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## Louisiana Oil & Gas Update

Keith B. Hall

*Louisiana State University Law Center, keith.hall@law.lsu.edu*

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# LOUISIANA



By: Keith B. Hall

I. MINERAL SERVITUDES .....	512
A. <i>Interruption of Prescription of Nonuse by Unit Operations</i> .....	512
B. <i>Creation of Servitudes—One or Several?</i> .....	513
II. LEASE INTERPRETATION DISPUTES .....	514
A. <i>Most-Favored-Nations Clause</i> .....	514
B. <i>Continuous Drilling Operations</i> .....	515
C. <i>Granting Clause in Louisiana Bath Form Lease</i> ....	515
D. <i>“Calculate and Pay” Clause</i> .....	516
III. OTHER LEASE DISPUTES .....	517
A. <i>Error as a Basis to Vitiating Consent</i> .....	517
B. <i>The Suspension Doctrine</i> .....	518
C. <i>Pre-Suit Notice of Royalty Claims in Putative Class Action</i> .....	519
D. <i>Judicial Control Doctrine</i> .....	519
IV. RECORDATION ISSUES .....	521
A. <i>Notices of Lease</i> .....	521
B. <i>Unrecorded Exercise of Option to Extend Lease</i> ....	521
C. <i>New Record Leaseholder Was Necessary Party in Action to Rescind Transfer</i> .....	522
V. LIENS .....	522
A. <i>Validity of Lien Under Louisiana Oil Well Lien Act</i> .....	522
B. <i>Uniform Cancellation Affidavit</i> .....	523
VI. CONTAMINATION CLAIMS .....	523
VII. MANDATORY DISCLOSURE OF FRACTURING WATER COMPOSITION .....	525

## I. MINERAL SERVITUDES

Louisiana does not recognize the concept of a mineral estate.<sup>1</sup> The closest concept that Louisiana has is the “mineral servitude,” a type of mineral right which is somewhat like a mineral estate, except that a mineral servitude automatically terminates through “prescription of nonuse” if the servitude is not used for any period of ten consecutive years.<sup>2</sup>

A. *Interruption of Prescription of Nonuse by Unit Operations*

In *Petitjean II v. Samson Contour Energy E&P, LLC*, servitude co-owners fought over the right to receive a portion of the proceeds from a productive well that was drilled in 2006.<sup>3</sup> The plaintiffs, along with other individuals, previously had been co-owners of certain land in indivision, including the land on which the productive well was drilled, but they had partitioned the land in 1993.<sup>4</sup> In the act of partition, the co-owners reserved a single mineral servitude over the entire area, with each of them being a co-owner of the servitude. They also agreed in the partition that they would keep their mineral interests “in undivided ownership . . . for the maximum allowable period of time.”<sup>5</sup>

The parties’ dispute over the rights to proceeds from the productive well turned on whether the servitude had terminated prior to 2006 based on prescription of nonuse for the area where the well was drilled. Under the Louisiana Mineral Code, production or operations that occur on the servitude tract generally will interrupt prescription of nonuse as to the entire servitude.<sup>6</sup> If a unit includes only a portion of a servitude tract, unit production or operations outside the servitude will interrupt prescription, but only for the portion of the servitude tract within the unit.<sup>7</sup> Nevertheless, Louisiana Mineral Code article 75 allows parties to alter this default rule by agreeing “expressly and in writing” that any unit operations will interrupt prescription as to the entire servitude.<sup>8</sup>

At the time the productive well was drilled in 2006, more than ten years had passed without any mineral production or operations occurring on the servitude tract.<sup>9</sup> Further, more than ten years had passed

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1. See *Hodges v. Long-Bell Petroleum Co.*, 121 So. 2d 831, 836 (La. 1959); *Long-Bell Petroleum Co. v. Tritico*, 43 So. 2d 782, 791 (La. 1949); *Indigo Minerals, L.L.C. v. Pardee Minerals, L.L.C.*, 37 So. 3d 1122, 1127–28 (La. Ct. App.), *writ denied*, 46 So. 3d 1274 (La. 2010).

2. See LA. REV. STAT. ANN. §§ 31:21–:23, :27 (2000).

3. See *Petitjean v. Samson Contour Energy E & P, LLC*, 51 So. 3d 200, 201 (La. Ct. App. 2010), *writ denied*, 57 So. 3d 339 (La. 2011).

4. *Id.*

5. *Id.*

6. See *Lee v. Giauque*, 97 So. 669, 670 (La. 1923).

7. See LA. REV. STAT. ANN. § 31:33 (2000).

8. See *id.* § 31:35.

9. *Petitjean*, 51 So. 3d at 201.

without any unit production or operations for any unit that included the area where the productive well was drilled. But there had been unit operations during the prior ten years for units that included other portions of the servitude tract.

