and revised the proposed Agreement to Lease to state "Chesapeake's offer is subject to the execution of a mutually agreed upon paid up form of Oil and Gas Lease." Plaintiff then executed the revised Agreement to Lease on September 18, 2008.

On October 8, 2008, plaintiffs contacted Chesapeake to determine whether the proposed lease had been finalized and whether or not Chesapeake required any revisions. Two weeks later, Chesapeake responded that the proposed lease was rejected, stating that "given the state of the economy and dramatically reduced gas prices and lease values" Chesapeake did not believe the parties would be able to reach an agreement on acceptable lease form.

Plaintiff filed suit against Chesapeake claiming that Chesapeake repudiated the Agreement to Lease, thereby breaching the contract in bad faith. Chesapeake filed a motion for summary judgment seeking dismissal and argued that there was no binding Agreement to Lease property at a future date. The trial court granted Chesapeake's motion finding that the "Agreement to Lease was tantamount to a letter of intent which contemplated additional negotiations, specifically finalizing the lease form." Plaintiff appealed.

On appeal, the Second Circuit framed the case's fundamental question, to wit: "whether the Agreement to Lease and plaintiff's proposed revisions constitute a contract between the parties." And, upon analyzing the provisions of the Agreement, the court concluded that they do reveal that a contract was formed. Chesapeake made an offer and Plaintiff made a counter-offer instead of accepting Chesapeake's offer.

La. Civil Code Art. 1947 provides that when in the absence of a legal requirement, the parties have contemplated a certain form, it is presumed that they do not intend to be bound until the contract is executed in that form. Further, La. Civil Code Art. 2670 provides a contract to enter into a lease at a future time is enforceable by either party if there was agreement as to the thing to be leased and the rent, unless the parties understood that the contract would not be binding until retuned to writing or until its other terms were agreed upon. Generally enforcement of a contract to lease is not available if the parties agreed that the contract would not be binding until reduced to writing. In these cases, "the contract is [merely] inchoate, incomplete, and either party, before signing may … recede …" La. C.C. art. 2670, Comment (C). These inchoate contracts are often referred to as "letters of intent" which definitively contemplate some further condition to be fulfilled, such as a subsequent written contract to be executed. As such, parties are not bound, and are therefore free to walk away, until those conditions are satisfied. *Graham v. Chesapeake Louisiana, L.P.*, 2013 WL 5673858 (W.D.La. October 16, 2013); *Ballard v. XTO Energy, Inc.*, 784 F.Supp.2d 635 (W.D.La. 2011).

The Court found clear evidence that Plaintiff rejected Chesapeake's proposed lease form by revising the original agreement and proposing his own lease form. The new revised language clearly stated that the Agreement to Lease was "subject to the execution of a mutually agreed upon paid up form of Oil and Gas Lease" thus requiring not only that the contract be reduced to writing, but also acknowledging a state of ongoing negotiations between the parties. The court stated that these actions transformed the Agreement to Lease into a nonbinding Letter of Intent. Thus, the Court held that the Agreement to Lease was a nonbinding and unenforceable contract.

C. LOUISIANA THIRD CIRCUIT COURT OF APPEAL

1. *Andrepont v. Chevron*, 2012-1100 (La. App 3 Cir. 4/3/13), 113 So.3d 421

Plaintiffs are individual owners of immovable property in Acadia Parish, Louisiana located near the historic Jennings Field well known as the site of the first oil production in Louisiana. In January, 2006, Plaintiffs filed suit against Radke Oil Company, Inc. ("Radke") and eleven other defendants, seeking damages for contamination of their property caused by oil and gas exploration and production activities. Specifically, Plaintiffs allege that Radke, et al had utilized unlined earthen pits for oil field waste storage leading to surface and subsurface contamination. According to Plaintiff's allegations, "other contamination to their properties was caused by the "Leaks, spills, and other discharges from oil wells, pipelines, tank batteries, plants and other equipment owned by operated by" Defendants." The Plaintiffs argued that the defendants knew or should have known that their day-to-day operations would lead to contamination and that they refused to remove the pollution and toxic wastes caused by their operations and instead chose to hide it. Allowing the pollution and toxic waste to migrate and spread to the soils, surface waters, and groundwater of their property. Thus, the Plaintiffs sought monetary damages based on theories of negligence, trespass, strict liability, strict liability for ultra-hazardous activity, and breach of contract and obligations as lessee.

The issue giving rise to the appeal was raised by Radke in a motion for summary judgment. Attached to Radke's motion for summary judgment were answers to interrogatories and request for production propounded on plaintiffs as well as an affidavit of Lee A. Day, a senior geologist with Toxicological and Environmental Associates, Inc. in Baton Rouge, Louisiana. Following hearing on the motion, the trial court granted Radke's motion and dismissed the plaintiffs' claim against it. Plaintiffs raised two assignments of error on appeal.

In the first assignment of error, the plaintiffs asserted that the evidence submitted by Radke was not sufficient to cause the burden of proof to shift to plaintiff as required by La. Code of Civ. Proc. art. 966(C)(2). La. Code of Civ. Proc. art. 966(C)(2) sets forth the burden of proof in summary judgment proceedings:

> The burden of proof remains with the movant, however, if the movant will not bear the burden of proof at trial on the matter that is before the court on the motion for summary judgment, the movant's burden on the motion does not require him to negate all essential elements of the adverse party's claim, action, or defense, but rather to point out to the court that there is an absence of factual support for one or more elements essential to the adverse party's claim, action or defense. Thereafter, if the adverse party fails to produce factual support sufficient to establish that he will be able to satisfy his evidentiary burden of proof at trial, there is no genuine issue of material fact.

