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Mineral Rights

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I. Legislation

A. Act 37-Liberative Prescription on Land Transferred to Government

Act 37 of the 1990 legislative session amends Article 149 of the Mineral Code.[1] It provides that prescription of nonuse does not run against the original owner whose property is transferred to the government and minerals are reserved as long as the land is owned by the government to provide that such prescription does not run even if the land is thereafter transferred to a third person "private or public." Before the property can be transferred from the state or federal agency or other entity with expropriation authority to a third person, the agency or entity must first offer to sell at the fair market value whatever rights or interest in the land it acquired subject to the mineral interest back to its original grantor, donor, or vendor, or his successors.

B. Act 192-Dry and Abandoned Wells, Disposal Wells, Pit Closures

Act 192 of the 1990 session amends Louisiana Revised Statutes 30:4(C)(1) and (16)(a) and 4.1(B)(1) relative to the authority of the Commissioner of Conservation regarding dry and abandoned wells. It provides for closure of pits, removal of equipment, structures, and trash, and general site clean-up of dry or abandoned wells and provides for a bond to secure such clean-up. It should be noted that the Act provides that only an owner of the right to produce shall be held responsible for actions required by the Commissioner under the authority of the statute.

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1. La. R.S. 31:149 (1989). Since 1980, there have been two versions of Article 149 in the Mineral Code. Presumably, this amendment cures this problem. For a recent case applying Articles 149 and 150, see Inversions Del Angel, S.A. v. Callon Petroleum Co., 883 F.2d 29 (5th Cir. 1989). See infra text accompanying note 24. See also 1990 La. Acts No. 978 discussed at I (6).

C. Act 387-Severance Tax on Natural Gas

A significant change to the manner of taxing natural gas was made by the legislature this year. Act 387 amends Louisiana Revised Statutes 47:633(9) and enacts Louisiana Revised Statutes 47:633.1(C) and (D), relative to the severance tax on natural gas and related products. The basic rate of taxation will now initially be ten cents per thousand cubic feet, rather than seven cents, and the rate will be adjusted annually based on the changing value of natural gas on the spot market in Louisiana. Exemptions from taxation for some gas, such as that reinjected within Louisiana, as well as lower taxation rates for low volume wells are provided for in this legislation.

D. Act 684-Leasing, Geothermal Resources

This Act amends Louisiana Revised Statutes 30:809 to provide that oil and gas leases executed after January 1, 1991, are deemed to include geothermal resources. Unless specifically excluded in the lease, the lessee shall not be required to obtain a geothermal lease.

E. Act 702-Public Sale of Property Related to Operation of Wells

Act 702 of 1990 enacts Louisiana Revised Statutes 30:74(A)(3) relative to sheriff's sales and public auctions of any property related to the operation of oil and gas wells. This statute provides for notification before the sale of such property to the Commissioner of Conservation and for retention by him of a lien to insure proper plugging and abandoning of the wells.

F. Act 971-Mineral Right Owner as Party to Partition of Land

Article 179 of the Mineral Code was revised by Act 971 of 1990 to read as follows:

> If the owner of a mineral right or interest therein is not made a party to an action for partition of the land subject to his right or interest, the partition is not invalid, but the right or interest therein is not extinguished or otherwise affected.

The previous wording of the article provided that the owner of a mineral right or interest therein was a necessary party to an action for partition of the land subject to the right. The amendment to the article removes the requirement that a mineral right owner be a necessary party.[2] This amendment should only add to the confusion surrounding

2. It is the author's understanding that the principal motivation for the amendment was that parties to partitions have felt it necessary to join all mineral interest owners in the partition proceeding even if the mineral interests were created by all the co-owners of the land. Such joinder may impose significant additional expenses to a partition. Article 186 of the Mineral Code provides that an owner of a mineral right that derives from all the co-owners of the land has no interest in the proceeds of a partition.

partition of land subject to mineral rights. That is to say, it is clear that the owner of land and the owner of a mineral right burdening the land are not co-owners.[3] Because they are not co-owners, the owner of a mineral right would not be a party to a partition by co-owners of land unless a statute makes the mineral interest owner party to such an action. Until changed by this amendment, Article 179 of the Mineral Code made the mineral interest owner party to such an action. The Louisiana Supreme Court, however, clouded the subject considerably in *Steele v. Denning*[4] by holding that a mineral interest owner under the facts of that case could not be made a party to a partition of land. The court rendered its opinion without discussing the application of Article 179 to the case.

To understand the problem, consider the following hypothetical problem. Assume A and B are co-owners of a 100 acre tract of land. A sells to C a mineral servitude for one-half the minerals on the tract. It is clear that A can make such a sale, and it is also clear that C cannot exercise his servitude without the consent of B.[5] Thereafter, B seeks partition of the land co-owned with A. We will assume after *Steele v. Denning* and the amendment to Article 179 that C cannot be made a party to the partition. A gets the west 50 acres and B gets the east 50 acres. What do A, B, and C have after this partition? The amended Article 179 says that C's interest is not affected by the partition. Does this mean that C still has a servitude for one-half the minerals over all of the 100 acres? Does this mean that B has only 50 acres after the partition and is still subject to a servitude for one-half the minerals on the reduced acreage? Is A's 50 acres burdened only by a servitude for one-half the minerals in C such that A will now be entitled to one-half of the minerals produced from his 50 acres? The only satisfactory method for dealing with these problems is to make C a party to the partition; however, the legislation seems to endorse the apparent holding of *Steele v. Denning* that C cannot be made a party to the litigation.

G. Act 978-Imprescriptibility of Rights Reserved in Transfers of Land to Charitable, Nonprofit Corporations

In addition to the revision of Article 149 noted above, a new section 149.3 has been added by Act 978 of 1990. It provides that when land is acquired from any person by a charitable, nonprofit corporation organized under the laws of the state of Louisiana and qualified under

3. See La. R.S. 31:169 (1989).

4. 456 So. 2d 992 (La. 1984). For a critique of this case, see Martin, Mineral Rights, The Work of the Louisiana Appellate Courts for the 1984-1985 Term, 46 La. L. Rev. 569, 587-88 (1986).

5. La. R.S. 31:164 (1989).

the U.S. Internal Revenue Code Section 501(C)(3) by conventional deed, donation, or other contract and by the act of acquisition a mineral right otherwise subject to the prescription of nonuse is reserved, the prescription of nonuse shall not run against the mineral right so long as title to the land remains with a charitable, nonprofit corporation.

H. Act 986-Effect of Division Order

Act 986 enacts Louisiana Revised Statutes 31:212.23(D). It provides that a division order may not alter or amend the terms of the oil and gas lease.

I. Act 1065-Exemption From Oil Well Lien Act

Act 1065 amends the Oil Well Lien Act to enact Louisiana Revised Statutes 9:4861.2(C) to exempt from the Oil Well Lien Act equipment moved onto the lease to plug and abandon a well or to close pits in compliance with an order of the Commissioner of Conservation after a public hearing.

