Louisiana Law Review

Volume 53
Number 3 *Review of Recent Developments: 1991-1992*
January 1993

Article 10

1-1-1993

Mineral Rights

Patrick H. Martin
Louisiana State University Law Center, patrick.martin@law.lsu.edu

Mineral Rights

*Patrick H. Martin**

I. Legislation

A. *Act No. 155—S.B. No. 997: Rights of Third Party Purchasers Receiving Declarations of Interest in Product Purchased*

This Act amended the Mineral Code to include a new subsection (210.2) to Article 210. It provides that until receipt of a declaration of interest, a third party purchaser of oil and condensate is fully protected and may withhold payment for the production. A "declaration of interest" is defined as

> a signed statement by a party claiming an interest in mineral production, including the authority to sell production belonging to others, containing the name, address, and taxpayer identification number, a description of the property from which the oil and condensate are produced, and a certification and representation of the claimant's fractional or decimal interest in the production.[1]

The Act goes on to specify remedies available to a claimant who notifies a third party purchaser of his "declaration of interest" if the third party fails to pay in response to the notification. The pattern is similar to that for non-payment of royalty[2] though the damages are less.

B. *Act No. 589—S.B. No. 1079: Unified Oil and Gas Regulatory Index*

This Act provides for the creation of an index of all rules and regulations by all regulatory agencies relating to oil and gas development. Each agency must index and summarize all such rules and regulations and indicate what permits an oil and gas business may have to obtain and must file the index and summaries with the Commissioner of Conservation by December 1, 1992 (or within twenty days of promulgation if promulgated after this date). The Commissioner may critique any

---

* Campanile Professor of Mineral Law, Paul M. Hebert Law Center, Louisiana State University.

1. 1992 La. Acts No. 155 (to be codified at La. R.S. 31:210.2B).
2. See La. R.S. 31:137-41 (1989).

submission of an index and summaries that he determines to be unclear or confusing as it relates to oil and gas development. The agency shall respond to the critique in a form acceptable to the Commissioner within twenty days. The Commissioner is given six months after December 1, 1992 to compile all the indexes and summaries into the Unified Oil and Gas Regulatory Index. Any rule or regulation or license requirement not indexed, summarized and filed in substantial compliance with the Act will be ineffective.

C. *Act No. 1067—S.B. No. 1072: Louisiana Natural Gas Marketing Commission*

The natural gas production industry of Louisiana (and other states) has been in a depressed state for nearly a decade now. Several approaches have been suggested to alleviate the problem of gas surplus and low prices. Cutting back on production on the basis of market demand (market demand prorationing) is one method that has been considered. Unless similar action were taken in other major producing states, this could simply be harmful to Louisiana. This Act to promote the marketing of natural gas is another approach. By expanding markets for natural gas, the surplus could be reduced and the outlook for the production industry could be improved. Coordination with other producing states would not be necessary. The purpose of the Act is "to promote the use and consumption of natural gas, to assist the natural gas industry in market development, and to identify and remove impediments to the development of natural gas as an alternative fuel."[3] The Natural Gas Marketing Commission created by this Act will be within the Department of Natural Resources and will consist of sixteen members drawn from different segments of the natural gas industry and consumer groups. The Act contemplates a cohesive, comprehensive effort to promote and market natural gas.

D. *Act No. 1074—H.B. No. 163: Oil, Gas, and Water Well Liens—Exemption for Tubular Goods Recovered from Drill Hole*

Act No. 1074 of 1992 amends the Louisiana Oil, Gas and Water Well Lien Act to exempt casing, tubing, pipe, and other tubular goods recovered from the drill hole from the oil, gas, and water well lien when they are recovered from plugging and abandonment operations that were undertaken in compliance with an order of the Commissioner of Conservation.

3. 1992 La. Acts No. 1067 (to be codified at La. R.S. 30:650B).

E. Act No. 1097—H.B. No. 1201: Louisiana Noncoal Surface Mining Law

This Act establishes a comprehensive program of regulation for all noncoal surface mining operations. No operator may engage in any mining operations without obtaining a permit from the Commissioner of Conservation. The jurisdiction of the Office of Conservation is to be exclusive, and no other governmental entity, including any political subdivision or governing authority, is to have jurisdiction over surface mining nor authority to enact any local or special law or ordinance affecting surface mining. All applications for a permit must be accompanied by a five-year plan of reclamation of the land to be affected by the mining operations. Procedures for reclamation are spelled out in the statute. The operator must file annual status reports on mining and reclamation activities with the Office of Conservation and notify that Office upon completion of all reclamation requirements. The Act levies a reclamation fee of three cents per ton for all minerals mined. The fee is to be used to provide revenue with which to administer the state's noncoal mining and reclamation regulatory program, to meet environmental management needs, and to reclaim abandoned noncoal mine lands. The Act contains provisions for inspection, enforcement procedures and penalties. The provisions of the Act do not apply to the parishes of Allen, Beauregard, St. Tammany, St. Helena, Tangipahoa, Vernon, and Washington.

F. Act No. 1110—S.B. No. 382: Division Orders

Act 986 of 1990 enacted R.S. 31:212.23(D) to provide that a division order may not alter or amend the terms of the oil and gas lease. Act 1110 of 1992 repeals this statute and reenacts the substance of it as R.S. 31:138.1. It now provides a definition of a division order, and further provides that if a lessee fails to pay royalties solely because his lessor has not executed a division order as defined in this Act, the court shall award as damages double the amount of royalties due, legal interest on that sum from the date due, and reasonable attorney fees. But it goes on to indicate that if the lessor fails to supply the name, address, and tax identification number in response to a written request of the lessee, the lessee's failure to pay royalties shall be deemed reasonable.

G. Act No. 1132—H.B. No. 1368: Mortgages—Civil Code Revision

The 1992 revision of the Civil Code articles on mortgages consolidates the articles on both legal and judicial mortgages into one chapter.[4]

4. The mortgage provisions were in La. Civ. Code arts. 3311-3370 and 3397-3411. The revision consolidates the law into articles 3299-3337.

There is no express provision dealing with mineral rights. To determine if property is made susceptible of mortgage, one looks to Article 3286, which does not mention mineral rights, or "to other law." Such "other law" would include the Mineral Code, and comment (c) to Civil Code article 3302 of the mortgages revision sets forth the application of that law. This comment states:

> (c) Mineral rights, although not expressly made susceptible of mortgage by C.C. Art. 3286, are made mortgageable "to the same extent immovables under Article 3286" by R.S. 31:203 (rev. 1991). This is intended to make such mineral rights subject to judicial and legal mortgages.[5]

H. H.R. No. 43: Anti-Indemnity Agreements In Oilfield Contracts

House Resolution No. 43 creates a task force to study issues concerning anti-indemnity agreements in oilfield contracts and to propose revisions to the Louisiana Oilfield Anti-Indemnity Act of 1981. Creation of this task force was apparently prompted by the volume of cases being adjudicated under the present Act and by the lack of enforcement provisions in the Act.

II. CONVEYANCING - CONTRACT INTERPRETATION

A. Lessor-Lessee Relations; Right of Lessor to Share in Take-or-Pay Revenue

The case of *Frey v. Amoco Production Co.*[6] is a significant addition to the oil and gas jurisprudence of this state. The Louisiana Supreme Court in this decision addressed the obligation of a lessee to pay royalty to its lessors on money it has received from a purchaser of gas under a take-or-pay clause.