The Court of Appeal disagreed with plaintiffs' first assignment of error, finding that the answers provided by plaintiffs to Radke's interrogatories and the lack of responses to Radke's request for production established that plaintiffs had not at that time provided any proof of Radke's liability for the claims asserted. Specifically, in their discovery responses, "plaintiffs acknowledged that they had no evidence of leaks, spills or discharges attributable to operations by Radke nor did they have information to suggest that Radke ever disposed of oilfield waste in unlined earthen pits on or near any of the property." Additionally, Mr. Day's affidavit established that (i) none of Radke's wells were located on the lease premises and (ii) no spill or leak from the Radke wells could have affected the property because of the well site elevations and the natural flow of ground water in the area. The Court agreed with the trial court's finding that evidence produced by Radke was sufficient to cause the burden to shift to plaintiffs as required by La. Code Civ. P. art. 966(c)(2).

Next the plaintiffs argued that the trial court erred in applying a heightened evidentiary standard by rejecting the assertion that their response to defendant's motion for summary judgment established a genuine issue of material fact." On January 17, 2012, the plaintiffs had filed a brief in opposition to the summary judgment motion and attached the affidavit of Gregory W. Miller, a geologist and principal of ICON Environmental Service, Inc., a Baton Rouge, Louisiana company. In his affidavit, Mr. Miller, a geologist with over twenty years of experience, was hired by the plaintiffs to determine whether the years of oil and gas exploration had caused soil and groundwater contamination of their properties. Although he did not specifically respond to Mr. Day's opinion concerning spills at the well sites, he asserted that he had reviewed historical aerial photographs, pit maps, and other related data to conclude that the contaminated condition of the plaintiffs' properties had been caused not by the oil and gas activity, but through the storage of oil and production wastes. Mr. Miller explained that both the oil and production waste produced through the drilling process were stored in earthen holding pits or tanks located a significant distance away from the production field and the oil and/or production waste was transported to the holding pits from the well site through surface flow lines. Based on this study, Mr. Miller discovered the presence of two holding pits on the plaintiffs' properties and four located adjacent to their properties and determined that the flow lines to the six earthen pits "appear to originate from wells operated by Radke, among others." The Court again disagreed with plaintiffs, noting that La. Code of Civ. Proc. art. 966(C)(2) does not require the trier of fact to make a determination, but instead "simply requires the nonmovant to present evidence that if believed by the trier of fact, would allow he or she to prevail at a trial on the merits." And, the Court found that the plaintiffs failed to present such evidence. The Court stated: "At best, Mr. Miller's affidavit establishes that the flow lines "appear" to originate from wells operated by Radke. This assertion, standing alone and if believed by the trier of fact, does not satisfy the plaintiffs' preponderance burden of proof. This is particularly true given the fact that it does not establish whether Radke was an operator of any of the wells at the time the oil and/or waste material was being transported through the flow lines or whether it assumed any responsibility for the actions of previous operators."

Thus, the Court affirmed the trial court's judgment that the information provided by plaintiffs was not sufficient to prove that Radke was liable for any alleged contamination on the property and dismissed plaintiffs' claims.

2. <u>*Olympia Minerals, LLC v. HS Resources, Inc.*, 2013-110 (La. App 3 Cir. 8/21/13), 123 So.3d 281; *rehearing denied* (10/9/13)</u>

In this case, Plaintiff Olympia Minerals, LLC ("Olympia"), as successor to both El Paso Minerals, Inc. and El Paso Leasing, Inc. ("El Paso"), brought an action against Aspect Resources, LLC ("Aspect") for breach of a seismic contract, seeking dissolution and damages, as well as specific performance of that portion of the contract requiring that all seismic data be turned over to Olympia. Plaintiff argued that under the contract Aspect owed a duty (1) to lease 15%

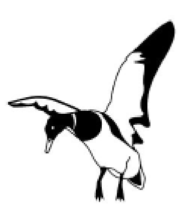
of El Paso's mineral interests; (2) to conduct a seismic survey over all lands covered by the contract; and (3) to turn over all seismic data, including field tapes, to plaintiff. The trial court ruled in favor of Plaintiff, finding that Aspect had breached all three of its major obligations under the contract and awarded Olympia dissolution, and damages and specific performance requiring that Aspect turn over all field data.

In affirming the trial court's finding that there was an obligation to lease 15% of the El Paso lands, the Court explained that the language contained in the contract specifically imposed such an obligation on Aspect. Next, the Appellate Court affirmed the trial court's finding that there was an obligation to survey all of the El Paso lands. The Court explained that Aspect's argument that the contract contained language allowing it to survey as much or as little of the property as they chose would render the provisions of the agreement inconsistent. Instead, the court accepted the opinion of John A. Mills, an officer of El Paso who supervised the negotiations of the agreement. Mr. Mills explained that the language stating that Aspect did not have to include all El Paso lands was customary in the industry and designed to deal with “surface issues …places where surveying crews could not work, such as towns, cemeteries, or tracts lacking the proper permit. Based on the testimony the Court affirmed the trial court's finding that Aspect was obligated to conduct the survey over the entire property covered by the contract. Third, the court found no question with regard to the intentional nature of Aspect’s failure to make the field tapes available and affirmed the trial court’s decision in finding breach.

In addressing the award of damages by the trial court in the form of lost bonuses and rentals based on a finding of Aspect's bad faith and from Aspect's failure to produce the field data, the Court of Appeal agreed that the contract provision which prohibited Olympia from recovering consequential damages was null, based on the application of Louisiana Civil Code articles 2004 and 1997, along with a finding of bad faith on the part of Aspect for refusing to perform its obligation to provide Olympia with the field tapes. Thus, the Appellate Court affirmed the trial court's award for damages and lost bonuses and rentals, in addition to its order for Aspect to promptly deliver the data requested by Olympia.

Under a separate assignment of error, the Court affirmed the trial court's finding that selective dissolution of the contract was in fact appropriate. Specific performance of Aspect's obligation to lease 15% of the lands as well as completion of the survey was no longer any use to Olympia, however, Olympia was still obligated to deliver the field data.