J. Act 1079-Uniform Commercial Code

This Act repeals Articles 197-202 of the Mineral Code relative to the pledge of mineral rights and minerals. The Mineral Code provisions are thus replaced by the comprehensive scheme of the Uniform Commercial Code provisions brought about by the Act.

II. Taxation

The plaintiff in *Rojo Oil Co., Inc. v. McNamara*[6] sought to recover Louisiana severance taxes paid under protest for the years 1983 and 1985. The issue before the court was whether the operator of a waste salt water disposal facility was liable for a severance tax on marketable oil recovered from the waste salt water prior to its disposal in an injection well. Although the disposal operator's operation recovering the oil is separate from the original severing of the oil at the well, the court ruled that the operator "was clearly the owner of the salt water and the oil at the time the oil was produced by extracting it from the salt water."[7] As such, the disposal operator was liable for severance tax under the statute.[8]

6. 547 So. 2d 1096 (La. App. 1st Cir. 1989).
7. 547 So. 2d at 1099.
8. La. R.S. 47:633, :634, :648.21 (1990).

III. Oil and Gas Leases

A. *Trespass by Lessee for Use of Pipeline*

A trespass claim was adjudicated in *Ortego v. Sevarg Company, Inc.*[9] In 1959, plaintiffs' predecessors in title granted an oil and gas lease to Colorado Oil and Gas Corporation. The lease provided that the lessee had the right "to construct, maintain and use . . . pipelines . . . thereon for operations hereunder or in connection with operations on adjoining land." In 1960, the plaintiffs' predecessors granted Colorado Oil and Gas a pipeline right of way, and a pipeline was constructed to serve a gas well. This gas well was plugged and abandoned in 1971. In 1961, the property was partitioned into three tracts. Colorado's assignees, including defendant Sevarg, constructed a new pipeline in 1982 which tied into the pipeline constructed in 1960. The new pipeline was to connect to the Courville property on which a gas well had been drilled. The gas well was the unit well for a unit that included plaintiffs' property. In 1986, plaintiff Arthur Wyble refused to allow Sevarg onto the property to repair a leak in the pipeline. In 1987, plaintiffs brought suit against Sevarg for trespass.

The court held that, even though the mineral production was not on lessor's property, the lease authorized the construction and use of pipelines across the leased property so long as the operations were on adjoining land. The evidence, however, disclosed that a road existed between the leased property and the property on which a gas operation was being conducted. The evidence did not show the ownership of the road; therefore, whether the defendant was conducting operations on adjoining land was not shown. Although Sevarg failed to meet its burden of proving that it had lease authority for the pipeline, the plaintiffs failed to show that the pipeline belonged to them.[10] Furthermore, no evidence was produced showing that plaintiffs had made demand on the lessee to remove the pipeline in the manner provided for by the Civil Code.[11] Although the pipeline servitude had expired, the court found no evidence that the pipeline had been abandoned. Moreover, the court found no evidence of actual damages to the plaintiffs for the use of the pipeline even if plaintiffs owned the pipeline or to the surface,

9. 550 So. 2d 340 (La. App. 3d Cir. 1989).

10. See Guzzetta v. Texas Pipe Line Co., 485 So. 2d 508 (La. 1986), where the Louisiana Supreme Court held that, in the absence of proof of abandonment, constructions permanently attached to the ground by consent of the owner remain the property of the one who constructed them and become the property of the landowner only after the failure of the constructing party to remove the permanent construction within 90 days after written demand.

11. La. Civ. Code art. 493.

and held that the court could not award speculative damages. The court ruled that there was no trespass as the tract in question was in a unit and participated in the production from the unit. Therefore, Sevarg was lawfully on the property and not trespassing.

B. *Lease Cancellation*

In *Estis v. Monte Carlo Exploration*,[12] plaintiff-lessor Estis brought suit against the lessee, Monte Carlo, and the assignees of the lease, seeking cancellation of leases granted in 1983 and 1984 to Monte Carlo. The defendants reconvened against the lessor and filed a third party petition against the party operating the lease under a contract. The court of appeals affirmed a trial court judgment in favor of plaintiff and in favor of the third party defendant operator. The leases had clearly expired when production ceased, and ninety days elapsed without production, drilling, or reworking. The operator had acted reasonably in attempting to maintain the lease but was hampered by the failure of some of the other working interest owners to finance the operation so that the operator could satisfy the requirements of the Office of Conservation for a permit to sell the oil that could be produced. The appellate court also upheld the trial court's award of attorney fees against one of the defendants personally. The award was made against the individual because the charter of Monte Carlo had actually been revoked before the lease was granted to Monte Carlo, and the lease was therefore actually with the individual defendant.

C. *Nonpayment of Royalty-Notice*

The question of what notice is required under Mineral Code article 137[13] to begin the article's thirty day period for compliance for the lessee in which the lessee must pay royalties or be liable for penalties and/or lease cancellation was addressed in *Rivers v. Sun Exploration & Production Co.*[14] The proceeding concerned nonpayment and improper payment of royalty to appellants on two oil and gas leases. The trial court ruled, on partial summary judgment, that penalties were not to

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12. 558 So. 2d 341 (La. App. 3d Cir. 1990).

13. La. R.S. 31:137 (1989) provides as follows: "If a mineral lessor seeks relief for the failure of his lessee to make timely or proper payment of royalties, he must give his lessee written notice of such failure as a prerequisite to a judicial demand for damages or dissolution of the lease." La. R.S. 31:138 (1989) provides in part that: "The lessee shall have thirty days after receipt of the required notice in which to pay the royalties due or to respond by stating in writing a reasonable cause for non-payment." Penalties and lease cancellation can be awarded under Articles 140 and 141 of the Mineral Code.

14. Rivers v. Sun Exploration and Production, 559 So. 2d 963 (La. App. 2d Cir. 1990). The author participated in the writing of the brief for the plaintiffs in this case.

be awarded even though the lessees had not paid certain royalty that was due in a timely manner and had given no explanation for such nonpayment in response to a demand for payment. The lessees who co-owned the working interest in these leases were appellees Sun Exploration and Production Company (Sun) and Sohio Petroleum Company (Sohio). Acreage under the two leases that were the subject of the appeal had been included in two units formed by the Commissioner of Conservation. Vaughan Petroleum, Inc., an assignee of Sun, was the operator. Concerned that some royalties under different leases were being paid at different rates, Rivers made inquiry of the lessees. Sun responded that Sun and Sohio marketed their respective shares at different prices pursuant to different contracts. Rivers made formal demand on the lessees on March 19, 1985 in a letter which reviewed the differential pricing and stated further that it was a "demand for an accounting and payment for all production saved and marketed during the three (3) years prior to March of 1985," listing six leases. Sohio reviewed its records and paid $339.41, which it said was a clerical error. Sun responded, saying it believed royalties had been properly paid and did not indicate it had assigned certain of the leases in dispute to Vaughan in 1978. Unsatisfied by the responses and lack of a full accounting, Rivers filed suit on June 7, 1985.

