Selected Haynesville Shale Issues Arising under the Public Records Doctrine and the "New Recording Act"

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I. Introduction

There are a number of issues which can arise in lease acquisition and in title examination upon which the public records doctrine and the "new recording act"[1] have a bearing. Although most of these issues have existed as potential problems for many years, the extraordinary value of the Haynesville Shale play which has been taking place in Northwest Louisiana recently has caused these and other issues to be disputed more frequently, and at greater stakes.

The Haynesville Shale play has given new meaning to the term "other valuable consideration," with consideration being paid to lessors and assignors/sublessors at rates not previously seen in this area of the country. Landowners in this area have become more litigious than has historically been the case, as some eagerly seek a means to challenge a lease which was executed at a "pre-Haynesville Shale" price. Leasing has become more competitive than has been experienced in quite some time. Often, third parties may acquire an interest in a lease with no idea that a challenge to the title may loom on the horizon.

This paper will focus on certain issues which are common problem areas in the high-value leasing climate of the Haynesville Shale play, and relate to the public records doctrine and the new recording act.

II. Overview of the Public Records Doctrine

Under the Louisiana Civil Code, the rights and obligations established or created by the following written instruments relating to immovable property are without effect as to third persons unless such instruments are recorded in the appropriate mortgage or conveyance records. These instruments include: (1) an instrument that transfers an immovable or establishes a real right in or over an immovable; (2) the lease of an immovable; (3) an option or right of first refusal, or contract to buy, sell, or lease an immovable or to establish a real right in or over an immovable; and (4) an instrument that modifies, terminates, or transfers the

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[1] The phrase "new recording act" herein shall mean Act 169 of the 2005 Regular Session of the Louisiana Legislature. The effective date of this legislation was changed from January 1, 2006, to July 1, 2006, by Act 13 of the 2005 First Extraordinary Session of the Louisiana Legislature.

rights created or evidenced by the instruments described in items (1), (2), and (3).[2] Under the Louisiana Mineral Code, a mineral right is an incorporeal immovable. All sales, contracts, and judgments affecting mineral rights are subject to the laws of registry.[3]

In summary, the public records doctrine provides protection to third parties against unrecorded acts. Thus, the public records doctrine protects third parties from what is *not* of record, causing it sometimes to be referred to as a "negative" doctrine. It has long been the law of Louisiana that acts of sale, etc., affecting immovable property must be recorded in the parish in which the property is situated in order to affect third parties, and that knowledge is not equivalent to registry. *McDuffie v. Walker*,[4] in which the holder of a recorded deed prevailed over the holder of an earlier, unrecorded deed, is one of the cornerstone cases on the public records doctrine in this state. This case provides interesting background on the law and cases concerning the public records doctrine at that time.

For an excellent article on the public records doctrine and the new recording act, *see* Thomas A. Harrell, *The Public Records Doctrine in Louisiana and Its Effect Upon the Examination of Title*.[5]

III. Certain Additional Matters as to which Third Parties Are Protected

Under Louisiana Civil Code article 3338, the public records doctrine protects third persons from instruments not of record. There are certain additional matters in which third persons are protected, even if they are of public record.

A. Marital status of the parties

When a declaration of marital status is stated in an acquisition of immovable property, that marital status is presumed to be correct. Although a subsequent alienation, encumbrance, or lease of the immovable by onerous title may be attacked on the ground that the marital status stated in the initial act of acquisition was false and incorrect, any such action shall not affect any rights acquired by a third person acting in good faith.[6]

B. Declaration of acquisition of separate property

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2 La. Civ. Code art. 3338.

3 La. R.S. 31:18.

4 *McDuffie v. Walker*, 51 So. 100 (La. 1909).

5 Thomas A. Harrell, *The Public Records Doctrine in Louisiana and Its Effect Upon the Examination of Title*, found in the proceedings of the October 26, 2006, Short Course on Title Examination of the Louisiana Mineral Law Institute, published by the Center of Continuing Professional Development of the L.S.U. Law Center.