In the past, a gas purchase contract between a producer/lessee and a pipeline typically has had a term extending for a number of years, with an obligation of the purchaser to take a specified quantity of gas. The take-or-pay clause in a gas purchase contract allows the gas purchaser to pay a sum of money to the seller in lieu of taking the full volume of gas. This take-or-pay obligation has been properly characterized as an alternative obligation of the gas purchase contract rather than as a penalty or liquidated damages clause for breach by the buyer. The reason for inclusion of such a provision in the gas purchase contract

---

5. 1992 La. Acts No. 1132 (to be codified at La. Civ. Code art. 3302 comment (c)).
6. 603 So. 2d 166 (La. 1992).

from the perspective of the buyer is that it allows the buyer to continue the existence of the obligation of the seller to have the gas available in succeeding years. Were it not for the take-or-pay as an alternative obligation of the buyer, the seller would be able to terminate the gas purchase contract when the buyer fails to take and pay for the contractual quantity of gas. By the mechanism of the take-or-pay clause, the buyer can maintain the contract even without taking the gas.

Over the last decade a number of pipeline purchasers of natural gas have experienced considerable problems in managing their supplies of gas. The pricing provisions of their contracts have ratcheted the price of gas upward at a time when demand has gone down. The Federal Energy Regulatory Commission has had a major role in restructuring the natural gas market. Years of litigation have resulted from the failure of pipelines to take and pay for gas and to make payments under the take-or-pay clauses.[7] Large sums of money have been paid to producer-sellers of natural gas to settle take-or-pay claims and to buy out or buy down the contractual obligations. Should the producers (lessees) pay royalty to their lessors (and other royalty owners) on such sums paid to them? The producers have generally asserted that under the terms of the typical oil and gas lease, the lessee is only obligated to pay a royalty on "production" or the sale of natural gas. Since take-or-pay money is not money paid to the producer on gas actually produced, the argument goes, there is no obligation under the lease to pay royalty. Lessors, on the other hand, have contended that a sale takes place when the gas purchase contract is executed and/or that they should participate in any benefits enjoyed by the lessee that arise by virtue of the lease the lessor has granted to the lessee. Moreover, the lessors have asserted that the take-or-pay settlements have a potential for the lessee to escape royalty obligations by taking a lump sum for take-or-pay settlement when the settlement amount actually reflects a payment for a lower future price for the natural gas that will flow under the contract (this would be properly characterized as a "buy-down" of the contract); therefore, they assert, they should receive royalty on such take-or-pay payments and settlements. Royalty owners' claims have met with little success in other states[8] and in federal court in Louisiana[9] until now.

---

7. For Louisiana examples of the sort of litigation that the gas market problems have spawned, see Hanover Petroleum Corp. v. Tenneco Inc., 521 So. 2d 1234 (La. App. 3d Cir.), *writ denied*, 526 So. 2d 800 (1988), and Superior Oil Co. v. Transco Energy Co., 616 F. Supp. 98 (W.D. La. 1985).

8. Hurd Enterprises, Ltd. v. Bruni, 828 S.W.2d 101 (Tex. App.—San Antonio 1992); State v. Pennzoil Co., 752 P.2d 975 (Wyo. 1988); Gerard J.W. Bos & Co., Inc. v. Harkins & Co., 883 F.2d 379 (5th Cir. 1989).

9. Diamond Shamrock Exploration Co. v. Hodel, 853 F.2d 1159 (5th Cir. 1988).

In *Frey v. Amoco*,[10] royalty owners brought suit for royalty they claimed was due under a settlement their lessee, Amoco, had made with the buyer of gas, Columbia. Amoco had paid them royalty on the $280.2 million portion of the settlement that reflected payment for past and future price deficiencies but not the $66.5 million portion that was for take-or-pay deficiencies.[11] The federal district court held that royalty was not due on the take-or-pay portion of the settlement because a sale of gas did not occur without physical production and severance of the gas; thus, under Louisiana law, take-or-pay payments did not constitute part of the sale price of natural gas.[12] On appeal to the Fifth Circuit, that court reversed, holding that take-or-pay payments were part of the "amount realized" from the sale of gas under the lease form in question, and such payments were thus subject to the lessor's royalty.[13] The Fifth Circuit also held that the plaintiffs' claims were not barred by the three year prescription applicable to rent payments because the doctrine of *contra non valentem* should be invoked where the plaintiffs did not learn of the underpayment of royalty.[14] The defendant filed for rehearing, and the Fifth Circuit then withdrew the portion of its opinion on the entitlement of the plaintiffs to a royalty interest on the proceeds of the take-or-pay settlement and certified to the Louisiana Supreme Court the following question:

> Whether under Louisiana law and the facts concerning the Lease executed by Amoco and Frey, the Lease's clause that provides Frey a "royalty on gas sold by the Lessee of one-fifth (1/5) of the amount realized at the well from such sales" requires Amoco to pay Frey a royalty share of the take-or-pay payments that Amoco earns as a result of having executed the Lease and under the terms of a gas sales contract with a pipeline-purchaser.[15]

The Louisiana Supreme Court agreed with the result reached by the Fifth Circuit, holding the take-or-pay payments under the facts of the case and the royalty clause at issue were subject to the lessor's royalty. The Louisiana court used sturdy timbers as the foundation for its opinion. Rather than parsing the precise wording of the lease or trying to determine some specific intent of the lessor and lessee, it looked to

---

10. 708 F. Supp. 783 (E.D. La. 1989), *rev'd*, 943 F.2d 578 (5th Cir. 1991), *op. withdrawn, in part, on reh'g, ques. certified*, 951 F.2d 67 (5th Cir. 1992) (per curiam).

11. $45.6 million of the total was a recoupable take-or-pay payment and the remaining $20.9 million was a non-recoupable take-or-pay payment. By "recoupable" it is meant that the buyer can offset the cost of future gas takes by the amount of the payment.

12. *Frey*, 708 F. Supp. at 786.

13. Frey v. Amoco Prod. Co., 943 F.2d 578, 584 (5th Cir. 1991), *op. withdrawn, in part, on reh'g, ques. certified*, 951 F.2d 67 (5th Cir. 1992) (per curiam).

14. *Id.* at 587.

15. *Frey*, 951 F.2d at 68.

the broad purposes of the royalty clause and to the lessee's obligation to market oil and gas as a prudent operator under the Mineral Code. The court concluded that the royalty clause would be rendered meaningless if the lessee were to receive a higher percentage of the gross revenues generated by the leased property than contemplated by the lease. It ruled: "An economic benefit accruing from the leased land, generated solely by virtue of the lease, and which is not expressly negated . . . is to be shared between the lessor and lessee in the fractional division contemplated by the lease."[16] Looking to the prudent operator obligation of the Mineral Code of the lessee to enjoy the thing leased as a good administrator, the court observed the lessee has the duty to market diligently and thus to obtain the best price reasonably possible. The court noted that without the take-or-pay clause, the buyer of gas would presumably have to pay a higher price for the gas, and thus the royalty owner ought to share in the benefits accruing to the lessee of the take-or-pay clause. Likewise, take-or-pay payments effectively increase the price for the gas paid by the pipeline, and the royalty owner is entitled to share in that price. Moreover, the benefits accruing to the lessee under the gas purchase contract are derived from the lease itself, and the lessor should enjoy a portion of those benefits.