Sohio subsequently discovered that the operator Vaughan had placed some production in escrow, and a payment for $15,451.25 was made by Vaughan to plaintiffs on July 15, 1986, i.e. more than a year after the demand and the filing of the suit. This money had been withheld on the claimed basis that this amount might be subject to refund by order of the Federal Energy Regulatory Commission. Also, Vaughan tendered a check to plaintiffs for $27,303.33 on October 3, 1985 (i.e. more than six months after demand), representing royalty on several years of production from a unit which had been suspended by Vaughan because of an alleged failure by plaintiffs to respond to Vaughan's request that they execute a division order.

Sohio filed a motion seeking partial summary judgment that it had no liability for double the amounts of the Vaughan payments and that it not be deprived of its leasehold interest. Sun filed a similar motion respecting its liability. These were granted by the trial court. On appeal, Rivers contended that penalties, interest, attorney fees, and lease cancellation should be awarded because of the lessees' failure to respond properly to the demand made for royalty payment and failure to act as prudent operators in their management of the lease. The lessees/appellees contended that the demand for royalty payment was inadequate under the Mineral Code and that they were relieved of responsibility for proper accounting and payment of royalty because Vaughan was operator of the units and because Vaughan had good reason for not paying royalty.

The appellate court affirmed the trial court judgment. The court focused on the fact that the initial inquiries of the plaintiffs to the defendants related to differential reporting of value of gas being sold under the leases and the formal demand for accounting and payment of royalty specifically referenced the pricing disparity. The court said that it appeared

> from the record that the lessees contacted by plaintiffs construed their demand letter to be the single issue of whether royalty should be based on the actual price received by each lessee or on the highest price received by any lessee when the working interest in a mineral lease was co-owned by several lessees.[15]

The court held that

> a mineral lessor does not have a right of action to judicially complain of the failure of his lessee to make timely or proper payments of royalties until he gives written notice of such failure to his lessee and allows him 30 days after receipt of the required notice to either pay the royalties due or state the reasonable cause for nonpayment. The notice requirements set forth in La. R.S. 31:137 are an indispensable prerequisite to a judicial demand for dissolution of the lease or damages.[16]

The court said the adequacy of the notice is determined on a case-by-case basis giving due consideration to the particular facts of each case. The notice must be "something more than the mere recitation of the lessee's contractual and statutory duty to pay royalties."[17] The apparent intent of the Mineral Code was that the notice be of a more specific nature "so as to reasonably alert the lessee and to allow for an appropriate investigation of the problem by the lessee."[18] While the lessors clearly demanded payment for all production saved and marketed,

> the lessee could have reasonably concluded that the letter was intended as notice of the alleged deficiency in price and was not a notice of any deficiency or failure to pay for production. The manner in which this notice was drafted was such that it may have motivated these two defendants to investigate only the pricing issue.[19]

The court said it would be error to penalize the defendants for failing to completely audit the payment and production records as opposed to merely investigating the pricing issue.

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15. 559 So. 2d at 965.
16. Id. at 969.
17. Id.
18. Id.
19. Id. at 970.

The court's decision in *Rivers* imposes considerable difficulties for lessors. All of the production data is in the hands of the lessee. The lessor generally has only such information as can be obtained from the lessee. Information about production and price is not in the possession of the lessors and is difficult, if not impossible, for the lessors to obtain from any source other than their lessees. Where a lessee refuses to render an accounting and refuses to respond to interrogatories after the filing of a suit concerning the production from the wells from a lease or leases, it will be virtually impossible for a lessor to obtain the specific information necessary to make a more detailed demand on the lessee. A court which will not impose the damages provided for by Articles 140 and 141 of the Mineral Code will encourage recalcitrant behavior by lessees.

IV. State Lands

A. *Interest Part of Royalties*

The interest on funds deposited for royalties in connection with litigation between the state and a petroleum producer is to be included in the definition of royalty insofar as a portion of the funds are to be paid to the parishes where the production took place. This was the holding in *East Baton Rouge Parish v. Treasurer, State of Louisiana.*[20] During litigation between the State of Louisiana and third parties, royalty payments to three parishes were held in escrow. On settlement of the litigation, the state turned over the ten percent royalty to the three parishes provided for by the Louisiana Constitution[21] and by statute[22] but did not turn over any of the interest which had accumulated on the royalties. The parishes brought this suit to recover their share of the interest that had accrued and legal interest from the date of judicial demand. The court ruled that the entire amount received by the state pursuant to the settlement of the underlying litigation, including interest earned during the pendency of the litigation, constituted a royalty payment. Therefore, the parishes in question were entitled to ten percent of the entire amount. Because the entire amount constituted a royalty payment, the statutory prohibition on paying interest on interest[23] had no application; thus, the parishes were entitled to interest from the date of judicial demand.

20. 560 So. 2d 478 (La. App. 1st Cir. 1990).
21. La. Const. Art. VII, § 4(e).
22. La. R.S. 30:145 (1989).
23. La. Civ. Code art. 2001.

B. *Liberative Prescription-State Lands*

In *Inversions Del Angel, S.A. v. Callon Petroleum Company,*[24] the sellers of a 320 acre tract reserved one-third of the minerals in the sale in 1966 to Erikson. In 1973, Erikson's successor in interest, Gauguin, recorded a plat of a subdivision of the tract. The effect of such a filing is to constitute a dedication to the State of Louisiana of the streets and alleys shown on the subdivision.[25] Because there was a prior creation of a mineral servitude, the dedication of the streets did not carry with it the mineral rights reserved in the 1966 conveyance. In 1980, Gauguin transferred the remaining property in the subdivision back to Erikson, reserving the mineral rights. In 1981 and 1982, Gauguin transferred its mineral rights to the plaintiffs. The plaintiffs brought this action to recover royalties not paid by Callon Petroleum on production attributable to the subdivision acreage. The dispute concerned the mineral rights underlying the streets and alleys of the subdivision. The servitude created in 1966 prescribed in 1976 for lack of use. At that time, the land underlying the streets and alleys was owned by the Livingston Parish Police Jury. The plaintiffs claimed that, under Articles 149 and 150 of the Mineral Code, the minerals underlying the streets and alleys belonged to them. The court ruled that, for these articles to apply, the act of acquisition by the public body must have contained a reservation of the mineral rights. There was no such reservation in the dedication of the subdivision in 1973. The plaintiff said that there could not have been a reservation of the mineral rights in 1973 because of the existence of the outstanding mineral servitude established in 1966.[26] The court ruled that Article 150 should be narrowly construed because it is an exception to the general policy favoring unification of ownership of land and minerals. Article 150 requires a written reservation of outstanding mineral rights, and there was no such reservation here. The court stated that the "mere acquisition of land by the government does not automatically create imprescriptible mineral rights in favor of the transferor."[27] Without an express reservation, the outstanding mineral rights reverted to the owner of the land, the government.