6 La. R.S. 35:11.

When there has been a declaration in an act of acquisition that things are acquired with separate funds as the separate property of a spouse, an alienation, encumbrance, or lease of the thing by onerous title, during the community regime or thereafter, may not be set aside on the ground of the falsity of the declaration.[7]

C. Contradiction of terms or statements of fact in a recorded instrument

Louisiana Civil Code article 3342 provides that a party to a recorded instrument may not contradict the terms of the instrument or statements of fact it contains to the prejudice of a third person who after its recordation acquires an interest in or over the immovable to which the instrument relates. For example, if the parties to a deed declare the price and acknowledge that the price was paid in full, the parties (or their heirs) are estopped from later claiming against a third person that the transaction was in truth a donation or the price was never paid at all.

D. Dissolution or nullity of a contract does not impair the rights of a third person in good faith.

Under Louisiana Civil Code articles 2021 and 2035, the dissolution or nullity of a contract does not impair the rights or interest acquired by a third person in good faith, whether by onerous or gratuitous title.

IV. Current Litigation

Litigation pertaining to mineral leases in Northwest Louisiana has increased due to the high value of the Haynesville Shale play. Current challenges to leases obtained in this play often allege fraud, which can be the basis for a relative nullity. For purposes of this paper, we examined petitions in five lawsuits recently filed against some of the largest companies operating in North Louisiana in the Haynesville Shale play. Each of the lawsuits examined was filed in either Caddo or DeSoto Parish. We have intentionally omitted the names of the parties to this litigation.

In one of these cases, the plaintiff lessor who had negotiated for bonus consideration similar to that received by another landowner claimed the price actually paid to the other landowner was misrepresented by the lessee at a lower amount. The plaintiffs in the second case claim that the lease taken by the defendant lessee should be rescinded because the lease was taken from a purchaser whose purported title was based on forged deeds, and therefore the lease was not valid. In the third case, the plaintiff lessor leased his mineral rights, then subsequently sold his mineral rights to a subsidiary of the lessee (wherein the relationship allegedly was not disclosed), shortly before a public announcement by the lessee of the Haynesville Shale play. The plaintiff lessor in the fourth case claims that certain provisions which the parties had agreed upon in the negotia-

[7] La. Civ. Code art. 2342.

tions were omitted from the lease by the lessee. The fifth case is a class action suit in which plaintiff lessors claim that the lessee was aware of the value of the Haynesville Shale before it became public knowledge and leased property for low bonus consideration and royalty compared to those leases which were acquired after the Haynesville Shale information became public knowledge. Plaintiffs claim that the withholding of this information vitiated lessors' consent.

In three of these cases, plaintiff lessor or landowner alleges fraud, among other things, against defendant lessee. Other allegations include material misrepresentation; breach of duties of good faith and fair dealing, violation of the Louisiana Unfair Trade Practices Act; error; and failure of cause. None of the cases examined alleges lesion beyond moiety. Under Louisiana Mineral Code article 17,[8] a sale of a mineral right is not subject to rescission for lesion beyond moiety. The comment to this article states that "it is reasonable to make the doctrine of lesion beyond moiety inapplicable to all mineral transactions."

These cases have been included to make the reader aware of the type of litigation presently occurring in regard to the Haynesville Shale play. This paper will not address the merits of these cases; rather, it will consider the effects such cases possibly could have on third parties, especially in regard to allegations of fraud.

A. Potential Effects of Such Claims on Third Persons

Presumably, the mineral leases which are the subjects of the litigation outlined above appear on their faces to be valid. The allegation most common among the cases mentioned above is fraud. What effect can such litigation potentially have on a third party, when a lease appears valid on its face, and thus the third party cannot tell by an examination of the particular lease involved that some type of fraud possibly was committed?

Fraud is defined in Louisiana Civil Code article 1953, as follows:

> **La. Civ. Code art. 1953. Fraud may result from misrepresentation or from silence**
>
> Fraud is a misrepresentation or a suppression of the truth made with the intention either to obtain an unjust advantage for one party or to cause a loss or inconvenience to the other. Fraud may also result from silence or inaction.