Aspect also appealed the trial court’s award of over $7 million for loss of royalties. Under this assignment of error, the Appellate Court agreed with Aspect’s argument that since Olympia did not claim, nor present any evidence of loss royalties, “the trial court did not have the authority to reopen the evidence to obtain a sum certain” to determine the amount of loss royalty damages. Additionally, during the period for which the trial court granted lost royalties, El Paso was not in a financial position to develop the prospect. El Paso had not even requested the data until 2 ½ years after the agreement expired. Thus, the Appellate Court reversed the



award for lost royalties finding the amount determined by the trial court to be speculative at best. Additionally, because the minerals owned by Olympia were still in the ground, and in fact were being produced at the time of the appeal, the Court stated that to force Aspect to pay for the same royalties based on a breach of seismic contract because the minerals were not extracted earlier would amount to a windfall for Olympia.

In addition to Olympia, several non-contracting parties who acquired subleases from Olympia on acreage covered by the seismic contract, and who had joined Olympia in its claims against Aspect, appealed the trial court's denial of their claims for damages against Aspect under the seismic contract. Since these non-contracting parties were not party to the original contract, they argued that they were third party beneficiaries. In affirming the trial court's decision, the Appellate Court agreed that third parties must meet the requirements outlined by the Supreme Court in *Joseph v. Hospital Service District No. 2 of the Parish of St, Mary,* 05-2364 (La. 10/15/06), 939 So.2d 1206, which stated that: "1) the stipulation for a third party is manifestly clear; 2) there is certainty as to the benefit provided the third party; and 3) the benefit is not a mere incident of the contract." The trial court found that the provisions of the contract did not meet any one of the three requirements in *Joseph* and as such held that the non-contracting parties could not seek recovery for damages from Aspects failure to timely produce the field data. The Third Circuit affirmed the trial court's finding that the non-contracting parties failed to carry their burden.

3. <u>*XXI Oil & Gas, LLC v. Hilcorp Energy Co.*, 2013-410 (La. App 3 Cir. 10/9/13), 124 So.3d 530</u>

In this case, Hilcorp Energy Company ("Hilcorp") appealed a partial summary judgment in which the trial court found that Hilcorp should be penalized for failing to provide a sworn detailed, itemized statement of costs to XXI Oil & Gas, LLC ("XXI") under La. R.S. 30:103.1 and La. R.S. 30:103.2 (hereinafter the "Statute").

In February, 2011, XXI acquired a number of mineral leases in a unit operated by Hilcorp. Two months later, XXI sent a certified letter, return receipt requested, to Hilcorp requesting an initial report containing a statement of costs and revenue for the unit well. On the same day, prior to receiving XXI's letter, Hilcorp sent XXI its own letter including an authority for expenditure (AFE) report dated January 26, 2011, which included an itemized list of the expenses incurred in recompleting the unit well, and an explanation of the status of the well including certain detailed estimated costs involved.

On May 20, 2011, XXI notified Hilcorp that it had elected to participate in the recompleted unit well. XXI sent Hilcorp a second letter on June 13, 2011, stating that and Hilcorp failed to provide a sworn, detailed statement of revenues and expenses for the unit well within 90 days of its completion and within thirty days of receipt of the April 21, 2011 letter, as required under the Statute, Hilcorp could no longer deduct the costs of completing or operating the well from XXI's revenue share. La. R.S. 30:103.2 provides:

> 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.

On September 9, 2011, XXI file XXI filed suit against Hilcorp asserting claims under the Statute. The trial court granted XXI's motion for partial summary judgment in which it argued that under La. R.S. 30:103.2 certain costs could no longer be deducted from XXI's share of the revenue. The trial court held that the authority for expenditure submitted to XXI by Hilcorp failed to comply with La. R.S. 30:103.1, as the report was neither sworn nor detailed. Hilcorp appealed, stating that the court "erred in refusing to deny XXI's motion for partial summary judgment by mechanically applying the technical formalities of La. R.S. 30:103.1...without determining whether the intent and purpose of the statute has been satisfied."

On appeal, the Third Circuit found the requirements of La. R.S. 30:103.1 to be unambiguous and due to their penal nature, are subject to strict construction. Citing the United States Fifth Circuit Court of Appeals, the Court indicated that although the Statute may not specify which details are required to be reported, the term "detailed" in the statute is unambiguous within the context of a report informing an unleased mineral owner of the associated costs. Thus, "the 'detailed' requirement...must tell the unleased mineral owner what it is getting for its money." *Brannon Props, LLC v. Chesapeake Operating, Inc.,* No. 12-30306, (5^{t} Cir. Feb. 21, 2013), 514 Fed.Appx. 459. In its analysis, the Court noted that the list of the cost estimate provided by Hilcorp in its report did not provide the detail required by the Statute.

Insofar as the requirement that the statement be sworn, the Court found that this requirement needed no further analysis since the record demonstrated that the report provided was not a sworn statement. The Court explained that the Statute is clear that regardless of whether Hilcorp's statement substantially supplied adequate information, without any additional qualifying or modifying language, the statement must be sworn.

The Court affirmed the trial court's ruling granting XXI's motion for summary judgment based on Hilcorp's substantial breach of the disclosure requirements coupled with its failure to provide a sworn statement, under the Statute.

4. *Black Water Marsh, LLC v. Roger Ferriss Properties, Inc.*, 2013-477 (La. App. 3 Cir. 1/8/14), 130 So. 3d 968, rehearing denied (2/26/2014)

In the matter of *Black Water Marsh, LLC v. Roger C. Ferriss Properties, Inc.*, 2013-447 (La. App. 3 Cir. 1/8/14); 130 So.3d 968, (rehearing denied 2/26/04), the Louisiana Third Circuit Court of Appeal applied Louisiana's Public Record Doctrine finding that the instrument at issue improperly identified the parties (and was therefore improperly indexed) and, consequently, was not effective against a subsequent purchaser of the property at issue.

The dispute arose out of a marsh lease agreement (the "marsh lease") dated March 13, 2006, by Janice Ferriss on behalf of Roger C. Ferris Properties, Inc., lessor, and Gary M. Lavoi on behalf of Black Water Marshes, Inc., lessee. Under the marsh lease Roger C. Ferriss Properties, Inc. granted hunting and fishing privileges over 350 acres of immovable property located in Calcasieu Parish and Jefferson Davis Parish (the "leased property") to Black Water Marshes, Inc. Included in the marsh lease was a right of first refusal granted to Black Water Marshes, Inc. if Roger C. Ferriss Properties, Inc. chose to sell the leased property. The marsh lease was subsequently recorded in both Calcasieu Parish and Jefferson Davis Parish.