C. *Taking of Property for Pipeline Servitude/Liberative Prescription*

In *Olivier v. Louisiana Gas Service Co.,*[28] the Parish of Jefferson had constructed two pipelines, one a three inch gas pipeline, on a certain

24. 883 F.2d 29 (5th Cir. 1989).
25. La. R.S. 33:5051 (1988 and Supp. 1990).
26. La. R.S. 31:76 (1989).
27. 883 F.2d at 32.
28. 551 So. 2d 67 (La. App. 5th Cir. 1989).

tract of land in 1957. In 1968, the plaintiff acquired a fifty percent interest in the lot. In 1978, the parish transferred to defendant Louisiana Gas Service (LGS) the gas distribution system that included the three inch gas pipeline in dispute. Plaintiff filed suit for damages for unauthorized construction of the two pipelines in 1983 asserting she did not know of the pipelines' existence until 1981. The trial court held that the claim was barred by the two year liberative prescriptive period for damages arising from construction of a public work[29] and by acquisitive prescription.[30] The appellate court reversed, holding that the liberative prescription provision must be read in conjunction with the protection against unlawful appropriation or taking afforded by the Louisiana Constitution.[31] The court construed the petition as an action for unlawful appropriation or taking. The liberative prescriptive period was held then to apply when property is damaged for public purposes but not to an action for the recovery of the property taken for public purposes. Acquisitive prescription could not be applied because LGS had been in possession for less than ten years when the suit was filed. The court remanded for further proceedings.

V. CONVEYANCING

A claim that a certain conveyance of property was an invalid simulation was rejected in the case of *Amoco Production Co. v. McMorris*.[32] On March 3, 1976, Amoco acquired a lease on certain property from Leo Miley. It was recorded on June 11, 1976. Leo Miley's wife Ruth, however, owned the property. On March 10, 1976, Ruth and Leo Miley transferred the title to the property to their daughter, Helen McMorris, through a cash deed in which they reserved lifetime usufructs. The next day, the transfer was recorded. Not recorded was a counter letter which stated that the $50,000 stated as consideration for the deed was not in fact paid. In October 1979, Ruth Miley, Helen McMorris and Eugene McMorris executed a mineral lease to Keyes; it was recorded October 24, 1979. After taking a mineral lease on the same property from the Miley grandchildren in July 1981, Amoco instituted an action to set aside the March 10, 1976 sale to Helen McMorris and the 1979 lease to Keyes. The Keyes group reconvened and sought a declaration that the Amoco leases were invalid. The court held that the 1976 sale to Helen McMorris was valid, that the lease to Keyes was valid, and that the leases to Amoco were invalid. The sale to Helen McMorris was not

29. La. R.S. 9:5624 (1983 and Supp. 1990).
30. La. Civ. Code art. 742.
31. La. Const. art. I, § 2 (1921), superceded by La. Const. art. I, § 4 (1974).
32. 552 So. 2d 1255 (La. App. 1st Cir. 1989).

an invalid simulation. While the $50,000 cash consideration was not actually paid, the consideration for the transfer was the past services of Helen McMorris in taking care of her parents and her promise to take care of them in the future. Helen McMorris was able to take possession of the property without her parents having to leave the property. Amoco's lease from Leo Miley was not recorded until after the conveyance to Helen McMorris. Moreover, that lease was null because the property was titled solely to Ruth Miley.[33] The lease between Amoco and the Miley grandchildren was a nullity; the transfer to Helen McMorris was valid, therefore the property did not pass through the succession of Leo Miley to the grandchildren.

VI. Contract Interpretation

A. *Purchase Agreement*

Whether a drop in the market for oil was an "adverse material change to the Properties" excusing the obligation to purchase was at issue in *Esplanade Oil & Gas, Inc. v. Templeton Energy Income Corp.*[34] Templeton Energy Income Corporation agreed on January 15, 1986 to purchase certain oil and gas properties from Esplanade Oil & Gas, Inc. at a specified price if there was no "adverse material change to the Properties" between the time of the purchase agreement and the time of closing. Within a few weeks, the price of oil dropped from approximately $28.85 per barrel to $20.35 per barrel. On February 6, 1986, Templeton Energy advised Esplanade that it was no longer willing to purchase because of the drop in the price of the oil. Esplanade brought suit against Templeton Energy for breach of contract, and it continued to operate the properties until it could sell them to a third party later that year. The trial court then ruled that the drop in the price of oil was an "adverse material change to the Properties" as contemplated by the agreement excusing Templeton Energy from the obligation to purchase. Esplanade appealed, and the Fifth Circuit reversed. Under the plain language of the agreement, no change "to the Properties" occurred. Rather, a change in the market for oil took place. The leases remained in effect, the wells continued to produce oil, and the well equipment remained the same. Templeton Energy further contended that the letter agreement was non-binding because the parties failed to execute a "mutually definitive Purchase and Sale Agreement," as specified in the letter agreement. The court rejected this agreement because it was Templeton

33. When the lease was granted, La. Civ. Code art. 2334 (since repealed) prohibited the husband from encumbering community property of record in the name of the wife without the written authority or consent of the wife.

34. 889 F.2d 621 (5th Cir. 1989).

Energy which refused to enter into or even negotiate such a definitive agreement, and because Templeton's breach was due to a change in market conditions, not a disagreement about the form of the final contract. Moreover, the court ruled that the unforeseen drop in the market price of the oil was not force majeure or a failure of cause excusing performance by Templeton Energy.

B. Area of Mutual Interest

The case of *J-O'B Operating Company v. Newmont Oil Co.*[35] involved a 1979 letter agreement creating an area of mutual interest (AMI) requiring that any party to the agreement acquiring an interest in a mineral lease within the area offer the non-acquiring parties an option to participate in the acquisition by paying a share of the out-of-pocket acquisition costs. A state lease held by Texaco was within the AMI. The state pressured Texaco for further development, and Newmont entered into a sublease agreement with Texaco in 1985 under which Newmont could conduct a seismic exploration program to be followed by the drilling of a well. Because of the seismic program and sublease, the State Mineral Board was willing to defer consideration of Texaco's development obligations. Some of the parties to the AMI were willing to participate in the drilling of a well but not in the costs of the seismic program. These parties asserted that the Texaco sublease authorized but did not require the seismic program. Newmont took the position that the seismic program was the primary consideration for the sublease and was indivisible from it. J-O'B Operating Company, on behalf of certain parties to the AMI agreement, filed suit to determine the rights of the parties under the AMI agreement.

The trial court ruled that all the plaintiffs had properly elected to participate in the Newmont-Texaco sublease and that the seismic program was a proper acquisition cost of the sublease. The court ordered transfer to plaintiffs of their share of the sublease and found plaintiffs indebted to defendants for their share of the costs of the seismic program.