Fraud may vitiate consent.[9] If a party to a contract did not give free consent at the time the contract was made, the contract is relatively null.[10] Third persons are given some protection from relative nulli-

8 La. R.S. 31:17.

9 La. Civ. Code art. 1954, *et seq.*

10 La. Civ. Code art. 2031.

ties arising from fraud. In particular, Louisiana Civil Code article 2035 states:

La. Civ. Code art. 2035. Rights of third party in good faith

Nullity of a contract does not impair the rights acquired through an onerous contract by a third party in good faith.

If the contract involves immovable property, the principles of recordation apply to a third person acquiring an interest in the property whether by onerous or gratuitous title.

The last portion of the above article, "to a third person acquiring an interest in the property whether by onerous or gratuitous title," was added by the new recording act.

Paragraph "(a)" of the 1984 Revision Comments to Louisiana Civil Code article 2035 indicates that this article does not change the law; rather, it articulates "the doctrines of bona fide purchase and the sanctity of the public records." In regard to remedies, paragraph "(b)" of the 1984 Revision Comments to Louisiana Civil Code article 2035 indicates that the remedy of dissolution is not available against a third party in good faith. Instead, the plaintiff's remedy would be limited to damages against the directly offending party.

1. Who is a third person?

Under the new recording act, a "third person" is defined in Louisiana Civil Code article 3343 as follows:

La. Civ. Code art. 3343. Third person defined

A third person is a person who is not a party to or personally bound by an instrument.

A witness to an act is a third person with respect to it.

A person who by contract assumes an obligation or is bound by contract to recognize a right is not a third person with respect to the obligation or right or to the instrument creating or establishing it.

Prior to the new recording act, the law read as follows:

La. R.S. 9:2722. Persons protected

Third persons or third parties so protected by and entitled to rely upon the registry laws of Louisiana now in force and effect and as set forth in this Chapter are hereby redefined to be and to include any third person or third party dealing with any such immovable or immovable property or acquiring a real or personal right therein as purchaser, mortgagee, grantee or vendee of servitude or royalty rights, or as lessee in any surface lease or leases or as lessee in any oil, gas or mineral lease and all other third persons or third parties acquiring any real or personal right, privilege or permit relating to or affecting immovable property.

An excellent article on the registry laws of Louisiana by F. Neelis Roberts[11] addresses, among other things, the question of who is, and who is not, a third party under the jurisprudence as it existed prior to the enactment of the new recording act.

Louisiana Civil Code article 3343 appears to codify existing Louisiana jurisprudence which held that a person, who is not a party to a contract, is protected from the obligations or rights created by an unrecorded instrument unless he acquires his interest in the property expressly subject to that unrecorded instrument or where he assumes the obligations or rights created by that unrecorded instrument. *See, Bradley v. Sharp*[12] (holding that buyer took title to land subject to unrecorded timber sale contract where purchase agreement and cash sale deed expressly recognized existence of the timber sale); *also see, Stanley v. Orkin Exterminating Co., Inc.*[13] (holding that buyer took title to building and land subject to unrecorded written commercial lease where purchase agreement expressly made the sale subject to said lease).

In determining whether a contract should be set aside with respect to a third person, Louisiana Civil Code article 2035, as originally enacted in 1985, provided that, as to a contract involving immovables, "the principles of recordation apply." As was noted earlier in this paper, the 1985 comments to that article explain that it was intended to articulate the principles of the public records doctrine as set forth in *McDuffie v. Walker*[14] and *Owen v. Owen*.[15] Those cases stand for the proposition that third parties are protected from what is absent from the public records so long as the third party has not participated in fraud.