On August 2, 2011, Timothy Litel purchased the property from Roger C. Ferriss Properties, Inc. A title search in both Calcasieu Parish and Jefferson Davis Parish was conducted by Mr. Litel; however, the marsh lease was not discovered.

On October 11, 2011, Black Water Marsh, LLC filed suit against Timothy Litel, Roger Ferriss Properties and Janice Ferriss seeking: (1) injunctive relief against Timothy Litel, whom denied it access to the property during hunting season; (2) dissolution of the sale between Timothy Litel and Roger Ferriss Properties; or (3) in the alternative, a money judgment against defendants for losses suffered as a result of being denied the right of first refusal due under the marsh lease. In response, defendants asserted the dilatory exceptions of no right and no cause of action claiming that because Black Water Marsh, Inc. executed the lease, Black Water Marsh, LLC could not exercise any rights Black Water Inc. may have under the marsh lease. The trial court granted the exceptions of no right and no cause of action as to Mr. Litel. In response to the Court's ruling Black Water Marsh, LLC amended its petition naming Gary Lavoi d/b/a Black Water Marshes, Inc. as an additional party to the suit.

Subsequent to the amending of its petition, plaintiffs appealed, asserting that the trial court erred in granting Mr. Litel's exceptions of no right and no cause of action, arguing that errors in the indexing process which lead to difficulty in discovering the existence of the marsh lease were not sufficient to protect Mr. Litel under the Public Records Doctrine.

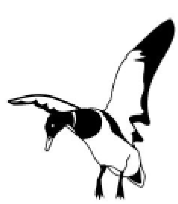
On appeal the Third Circuit reviewed the trial court's application of the Public Records Doctrine, which is codified in Louisiana.

Civil Code article 3338, et seq. Article 3338 states:

> The rights and obligations established or created by the following written instruments are without effect as to a third person unless the instrument is registered by recording it in the appropriate mortgage or conveyance records pursuant to the provisions of this Title:
>
> (1) An instrument that transfers an immovable or establishes a real right in or over an immovable;
>
> (2) The lease of an immovable;
>
> (3) An option or right of first refusal, or a contract to buy, sell or lease an immovable or to establish a real right in or over an immovable; and
>
> (4) An instrument that modifies, terminates, or transfers the rights created or evidenced by the instruments described in Subparagraphs (1) through (3) of this Article.

Louisiana Civil Code article 3343 defines a "third person" as "a person who is not a party to or is personally bound by an instrument."

In its analysis, the Court identified several issues with the recorded lease. First, the Court noted issues with both the identification (or naming) of the lessee and the lessor, finding that the lessee, Black Water Marshes, Inc., did not exist as a legal entity at the time the marsh lease was executed and that the named lessor was identified in three different ways throughout the lease: Roger Ferris Properties; Janice Ferris of Roger Ferriss Properties; and Roger Ferriss Properties. Next the Court noted that although the marsh lease was recorded in the appropriate conveyance offices, the recordation process in both Calcasieu and Jefferson Davis Parishes resulted in indexing errors which made locating the marsh lease in the public records difficult. Specifically, in Calcasieu Parish, "Roger Ferris Properties" was lessor, instead of Roger C. Ferriss Properties, Inc. And, in Jefferson Davis Parish, "Janice Ferriss" was lessor. Neither parish correctly indexed Roger C. Ferriss Properties, Inc., the owner of the property, as the lessor. Additionally, both parishes indexed Black Water Marshes, Inc., which was a non-existent corporation, as lessee. "Thus, when the lease was recorded in the conveyance records of Calcasieu Parish, neither indexed party to the lease agreement existed as a legal entity; and when the lease was recorded in the conveyance records of Jefferson Davis Parish, one of the indexed parties did not exist as a legal entity, and the other could at best be described as 'Janice Ferriss d/b/a Roger Ferriss Properties.'"



Black Water Marsh, LLC argued that at the time of the sale, Mr. Litel knew of the marsh lease and should have insisted on seeing a copy of the lease before the closing of the sale or, at the very least, should have found the lease through examination of the public records. The Court found no merit in Black Water Marsh LLC's argument stating that under the Public Records Doctrine, "Mr. Litel was not required to take notice of anything outside of the public records." The Court further held that "appellants' attempts at recordation of the marsh lease were [not] effective as against Mr. Litel." Citing to Louisiana Civil Code article 3353: "[a] recorded instrument is effective with respect to a third person if the name of a party is not so indefinite, incomplete, or erroneous as to be misleading and the instrument as a whole reasonably alerts a person examining the records that the instrument may be that of the party;" the court found that "the inappropriateness of recordation, i.e., the recordation in names which would not appear on a search of the title under the record owner, rendered the recording to be so indefinite, incomplete and erroneous that it did not reasonably alert a person examining the title of any claim by those parties." Based on its analysis of Article 3353, the Court found no error in the trial court's ruling that the recordation of the marsh lease was not effective against third persons and thus Mr. Litel was protected under the Public Records Doctrine.

This decision of the Third Circuit is important because it confirms the long-standing rule of the Public Records Doctrine that actual notice is not relevant and also provides guidance that even the slightest deviation in the name of a record owner of immovable property may be sufficient to cause a recorded instrument to be ineffective as to a third person under the Public Records Doctrine. Thus one should be vigilant when executing and recording leases of immovable property that all parties are correctly identified in the lease document as well as correctly recorded in the conveyance office of the parish in which the immovable property is located.