One aspect of the case is somewhat troublesome, but the court left room for future reconsideration of the problem under different circumstances. That is, the court followed the lead of the Fifth Circuit in characterizing the gas purchase contract as the sale of a "thing to come" under the Civil Code.[17] The court thus analogized the gas purchase contract to an animal yet unborn. It would seem more appropriate to treat a gas purchase contract as an imperfect sale under Article 2458[18] because it is subject to being measured and delivered before risk passes to the buyer. A buyer of gas only pays for each unit of gas that is actually delivered, and the take-or-pay payment is an alternative obligation of the contract that is not itself for the sale of the gas. That is to say, under a gas purchase contract there is no present sale of the thing to come or of an uncertain hope. There is a promise to sell and to purchase a portion of the gas that is produced, but only if it is

16. Frey v. Amoco Prod. Co., 603 So. 2d 166, 174 (La. 1992).

17. "A sale is sometimes made of a thing to come: as of what shall accrue from an estate, of animals yet unborn, or such like other things, although not yet existing." La. Civ. Code art. 2450.

18. Article 2458 states:

> When goods, produce, or other objects, are not sold in a lump, but by weight, by tale, or by measure, the sale is not perfect, inasmuch as the things so sold are at the risk of the seller, until they be weighed, counted or measured; but the buyer may require either the delivery of them or damages, if there be any, in case of non-execution of the contract.

produced. The seller continues to bear the risk that there may be no production. The promise is to pay only if gas is actually produced or is capable of being produced. There is no present sale in standard gas purchase contracts. The seller of gas generally owns only a right to produce and not any gas as such when the "sale" is made. Indeed, the gas may never be produced from the contract area. The seller is not selling the hope that there will be gas produced with the risk thus passing to the buyer that there may be no production. The court could yet adopt this approach in a dispute between buyer and seller for the court carefully noted: "[O]ur decision does not turn on whether a 'sale' of gas occurred between Amoco and Columbia for purposes of the gas purchase contract, but whether a 'sale' occurred between Columbia and Amoco so as to trigger the royalty clause of the Lease."[19]

Another point to be observed about *Frey* is that the Louisiana Supreme Court did not take up the *contra non valentem* ruling of the Fifth Circuit. Under the doctrine *contra non valentem agere nulla curiet praescriptio*, no prescription runs against a person unable to bring an action.[20] The three year prescriptive period for nonpayment of rent has been an important defense to claims of nonpayment or underpayment of royalty by the lessee in royalty litigation over the years.[21] Application of the *contra non valentem* doctrine to the three year prescription will lessen the value of this defense to lessees, and one can expect future litigation on this subject, with focus being directed to what a lessor or other royalty owner could know about the lessee's nonpayment or underpayment with the exercise of reasonable diligence.

B. Classification of Income Arising From Mineral Rights

The classification of income arising from mineral rights on property was raised in *Succession of Doll v. Doll*.[22] The deceased father had three children. In March, 1978, he conveyed 468 acres to one daughter for the stated price of $60,000. He died in August of that same year. The daughter remained in possession of the property until December 1985, with revenues accruing in that period from rental of houses, the sale of timber, a subsidy for planting of trees, and bonus money for the granting of two mineral leases. In December, 1982, another daughter

---

19. *Frey*, 603 So. 2d at 178.

20. See Plaquemines Parish Comm'n Council v. Delta Dev. Co., Inc., 502 So. 2d 1034 (La. 1987).

21. Matthews v. Sun Exploration & Prod. Co., 521 So. 2d 1192 (La. App. 2d Cir. 1988); Hankamer v. Texaco, Inc., 387 So. 2d 1251 (La. App. 1st Cir. 1980), *appeal dismissed on joint motion of the parties*, 403 So. 2d 651 (La. 1981); Board of Comm'rs v. Pure Oil Co., 167 La. 801, 120 So. 373 (1929); Parker v. Ohio Oil Co., 191 La. 896, 186 So. 604 (1939); Edmundson v. Amoco Prod. Co., 924 F.2d 79 (5th Cir. 1991).

22. 593 So. 2d 1239, *rev'g* 577 So. 2d 802 (La. App. 2d Cir. 1991).

sought return of the 468 acres to the succession along with the revenues produced by the property. The appeals court affirmed a trial court judgment that the revenue from the mineral lease had to be returned to the succession. The Louisiana Supreme Court reversed. A lease bonus is paid to induce the lessor to grant a mineral lease. It is for the privilege of going on the land to search for oil and gas. It is independent of production and does not diminish the estate. The defendant's obligation to restore the fruits from the donated property accrued at the date of judicial demand. Accordingly, it is a civil fruit under the plain wording of article 551 of the Civil Code. Therefore, the revenue from the mineral lease did not have to be returned to the succession.

C. Dedication of Streets and Roads

At issue in *Newman v. Livingston Parish Police Jury*,[23] a concursus proceeding, was the ownership of 10.9 acres of streets and roads in a subdivision and the right to receive royalties therefrom. Livingston Parish asserted title arising from a statutory dedication. The plaintiffs, Newman and Ponder, contended that the land referenced as streets in the subdivision plat was never released of a previously recorded mortgage and vendor's privilege and that they thus owned the subject property under a deed from a sheriff's sale. Although an unsigned plan was recorded in 1959 by someone, streets were never laid out or used. The trial court ruled in favor of the Parish, holding that the filing of the plat in 1959 was in substantial compliance with Louisiana Revised Statutes 33:5051 so as to constitute a statutory dedication of the 10.9 acres.

In reversing the trial court the appeals court held that when the mortgagee allegedly transferred ownership of a portion of the 62.81 acre tract to the Parish by way of a statutory dedication, the Parish could not acquire greater rights in the property than that held by the mortgagee. The mortgage was recorded prior to the alleged dedication, and thus the dedication was subject to the mortgage. The foreclosure and sale of the 62.81 acre tract divested the Parish of the alleged ownership interest granted to it by the mortgagee after the mortgage had been properly recorded. The court also ruled that if the mortgagee's actions amounted to only an implied dedication, ownership would not have vested in the Parish.

D. Finder's Fee; Contract Interpretation—Parol Evidence Rule

In *Billingsley v. Bach Energy Corp.*,[24] the plaintiff brought suit seeking payment of fees under a contract with defendant that provided

---

23. 603 So. 2d 250 (La. App. 1st Cir. 1992).
24. 588 So. 2d 786 (La. App. 2d Cir. 1991).

that he would be paid a finder's fee of five percent of the total purchase price of certain oil and gas properties and a per well location fee. The contract provided he was to be paid when the sale was consummated and when the wells were drilled. The defendant asserted that although the sale had taken place it would not be "consummated" until written consent was obtained under certain farm-out agreements with third parties. The defendant also claimed that the per well location fee was not owed because it was contingent on the plaintiff performing certain services upon the wells and that these had not been performed. The trial court granted summary judgment for plaintiff on these claims, and the appeals court affirmed. The court ruled that the defendant's efforts to show that the sale was not "consummated" and that the per well location fees were contingent on performance of services depended on parol evidence that would not be allowed to vary the terms of the written contract. The court based its opinion in part on the fact that mineral rights are incorporeal immovables and that "transfer of ownership or an interest in a mineral right cannot be the subject of a verbal agreement; it must be evidenced by a written contract and cannot be proved by parol evidence."[25] If the court's opinion is based on a premise that payment of a cash finder's fee is a mineral right, it seems most questionable. But the court's opinion really does not need such a basis, and the court went on to base its conclusion on the parol evidence rule as applicable to any written contract.