Relying on the default rule that unit operations occurring outside the servitude tract will interrupt prescription only for the portion of the servitude within the unit, the defendants argued that servitude had terminated by prescription of nonuse as to the portion of the servitude tract where the productive well was now located. The plaintiffs, however, argued that the parties to the partition had altered the default rule by stating in the act of partition that they agreed to keep their mineral interests “in undivided ownership . . . for the maximum allowable period of time.”<sup>10</sup> The plaintiffs’ reasoning was that altering the default rule to interrupt prescription as to the entire servitude would have the effect of keeping the parties’ entire mineral interests in “undivided” ownership because the servitude was co-owned, whereas allowing the servitude to terminate as to certain areas by prescription would result in the mineral interests reverting to individual ownership in those areas.

The appellate court rejected the plaintiffs’ argument. The Louisiana Third Circuit stated that the parties to an act creating a mineral servitude need not expressly refer to Mineral Code article 75 in order to overrule the default rule regarding the interruption of prescription by unit operations, but they “must leave no question” that they intended to agree that unit operations occurring outside the servitude tract would interrupt prescription as to the entire servitude if the unit overlapped the servitude.<sup>11</sup> Although an interruption of prescription as to the entire servitude would have the effect of keeping the entirety of the mineral interests “in undivided ownership” for the maximum time, the language of the act creating the servitude did not clearly demonstrate an intent to alter the default rule regarding interruption of prescription by unit operations.<sup>12</sup>

### B. *Creation of Servitudes—One or Several?*

The parties disputed ownership of the royalty proceeds from a certain well, with the ownership question turning on whether prior transactions had created a single servitude or multiple servitudes.<sup>13</sup> The competing claimants were the landowner and the Mikell Group, which consisted of several persons who claimed to be owners of a single mineral servitude. The Mikell Group claimed that a single servitude had been created over several contiguous tracts by an act of

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10. *Id.* at 203.

11. *See id.*

12. *See id.*

13. *Neumin Prod. Co. v. Tiger Bend, Ltd.*, 58 So. 3d 1088, 1090 (La. Ct. App.), *writ denied*, 63 So. 3d 984 (La. 2011).

partition and exchange in 1983. Further, they claimed that the servitude had been kept alive by mineral activity on one of the tracts covered by the alleged single servitude, though the activity was not on the tract that now had a productive well.

The landowner sought summary judgment, arguing multiple servitudes had been created and that the particular servitude that included the well's location had been extinguished by ten years prescription of nonuse.<sup>14</sup> The trial court granted the landowner's motion for summary judgment. The appellate court affirmed. The appellate court noted that the 1983 transaction had involved several tracts of land owned by different individuals. The court concluded that the individuals had made mineral reservations prior to combining the land for partition, and therefore they must have intended that each of them would reserve the minerals he owned prior to the partition.<sup>15</sup> Thus, they had created multiple servitudes. The court concluded that the servitude for the area that now contained a productive well had terminated based on prescription of nonuse.

## II. LEASE INTERPRETATION DISPUTES

### A. *Most-Favored-Nations Clause*

Hoover Tree granted a mineral lease to Goodrich covering 317 acres in Caddo Parish. The lease specified a \$1,000 per acre bonus, a 25% royalty, and that Goodrich would be bound by a most-favored-nations clause ("MFN").<sup>16</sup> The MFN provided that if Goodrich or its "successors and assigns" paid a higher bonus or royalty to any other lessor within a specified area during the primary term of Hoover Tree's lease, Hoover Tree would be paid the difference.

Goodrich subsequently transferred a one-half interest in the lease to Chesapeake as to depths below the Cotton Valley Formation.<sup>17</sup> Goodrich did not retain an overriding royalty on the transferred interest. Hoover Tree learned that Chesapeake had paid bonuses as high as \$25,000 per acre and royalties as high as 30% within the specified area during the primary term of the Hoover Tree lease.<sup>18</sup> Relying on the MFN clause and an argument that Chesapeake was Goodrich's "assign," Hoover Tree filed suit against Goodrich, Chesapeake, and others, seeking a higher royalty and higher bonus.

The district court granted judgment for Hoover Tree, increasing its royalty to 30% and awarding it more than \$7.6 million, the difference between a bonus of \$1000 per acre and a bonus of \$25,000 per acre for

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14. *Id.*

15. *Id.* at 1093.

16. Hoover Tree Farm, L.L.C. v. Goodrich Petroleum Co., 63 So. 3d 159, 161–62 (La. Ct. App.), *writ denied*, 69 So. 3d 1161 (La. 2011).

17. *Id.* at 160.