D. LOUISIANA SUPREME COURT

1. *Caskey v. Kelly Oil Co.*, 98-1193 (La. 6/29/99), 737 So.2d 1257

In 1972, Lessors granted an oil, gas and mineral lease to Lessee covering 140 acres in Webster Parish, Louisiana known as the Connell tract ("the tract"). Lessee's personnel began entering the tract through a locked gate on the tract's north boundary and used an existing unimproved north-south road on the tract that had been used by previous operators of the well. Lessors never objected to the use of the road by Lessee to obtain access to the well on the tract. In 1996, Lessee directed their contractor to improve the road on the tract. Lessee's contractor then removed the locked gate, improved the ditches, removed small timber alongside the road, and laid a shale surface over the roadway. As a result of the improvements, a high quality oilfield road now traverses the entire tract in a north-south direction and permits access to an adjacent land.

Lessors brought a trespass action against Lessee to enjoin use of road for access to adjacent land. The trial court denied the Lessors' injunction and prayer for damages resulting from alleged unreasonable use of the Lessors' premises. The trial court reasoned that Lessee had the right, under the clear and unambiguous "adjacent lands" clause in the lease, to construct roads to further its mineral operations on any adjacent lands. Further, the trial court held that Lessee's conduct was "brash" and "uncivil" but *not* unreasonable under Article 11 of the Mineral Code.

Upon review, the Louisiana Second Circuit Court of Appeal reversed the trial court's judgment and permanently enjoined Lessee from committing any further acts of trespass on the tract. The court reasoned that Article 122 of the Mineral Code imposes an obligation upon the Lessee to operate the leased property for the mutual benefit of the parties to the lease, and while that obligation can be contractually defined, the public policy underlying the obligation cannot be abrogated. The court held that Lessee failed to prove a benefit accruing to the Lessor from Lessee's use of the surface of the leased premises to conduct operations on adjacent lands. Further, the Second Circuit Court opined that while the lease permits the Lessee to use the surface of the leased tract for road construction, such use cannot increase the burden on the property unless the conduct is in good faith and for the mutual benefit of the parties. The Court referred to the high-quality oilfield road as "unwanted, heavily traveled, and clearly not consistent with the mineral development of the tract."

The Supreme Court then weighed in on the issue. The Court first addressed the mutual benefit requirement of Mineral Code art. 122 as asserted by the appellate court to determine its applicability to the "adjacent lands" provision under the lease. First, the court noted that a mineral lease is a contract by which a lessee is granted the right to explore for and produce minerals. Therefore, the Mineral Code, along with the contract of lease between the parties, defines the parties' respective rights and obligations. In general, a lessor is bound to deliver the leased premises, to refrain from disturbing the lessee's possession, and to perform the contract in good faith.[15] On the other hand, the courts early recognized that a mineral lessee is "obliged to operate the leased premises in the best interests of both lessor and lessee." John M. McCollam, A Primer for the Practice of Mineral Law Under the New Louisiana Mineral Code, 50 Tul.L.Rev. 729, 804 (1976). This "mutual benefit" principle is now embodied in Article 122 of the Mineral Code.

Article 122 sets forth some of the obligations imposed on mineral lessees under pre-Code jurisprudence. By its express terms, Article 122 imposes on the mineral lessee the obligations (1) to perform the contract in good faith and (2) to develop and operate the leased property as a reasonably prudent operator for the mutual benefit of both lessor and lessee. Essentially, the mutual benefit requirement pertains to the manner in which the lessee must develop and operate the leased premises.

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[15] See La.Rev.Stat. 31:119.

The Court discussed pre-Mineral Code jurisprudence in Louisiana which recognized the lessee's duty as encompassing five distinct categories of obligations:

> (1) the obligation to develop reservoirs discovered;
> (2) the obligation to explore and test all portions of the leased premises after discovery of minerals in paying quantities;
> (3) the obligation to protect the leased property against drainage from wells on adjacent lands;
> (4) the obligation to diligently market the minerals discovered and capable of production in paying quantities; and
> (5) the obligation to restore the surface as near as practical on completion of operations.

The court noted that scholarly treatises have recognized the implied obligations of a mineral lessee in other jurisdictions to include obligations to drill an initial exploratory well; to protect the leasehold from drainage; to reasonably develop the premises; to explore further and market the product; and to conduct with reasonable care and due diligence all operations on the leasehold that affect the lessor's royalty interest (including drilling, producing and marketing operations).[16] Still other scholarly writings suggest that the implied obligations also extend a duty to represent the lessor fairly in regulatory proceedings.[17] In the end, the Court found no authority to extend the scope of the mutual benefit requirement of Article 122 to encompass the lessee's contractual right to reasonable use of the surface of the leased premises for operations on adjacent lands, and further stated that the Legislature never intended for Article 122 to have such a broad sweep. Thus, the Louisiana Supreme Court held that the "mutual benefit" principle in Article 122 has no application to the "adjacent lands" clause in the lease. The Court held that the "adjacent lands" clause in the lease represented a bargained-for exchange between the Lessor and Lessee and thus the Lessee could use the road for access to an adjacent land without providing a mutual benefit to the Lessor.

The Court also held that it did not matter that the adjacent lands were not owned by Lessors. The Court rejected the Lessors' argument that Lessee's allowing a non-operator co-lessee to use the surface was not intended by the parties and is not a reasonable interpretation of the "adjacent lands" clause. The Court stated that under the Plaintiff's assertion, the "adjacent lands" clause would apparently only apply when Lessee is the operator of record of the tract and the adjacent tract. The Court rejected this argument and stated that this constrained interpretation would render the "adjacent lands" clause virtually without effect. The Court explained that the purpose of an "adjacent lands" clause, although constituting a significant burden on the leased premises, is intended to promote the "efficient development of

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[16] See, e.g., 5 Patrick H. Martin & Bruce M. Kramer, Williams & Meyers Oil and Gas Law § 804 (1998).

[17] McCollam, supra at 810; Luther L. McDougal, Louisiana Oil and Gas Law § 4.7 at 234 (1991).

oil and gas fields and the state's public policy of developing mineral resources." The intent of the provision is to permit a lessee "to develop an oil and gas field without regard to property lines and without the necessity of constructing duplicative roads, pipelines, tank farms and other facilities."