On appeal, the appellate court upheld the trial court determination that Newmont's obligation to conduct the seismic program was the principal consideration for the sublease; however, the court overturned the trial court's finding that the plaintiffs had timely and properly elected to participate in the sublease. Under the AMI agreement, each party had the option, for 15 days after receiving notice of acquisition of an interest in the AMI, to elect to participate by paying the acquiring party its proportionate part of all out-of-pocket acquisition costs. The effort to elect to participate in the sublease but not the cost of the seismic

35. 560 So. 2d 852 (La. App. 3d Cir. 1990).

program was not a proper election by plaintiffs. The court ruled that the AMI agreement did not allow an electing party the right to contest the necessity for or the extent of any consideration paid by the acquirer for a lease or other mineral interest. The agreement did not authorize a conditional election to participate.

C. *Sublease-Failure to Maintain*

In *Huggs, Inc. v. LPC Energy Inc.*,[36] Huggs, Inc. and McRae Exploration, Inc. entered into a letter agreement and a joint operating agreement under which Huggs was to acquire mineral leases in the prospect area. Huggs was then to assign them to McRae for the acquisition cost plus ten percent. In addition, Huggs was to have a five percent overriding royalty until payout and, thereafter, a twenty percent working interest. LPC Energy, Inc. succeeded to the rights of McRae. Huggs acquired certain leases and made the proper assignments. McRae lost Leases 290 (a) and (b) because it failed to pay delay rentals under the leases and LPC lost Lease 245 because it failed to recommence drilling or reworking operations within ninety days after the cessation of production from the lease well. Huggs and others with interests in the leases brought suit against LPC claiming the loss of the leases was a breach of the letter agreement and the joint operating agreement. While the litigation was pending, Lease 677 expired and Huggs added a claim for its loss.

The Fifth Circuit found that LPC had not breached the agreements by the loss of Leases 290 (a) and (b) because the agreements provided there would be no liability for loss of the lease interest through mere oversight. The failure to pay delay rentals was the result of oversight because the leases were never put onto McRae's computer records properly and, thus, did not get onto LPC's computer records. Huggs had prepared both agreements, and it was proper to construe them against the drafter.

The Fifth Circuit agreed with the trial court that LPC had breached the letter agreement when LPC lost Lease 245 because it failed to recommence drilling or reworking operations within ninety days after the cessation of production from the lease well. LPC's duty under the agreement was either (1) to maintain the lease by paying delay rentals or resuming drilling operations or (2) to relinquish and assign all the leases within a unit area to Huggs sixty days before the lease expired. Failure to do one or the other was a breach. Although LPC claimed that Huggs had constructive notice that Lease 245 was in danger of expiring because Huggs had received monthly production reports, op-

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36. 889 F.2d 649 (5th Cir. 1989).

erating statements, and revenue checks, the court said such information was equivocal at best. The loss of Lease 245 was also ruled not to be a joint loss under the joint operating agreement. The joint loss provision was said to be directed to the situation where both parties agree to the extinction of a lease, a situation not present in the facts of this case. Because LPC's failure to maintain Lease 245 was grossly negligent, LPC was also liable to Exordium, the owner of an overriding royalty interest which did not have the privity of contract with LPC. The active breach of a contract can give rise to tort liability to third parties under Article 2315 of the Louisiana Civil Code.

LPC was liable to Huggs for the loss of Lease 677. It had been held by the same well which held Lease 245. When LPC elected not to maintain a lease in a unit, it had to relinquish and assign the lease to Huggs. LPC had failed to relinquish and assign the lease to Huggs, so LPC was liable to Huggs for the cost of re-acquiring the acreage covered by Lease 677.

The Fifth Circuit did remand to the trial court on one aspect of the damages against LPC. While the loss of profits and royalties was not too speculative, the discount factor to be applied by an expert witness required that the expert be cross-examined; therefore, this factor could not be submitted to the trial judge in the form of a report without such cross-examination. The appellate court also reversed the trial court for awarding only post-judgment interest to Huggs. Because Huggs proved a basis for recovery both in contract and in tort, it was entitled to recover under both theories, and the trial court should have awarded interest from the date of judicial demand.

D. *Joint Operating Agreement-Gas Balancing*

In *Pogo Producing Co. v. Shell Offshore, Inc.*,[37] Pogo, Shell, and others had signed an operating agreement governing production from a federal OCS lease. The agreement provided in section 10.4: "Any party's failure to timely take or sell its share of gas production shall not prohibit the other party or parties from producing their share of production, provided that non-producing party or parties may recoup or recover their share from future production and/or in cash by suitable agreement." The other lessees sold their gas to Tennessee Gas while Pogo was obligated to sell its gas to United. When production from the lease commenced in July, 1982, United was not connected to the lease. The Pogo/United contract was rescinded in January, 1985 with no gas having been delivered to United. Pogo began deliveries to Texas Eastern Transmission Corporation in February, 1985. Pogo had never signed the gas

37. 898 F.2d 1064 (5th Cir. 1990).

balancing agreement to which the other lessees had agreed because Pogo objected to a provision that required an underproduced party who commenced to take "makeup gas" to remit the operator any differences in value between the makeup gas and the value of the gas when taken by the overproduced party.

In June, 1987, Shell transferred its interest in the OCS property, and the assignee (the "Hughes-Denny Group") assumed Shell's rights and obligations under the operating agreement subject to Pogo's right to recover its imbalance. Pogo brought suit against Shell seeking a cash recovery for approximately 2,000,000 Mcf of underproduced natural gas. The trial court concluded that section 10.4 of the Operating Agreement was only an "agreement to agree," and that, in the absence of an agreement, the custom and usage of the industry required balancing in kind. The court dismissed the complaint as there was no reason balancing in kind would be inequitable to either party. The trial judge commented that the rule favoring balancing in kind, as a general matter, discourages an underproduced party from alternatively demanding balancing in cash or in kind as the market favors him.

The Fifth Circuit affirmed the trial court's ruling, relying on *Amoco v. Thompson*[38] to reject Pogo's contention that under Louisiana law a court should order cash balancing at the price received by the overproduced party when the underproduced party, through no fault of its own, is shut in without a market for its gas. Under Louisiana law, the court said, "balancing in kind is the preferred method of remedying underproduction."[39] Although the court acknowledged that some circumstances might make balancing in kind inequitable, there was no support for that here, particularly in view of the fact that the property at issue was not nearing depletion. The court found inapplicable the force majeure provision of the operating agreement. The court rejected Pogo's claim that Shell breached its obligation to perform its duties as an operator in good faith. While Louisiana law imposed a duty on the parties to perform contracts in good faith, there was no evidence that Shell failed to act in good faith. Shell's insistence that Pogo join the gas balancing agreement, to which all other producers had subscribed, was not evidence of bad faith; it showed only that Shell did not agree to Pogo's terms. The court recognized that Pogo could sue either Shell or the Hughes-Denny group for non-performance, but observed that the Louisiana Civil Code permits a third person, even against the will of

38. 516 So. 2d 376, 388 (La. App. 1st Cir. 1987), writ denied, 520 So. 2d 118 (1988). In the latest round of this protracted litigation, the court of appeal has upheld a determination of the Commissioner that non-taking owners were entitled to a cash accounting for a specified time period for which they did not have a "viable market." Amoco Production Co. v. Thompson, 566 So. 2d 138.