E. Joint Venture for Oil and Gas Need Not Be in Writing

The parties to the litigation in *Riddle v. Simmons*[26] were co-owners of property. Two co-owners claimed damages from a third owner and from a corporation solely owned by the third owner on the grounds that the defendants converted the profits from certain gas agreements in violation of an agreement to purchase and develop the land with the plaintiffs. The trial court sustained an exception of no cause of action, finding that a writing is necessary to support a joint venture agreement that has as its object the purchase and development of immovable property. In this decision, the court of appeals held that a joint venture was distinct from a partnership, stating the following:

> The principal difference between a partnership and a joint venture is that while a partnership is ordinarily formed for the transaction of a general business of a particular kind, a joint venture is usually, but not necessarily, limited to a single trans-

25. *Id.* at 789-90.
26. 589 So. 2d 89 (La. App. 2d Cir. 1991).

> action, although the business of conducting it to a successful termination may continue for a number of years. No formal or specific agreement is required. Generally the relationship may be formed by an oral agreement and the existence of a joint venture may be inferred from the conduct of the parties and other circumstances.[27]

The appeals court concluded that the litigation was concerned with the conversion of profits from the real estate and that parol evidence would be admissible to establish a management agreement concerning the property. Summary judgment by the trial court was inappropriate as there existed genuine issues of material fact concerning the parties' agreement to share profits derived from the property. Two cases in which parol evidence was not allowed to prove a joint venture,[28] were distinguished on the basis that those cases did not involve co-owners of property; here the plaintiffs were record owners of the property for which they were claiming an accounting of revenues.

The court stated the rule as follows:

> Where a person claiming an interest in revenue from immovable property is not a record owner of that property such claims are tantamount to the assertion of an ownership interest thereby invoking the parol evidence rule. In cases such as this, however, where the claimants are co-owners of the immovable property, we see no reason to exclude parol evidence to establish agreements concerning the management, exploitation, development or sharing of profits with reference to the co-owned property.[29]

The case was remanded for further proceedings.

F. Writing Required for Overriding Royalty

In *Petrocana, Inc. v. William H. Kenny Consultants, Ltd.*,[30] the plaintiff sought to be declared the owner of a five percent overriding royalty interest (ORRI) in certain mineral leases owned by William H. Kenny Consultants, Ltd. The claim grew out of a letter of agreement between Petrocana and Flynn Energy Corporation (Flynn) creating an area of mutual interest. Petrocana was to have a five percent ORRI in any leases acquired by Flynn within that area of mutual interest. At the time of the execution of the agreement, the leases in question were owned by Margo, Inc. William H. Kenny, as vice-president of Flynn,

---

27. *Id.* at 92.
28. Hayes v. Muller, 245 La. 356, 158 So. 2d 191 (1963), and Porter v. Johnson, 408 So. 2d 961 (La. App. 2d Cir. 1981), *writ denied*, 412 So. 2d 99 (1982).
29. *Riddle*, 589 So. 2d at 93.
30. 595 So. 2d 384 (La. App. 3d Cir. 1992).

negotiated to buy the leases. Kenny Consultants, a corporation controlled by William Kenny, bought the leases from Margo, Inc., allegedly as a "nominee" for Flynn. The trial court sustained an exception of no cause of action filed by Kenny Consultants. The appeals court affirmed, holding that in the absence of an allegation of a written agreement to which Kenny Consultants was a party, the petition failed to state a cause of action against Kenny Consultants.

G. *Indemnity Provision Is Null if it Excludes or Limits Liability for Intentional or Gross Fault*

Sevarg contracted with Energy Drilling (Energy) to drill an oil well. When the well proved unsuccessful, Sevarg brought suit for damages based on a claim that Energy breached the contract by failing to comply with the mud control program specified in the agreement.[31] Sevarg alleged that Energy's breach was intentional or was the result of gross fault. Energy raised as a defense an indemnity provision that it said precluded suit.[32] The trial judge partially maintained Energy's exception, by ordering part of the damages stricken from the petition based on the indemnity provision. The court of appeals reversed this ruling. This provision would be null because it, in advance, excludes or limits the

---

31. Sevarg Co., Inc. v. Energy Drilling Co., 591 So. 2d 1278 (La. App. 3d Cir. 1991), *writ denied*, 595 So. 2d 662 (1992).

32. The indemnity agreement provided as follows:

> 18.8 Underground Damage: Operator agrees to defend and idemnify Contractor for any and all claims against Contractor resulting from operations under this Contract on account of injury to, destruction of, or loss or impairment of any property right in or to oil, gas, or other mineral substance or water, if at the time of the act or omission causing such injury, destruction, loss, or impairment, said substance had not been reduced to physical possession above the surface of the earth, and for any loss or damage to any formation, strata, or reservoir beneath the surface of the earth.
>
> 18.14 Consequential Damages: Neither party shall be liable to the other for special, indirect or consequential damages resulting from or arising out of this Contract, including, without limitation, loss of profit or business interruptions, however same may be caused.
>
> 18.15 Indemnity Obligation: Except as otherwise expressly limited herein, it is the intent of parties hereto that all indemnity obligations and/or liabilities assumed by such parties under terms of this Contract, including without limitation, paragraphs 18.1 through 18.14 hereof, be without limit and without regard to the cause or causes thereof (including pre-existing conditions), the unseaworthiness of any vessel or vessels, strict liability, or the negligence of any party or parties, whether such negligence be sole, joint or concurrent, active or passive. The terms and provisions of paragraphs 18.1 through 18.14 shall have no application to claims or causes of action asserted against Operator or Contractor by reason of any agreement of indemnity with a person or entity not a party hereto.