After having determined that the surface rights granted under the lease clearly included those necessary for operations on adjacent lands, the Court held that the Lessee's use of the leased premises appeared reasonable. In determining so, the Court noted that reasonable use is determined on a case-by-case basis and presents a question of fact subject to the manifest error standard of review. In this case, the trial judge had personally visited the site prior to denying Lessors' injunction petition. The trial judge had concluded that the Lessee's use of the road was not contrary to the reasonableness standard and was consistent with the rights granted under the lease. The Court observed no evidence of manifest error in this judgment. Further, the Court noted other evidence offered to the trial judge to support its reinstatement of the trial court's judgment of reasonable use. The Court highlighted the testimony of Lessee's employee who had driven on the unimproved road for two years to service the well and his description of the unimproved road as difficult to use in rainy weather. The Court also noted that the Lessee's employee had observed, on several occasions, large saltwater trucks used to transport needed operations materials to the wells that could not make it up the road on rainy days. Lessee's employee further testified that the improvement of the road enhanced Lessee's operations on the tract. In summary, the Court held that Lessee's actions in improving the road, expressly authorized by the "adjacent lands" clause of the lease, were reasonable. The unimproved road could not be safely used by the equipment needed to drill and complete the well.

Ultimately, the Louisiana Supreme Court held that Lessee had used the road under the express authority of the lease to conduct mineral operations on adjacent lands and that their use was reasonable under the circumstances. Thus, the Louisiana Supreme Court reversed the appellate court's decision and reinstated the judgment of the trial court.

2. *Clovelly Oil Co., LLC v. Midstates Petroleum Co., LLC* 12-20255 (La. 3/19/13), 112 So.3d 187, rehearing denied, May 3, 2013

In *Clovelly Oil Co., LLC v. Midstates Petroleum Co., LLC*, 112 So.3d 187 (La. 2013), the Louisiana Supreme Court ruled that an AAPL model form Joint Operating Agreement (JOA) did not cover new leases acquired after the JOA was executed, where the JOA did not also include a separate area of mutual interest (AMI) provision.

This case had the oil and gas industry on tenterhooks because the form of agreement at issue was not a one-of-a-kind form unique to the two litigants in dispute but instead is probably the most widely accepted and most often used form in the industry. When an operating agreement is used in Louisiana, the particular form used is almost always one of the four editions of the "*A.A.P.L. Form 610—*

Model Form Operating Agreement" developed by the American Association of Professional Landmen (AAPL): either the original, 1956 edition at issue in *Clovelly* or one of the three later editions (adopted in 1977, 1982 and 1989).

As with any model form of agreement in any industry, the use of AAPL model forms in the oil and gas industry is designed to avoid the need for drawn-out, individualized negotiations and contract forms and to have a familiar form of agreement with a well-established understanding among industry participants over its meaning, purpose and effect. By using AAPL model JOA forms, industry participants are better able to make conscious decisions of when they need or want to deviate from these well-established contract provisions. Thus, the Court's ruling in *Clovelly* affects not just the two litigants, but instead oil and gas producers and mineral lessees throughout the country.

Clovelly involved a JOA executed in 1972 using the 1956 edition of the AAPL Form 610–Model Form Operating Agreement. Although the JOA contained two added, typewritten provisions, it did not include an area of mutual interest (AMI) provision. The parties attached an Exhibit A, which does not enumerate specific leases, but instead merely contains a list of certain township sections with a corresponding plat outlining an area of several square miles in the Pine Prairie Field in Evangeline Parish, Louisiana. The original operator under the JOA held a 56.25% working interest in the original leases, and the non-operator held the remaining 43.75% working interest. Through a series of assignments, Clovelly Oil Co. LLC succeeded to the rights of the original operator, and Midstates Petroleum Company LLC succeeded to the rights of the original non-operator.

In 2008 (36 years after the JOA was executed), Midstates obtained a new oil and gas lease covering lands within the geographic area described on Exhibit A to the JOA. In 2009, Midstates then successfully obtained production from this new lease. Clovelly promptly notified Midstates that these activities and operations were covered by the 1972 JOA and that Clovelly was entitled to both a 56.25% working interest and the right to operate the associated wells. When Midstates refused to acquiesce in Clovelly's demands, Clovelly sued Midstates. Cross motions for partial summary judgment were filed on the issue of whether the JOA applied to the new lease.

On the one hand, Clovelly relied on the typewritten Exhibit A, along with the AAPL's definition of the term "Unit Area." Section 1(5) of the AAPL form provides:

> (5) The term "Unit Area" shall refer to and include all of the lands, oil and gas leasehold interests and oil and gas interests intended to be developed and operated for oil and gas purposes under this agreement. Such lands, oil and gas leasehold interests and oil and gas interests are described in Exhibit "A."

Section I of Exhibit A is titled "Lands subject to this agreement" and reads "The following described property situated in Evangeline Parish, Louisiana," and lists specified portions of 12 enumerated township sections, with a corresponding plat outlining these same sections.

On the other hand, Midstates pointed to several other preprinted provisions in the AAPL form itself. Midstates noted the present tense in the Preamble to the JOA form:

WHEREAS, the parties to this agreement ***are*** owners of oil and gas leases covering and, if so indicated, unleased mineral interests in the tracts of land described in Exhibit "A", and all parties have reached an agreement to explore and develop ***these leases*** and interests for oil and gas to the extent and as hereinafter provided:

Midstates also noted the present tense in the definition of "oil and gas interests" in Section 1(4) of the JOA form:

> (4) The term "oil and gas interests" shall mean unleased fee and mineral interests in tracts of land lying within the Unit Area which *are* owned by the parties to this agreement.

Midstates also relied on Section 23 of the JOA form, which addresses renewal or extension of leases and provides in relevant part that "[a]ny renewal lease in which less than all the parties elect to participate shall not be subject to this agreement."

Midstates argued that the Model Form JOA at issue does not cover "new leases" (that is, leases granted after the JOA was executed). In support, Midstates cited the present tense language used throughout; it also noted that Section 23 would be meaningless surplusage if all new leases were already subject to the JOA. It also noted that Exhibit A does not itself contain any AMI language and thus does not conflict with these preprinted provisions in the Model Form JOA itself.