18. *Id.* at 162.

317 acres.<sup>19</sup> The defendants appealed, arguing that the transfer to Chesapeake was a sublease, not an assignment, and therefore that Chesapeake was neither a “successor” nor an “assign.” The appellate court rejected the defendants’ arguments and affirmed, holding that Goodrich’s transfer of an undivided interest in the deep formations, without reservation of an overriding royalty, constituted an assignment. Therefore, the MFN applied.<sup>20</sup> The appellate court held that both Chesapeake and Goodrich were liable for the higher royalty and bonus because the Louisiana Mineral Code makes an assignee directly liable for lease obligations.<sup>21</sup>

### B. *Continuous Drilling Operations*

H & K Limited’s predecessor-in-interest granted a mineral lease to Martin Producing, which later assigned the lease to Chesapeake.<sup>22</sup> The lease provided that it would remain in effect for a primary term of three years and as long thereafter as minerals were produced in paying quantities. The lease also had a continuous drilling operations clause which provided that if there was not production at the end of the primary term, but the lessee was conducting drilling operations, the lease would continue in effect so long as the lessee continued drilling operations or produced minerals in paying quantities without a break of more than ninety consecutive days. At the end of the primary term, Chesapeake was not producing minerals from the leased premises, but it had begun drilling operations. Chesapeake continued such operations without any cessation exceeding ninety days and put the well into production. H & K brought suit for a judgment that the lease had terminated, but the district court granted summary judgment in favor of Martin and Chesapeake, holding that plain language of the continuous drilling operations clause meant that the lease had been maintained.<sup>23</sup> The appellate court affirmed.

### C. *Granting Clause in Louisiana Bath Form Lease*

In *Alyce Gaines Johnson Special Trust v. El Paso E & P Co.*, the parties disputed the meaning of a clause in a standard form lease—a Louisiana Bath form 14-BRI-24—that granted rights “exclusively unto lessee for the purpose of . . . exploring . . . and producing oil, gas, and all other minerals” from the leased premises.<sup>24</sup> The lessor sought a declaratory judgment that the lease did not apply to the Haynesville

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19. *Id.* at 160.

20. *Id.* at 180–81.

21. *Id.*

22. *H & K Ltd. of La. v. Martin Producing, L.L.C.*, 70 So. 3d 847, 847–48 (La. Ct. App. 2011).

23. *Id.* at 850–51.

24. *Alyce Gaines Johnson Special Trust v. El Paso E & P Co.*, 773 F. Supp. 2d 640, 641–42 (W.D. La.), *aff’d*, 438 F. App’x 340 (5th Cir. 2011).

Shale, which is found at a depth of about 10,400 feet. The plaintiffs asserted that no wells in the area had ever been drilled to a depth greater than 7,500 feet at the time the lease was granted in 1950, and that the parties had not contemplated drilling to depths as great as 10,400 feet at the time when the lease was signed. The defendant filed a motion to dismiss. The court initially denied the motion to dismiss, but on reconsideration, the court granted the motion to dismiss, holding that the lease unambiguously granted to the lessee the right to explore and drill to all depths.<sup>25</sup>

#### D. “Calculate and Pay” Clause

The Deep Water Royalty Relief Act (“DWRRA”) provides incentives for deepwater drilling on federal lease tracts sold in certain areas of the Gulf of Mexico between 1996 and 2000.<sup>26</sup> For example, section 304 provides that lessees will not owe royalties on the first 87.5 million barrels of oil equivalent (“BOE”) produced from water depths greater than 800 meters. Lesser amounts of royalty relief are granted for wells located at depths greater than 200 meters, but less than 800 meters.

In 1999, a lessee granted overriding royalty interests to several individuals for a well that qualified for 87.5 million BOE of royalty relief under section 304.<sup>27</sup> The agreements granting the overrides stated that the overrides would be “payable out of all oil, gas, casinghead gas and associated substances produced,” but also provided that “[t]he overriding royalty interest assigned . . . shall be calculated and paid in the same manner and subject to the same terms and conditions as the landowner’s royalty under the Lease.”<sup>28</sup> The latter provision is a “Calculate and Pay” clause.

Statoil and Total owned fractional working interests in the lease. They filed motions for a summary judgment that they did not have to pay overriding royalties until the well produced 87.5 BOE because that is how the lessor’s royalty would be “calculated and paid.”<sup>29</sup> One of the override owners opposed the motions, arguing that the override royalties were owed on all production, and that the lessees’ override obligations were not affected by DWRRA.<sup>30</sup> The court granted the motion for summary judgment, holding that the obligation to pay overriding royalties did not begin until there was an obligation to pay royalties to the lessor.

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25. *Id.* at 646–47.