39. 898 F.2d at 1067.

the obligee, to render performance unless the obligee has an interest in performance only by the obligor. One final point to note is that because, under section 10.4 of the operating agreement, the parties made "an agreement to agree," Shell could not choose the method of balancing without Pogo's consent.

VII. Oil Well Liens

A. *Prescriptive Period For Unrecorded Liens*

In *Matter of Hyde*,[40] Sawyer Drilling contracted with Hyde Oil to drill a well. The well was completed in November, 1985. Sawyer did not file a statement of lien until July 25, 1986, more than 180 days after the work. Hyde Oil went into bankruptcy, and Sawyer answered the trustee's complaint in April, 1987, more than a year after completing the drilling but less than a year and 180 days after completing the drilling. Because Sawyer did not file a lien within 180 days as required by the statute,[41] Sawyer held an unrecorded lien.

The Oil Well Lien Act does not specify a prescriptive period for unrecorded liens. The Louisiana courts of appeal are in conflict whether the prescriptive period runs one year or one year and 180 days. The Second and Third Circuits have held that the prescriptive period is one year plus the 180 days in which the lien could have been recorded from the completion of the work.[42] The First Circuit has held that the prescriptive period is one year from the completion of the work.[43] The bankruptcy court followed the broader view of the Second and Third Circuits, adopting the one year and 180 day approach to prescription. Thus, the bankruptcy court upheld the validity of Sawyer's lien. The district court affirmed the bankruptcy judge and the Fifth Circuit held that the district court was entitled to substantial deference in cases raising unsettled questions of state law.

B. *Who is a Furnisher?*

The facts of *Baker Chemicals, Inc. v. TXO Production Co.*[44] were virtually identical to those of *Baker Chemicals, Inc. v. Arkla Exploration*

40. 901 F.2d 57 (5th Cir. 1990).
41. La. R.S. 9:4862(A)(1) (Supp. 1990).
42. Compadres, Inc. v. Johnson Oil & Gas Corp., 547 So. 2d 382 (La. App. 3d Cir. 1989); Hawn Tool Co. v. Crystal Oil Co., 514 So. 2d 636 (La. App. 2d Cir. 1987).
43. Genina Marine Services, Inc. v. ARCO Oil & Gas Co., 499 So. 2d 257 (La. App. 1st Cir. 1986), subsequent appeal, 552 So. 2d 1005 (La. App. 1st Cir. 1989), writ denied, 556 So. 2d 1281 (1990).
44. 556 So. 2d 226 (La. App. 2d Cir. 1990).

Company.[45] A supplier of mud-drilling equipment sought recognition of a lien and privilege on an oil and gas well and appurtenant structures. Baker, the supplier, had entered a warehouse agreement with Drilling Chemicals Inc. ("DCI"). DCI had a man named Willis operating the warehouse. DCI paid him to deliver materials from the warehouse to the well locations. Baker also contracted with Willis to maintain its inventory at the warehouse and to act as its agent in sales to DCI. Willis delivered Baker's materials to TXO's well, and TXO paid DCI in full for the materials. DCI did not pay Baker, prompting Baker to record a lien against TXO. The court ruled that there was a completed sale from Baker to DCI before DCI ever sold the materials to TXO and delivered them to TXO's site. This broke the link between Baker and TXO. In effect, Baker furnished materials to DCI and DCI furnished them to TXO, but Baker did not furnish them to TXO as required by the statute. The presence of an intermediary sale or lease of material or equipment does not automatically destroy the supplier's right to assert the lien. The court ruled that a "furnisher of a furnisher" who does not actually deliver the materials to the site and does not look to the well for security has not established his right to assert the lien.

C. Louisiana Oil Well Lien Act Applicable to Construction of Gathering Lines on Outer Continental Shelf

In *Union Texas Petroleum Corp. v. PLT Engineering*,[46] Union Texas Petroleum entered into a contract with PLT Engineering to design, fabricate, and install a gas transportation system to connect to a platform owned by Union Texas and its partners. PLT Engineering engaged certain subcontractors for constructing the pipeline, burying it, and connecting it to the platform. When Union Texas learned that PLT had not paid the subcontractors, Union Texas invoked a contract provision allowing it to withhold money from the amount due. Union Texas then instituted an interpleader action to enable PLT and the subcontractors to determine how the withheld money should be paid. The subcontractors answered and filed counterclaims asserting liens under the Louisiana Oil Well Lien Act.

The trial court ruled that the Louisiana Act was applicable by operation of the Outer Continental Shelf Lands Act and dismissed the interpleader as inappropriate. Union Texas appealed, asserting maritime law applied. The Fifth Circuit affirmed the trial court. The principal obligation of PLT and the subcontractors was building a gathering line and connecting it to a well platform; such activities are subjects of oil

45. 545 So. 2d 709 (La. App. 2d Cir. 1989).
46. 895 F.2d 1043 (5th Cir. 1990).

and gas exploration and production, and are not traditionally maritime activities. Although the subcontracts themselves provided for the application of maritime law, the Outer Continental Shelf Lands Act (OCSLA) required that the substantive law of the adjacent state apply even in the presence of a choice of law provision to the contrary. Under the Louisiana Act as amended, those who construct gathering lines that are connected to a well have a lien privilege. Recordation requirements for the liens were sufficiently complied with by filing in the adjacent parishes and with the Department of the Interior's Minerals Management Service.[47] Under the court's reading of the OCSLA, the federal act extends the boundaries of the state parish to the outer limits of the OCS. The court further rejected Union Texas's contention that the subcontractors waived any lien rights under Louisiana law by a provision of the relevant contracts. Such a reading of the contracts was not supported by the language of the agreements.

D. *Solidary Obligors?*

The issue on appeal in *Genina Marine Services, Inc. v. ARCO Oil & Gas Co.*[48] was whether Briley and ARCO were solidary obligors. As held in earlier litigation, Genina failed to file its lien timely and also failed to file suit against ARCO within one year from the date of last service performed. Genina now argued that because it timely filed suit against Briley in March of 1983, such suit interrupted the prescriptive period with respect to ARCO as well since ARCO, it claimed, was solidarily liable with Briley. The court ruled that the lien was an in rem claim against the property listed in the statute and did not create any personal liability on the part of ARCO. ARCO was not indebted to Genina; therefore, there could be no solidary obligation between ARCO and Briley that was owed to Genina.[49] Thus, the suit by Genina against Briley did not interrupt prescription against ARCO.