Id. at 1280.

liability of Energy for intentional or gross fault that causes damage to Sevarg.[33]

H. Oil Well Lien Act-"Amount"

In *Amoco Production Co. v. Horwell Energy, Inc.*,[34] Amoco contracted with Horwell Energy, Inc., to operate a lease held by Amoco and to drill a test well. In return Horwell was to receive an eighty percent interest in the well if Horwell satisfactorily performed. Horwell in turn contracted with Gardes Directional Drilling to provide directional drilling services, which were valued at $246,375. Gardes received a cash payment of $140,000 and was also to receive "an interest equivalent to .3888266 in all rights, interests and obligations in and to the initial test well."[35] The Amoco-Horwell agreement was attached to and incorporated by reference in the Horwell-Gardes agreement. Horwell breached its agreement with Amoco, and Amoco terminated the contract. This meant Gardes could not earn its interest, and it thereupon filed evidence of a privilege[36] on the Amoco property. The trial court declared the privilege invalid, and Gardes appealed. The Fifth Circuit affirmed, holding that a drilling contractor who drills to earn an interest in a well does not have a privilege on the lease and well. A fractional interest in rights under a mineral lease does not fall within the meaning of the word "amount" in the oil well lien statute. The court observed: "Privileges, which often derogate the rights of innocent parties, are construed strictly. When in doubt, we decline to find a privilege."[37]

I. Fraud not Established so as to Overturn Sale of Mineral Rights by Debtor

In *Opelousas Production Credit Ass'n v. B.B. & H., Inc.*,[38] a creditor filed suit against debtors and the purchaser of mineral rights to set aside the debtors' sale of the mineral rights. The purchaser was a corporation whose shareholders were all members of the family of the debtors. The debtors filed for bankruptcy protection ten months after the sale. The trial court dismissed the suit finding that, while plaintiff proved at the time of the sale that the debtors were indebted to plaintiff and insolvent, the evidence did not support the conclusion that they intended to defraud

33. *See* La. Civ. Code art. 2004.
34. 969 F.2d 146 (5th Cir. 1992).
35. *Id.* at 147.
36. *See* La. R.S. 9:4861A (1991).
37. *Amoco*, 969 F.2d at 148.
38. 587 So. 2d 812 (La. App. 3d Cir. 1991).

the creditor.[39] The appeals court affirmed this judgment. Although the plaintiff introduced expert testimony that the mineral rights were worth much more than the price paid, there was conflicting evidence given, and there was no manifest error by the trial court.

J. Is Production Payment a Royalty?

The focus of *In re Senior-G & A Operating Co., Inc.*,[40] a bankruptcy proceeding, was whether PSI, Inc. of Missouri (PSI) could be charged with a share of workover expenditures approved by the trustee in bankruptcy. PSI's interest arose from a "Production Payment Loan Agreement" (the Agreement) in which it advanced $5,100,000 to Senior (the debtor) and in return Senior conveyed to PSI the right to production payments totalling $12,750,000 from a number of wells owned by Senior. One of the wells was the U. Richard No. 2, 2-D Well (the well). In November 1988, the parties entered into a separate loan agreement, and PSI deposited $250,000 in escrow to cover these workover costs. The following month, Senior filed a Chapter 11 bankruptcy petition. The costs of the workover on the well exceeded the $250,000 in escrow and Timco, which had performed some of the workover operations, sought payment of its charges. The trustee in bankruptcy allowed the charges and sought these from the secured creditors, including PSI, rather than the estate since the secured creditors would get the bulk of the benefits from the workover. PSI opposed the assessment on the basis that it was a royalty owner, not a secured creditor, and thus was not subject to sharing in costs of preserving the assets of the debtor. The production payments it received under the Agreement, PSI asserted, were a form of royalty; the Agreement made clear that its arrangement with Senior was a "loan" only for tax purposes. The bankruptcy court rejected this assertion and held that PSI was a secured creditor, not a royalty owner, and this was affirmed by the district court. On appeal, PSI again asserted that a production payment is, by definition, a royalty interest—a share of actual product at the wellhead free of costs of extraction—but limited by amount, value, or time, and expiring when the limit is reached. The only difference, according to PSI, between a royalty interest and a production payment is that a royalty interest continues indefinitely while

39. At the time of the sale of the mineral rights . . . 1983, [the] law required proof by plaintiff in a revocatory action of the insolvency of the debtor, injury to the creditor, a pre-existing and accrued indebtedness as well as proof of the debtor's intent to defraud the creditor. . . . In the 1984 [revisions to the law of obligations], the legislature dispensed with fraud as the principal criterion for revocatory actions and adopted instead the criterion of whether the debtor's act or omission caused or increased his insolvency.

Id. at 813.

40. 957 F.2d 1290 (5th Cir. 1992).

a production payment terminates when the predetermined limiting factor is met. PSI was forced to admit, however, that the interest was "hybrid" in that the Agreement gave PSI a lien on Senior's mineral interest. The court noted that if Senior failed to produce the well and to make payments from that production, PSI could foreclose on the well, then operate it and make production. A royalty interest, as merely a passive right, characteristically cannot develop minerals. Instead, Senior mortgaged its mineral interest in the well to PSI, and PSI was classified as a secured creditor rather than royalty owner. PSI had an "allowed secured claim" within the meaning of the Federal Bankruptcy Act.[41] PSI and its secured interest were within the bankruptcy court's jurisdiction. The court further held that, under the Bankruptcy Act, a lienholder may be charged with the reasonable costs and expenses incurred by the trustee that are required to preserve or dispose of the property subject to lien to the extent the lien-holder derives a benefit therefrom. The workover was necessary to preserve PSI's collateral but the bankruptcy court erred in determining that the expenses over $250,000 were reasonable, and the court remanded to the bankruptcy court to determine if PSI consented to expenditures above $250,000. If such consent had been given, then the expenditures would be "reasonable," by virtue of that consent.

K. Merchantable Title

The plaintiffs in *Huckabay v. Keahey*[42] were owners of separate tracts of land in Red River Parish. They had granted mineral leases on the property, and gas wells were drilled on each of the two tracts. Bayou Exploration became operator of both. In 1989, defendant Keahey learned the leases may have expired. After negotiations, he acquired mineral deeds from the Huckabays and from the Elliotts, in exchange for royalty deeds for twenty-five percent of the minerals and a $10,000 bank draft for each tract. The drafts stated that payment was contingent on approval of title within ten days of receipt by defendant's bank. The drafts were submitted but were returned unpaid. Keahey had learned that the holders of the existing leases asserted the leases were still valid, and he had learned of liens that had been filed against the wells. Keahey executed and filed reconveyance deeds in favor of the plaintiffs without their consent. Upon plaintiffs' suit, the trial court ordered defendant to honor the drafts and pay attorney fees. On appeal, the second circuit reversed. The court held that a vendor of mineral interests is obligated to warrant merchantable title. As the plaintiffs had not excluded war-

41. 11 U.S.C. §§ 101(10)(A), 102(2) (1979 and Supp. 1992).
42. 600 So. 2d 97 (La. App. 2d Cir. 1992).

ranty, the deeds were "warranty deeds." The claims of an existing lessee and the presence of liens on the wells would interfere with the buyer's ability to enjoy the property, and he thus would have suffered an eviction. The fact that there were wells on the property was not enough to constitute visible external effects on the property that would preclude a claim in warranty.[43] The court did not approve of the self-help measure of filing reconveyances, but because Keahey had taken this action he could not now sue to rescind his purchase of the mineral rights. So the court concluded the only appropriate course was to consider the initial sales as rescinded.

III. PRESCRIPTION

A. *Interruption of Prescription—Canal Bisecting Property*

In *Ultramar Oil & Gas Ltd. v. Fournet*,[44] royalty interests were created that purported to cover a single tract of 518 acres. However, a canal owned by third parties bisected the property. Production was obtained from the one portion of the tract, but ten years passed without production on the other portion of the tract. The court ruled in this concursus proceeding that two separate royalty interests were created. Prescription was interrupted as to one royalty tract but not as to the other from which there was no production. The Mineral Code and the prior jurisprudence clearly provide for the result given here.[45] Estoppel did not prevent the persons creating the mineral royalty from asserting the operation of the rule of prescription.