26. See Outer Continental Shelf Deep Water Royalty Relief Act, Pub. L. No. 104-58, § 304, 109 Stat. 563, 565–66 (1995) (not codified but contained in a note to 43 U.S.C. § 1337 (2006)).

27. *Total E & P USA, Inc. v. Kerr-McGee Oil & Gas Corp.*, Nos. 09-6644, 10-0106, 2010 WL 5207591, \*1–2 (E.D. La. 2010).

28. *Id.* at \*2 (emphasis added).

29. *Id.* at \*3.

30. *Id.* at \*4.

## III. OTHER LEASE DISPUTES

A. *Error as a Basis to Vitiate Consent*

In *Cascio v. Twin Cities Development*, the plaintiffs were individuals who had granted a mineral lease covering seventy-six acres in Bossier Parish in April 2008.<sup>31</sup> Six months after granting the lease, the plaintiffs filed suit seeking to rescind the lease based on error. The plaintiffs alleged that the Haynesville Shale extended beneath the leased premises, and that they had not known this when they signed the lease, but that the lessee had known. The plaintiffs argued that these facts were a sufficient basis to rescind the lease based on error. The district court, however, granted summary judgment in favor of the defendant, and the plaintiffs appealed.<sup>32</sup>

The Louisiana Second Circuit Court of Appeal noted that mineral leases are governed by the Louisiana Mineral Code,<sup>33</sup> as well as the general principles of contract law provided by the Louisiana Civil Code.<sup>34</sup> The Civil Code provides that contracts require the consent of the parties,<sup>35</sup> and that “consent may be vitiated by error,”<sup>36</sup> but error vitiates consent only if: (1) the error concerns a reason without which the party would not have entered the contract, and the reason was known to the other party;<sup>37</sup> or (2) the error concerned the nature of the contract, the thing that is the object of the contract, or a substantial quality of the thing.<sup>38</sup>

The plaintiffs argued that the object of the contract was the land and its mineral formations, and their lack of knowledge about an exceptional quality of the land—the presence of the Haynesville Shale—was an error that vitiated consent. But the Second Circuit rejected that argument, stating that mineral exploration is inherently speculative.<sup>39</sup> Accordingly, “[t]he inherent nature and character of the right to extract oil and gas from the soil is such as not to be susceptible of having an intrinsic, determinable, and fixable value.”<sup>40</sup> Given the speculative nature of mineral exploration, and that “both the plaintiffs and the defendants could speculate as to the existence and value of minerals” beneath the leased premises, the plaintiffs’ alleged “error” was not the sort that would vitiate consent.<sup>41</sup>

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31. *Cascio v. Twin Cities Dev.*, 48 So. 3d 341, 342 (La. Ct. App. 2010).

32. *Id.*

33. *Id.*; see LA. REV. STAT. ANN. § 31:1 (2000).

34. *Cascio*, 48 So. 3d at 342–43.

35. *Id.* at 343 (citing LA. CIV. CODE ANN. art. 1927 (2008)).

36. *Id.* (citing LA. CIV. CODE ANN. art. 1948 (2008)).

37. *Id.* (citing LA. CIV. CODE ANN. art. 1949 (2008)).

38. *Id.* (citing LA. CIV. CODE ANN. art. 1950 (2008)).

39. *Id.* at 344.

40. *Id.* (quoting *Wilkins v. Nelson*, 99 So. 607, 609 (La. 1924)).

41. *Id.*



### B. *The Suspension Doctrine*

The Ferraras granted a mineral lease covering a forty-eight-acre tract in DeSoto Parish in 1988.<sup>42</sup> The lessee drilled two wells on lands unitized with the leased premises—one in 1988 and another in 1989. Both wells were productive and still were producing at the time of trial. The lessee also drilled a dry hole on the leased premises in 1990. Questar, which had been assigned the lessee's rights, drilled a well on land unitized with the leased land in 2000. The well was productive and remained in production at the time of trial. But the lessors sued for lease cancellation, asserting that the lessee had not adequately developed deeper formations, such as the Haynesville Shale. The plaintiffs filed their suit about five months after Chesapeake made an announcement about the Haynesville Shale's potential and one week after the Louisiana Office of Conservation had made an announcement.

After a bench trial, the district court granted cancellation of the lease as to all depths deeper than the Hosston formation.<sup>43</sup> On appeal, Questar argued that the district court had erred by allowing the Ferraras to introduce evidence of Questar's and other companies' drilling of Haynesville Shale wells on other properties subsequent to the Ferraras filing suit. Questar argued that such evidence was not relevant because both an express clause in the lease and the jurisprudential "suspension doctrine" provided that a lessee's duties to explore and develop are suspended during litigation in which a lessor challenges the validity of a lease.