As amended by the new recording act, article 2035 now states that "the principles of recordation apply to a third person acquiring an interest in the property whether by onerous or gratuitous title." It is this writer's opinion that the amendment to Louisiana Civil Code article 2035 was not intended to change the meaning of a "third person," but was intended to include the protections afforded by the statute to a third person whose ownership is based on a gratuitous title. In earlier decisions, such protections were not afforded to third persons whose ownership was based on a gratuitous title.[16]

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[11] F. Neelis Roberts, *Louisiana's Law of Registry*, found in the proceedings of the 1997 Short Course on Examination of Mineral Titles in Louisiana, published by the Center of Continuing Professional Development of the L.S.U. Law Center.

[12] *Bradley v. Sharp*, 35,034 (La. App. 2 Cir. 8/22/2001); 793 So.2d 500.

[13] *Stanley v. Orkin Exterminating Co., Inc.*, 360 So.2d 225 (La. App. 1st Cir. 1978).

[14] *McDuffie v. Walker*, 51 So. 100 (La. 1909).

[15] *Owen v. Owen*, 336 So.2d 782 (La. 1976).

[16] *See, for example, The American Legion Chappepeela Post #255 of Loranger, Louisiana v. Morel*, 580 So.2d 924 (La. App. 1st Cir. 1991), *writ denied*, 580 So.2d 924 (La. 1991); *also see, Mathews v. Mathews*, 35,984 (La. App. 2 Cir. 5/8/2002); 817 So.2d 418.

2. What is good faith?

"Good faith" is not defined in the new recording act or in Louisiana Civil Code article 2035. Based on the existing jurisprudence, a requirement for good faith is that the public records do not disclose a matter impugning title.[17] In other words, a third person is in good faith unless the public records themselves place the third person on notice of a claim. Consequently, a third person's good faith can be defeated only by the knowledge afforded by the public records or by a successfully proffered allegation of fraud, *i.e.*, the third person was "personally" involved in the conduct that served to deprive a party to a recorded instrument of his rights.[18]

Although third persons generally are protected from claims of nullity, Louisiana courts will not extend this protection to a third person who engages in a fraudulent scheme. The Louisiana Supreme Court has stated that "[a] third party purchaser can rely on the public records so long as he does not participate in fraud."[19] It is rare to find a case in which a third party has engaged in fraud; however, the following old case gives an interesting example.

The case of *Sanders v. Mitchell*[20] involved the following facts: The plaintiff, Sanders, executed a mineral deed to Mitchell, who was represented by Day as his agent. The deed was placed in escrow with the Planters' Bank pending examination of the title. For an unexplained reason, the deal was never consummated. Sanders and Day called the bank to have their papers returned. While in the bank building, Day pretended to tear up the deed, but secretly retained it and carried it away. Sanders gave no further thought to the matter until a check of the conveyance records revealed a recorded copy of the deed, along with a subsequent deed from Mitchell to a third party named Manziel. Sanders filed suit against Mitchell and Manziel, and Manziel asserted protection as a third party purchaser.

The Court rejected the defense, considering the testimony of two witnesses that Manziel was told in the presence of Day that Day held only an option that had expired and that no consideration was ever paid to Sanders for the property, with Manziel's reply being that "it made no difference, as long as it was on record."[21] The Court also noted that Manziel filed both instruments himself on the same day, and that he could hardly assert the public records as a defense when the instrument on

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17 *Brewster Dev. Co., Inc. v. Fielder*, 271 So.2d 299 (La. App. 2d Cir. 1973), *writ refused*, 272 So.2d 695 (La. 1973); *Prater v. Porter*, 145 So. 675 (La. 1933).

18 1 La. Prac. Real Est. §8:26 (2d ed.).

19 *Owen*, 336 So.2d at 788.

20 *Sanders v. Mitchell*, 97 So. 200 (La. 1923)

21 *Id.* at 1090-1091.

which he relied had not been filed until he himself filed it minutes before.