VIII. Well Costs-Co-lessees

A co-lessee of oil and gas wells brought suit against the creditor of its bankrupt co-lessee to recover the bankrupt's proportionate share

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47. In St. Mary Iron Works v. McMoran Exploration Co., 802 F.2d 809 (5th Cir. 1986), vacated, 809 F.2d 1130 (5th Cir. 1987), the court had declined to answer whether there was a place for recordation of liens for work on the Outer Continental Shelf.

48. 552 So. 2d 1005 (La. App. 1st Cir. 1989).

49. The court declined to follow Frank's Casing Crew and Rental Tools v. Carthay Land Co., 212 So. 2d 161 (La. App. 4th Cir.), writ denied, 252 La. 889, 214 So. 2d 716 (1968), to the extent that it held the owner of the property subject to the lien is personally obligated to the claimant.

of well costs in *Grace-Cajun Oil Co. No. 3 v. MBank*.[50] The plaintiff co-lessee had paid the bankrupt co-lessee's share of well costs to avoid foreclosure on liens. The trial court ruled that the creditor's rights primed the co-lessee's claim for recovery of drilling costs. On appeal, the Fifth Circuit reversed. The appellate court recognized that under Louisiana law a co-lessee is not entitled to a share of production until he pays his share of well costs. The court analyzed the security interest acquired by the creditor and found that the nature of the transaction between the bankrupt co-lessee and the creditor was that of a pledge. Under the Mineral Code,[51] the owner of a property right could not pledge any right greater than that owned. The bankrupt co-lessee's right to share in the production was conditioned on its obligation to pay its proportionate share of well costs; it could transfer to its creditor no greater right than it had; therefore, the creditor had to pay the share of well costs before sharing in production. The court was careful to observe that it was not holding that the creditor had become a co-owner of the property by exercising rights under the security agreement.[52]

IX. PROCEDURE

A. *Joinder of Parties*

In 1985, the City of Shreveport brought an action against a unit operator seeking to increase its share of production from a forty-acre unit within Shreveport. The claim of the plaintiff was that the true extent of the plaintiff's interest had been concealed from it and fraudulently represented as 1.5 acres rather than thirteen acres, apparently based on ownership of streets and alleys. The defendant operator filed an exception of non-joinder of parties who claimed to own the mineral interests underlying the streets and alleys. The trial court denied the exception but the appeals court reversed in *City of Shreveport v. Petrol Industries, Inc.*[53] The court reasoned that the interest in the unit production of the non-joined lot owners and others currently being credited with title to minerals underlying the streets and alleys clearly would be affected by a court decision; therefore, those parties should have been joined in the litigation.

50. 882 F.2d 1008 (5th Cir. 1989).

51. La. R.S. 31:204 (1989): "A mortgage of mineral rights may also provide for the pledge of minerals subsequently produced to the extent of the mortgagor's interest therein or of the proceeds accruing from the sale or other disposition thereof."

52. 882 F.2d at 1012 n.4.

53. 550 So. 2d 689 (La. App. 2d Cir. 1989).

B. *Concursus Proceeding-Petitory Action*

In the decision *Chevron U.S.A., Inc. v. Bergeron*,[54] the court held that in a concursus proceeding a petitory action can follow a possessory action to determine the ownership of immovable property that is the basis of the concursus proceeding. Chevron U.S.A., Inc. had filed the concursus proceeding to determine who had rights to production attributable to a 6.456 acre tract in a unit operated by Chevron. The concursus proceeding was consolidated with a possessory action brought by Ruffin Bergeron against the Pauls. The trial court recognized Bergeron's possession and ordered the Paul claimants to bring a petitory action within sixty days to assert their claim of ownership. Bergeron appealed, asserting that the trial court should have recognized him as owner of the funds without permitting the Paul claimants to assert their ownership claims in a petitory action. The appellate court affirmed the trial court.

The court noted that the rules regulating real actions apply in concursus proceedings where ownership of immovable property is at issue, even though concursus proceedings are not real actions.[55] Possession is a preliminary matter to be resolved prior to trial on the issue of ownership and the party found not in possession bears the burden of proof in the petitory action. Thus, the court rejected Bergeron's claim that when real rights arise in a concursus proceeding, a single action must adjudicate both the issues of possession and ownership. Where adverse claimants dispute possession and, ultimately, ownership of immovable property involved in a concursus proceeding, possession is a preliminary matter which must be resolved prior to adjudication of the issue of ownership.

X. ACQUISITIVE PRESCRIPTION

The proper application of the standards of possession to perfect title under the acquisitive prescription of thirty years[56] was at issue in *Linder Oil Co. v. LaBoKay Corp.*[57] Linder Oil instituted a concursus proceeding against LaBoKay and Ursin Perkins to determine entitlement to royalties attributable to a 25.67 acre tract. The trial court held that, while LaBoKay was the record owner of the entire tract, Perkins was possessor and owner of 6.24 acres by acquisitive prescription. On LaBoKay's appeal, the Third Circuit reversed the trial court as to the 6.24 acres. The possession of the 6.24 acres through farming activities during part of the thirty year prescriptive period by a Perkins predecessor

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54. 551 So. 2d 746 (La. App. 1st Cir.), writ denied, 553 So. 2d 465 (1989).
55. See Chevron U.S.A., Inc. v. Landry, 546 So. 2d 858 (La. App. 1st Cir. 1989).
56. La. Civ. Code arts. 3486, 3487.
57. 556 So. 2d 899 (La. App. 3d Cir. 1990).

was with the permission of the holder of the record title, so the possession was that of a precarious possessor. Perkins could not thus establish sufficient open and notorious possession for the requisite period. LaBoKay's predecessors were the only ones who paid taxes on the property up to 1983; moreover, they had granted mineral leases, executed timber sales, leased pasture rights, received royalty payments from other wells and had otherwise exhibited characteristics of ownership of property. The trial court should have recognized LaBoKay's recorded title to the entire 25.67 acre tract.

XI. Conservation Practice

A. *Declaration of Pooling*

In *Debetaz v. Chevron U.S.A., Inc.*,[58] Chevron filed a declaration of pooling under its leases, creating a rectangular 160 acre unit around a well it was drilling. The declared unit included portions of two leases at issue in this case. The plaintiffs claimed that the pooling was invalid and the leases had terminated. The basis of the claim was that the Commissioner of Conservation was establishing 640 acre spacing for the field in question, and the lessee had to declare units in conformity with the 640 acre spacing pattern even though no Commissioner's unit had yet been established for the tracts in question. The plaintiffs argued that the "declaration of pooling was invalid under the provision of the pooling clause requiring a declared unit to conform to a unit established by an order of a regulatory body of the State of Louisiana and that the leases therefore expired at the end of their primary terms."[59] The court rejected the plaintiffs' "awkward and unlikely construction of the pooling clause,"[60] noting that the pooling provision simply required a declared unit to be no smaller than a Commissioner's unit covering the same land. Although the lessee was motivated in part by the desire to maintain expiring leases, the lessee had acted as a prudent lessee in good faith and the leases were held by the pooling declaration and drilling.