But a three-judge panel of the Louisiana Second Circuit disagreed, concluding that the jurisprudential suspension doctrine applies to servitudes, not leases.<sup>44</sup> The panel concluded that the express lease clause did not apply because the lessors did not challenge the validity of the lease. Rather, they recognized the lease as valid and simply sued for lease cancellation. The court agreed with Questar that post-lawsuit conduct could not prove whether someone breached a duty to explore prior to suit being filed, but held that the trial court did not err in considering post-lawsuit conduct as circumstantial evidence of Questar's intent prior to suit being filed.

Nevertheless, the three-judge panel reversed. They stated that lease cancellation is a harsh remedy, and that the Ferraras had not presented any expert testimony that a reasonably prudent operator would have drilled a well to the Haynesville formation prior to the time the Ferraras made demand or filed suit.<sup>45</sup> In the absence of such testimony, the mere fact that Questar had not drilled a Haynesville

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42. *Ferrara v. Questar Exploration & Prod. Co.*, 70 So. 3d 974, 977 (La. Ct. App. 2011).

43. *Id.* at 979.

44. *Id.* at 981.

45. *Id.* at 983–84.

Shale well on the leased premises within five months of Chesapeake's announcement and one week of the Commissioner's announcement was not sufficient to support a finding that Questar had breached its duty of further exploration.

A five-judge Second Circuit panel that included Judge Caraway considered a request for rehearing, and denied rehearing.<sup>46</sup> Judge Caraway, who was not on the three-judge panel, wrote an opinion concurring in the denial of rehearing and declaring that he agreed with the result below, but he disagreed with the original panel's statement that the "suspension doctrine" does not apply to leases. Judge Caraway wrote that the original panel's statement is inconsistent with Louisiana Supreme Court jurisprudence.<sup>47</sup> Judge Caraway stated that a lessor's erroneous suit for lease cancellation breaches the warranty of peaceful possession and justifies a suspension of the duty to develop. Two other judges joined Judge Caraway's concurring opinion.<sup>48</sup>

### C. *Pre-suit Notice of Royalty Claims in Putative Class Action*

Mineral Code article 137 requires a lessor to give written notice to a lessee thirty days prior to filing claims based on the nonpayment, underpayment, or untimely payment of royalties.<sup>49</sup> In *Williams v. Chesapeake Louisiana, Inc.*, a plaintiff brought a putative class action for allegedly unpaid royalties.<sup>50</sup> The district court adhered to existing United States Fifth Circuit jurisprudence by holding that the required notice cannot be given by one person on behalf of a putative class.<sup>51</sup> The court rejected plaintiff's argument that the notice requirement does not apply if a plaintiff seeks unpaid royalties, but not "damages."

### D. *Judicial Control Doctrine*

Several members of the Walker family granted mineral leases to Chesapeake Louisiana, L.P. for land in Caddo Parish.<sup>52</sup> The Walkers brought suit the following year, alleging that Chesapeake had breached three provisions in the leases. The sole relief sought by the Walkers was lease cancellation.<sup>53</sup>

One of the three lease clauses allegedly breached by Chesapeake prohibited the company from using the surface of the leased premises

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46. *Id.* at 985.

47. *Id.* at 987.

48. *Id.*

49. LA. REV. STAT. ANN. § 31:137 (2000).

50. *Williams v. Chesapeake La., Inc.*, No. 10-1906, 2011 WL 1868750, at \*1 (W.D. La. May 13, 2011).

51. *Id.* at \*3 (following *Chevron USA, Inc. v. Vermilion Parish Sch. Bd.*, 377 F.3d 459, 461 (5th Cir. 2004)).

52. *Walker v. Chesapeake La., Ltd. P'ship*, 440 Fed. App'x 254, 255 (5th Cir. 2011).

53. *Id.*

without the Walkers' consent. The Walkers alleged that Chesapeake violated the clause by crossing the leased premises in all terrain vehicles without permission and by staking the location of a future well site on the leased premises without permission. It was undisputed that these alleged actions did not cause any physical damages.

A second clause allegedly breached by Chesapeake required the company to share certain well data with the Walkers, pursuant to a "data license agreement" to which the parties would mutually agree.<sup>54</sup> The undisputed facts showed that the parties had never agreed to a data license agreement, and that Chesapeake had not shared the required well data with the Walkers, but that Chesapeake had contacted the Walkers in an attempt to negotiate a data license agreement the day after the Walkers notified Chesapeake of its alleged breach of the duty to share well data.