B. *Construction of Instruments; Prescription*

In *King v. Strohe*,[46] Ms. King entered into a conveyance in 1965 exchanging other property with parties designated as the Strohe group in this litigation. The conveyance provided that the parties exchanged their interest in the described tracts "less and except their interest in and to all irrigation wells, canals, laterals and other irrigation channels existing on said lands."[47] They also reserved "all of the oil, gas and other minerals in and to their undivided interest in said lands."[48] In

43. Richmond v. Zapata Development Corp., 350 So. 2d 875 (La. 1977); *see also* Collins v. Slocum, 317 So. 2d 672 (La. App. 3d Cir. 1975).

44. 598 So. 2d 645 (La. App. 3d Cir. 1992).

45. *See* Mineral Code arts. 64 and 73; Lee v. Giauque, 154 La. 491, 97 So. 669 (1923) and the discussion in Shell Oil Co. v. Pitman, 476 So. 2d 1031 (La. App. 3d Cir. 1985).

46. 602 So. 2d 219 (La. App. 3d Cir. 1992).

47. *Id.* at 220.

48. *Id.*

1977 and 1979, Ms. King conveyed to Robert Carey King one-half of her undivided oil, gas, and mineral royalty interest in the land named in the act of exchange. She also granted an oil and gas lease on certain of the land on which she had reserved the mineral rights. In 1990 she and others to whom she had conveyed rights filed a petition for recognition as owners of mineral rights and for an accounting against defendants, members of the Strohe group and those claiming under them. The trial court granted summary judgment for the defendants on the basis that the reservation of the irrigation canals was a reservation of land that had the effect of making the disputed tract non-contiguous to land on which liberative prescription had been interrupted. The appeals court reversed, holding that a genuine issue as to material fact existed. The court found the reservation of irrigation canals ambiguous and said:

> This court finds that the phrase "existing on said lands" could be construed as a reservation of a servitude in and to all irrigation wells, canals, laterals and other channels. . . .
>
> The matter of whether the contract reserved a fee ownership interest or a servitude in the irrigation canals, laterals and channels can be resolved only through a determination of the intent of the parties to the exchange.[49]

C. Prescription; "Community Servitude"

In *Broussard v. Elsbury Production, Inc.*,[50] the court addressed a question of liberative prescription where a single mineral servitude was established over several contiguous tracts of land. Tract A and Tract B were combined by related persons in 1964 and then partitioned into eleven different tracts, reserving a single mineral servitude over the whole. At the time of the combination and partition there was a producing well on Tract A but not on Tract B. A producing well was not obtained on Tract B until 1987. A purchaser of one of the eleven smaller tracts filed suit, contending that there was an invalid pooling of a producing tract with a non-producing tract, and that production from Tract A could not interrupt prescription on Tract B. The appeals court affirmed a trial court judgment for defendants. Without focusing on whether it was appropriate to refer to the conveyance in 1964 as pooling, the court observed that under the Louisiana Mineral Code a single mineral servitude may be created on contiguous tracts and a single mineral servitude may be reserved in partitioning a tract into smaller tracts.[51] Production

---

49. *Id.* at 221-22.

50. 595 So. 2d 386 (La. App. 3d Cir. 1992), *writ denied*, 600 So. 2d 641 (1992).

51. The court relied on Mineral Code arts. 63-67, GMB Gas Corp. v. Cox, 340 So. 2d 638 (La. App. 2d Cir. 1976), and Wall v. Leger, 402 So. 2d 704 (La. App. 1st Cir. 1981).

from the well on Tract A interrupted prescription on all tracts, including the one acquired by the plaintiffs.

IV. State Lands and Taxation Cases

A. *State Lands—Navigability; Public Trust Doctrine; Repose Statute*

The concursus proceeding in *Delacroix Corp. v. Jones-O'Brien, Inc.*,[52] arose in part from a controversy over whether the bed and bottom of Lake Quatro Caballo was state property. The trial court ruled that the bed and bottom of Lake Quatro Caballo was not navigable in 1812 nor in 1902, that Lake Quatro Caballo was not subject to the ebb and flow of the tide of the Gulf of Mexico in 1812 or in 1902, and that Act 62 of 1912 (the repose statute)[53] applied to the facts of the case irrespective of navigability. The appeals court affirmed all of these findings. The expert testimony against the State's position was more convincing as to non-navigability at the time of Louisiana's admission to the Union and at the time of the alienation of the property (1902). The appeals court affirmed the trial court's determination that the State failed to produce credible evidence that there was a tidal ebb and flow effect in Lake Quatro Caballo prior to 1902. In light of these two determinations, the court's further discussion of the application of Act 62 of 1912 appears to be dictum. That is, if the lands were not the beds of navigable waters and not subject to the ebb and flow of the tide, the repose statute has no applicability. But perhaps the court was anticipating the litigation that will undoubtedly take place over the possible assertion by the state to water bottoms under the "public trust" doctrine arising from the United States Supreme Court decision in *Phillips Petroleum Co. v. Mississippi*.[54] The appeals court agreed with the trial court's statement concerning the wisdom of the repose statute:

> *Phillips Petroleum Co.* is the ultimate justification for the wisdom of the 1912 Legislature in their adoption of Act 62 of that session. But for the legislation every private domain owner of an opening in the marsh, large owners and small, would need to stand ready to litigate on the level of the instant case, and produce like expert testimony on a complicated historical subject, or forfeit their ownership to State claims which had been allowed to lie dormant for nearly a century.[55]

---

52. 597 So. 2d 65 (La. App. 4th Cir. 1992).
53. La. R.S. 9:5661 (1991). The statute of repose provides that the state has six years in which to "vacate or annul" any State patent or any transfer by a subdivision of the State.
54. 484 U.S. 469, 108 S. Ct. 791 (1988).
55. *Delacroix*, 597 So. 2d at 70.

On another issue, the appeals court affirmed the trial court's conclusion that the unit operator was not entitled to recover its drilling and operating costs from the funds deposited in court in the concursus proceeding. The operator had failed to raise the issue in pleadings or at trial, and there was no documentary evidence in the record that addressed the drilling and operating costs.

B. *Taxation—Procedure; Department Failed to Meet Burden of Proving It Did Not Receive Forms*

The severance tax rate for oil is 12.5%.[56] But a well can qualify as "incapable" and be taxed at a lower rate if the producer meets certain requirements.[57] In *Conoco, Inc. v. Tarver*,[58] Conoco purchased oil and gas from Source Petroleum and remitted taxes on the production as being from incapable wells. In an audit, the Department of Revenue and Taxation could not locate the O-3 forms that must be filed to entitle one to the lower tax rates. The Department took the position that the forms must not have been filed and assessed additional taxes. Conoco appealed to the Board of Tax Appeals. The Board found credible the testimony of a Source Petroleum employee who stated she mailed the forms and who had produced copies of the missing forms within hours of being notified that the forms were missing. The Department appealed this decision. The trial court held for the Department, finding that there was no substantial evidence to support the decision of the Board of Tax Appeals. Conoco appealed to the first circuit, which held that the trial court erred in concluding the Board of Tax Appeals had no evidence to support its findings. With the employee's testimony that she had mailed the forms, a presumption of receipt of the forms followed. The Department failed to meet its burden of proving that it did not receive the forms.