B. *Accounting to Unleased Owners in Conservation Unit*

The Louisiana Supreme Court, in *Taylor v. Woodpecker Corp.*,[61] ruled on the issue of whether an unleased mineral interest owner has a right or cause of action against a purchaser of unit production to

58. 891 F.2d 562 (5th Cir. 1990).
59. Id. at 563.
60. Id. at 565.
61. 562 So. 2d 888 (La. 1990).

recover the value of his share. The unit involved in the litigation was a forty acre unit established in 1942 by Order No. 24-D. The form of the order was somewhat different from later orders issued by the Commissioner of Conservation in that the order did not contain force-pooling language, and it specifically provided that, should the owners not agree to pooling, the drilling owner's allowables would be reduced to its proportionate share of the unit acreage.

In 1979, a well was drilled on acreage within the 1942 unit by E.C. Wentworth. Ashland purchased production from the well. In 1986, the lessor-plaintiffs (Taylors) filed a lawsuit against their lessee, Woodpecker Corporation, and against Wentworth, the well operator. They later amended it to include Ashland as a defendant. The plaintiff's lessee, Woodpecker, settled with the plaintiffs and released the leasehold rights, retroactive to the date of first production from the unit well. The trial court maintained defendants' exception of no right of action for the period from the date of production until the date of the Woodpecker release, finding that the Woodpecker release did not transfer or assign Woodpecker's rights to the plaintiffs. The court of appeal reversed.[62] Only the purchaser's writ for certiorari was granted by the Louisiana Supreme Court, which remanded for briefing and argument the right/cause of action of the plaintiffs against the purchaser.[63] The court of appeal overruled the purchaser's exception[64] and this appeal ensued, with the Louisiana Supreme Court now reversing the appellate court. The court held that an unleased owner's sole remedy for a share of production from a unit well is from the operator because of a 1984 Legislative act[65] that provides that the unit operator must account to an unleased landowner within the unit for his share of production from the sale of the unit production.[66] The unleased owner could not seek recovery from

62. Taylor v. Woodpecker Corp., 539 So. 2d 1293 (La. App. 3d Cir. 1989). The appellate court's discussion of the unit order is less than satisfactory, containing no analysis of the specific provisions of the order.

63. Taylor v. Woodpecker Corp., 545 So. 2d 1042 (La. 1989).

64. Taylor v. Woodpecker Corp., 552 So. 2d 81 (La. App. 3d Cir. 1989).

65. 1984 La. Acts No. 345 § 1 amends La. R.S. 30:10(A) to provide: "(3) If there is included in any unit created by the commissioner of conservation one or more unleased interests for which the party or parties entitled to market production therefrom have not made arrangements to separately dispose of the share of such production attributable to such tract, and the unity [sic] operator proceeds with the sale of unit production, then the unit operator shall pay to such party or parties such tract's pro rata share of the proceeds of the sale within one hundred eighty days of such sale."

66. In State ex rel. Superior Oil Co. v. Texas Gas Transmission Corp., 242 La. 315, 136 So. 2d 55, 16 O. & G.R. 582 (La. 1961), the court had held that a nonoperator working interest owner was undoubtedly entitled to be reimbursed for the value of its share of gas from a unit but that summary process against the purchaser was not authorized because the amounts were not certain, definite and fixed.

a purchaser of production where there had been no accounting from the operator of a unit. Recovery against the purchaser under a theory of unjust enrichment was not allowed as the plaintiffs had another remedy at law.

C. *Jurisdiction of Court and Commissioner*

Magnolia Coal Terminal v. Phillips Oil Company,[67] a case based on a claim for damages arising from a leaking well, went forward in district court despite an assertion by the defendant that the Commissioner of Conservation had exclusive jurisdiction over leaking wells. The court found that the well had not been plugged properly and awarded damages. At the same time, a proceeding was going on before the Commissioner of Conservation, and the Commissioner concluded that the well was not leaking.[68] The trial court and the Commissioner of Conservation made findings of fact that were in direct contradiction to one another. Phillips was ordered by the trial court to pay Magnolia a substantial sum of money to plug a well that the Commissioner had found to be plugged properly.

The court of appeal reversed the district court's damage award in its entirety, holding that the judgment of the trial court was based on factual issues which fell within the exclusive province of the Commissioner of Conservation. The court stated: "The hearings upon which these adjudications rest, while concerned with much of the same testimony and evidence as to the same issues, produced intolerably conflicting results."[69] The court later reiterated its opinion, saying "the result of these two forums conducting independent hearings on the same issue is untenable."[70] The court thus required administrative action first, saying that Magnolia was entitled to request the Commissioner to reopen, with the benefit of Magnolia's evidence, his public hearing to consider whether the well was leaking. The court on rehearing recognized that it had no jurisdiction to require the Commissioner to reopen the hearing but did urge him to do so.

D. *Escrow of Production Pending Unitization*

In *Exxon Corp. v. Thompson*,[71] the Louisiana court of appeal upheld the conditioning of a grant of allowables upon the producer's agreeing

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67. 561 So. 2d 732 (La. App. 4th Cir. 1990).

68. Magnolia, it should be noted, did not participate in this hearing before the Commissioner. The case of Phillips Petroleum Co. v. Batchelor, 560 So. 2d 461 (La. App. 1st Cir. 1990), sought a review of the Commissioner's determination but the court of appeals dismissed the case since it was clear that Phillips was seeking to confirm the order, not challenge it, and thus the case presented no justiciable controversy.

69. 561 So. 2d at 735.

70. Id. at 736.

71. 564 So. 2d 387 (La. App. 1st Cir. 1990).

to escrow the proceeds of production and then pay out the proceeds in accordance with the unit eventually adopted. The effect of such a conditioning of allowables is to allow the effective date of the unit to relate back to the filing of the pre-application notice that initiates the hearing for the creation of compulsory units in Louisiana. The court recognized that "[a]fter a pre-application notice (when the adjoining landowner is thus deprived of his right to explore), the Commissioner has the authority to condition an allowable on compliance with a unit yet to be created."[72] The policy of conditioning allowables was a reasonable exercise of the authority of the Commissioner to protect correlative rights. The holding of the court is no doubt the proper resolution of a thorny problem involving the protection of correlative rights in a competitive reservoir.[73]

72. Id. at 396.

73. The court found persuasive Comment, Can a Louisiana Unit Order be Effective Retroactively?, 49 La. L. Rev. 1119 (1989). See also the discussion of the problem of the effective date of unit orders in 1 B. Kramer & P. Martin, The Law of Pooling and Unitization, § 13.03[3] (1990).