The third clause allegedly breached by Chesapeake states that if "Lessee acquires seismic permits on lands within one mile of the Leased Premises, Lessee agrees to negotiate in good faith to include both the Leased Premises and surrounding acreage so as to adequately provide fully imaged 3-D seismic coverage of the Leased Premises."<sup>55</sup> The parties disputed whether Chesapeake's duty under this clause was triggered by Chesapeake merely acquiring seismic permits, as the Walkers contended, or whether the duty arose only if Chesapeake actually conducted seismic testing within one mile.

In support of their request for lease cancellation, the Walkers relied on Louisiana Civil Code article 2013, which states: "When the obligor fails to perform, the lessee has a right to the judicial cancellation of the contract . . . ."<sup>56</sup> The Walkers argued that article 2013 provided them an unconditional right to lease cancellation if they proved a breach by Chesapeake. Chesapeake argued otherwise, contending that the doctrine of "judicial control" gives courts the discretion to decide whether to terminate a contract or award a lesser remedy in the event of a breach.

Chesapeake sought summary judgment on two grounds: (1) it had substantially performed; and (2) under the doctrine of "judicial control," the district court need not terminate the leases, even if Chesapeake had breached the leases, and under the facts of this case the court should not terminate the leases.<sup>57</sup> The district court concluded that an issue of fact precluded a summary judgment based on Chesapeake's contention that it had substantially performed its obligations. But the court granted summary judgment on the basis of judicial control, and dismissed the Walkers' claims.

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54. *Id.* at 257–58.

55. *Id.* at 258.

56. *Id.* at 256.

57. *Id.* at 255.

On appeal, the United States Court of Appeals for the Fifth Circuit rejected the Walkers' argument that article 2013 requires lease termination in the event of a breach. The court noted that Louisiana courts have sometimes declined to award lease cancellation, and that article 2013 should be interpreted as giving a party a right to seek judicial dissolution of a contract, while leaving the court with discretion whether to grant that remedy.

Turning to the standard for contract dissolution, the Fifth Circuit noted that Louisiana jurisprudence does not favor lease cancellation. The court determined that a "dereliction of duty must be of a substantial nature and cause injury to the lessor" in order for lease dissolution to be warranted.<sup>58</sup> The Fifth Circuit stated that the decision whether to exercise "judicial control" to avoid lease termination is a decision for the judge, not a jury, that appellate review of a decision to exercise judicial control is based on an abuse of discretion standard, and that summary judgment is appropriate if the judge determines that judicial control should be exercised even under the version of "the facts most favorable to the non-moving party that could be found by a jury."<sup>59</sup> Applying these standards, the Fifth Circuit affirmed the district court's grant of summary judgment, holding that the court had not abused its discretion by declining to terminate the leases.

#### IV. RECORDATION ISSUES

##### A. *Notices of Lease*

Effective January 1, 2011, Louisiana Revised Statute 44:104 was moved to Louisiana Revised Statutes Title 9, known as the Civil Code ancillaries, and was redesignated as 9:2742.<sup>60</sup> Among other things, the statute specifies that recordation of a notice of lease will be given the same effect as recordation of the lease itself.

##### B. *Unrecorded Exercise of Option to Extend Lease*

Claude and Linda Sparks purchased several acres in Caddo Parish.<sup>61</sup> The parties to the sale had agreed that the sellers would reserve 25% of the minerals, but the parties signed an act of sale that erroneously stated that the sellers reserved 75%. Some time later, XTO offered to lease a 75% mineral interest from the Sparks for \$20,000 per acre, but XTO withdrew the offer after discovering that the Sparks seemed to own only 25% of the minerals. An act of correction was recorded to reflect that the sellers had reserved only 25% of the min-

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58. *Id.* at 256.

59. *Id.*

60. H.B. 857, 2010 Leg., Reg. Sess., 2010 La. Acts 284.

61. *See Sparks v. United Title & Abstract, L.L.C.*, 56 So. 3d 302, 303 (La. Ct. App. 2010), *writ denied*, 57 So. 3d 337 (La. 2011).

erals, but, by that time, XTO was no longer interested in leasing the property.

The Sparks brought suit against their title insurance company, which had prepared the erroneous act of sale. The company moved for summary judgment, noting that the Sparks' land was subject to a previously recorded lease to St. Mary Land & Exploration. That lease's three-year primary term had expired (and apparently the lease had not been maintained by production), but the lease contained an option for a two-year extension, which St. Mary had exercised. The title insurance company argued that the Sparks were not damaged by XTO's withdrawal of its lease offer because the pre-existing lease to St. Mary precluded the Sparks from granting a valid lease to XTO.

The Sparks argued that they were not bound by St. Mary's unrecorded exercise of its option to renew.<sup>62</sup> The trial court disagreed, holding that, under the Louisiana public records doctrine, a third party is bound by an unrecorded exercise of an option to renew a lease if the lease containing the option is recorded. The Louisiana Second Circuit affirmed.