C. *Stripper Well Certification*

In another case in which the State claimed higher taxes because of a failure to file forms, the State was more successful. In *McNamara v. Bayou State Oil Corp.*,[59] Bayou State had approximately 100 wells in the Bellevue Field producing at the stripper production rate of less than ten barrels of oil per day. Bayou State paid royalty at the stripper tax rate (3.125% of value), but the State sought payment at the 12.5% rate for fully capable wells for thirty-one months of the thirty-four month

56. La. R.S. 47:633(7)(a) (1990).
57. La. R.S. 47:633(7)(b) (1990).
58. 600 So. 2d 889 (La. App. 1st Cir. 1992).
59. 589 So. 2d 1099 (La. App. 2d Cir. 1991).

period in which Bayou State failed to certify the monthly production from each well on the necessary form. Relying on three earlier cases,[60] the court rejected Bayou State's assertion that once the State had determined its wells to be stripper wells, no further monthly certification by the taxpayer was required during the thirty-four month period to obtain the lower tax rate. A 1990 act[61] of the legislature, supporting Bayou State's position that the legislature intended to be retroactive, was not given retroactive effect by the court. Under the state constitution, the legislature is prohibited from releasing or extinguishing "any indebtedness, liability, or obligation of a corporation or individual to the state."[62]

V. Pooling and Unitization; Conservation

A. *What is a Unit for Pugh Clause Purposes?*

In *Banner v. GEO Consultants International, Inc.*,[63] the plaintiff landowners sought cancellation of leases granted to GEO in 1983 that covered 1220 acres. The leases had a five year primary term. GEO assigned the leases to Devon, who drilled a producing gas well. In 1990, Devon reassigned to GEO except for a 160 acre square around the producing well. The court found that this designation of 160 acres was a unit for purposes of the Pugh clause which provided:

> Anything to the contrary herein notwithstanding, it is provided that if any portion of the lands held hereunder should be unitized in any manner with other lands, then unit drilling or reworking operations on or unit production from any unit shall only maintain this lease as to the land included in such unit.[64]

The *Banner* court apparently completely misunderstood the nature of a unit, failing as it did to understand that a unit merges or integrates separate rights to produce. The court's misconceptions are further revealed in the court's observation that: "[T]he original leases speak of the creation of 160 acre units for gas production, as was done in this

60. Secretary, Dep't of Revenue v. Texas Gas Exploration, 506 So. 2d 528 (La. App. 1st Cir.), *writ denied*, 511 So. 2d 1153 (1987); Davenport Prod. Corp. v. Secretary of La., 490 So. 2d 1140 (La. App. 2d Cir.), *writ denied*, 496 So. 2d 327 (1986); McNamara v. Scurlock Oil Co., 545 So. 2d 1312 (La. App. 1st Cir.), *writ denied*, 550 So. 2d 652 (1989).

61. Act 313 of 1990; a related act was Act 551. The court accepted Bayou State's characterization of the statutes only for discussion purposes, since the court went on to hold that the legislature could not make such legislation retroactive.

62. La. Const. art. VII, § 15.

63. 593 So. 2d 934 (La. App. 4th Cir. 1992).

64. *Id.* at 935.

case by GEO's assignee, Devon."[65] The clause referenced concerns the power of the lessee to merge one lease with another, not the power to assign a portion of the lease. The case of *Fremaux v. Buie*[66] was distinguished on the basis that *Fremaux* had involved an "intra-lessee division of mineral production for accounting purposes." Under the approach adopted by the court, any sublease or assignment of a portion of a lease may be treated as a unit for Pugh clause purposes. This is clearly erroneous.

B. Horizontal Pugh Clause

A horizontal Pugh clause was interpreted in *Sandefer Oil & Gas, Inc. v. Duhon*.[67] The clause provided as follows:

> After expiration of the primary term, this lease will terminate automatically as to all horizons situated 100 feet below the deepest depth drilled (a) from which a well located on the land or acreage pooled therewith is producing in paying quantities, or (b) in which there is completed on the land or acreage pooled therewith a shut-in gas well which cannot be produced because of lack of market, marketing facilities, or because of governmental restrictions, whichever is the greater depth.[68]

The controversy arose when the lessees tendered a release of all horizons located below 17,700 feet. This depth was arrived at as 100 feet below the deepest depth the well had reached, which was 17,609 feet. The lessors claimed they were entitled to a release of all horizons 100 feet below the Middle Miogyp sand, defined by the Commissioner of Conservation as the interval between 17,100 and 17,250 feet in the well in question; thus the lessors claimed all horizons below 17,350 feet in that well. At stake in the controversy were the rights in the Lower Miogyp sand, which lies at a depth of 17,300 to 17,420 feet. The trial court ruled for lessees, but the Fifth Circuit reversed, holding that the lessors' interpretation was correct. The appeals court read the clause such that "producing in paying quantities" modified "depth" and not "well." The court's strained interpretation of syntax was bolstered, in its view, by the purpose of a Pugh clause to overcome the rule of *Hunter v. Shell Oil*[69] and to insure diligent development. The court said:

65. *Id.*
66. 212 So. 2d 148 (La. App. 3d Cir. 1968).
67. 961 F.2d 1207 (5th Cir. 1992).
68. *Id.* at 1208.
69. 211 La. 893, 31 So. 2d 10 (1947). *See* John B. Hussey, Jr., *Mineral Rights and Forced Pooling*, 17 La. L. Rev. 433, 441-43 (1957) for a discussion of *Hunter* and reference to criticisms of its approach in Louisiana.

"To hold otherwise would defeat the main purpose of the horizontal Pugh clause by allowing the lessees to hold deeper horizons indefinitely without producing a cup of oil or an MCF of gas."[70] The court did interpret one aspect against the lessors. It held that "horizon" does not mean a flat, parallel boundary line which would be drawn at 17,350 feet. Instead, the horizontal lease boundary under the Lounsberry tract was to be 100 feet below the bottom of the Middle Miogyp, at whatever depth it was found throughout the leased tract.

C. Conservation Practice; Participation Under Operating Agreement Revised Only for First Unit Revision by Commissioner

A number of parties entered into a joint operating agreement for the drilling of a well or wells within a contract area. The agreement expressly provided for the possibility of the Commissioner of Conservation establishing a unit, and well costs were to be adjusted to correspond to the Commissioner's unit. Once the well was drilled, the unit was established by the Commissioner, but there were then several revisions to the original Commissioner's unit based on new geology. A number of disputes arose among the parties concerning the wells' costs and the participation in a subsequent well. The trial court found that the costs and participation of the parties were to be adjusted with each revision of the unit by the Commissioner. The appeals court reversed in *AcadiEnergy, Inc. v. McCord Exploration Co.*,[71] finding that the joint operating agreement provided for adjustment only for the first unit established by the Commissioner; thereafter, well costs were not to be adjusted. The language of the agreement interpreted as providing for a single adjustment was as follows:

> D. AcadiEnergy, McCord, and Westover agree to pay a percentage share each of all costs actually incurred by AcadiEnergy in the drilling and completion of the Initial Well as follows: AcadiEnergy—50%; McCord—25%; and Westover—25%. AcadiEnergy, McCord, and Westover further agree that upon unitization of the reservoir or reservoirs of the Initial Well, either through voluntary agreement or by Order of the Commissioner of Conservation for the State of Louisiana, all costs incurred in connection with the drilling, completion and operation of the Initial Well shall be adjusted to reflect the participation in the aforementioned unit by AcadiEnergy, McCord, and Westover. The parties to this Agreement further agree that if the percentage amount paid for the drilling and completion

70. *Sandefer*, 961 F.2d at 1211.
71. 596 So. 2d 1334 (La. App. 3d Cir. 1992).