Further evidence of Manziel's participation in a fraudulent scheme was that Manziel backdated the deed in favor of himself to a date well before his actual execution of the deed. The Court viewed this as an attempt to make it appear as though he acquired his interest prior to discovery of Day's fraud. Also suspicious to the Court was Manziel's testimony as to the circumstances surrounding the manner of payment.[22] The Court ultimately held that Manziel was a party to a "dishonest transaction" and affirmed the judgment of the trial court cancelling the deeds.[23]

It is important to note that a party does not commit fraud merely because he has knowledge of a previously executed but unrecorded act, yet he files a competing act. This can easily happen in the competitive leasing environment which characterizes the Haynesville Shale play. In *McDuffie v. Walker,*[24] in which the holder of a recorded deed prevailed over the holder of an earlier, unrecorded deed, the Louisiana Supreme Court stated that "it cannot be said that one perpetrates a fraud who merely treats as utterly null and void a contract which the law in terms declares 'shall be utterly null and void.' To hold such doctrine is necessarily to hold that one who knows a particular contract to be denounced by the law as utterly void is bound in spite of the law to respect it as valid and binding, a paradox to which a court of justice would be unwilling to commit itself as an interpretation of law."[25] The *McDuffie* court also noted that it had long been held by the Louisiana Supreme Court that "knowledge, unaccompanied by fraud, was not equivalent to registry in Louisiana."[26]

Based on the principles outlined above, it is this writer's opinion that an assignee or sublessee of a mineral lease is protected from a claim by the original lessor for dissolution of a mineral lease based on a relative nullity such as fraud, unless notice of the claim appeared of public record or the said assignee or sublessee participated in a fraudulent scheme.

For parties acquiring mineral leases which may have had suits filed attacking their validity, it is important to remember that the pendency of an action in any court affecting the title to immovable property does not constitute notice to a third person not a party thereto unless a notice of the pendency of the action or proceeding is made and filed or recorded in accordance with Louisiana Code of Civil Procedure article 3752. The

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22 *Id.* at 1089.

23 *Id.* at 1091.

24 *McDuffie v. Walker*, 51 So. 100 (La. 1909).

25 *Id.* at 105.

26 *Id.*

Code of Civil Procedure requires, among other things, that the notice provide a description of the property sought to be affected thereby.[27] Such notice is effective from the time of filing for recordation in the mortgage records of the parish in which the property is located. The recordation of this notice makes the outcome of the suit of which notice is given binding on third parties.[28]

V. Certain Matters as to which Third Parties Are Not Protected

There are certain matters as to which third parties are not protected under the public records doctrine. For example, the public records doctrine does not afford protection to a third party from a forgery.[29] The new recording act specifically provides that several matters are effective as to third persons although such matters are not evidenced of record. Louisiana Civil Code article 3339 provides as follows:

> **La. Civ. Code art. 3339. Matters not of record**
>
> A matter of capacity or authority, the occurrence of a suspensive or a resolutory condition, the exercise of an option or right of first refusal, a tacit acceptance, a termination of rights that depends upon the occurrence of a condition, and a similar matter pertaining to rights and obligations evidenced by a recorded instrument are effective as to a third person although not evidenced of record.

Many of the mineral leases acquired in Northwest Louisiana as part of the Haynesville Shale play contain an option to extend the primary term for a certain period of time by the payment of additional bonus consideration. In several cases in this competitive leasing play, lessors have been able to negotiate tough lease terms which sometimes include special conditions for maintenance of the lease. Therefore, this section of the paper will focus on options and special conditions.

A. Option to Extend the Primary Term of a Mineral Lease

When a mineral lease contains an option to extend the primary term by the payment of additional bonus consideration, problems often arise because a prospective lessee does not know whether the current lessee has exercised its option to extend the primary term of a lease.

> **Hypothetical Situation:** Company A takes a mineral lease from Mr. X. The lease provides for a primary term of three years, with an

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[27] La. Code Civ. Proc. art. 3752 provides the requirements for the notice of lis pendens and recordation of same.

[28] *Mortgage Electronic Registration Systems, Inc. v. Bynum*, 2003-1671(La. App. 1 Cir. 5/14/2004); 879 So.2d 807, *writ denied*, 2004-1926 (La. 11/15/2004); 887 So.2d 479; *Williams v. Williams*, 2003-2089 (La. App. 1 Cir. 6/25/2004); 886 So.2d 478, *writ denied*, 2004-1891 (La. 10/29/04), 885 So.2d 596.