### C. *New Record Leaseholder Was Necessary Party in Action to Rescind Transfer*

Morgan held the rights of lessee under several mineral leases, but he assigned those rights to Winbeau Oil & Gas.<sup>63</sup> Morgan later brought suit to rescind the assignment, alleging that he had assigned his rights based on false representations by an agent of Winbeau. In the meantime, however, Winbeau had reassigned the leases to Petrohawk. The trial court rendered a judgment rescinding the assignment, but the appellate court reversed and remanded, holding that Petrohawk, the record leaseholder, was a necessary party under Louisiana Code of Civil Procedure article 641.

## V. LIENS

### A. *Validity of Lien Under Louisiana Oil Well Lien Act*

Cutting Underwater Technologies USA, Inc. v. Con-Dive, LLC concerned a dispute that arose after Hurricane Rita toppled a platform associated with a lessee's inactive well on the outer continental shelf.<sup>64</sup> The lessee hired a contractor that removed the platform, but failed to pay its subcontractors. The subcontractors responded by placing liens on the lessee's property, pursuant to the Louisiana Oil

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62. *Id.* at 304.

63. See *Morgan v. Winbeau Oil & Gas Co.*, 57 So. 3d 1202, 1203-04 (La. Ct. App. 2011).

64. *Cutting Underwater Techs. USA, Inc. v. Con-Dive, LLC*, No. 09-387, 2011 WL 1103679, at \*1 (E.D. La. Mar. 22, 2011).

Well Lien Act<sup>65</sup> (“LOWLA”), which applied as surrogate federal law under the Outer Continental Shelf Lands Act<sup>66</sup> (“OCSLA”).<sup>67</sup>

LOWLA protects those who provide work for “operations” performed at the “well site” of an oil or gas well.<sup>68</sup> “Operations” include “drilling, completing, testing, producing, reworking, or abandoning a well.” The lessee challenged the validity of the liens on two bases. First, the lessee argued that removal of the platform was not part of “abandoning a well.”<sup>69</sup> The lessee had plugged the well and cut its casing prior to Hurricane Rita. The lessee argued that those prior steps had completed the abandonment. The court disagreed, concluding that the subcontractors’ work should be considered part of “abandonment” because federal regulations require the removal of a platform after well depletion. The lessee also argued that a subcontractor that performed sonic surveys of the site had not performed work “at the well site.” The court disagreed, stating that LOWLA does not restrict “at the well site” to the immediate vicinity of the well.

### B. *Uniform Cancellation Affidavit*

Act 124 of the Louisiana legislature’s 2011 Regular Session enacted Louisiana Revised Statute 9:5166, which establishes the form for a uniform cancellation affidavit that may be used for the cancellation of mortgages and vendor’s lien inscriptions, except for judicial and legal mortgages.<sup>70</sup> Act 124 does not prohibit the use of any other method or form of cancellation otherwise authorized by law.

## VI. CONTAMINATION CLAIMS

The Marins and the Breauxs brought tort and contract claims against the defendants, alleging that the defendants’ oilfield activities had contaminated the plaintiffs’ land.<sup>71</sup> The trial court awarded approximately \$21 million in compensatory damages, and an equal amount of punitive damages under former Civil Code article 2315.3.<sup>72</sup> The First Circuit Court of Appeal affirmed, and the Louisiana Supreme Court granted writs. One of the major issues in the case was whether the plaintiffs had asserted their claims timely.

Under Louisiana law, claims are subject to liberative prescription, which is defined as “a mode of barring of actions as a result of inac-

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65. LA. REV. STAT. ANN. §§ 9:4861–4873 (2007).

66. See 43 U.S.C. §§ 1331–1356a (2006).

67. *Cutting*, 2011 WL 1103679 at \*1.

68. §§ 9:4861–4873.

69. *Cutting*, 2011 WL 1103679 at \*2.

70. S.B. 24, 2011 Leg., Reg. Sess., 2011 La. Acts 124.

71. *Marin v. Exxon Mobil Corp.*, 48 So. 3d 234, 241 (La. 2010).

72. *Id.* at 243. Former article 2315.3 allowed for the award of punitive damages in certain circumstances for activities involving hazardous substances.

tion for a period of time.”<sup>73</sup> Although the Civil Code states that “[p]rescription runs against all person unless exception is established by legislation,”<sup>74</sup> Louisiana jurisprudence recognizes that the running of prescription may be suspended by the doctrine of *contra non valentem*.<sup>75</sup> Under this doctrine, the running of prescription is suspended in certain circumstances, including if plaintiffs neither knew nor reasonably should have known of their claim.<sup>76</sup> In *Marin*, the lower courts concluded that the running of prescription had been suspended by this “discovery rule” portion of the *contra non valentem* doctrine, and therefore, the plaintiffs’ claims had not prescribed.