> of a well is greater or lesser after unitization than its initial percentage participation, the well cost shall be adjusted to reflect the party's post-unitization interest. In the event a party is responsible for additional cost due to the readjustment, an invoice shall be sent to the party for the added cost.[72]

The court characterized the clause as ambiguous and based its interpretation in part on the principle of interpreting against the drafter, which was AcadiEnergy. The court also stated that it would be clearly inequitable to have well cost adjustments based on subsequent revisions of the unit, after all the drilling costs had already been paid out of production, when there was no provision to adjust also the production payments received by the parties based on subsequent revisions of the unit.

VI. Procedural Issues

A. *Failure to Provide Notice of Demand*

Three questions involving notice of nonpayment of royalty were presented in *Massey v. TXO Production Corp.*[73] They were stated by the court to be the following:

> (1) Whether the original lessee is entitled to the requisite notice after having assigned the lease, noticing the lessor, and registry of the assignment; (2) Whether notice to a sublessee or assignee is notice to the original lessee; and (3) Alternatively, if notice is required to the original lessee, whether service of an original petition and citation is sufficient notice to lessee.[74]

The plaintiff lessor sought an accounting for royalty from one unit and alleged nonpayment of royalty from another and sought an accounting from it as well. Plaintiff sent a demand letter seeking cancellation of the lease to several working interest owners before filing suit against them. Amoco was also made a defendant but it filed an exception of prematurity on the ground no notice was given to it before filing suit as required by article 137 of the Mineral Code. The trial court sustained the exception and dismissed Amoco. The plaintiff then made written demand and again brought Amoco into the suit two days after Amoco received the demand letter. Amoco again asserted prematurity as thirty days had not elapsed as provided for in the Mineral Code. The trial court again sustained the exception whereupon this appeal was taken. The plaintiff asserted that its demand on TXO served as

72. *Id.* at 1340.
73. 604 So. 2d 186 (La. App. 2d Cir. 1992).
74. *Id.* at 187-88.

notice to Amoco, as TXO was the sublessee of Amoco. However, TXO was the assignee of an interest from Amoco in only one of the units, and thus Mineral Code article 132 had no bearing upon notice as to the interest not subleased. As to the other unit where Amoco had subleased, the court ruled that "the plain meaning of Article 132 is that if a sublease is properly recorded and notice thereof is given to the lessor, the lessor may not give Article 137 notice of cancellation to the original lessee only. Notice of cancellation must be given to the sublessees as well, to affect them."[75] Filing of a petition in court was not the equivalent of demand.[76]

B. *Summary Process to Compel Compliance With Consent Judgment Involving Gas Purchase Contract*

In *Preston Oil Co. v. Transcontinental Gas Pipe Line Corp.*,[77] Preston had obtained a consent judgment in December 1986 granting Preston specific performance of a gas purchase agreement with defendant Transco as amended by a settlement agreement and contract amendment. When Transco allegedly failed to perform certain obligations under the amended agreement and consent judgment, Preston filed suit in January 1991 to compel compliance with that consent judgment and sought to have Transco held in contempt of the consent judgment. Transco asserted that the claim was an unauthorized use of summary proceeding. The trial court set a hearing date on Preston's claims, and Transco appealed. The appeals court held that Preston was entitled to enforce the consent judgment. Transco could be held by the trial court to specifically perform the gas purchase agreement. The court recognized that a party to a consent judgment might have questions regarding the interpretation of its obligations under the judgment, but the means of resolving its questions is through seeking declaratory judgment, not by disregarding the consent judgment. A consent judgment is given the same sanctity as any other judicial determination.

C. *Judicial Control of Lease Termination*

In *Ergon, Inc. v. Allen*,[78] Ergon held a lease on land, at an annual rental, for the purpose of operating a compressor station on property

75. *Id.* at 188.

76. The case of Fuller v. Franks Petroleum, Inc., 501 So. 2d 1024 (La. App. 2d Cir. 1987), where the written notice did not include a demand for interest but the court allowed the petition's demand to satisfy the notice requirement, was distinguished. The *Massey* court said: "A technical shortcoming in a proper notice may be overlooked. . . . A judicial demand is not a 'written demand' under Article 137 and thus is not a valid prerequisite to another judicial demand. Rebstock v. Birthright Oil & Gas Co., 406 So. 2d 636 (La. App. 1st Cir.), *writ denied*, 407 So. 2d 636 (1981)." *Massey*, at 189.

77. 594 So. 2d 908 (La. App. 1st Cir. 1991).

78. 593 So. 2d 438 (La. App. 2d Cir. 1992).

owned by Allen. In 1986 through clerical error it failed to pay the annual rental of $350. When the landowner refused a late tender of the rental, Ergon brought suit to expropriate the land. The landowner reconvened, asking the court to evict Ergon from his property for non-payment of rent. The trial court declared the lease valid, invoking the doctrine of judicial control of the termination of leases. It found that Ergon gave a reasonable explanation for the delinquent May 1986 rental payment, that all parties intended for the lease to continue for at least fifteen years, and that the cancellation of the lease would cause substantial financial harm to Ergon and others, including royalty owners and consumers. Because the lease was continued, the trial court also denied the petition for expropriation. On the landowner's appeal, the appellate court affirmed the trial court. The court held that the courts of this state are vested with discretion to decline to grant a lessor cancellation of a lease that he otherwise has a right to. Cancellation of leases, the court said, is not favored in Louisiana law.[79] The court observed that evidence established that it would cause a loss of production if Ergon had to stop operations for a time, that it would cost Ergon $2,000,000 to construct a new compressor station and $6,000,000 to remove and dismantle the existing one.

D. Concursus Proceeding Ended When Property Claims Resolved Through Summary Judgment

Chevron filed a concursus proceeding as mineral lessee of numerous competing claimants, seeking to have determined the ownership interests in lands and mineral rights.[80] The rival claimants were Oliver and the heirs and assigns of Hardy Price and George Williams. Oliver entered into five settlement agreements that compromised the claims between him and all of the other claimants, and five summary judgments were rendered, the last of which was signed in January, 1988. A year later, Oliver filed a reconventional demand against Chevron, claiming royalties, and Chevron filed exceptions. The trial court dismissed the reconventional demand, denied Chevron's exceptions, and declared the concursus proceeding closed. Oliver appealed, but the appeals court affirmed. The concursus was complete upon the rendering of the last summary judgment in January, 1988. At that moment, no dispute existed among the claimants as to the ownership interests of the property. Therefore, a reconventional demand could not be maintained in that proceeding.

79. *Id.* at 440.

80. Chevron U.S.A., Inc. v. Oliver, 590 So. 2d 1248 (La. App. 1st Cir. 1991), *writ denied*, 597 So. 2d 1028 (1992).