In response, Clovelly argued that, because Exhibit A to the JOA does not list any leases but instead merely describes a geographical area, the JOA applies to all mineral interests in the lands described on the Exhibit regardless of when the mineral interests were acquired. Basically, Clovelly argued that, by including a property description and plat on Exhibit A to the JOA, the parties implicitly created an Area of Mutual Interest (AMI) provision so that each party was entitled—or, more specifically per Clovelly's argument, both entitled and required—to obtain its proportionate interest in any mineral lease or other mineral interest acquired by either party within that area.

The trial court granted summary judgment in favor of Midstates finding that the JOA "does not apply to any new oil, gas and mineral leases acquired after July 16, 1972 which are not extension or renewal leases as defined by Section 23 of the aforesaid Joint Operating Agreement."

But on appeal, the Third Circuit reversed finding a conflict between the language in the body of the 1972 JOA and the language included on the Exhibit. The Court of Appeal concluded that the Exhibit attached to the JOA reflected the area the parties intended to be developed under the JOA and because there was no language in the Exhibit that referenced specific leases or limited the coverage of the JOA to presently owned leases, the Exhibit was in conflict with the present tense language contained in the body of the JOA. And because the typewritten language in the Exhibit was prepared by the parties, the court determined it should be given greater deference than the language in the pre-printed form and thus reflects the true intent of the parties. Thus, the court concluded that the JOA should apply to the new lease because "any unleased fee and mineral interests in tracts of land lying within the unit area" delineated on the Exhibit attached to the JOA were "intended to be developed and operated" by the original parties to the JOA. The Third Circuit relied heavily on a Kansas Supreme Court decision *Amoco Production Co. v. Charles B. Wilson, Jr., Inc.*, 266 Kan. 1084, 976 P.2d 941 (1999).

With the support of various industry groups (including the AAPL, which developed the JOA form at issue; the Independent Petroleum Association of America (IPAA), which incidentally my firm represented; the Louisiana Oil and Gas Association (LOGA) and the Louisiana Mid-Continent Oil and Gas Association), Midstates filed a writ with the Louisiana Supreme Court, which then unanimously reversed the Third Circuit. Concluding that the 1972 JOA does not apply to new leases, the Supreme Court reinstated the trial court's judgment. In its discussion of bedrock contract interpretation principles, the Court noted that when printed contract provisions conflict with typewritten provisions, the typewritten provisions prevail. However, before finding such a conflict, a court should first attempt to interpret the contract as a whole and, if possible, "harmonize" the various provisions. "Most importantly, a contract must be interpreted in a common-sense fashion, according to the words of the contract their common and usual significance."

The Court found no express conflict between the language in the pre-printed form and the parties' typewritten Exhibit. The Court stated that the two provisions can be reconciled if the JOA is read to include only "presently-owned leases" (referring to language in the pre-printed form) within the geographical area identified in the Exhibit (referring to the language added by the parties). The court remarked that "this construction of the JOA is reasonable and gives effect to all of its terms." In particular, the Court focused on the language in Section 23 of the JOA, stating:

> If all future leases in the geographic area set forth in the Exhibit "A" are automatically subject to the JOA, the language of Section 23, allowing the parties to choose whether to participate in renewal or extension leases, is essentially rendered meaningless. At the very least, the Court of Appeal's interpretation is incongruous and leads the absurd result that the parties to the JOA would have the option to decide whether to participate in renewal or extension leases, which are more familiar to the parties, but new future leases, with less familiarity, would automatically be subject to the JOA.

The Court recognized that the parties could have expressly provided for the JOA's application to new leases by including an AMI provision. Citing various commentators, the Court discussed the common understanding that, with the limited exception of the extension and renewal clause, the AAPL model forms do not contain an AMI provision and thus that new leases taken within the contract area are not generally covered by the operating agreements. Incidentally, the AAPL, promulgator of the Model Form, also expressed that although the Model Form JOA is designed to accommodate specific negotiated terms and conditions, such as an AMI provision, AMI provisions are not, and have never been, included as a standard provision in any of the four editions of the Model Form JOA. Because the parties elected not to include an AMI provision in their JOA, the Court ruled that any new leases taken within the geographic area covered were thus not subject to the JOA unless they are "renewal or replacement leases" as defined in the JOA. Because the lease at issue was a new lease and not a "renewal or replacement lease," the Court concluded that the 1972 JOA did not apply to Midstates' new lease.

By reinstating the trial court's decision, the Louisiana Supreme Court solidified the traditional interpretation of the Model Form JOA. The Court's interpretation thus fosters its oft-articulated "public policy and social purpose" in promoting the stability and certainty over the meaning and effect of contracts and deeds affecting lands; moreover, the Court's interpretation follows the long-standing civil law principle *in favorem libertatis* that contractual burdens on immovable property "are never sustained by implication—[that] the title creating them must be express, as to their nature and extent, as well as to the estate to which they are due" and thus that any doubt must be construed against the party seeking to impose the burden. In its common sense approach to contract interpretation, the *Clovelly* Court demonstrated what oil and gas operators and non-operators should expect: namely, uniform interpretation of the rights and obligations the Model Form JOA is designed to provide.

3. *Peironnet v. Matador Res. Co.*, 2012-2292 (La. 6/28/13), So.3d, *rehearing denied*, August 30, 2013

In this mineral rights case, lessors sought rescission and/or reformation of an extension of an oil, gas and mineral lease under the theory of error as a vice of consent.

In June 2004, plaintiffs entered into an oil, gas and mineral lease in favor of predecessor in title to Matador Resources Company. The lease covered 1,805.34 acres of land in eight governmental sections in Caddo Parish, Louisiana and contained a three year primary term beginning June 22, 2004 and ending June 22, 2007. The lease also contained a Pugh clause and a depth severance provision. The lease was ultimately assigned to Matador.