The Supreme Court held, however, that the lower courts had erred in concluding that *contra non valentem* had interrupted the running of liberative prescription. For several years before filing suit, the plaintiffs had known that sugar cane would not grow near pits operated by the defendants. Further the plaintiffs had complained about contamination for several years. This demonstrated sufficient knowledge to start the running of prescription. The Court rejected plaintiffs’ argument that prescription did not start running until an environmental consultant informed them about the extent of contamination. Further, although a defendant allegedly misled the plaintiffs about certain test results, the plaintiffs knew there was a problem and they could have investigated further.

Next, the Court held that the evidence did not demonstrate a continuing tort. It had been several years since the defendants had deposited wastes in the pits, and there was “scant” evidence that the pits were still leaking. And even if a plume of contaminants that already had leaked were still migrating beneath plaintiffs’ property, the migration did not constitute a continuing tort. Therefore, the plaintiffs’ tort claims were prescribed.<sup>77</sup> This required reversal of the punitive damages award because article 2315.3 punitive damages are a tort remedy.<sup>78</sup>

Turning to the contract claims, the Court noted that the Breauxs were successors to a mineral lease that expired more than ten years before suit was filed. Therefore, their contract claims were prescribed.<sup>79</sup> The Marins, on the other hand, still had a valid lease. The defendants argued that their contractual liability to clean up the Marins’ property would not arise until after the lease expired, and that

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73. See LA. CIV. CODE ANN. art. 3447 (2007) (periods of liberative prescription are similar to statutes of limitations).

74. See *id.* art. 3467.

75. *Marin*, 48 So. 3d at 245.

76. *Id.*

77. See LA. CIV. CODE ANN. art. 3492 (2008) (tort claims are subject to a one-year liberative prescriptive).

78. *Marin*, 48 So. 3d at 256.

79. *Id.* (contract claims are subject to a ten-year liberative prescription); see LA. CIVIL CODE ANN. art. 3499 (2011).

the Marins' contract claims therefore were premature. The court disagreed. Although a lessee's Civil Code article 2683 duty to return the leased thing to the lessor in the original condition, but for "normal wear and tear," does not arise until the end of the lease, other Civil Code and Mineral Code articles impose duties not to damage the leased premises, and claims based on those duties were not premature. Accordingly, the court upheld the Marins' compensatory damages award.

Ironically, the court's dismissal of all the Breauxs' claims based on prescription meant that the court never reached one of the questions that had prompted it to grant writs—namely, whether purchasers of property have a right to sue for contamination that existed prior to their purchase.<sup>80</sup> This question arose because the contamination of the Breauxs' land occurred prior to their purchase of it.

## VII. MANDATORY DISCLOSURE OF FRACTURING WATER COMPOSITION

The Louisiana Department of Natural Resources ("DNR") proposed a new regulation that would require operators to disclose information about the water used in hydraulic fracturing.<sup>81</sup> Specifically, the regulation would require operators to disclose:

- the volume of hydraulic fracturing fluid used
- the types of additives used (for example, biocides, corrosion inhibitors, friction reducers, etc.), as well as the volume of each type
- the trade name and supplier of each additive, and
- a list of the chemical compounds classified as hazardous by the Occupational Safety and Health Administration that are contained in the additives, along with the maximum concentration of each compound.<sup>82</sup>

If the identity of the chemical compound is a trade secret, the operator would be excused from identifying the compound, but would be required to identify the chemical family to which the compound belongs.<sup>83</sup>

DNR collected public comments via e-mail and regular mail, and held a public meeting on the proposed regulation on August 30,

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80. *See Marin*, 48 So. 3d at 256.

81. *Hydraulic Fracture Stimulation Operations Hearing*, DEP'T OF NATURAL RES., STATE OF LA., (Aug. 30, 2011), <http://dnr.louisiana.gov/index.cfm?md=calendar&tmp=detail&eid=110&nid=249&pnid=231>.

82. *See id.*

83. *See id.*



2011.<sup>84</sup> As of that time, the regulation appeared to be on track to become effective in late October 2011.<sup>85</sup>

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84. Keith B. Hall, *Louisiana's Proposed Regulation for Disclosure of Fracking Water Composition Appears on Track for Enactment*, OIL & GAS L. BRIEF (Sept. 4, 2011), <http://www.oilgaslawbrief.com/hydraulic-fracturing/louisianas-proposed-regulation-for-disclosure-of-fracking-water-composition-appears-on-track-for-ena/>.

85. *Id.*