During the primary term of the lease, Matador successfully explored and developed the Cotton Valley formation in five of the eight sections covered by the lease. In the spring of 2007, expiration of the primary term of the lease was approaching and three of the sections covered by the lease had not yet been developed. The undeveloped acreage consisted of approximately 168.95 acres. At this time, there existed the potential that Matador would lose certain acreage by operation of the Pugh clause and the undeveloped depths below the Cotton Valley formation would also be released. In May 2007, Matador hired a lease broker to negotiate a lease extension. Ultimately, plaintiffs executed an extension of the primary term for the entire lease for an additional 18 months (the "Lease Extension").

In early 2008, with the discovery of the productive potential of the Haynesville Shale formation, Matador notified plaintiffs of its intent to create seven Haynesville units in order to drill to that zone. In response, plaintiffs filed suit claiming that the Lease Extension only applied to the 168.95 acre tract that was not being produced at the end of the primary term of the mineral lease and therefore, Matador's rights in the undeveloped depths (the "Deep Rights") had terminated within the primary term pursuant to the depth severance provision contained in the lease. Plaintiffs sought to rescind the Lease Extension claiming unilateral error. In the alternative, plaintiffs sought reformation of the Lease Extension in conformity with the intent of the parties based on the theory of mutual error.

Matador filed motions for summary judgment requesting dismissal of plaintiffs' claims in the First Judicial District Court in Caddo Parish. The trial court granted Matador's motion in part as to plaintiffs' unilateral error claim, but denied plaintiffs' claim for mutual error which was tried by jury. At trial, the jury found in favor of Matador, upholding the extension as to the entire leased acreage. The trial court further held that the entire lease had been extended beyond its primary term by continuous drilling operations within compulsory units. On appeal, the Second Circuit affirmed in part and reversed in part, reforming the Lease Extension to include only the 168.95 acres that was undeveloped based on plaintiffs' unilateral error. The Louisiana Supreme Court granted writs to address critical issues concerning [Louisiana's] civilian doctrine of error and the reformation of written contracts for errors which ultimately vitiate consent. The Supreme Court reversed the appellate court's decision and reinstated the judgment of the trial court.

The seminal legal issues before the Supreme Court were the vitiation of consent to a contract through error and the reformation thereof. Louisiana Civil Code article 1949 articulates the concept that "[e]rror vitiates consent only when it concerns a cause without which the obligation would not have been incurred and that cause was known or should have been known to the other party." In its analysis, the Court expounded on the relief available to a party claiming error; said relief depends on whether the error was mutual or unilateral. In cases of mutual error, a court can either rescind the contract or reform it. In cases of unilateral error, a party is only entitled to rescission.

In its argument alleging unilateral error, plaintiffs claimed that their agent did not understand that the Lease Extension extended the primary term for the entire lease, and that the defendants knew or should have known of this misunderstanding. It is well settled in Louisiana that a contract may be rescinded for unilateral error as to a fact which was a principal cause for making the contract, where the other party knew or should have known it was the principal cause."[18] In deciding whether or not rescission is appropriate, courts consider if the error is excusable or inexcusable according to the circumstance surrounding each particular case. In its opinion, the Court noted several relevant examples of inexcusable error, including where the complaining party through education or experience had the knowledge or expertise requisite to discover the alleged error; and the situation where a party claims to have made an error...but admits that he failed to read the contract. Thus, the concept of contractual

[18] ***Nugent v. Stanley***, 336 So.2d 1058, 1063 (La. App. 3rd Cir. 1976).

negligence has developed as a defense to unilateral error. And a review of the jurisprudence reveals two key elements involved with such a defense:

> (1) Solemn agreements between contracting parties should not be upset when the error at issue is unilateral, easily detectable, and could have been rectified by a minimal amount of care.
>
> (2) Louisiana courts appear reluctant to vitiate agreements when the complaining party is, either through education or expertise, in a position which renders his claim of error difficult to rationalize, accept or condone.[19]

In response to plaintiffs' claims, defendants raised the defense of contractual negligence and demonstrated that "plaintiffs could show no excuse for failing to read and understand the clear terms of the Lease Extension, which was written in 'plain English, without technical language or terms of art.'" Additionally, defendants showed that "plaintiffs' agents...were self-proclaimed experts in dealing with oil and gas matters, including oil and gas leases." The Court found that the "plaintiffs' failure to question the extension, to seek clarification of the acreage covered, or to ever discuss the Deep Rights demonstrates an inexcusable lack of elementary prudence or simple diligence that now precludes their rescission of the agreement."

The Court next discussed the claim of mutual error finding that the trial court jury did not err in concluding that the plaintiffs had not met their burden of proof in showing that both parties were mistaken regarding the cause of the contract. The error or mistake of both parties is a fundamental requirement of mutual error claims. And since the evidence reasonably showed that Matador intended to extend the entirety of the lease, it was reasonable for the jury to find that mutual error requiring reformation of the lease had not been proven based on the record.

Finally, the Supreme Court turned to the issue of whether the lease had been maintained by continuous operations. Plaintiffs argued that the lessor consent requirement in the lease's pooling provisions limited the Defendants' ability to maintain the lease through continuous operations on land pooled with Plaintiffs' land pursuant to orders of the Commissioner. In the year between December of 2008 and November of 2009, Matador, Chesapeake and Petrohawk conducted both vertical and horizontal drilling operations on the leased premises and lands pooled therewith. Each of their wells was spud within ninety days of completion of the preceding well. Defendant argued that the compulsory unit orders "trumped the contractual limitations of the parties regarding the diligent unitization obligations set forth in the lease." The Court agreed.

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[19] *Scott v. Bank of Coushatta*, 215 So.2d 356, 362-63 (LA. 1987).

Ultimately, the Supreme Court held that the unit operations relieved the Defendants from conducting operations on the unitized leased premises because "all operations on and production from a unit shall be considered operations on and production from each of the separate tracts within such unit and under the terms of each of the mineral leases affecting said tracts." Thus, solidifying the longstanding rule in Louisiana that Commissioners' Orders "supersede, supplement, replace and are incorporated in the provisions and obligations of the leases subject thereto, such that they become the law between the parties."

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