[29] *First National Bank of Ruston v. Mercer*, 448 So.2d 1369 (La. App. 2d Cir. 1984); *Keller Bldg. Products of Baton Rouge, Inc. v. Siegen Dev., Inc.*, 312 So.2d 182 (La. App. 1st Cir. 1975), *writ denied*, 314 So.2d 736 (La. 1975).

option to extend the primary term for two years by the payment of additional bonus consideration. Before the expiration of the initial three-year primary term, Company A pays the required additional bonus consideration to Mr. X, thus extending the primary term of the lease for two years. No instrument is placed of record which states that the option has been exercised.

A few months after the initial three-year primary term expires, Company B approaches Mr. X about acquiring a lease from him. Mr. X has just paid his income taxes, which were greater than he had expected due to his option bonus, and he decides to execute a lease in favor of Company B to replenish his funds. Company B promptly records its lease.

Query: Which lessee prevails? Does Company B's lease trump Company A's lease because there was no instrument of record evidencing the fact that Company A had exercised its option?

Prior to the revision of the laws of registry, there was a conflict between two Louisiana circuits as to whether the exercise of an option to extend a lease had to be recorded in order to affect third parties. The Louisiana Second Circuit Court of Appeal held that "a recorded lease containing an option to renew puts the purchaser on notice of a potential claim against the property. We conclude that the exercise of an option to renew under a recorded lease need not be recorded in order to have effect against third persons . . . ."[30]

This holding was in express contrast to the opinion of the Louisiana Fourth Circuit Court of Appeal in *Julius Gindi and Sons, Inc. v. E.J.W. Enterprises, Inc.*, where the court stated, "The duty to inquire should be limited only to recorded instruments because unrecorded instruments have no effect upon third parties. Generally, a duty to inquire *outside* of the record would be fruitless for even if something does exist it would not be binding upon third parties."[31] (Emphasis that of the court). The court went on to hold that the exercise of a renewal option must be recorded to be binding on third parties.

The Louisiana Legislature appears to have codified the holding of the Louisiana Second Circuit Court of Appeal in its revision of the registry laws. Under the plain language of Louisiana Civil Code article 3339, the issue of whether evidence of the exercise of the option must be recorded seems to have been settled by the above article, with the result in

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[30] *Thomas v. Lewis*, 475 So.2d 52 (La. App. 2d Cir. 1985). *See also*, *Port Arthur Towing Co. v. Owens-Illinois, Inc.*, 352 F.Supp. 392 (W.D. La. 1972) (reaching the same conclusion), *affirmed*, 492 F.2d 688 (5th Cir. 1974).

[31] *Julius Gindi and Sons, Inc. v. E.J.W. Enterprises, Inc.*, 438 So.2d 594, 597 (La. App. 4th Cir. 1983). *See also*, *Avenue Plaza, L.L.C. v. Falgoust*, 94-2491(La. App. 4 Cir. 4/26/95); 654 So.2d 838.

the hypothetical situation above being that Company A would prevail. Because Company A's lease evidenced the option to extend, and the lease was recorded, the exercise of the option was effective as to third parties although the exercise of the option itself was not evidenced of record.

It may be advisable for a lessee which has exercised an option to extend the primary term of its lease to record evidence of the exercise. Although recordation of evidence of the exercise of an option is not required in order to make the exercise effective as to third persons, the recordation of such an instrument may help to prevent a subsequent lessee from clouding the title of the first lessee with a top lease.

B. Special Lease Conditions

An example of a special condition a lessor may negotiate for his lease is an obligation of the lessee to drill a well.

Hypothetical Situation: Company A obtains a mineral lease from Mr. X. The lease is dated May 1, 2009, and provides for a one-year primary term. However, the lease contains a provision that the lessee shall drill a well on the leased premises or on lands pooled therewith to a depth sufficient to test the Haynesville Formation, which well shall be spud on or before November 1, 2009, or the lease shall terminate and be of no further force and effect. The required well is drilled before this date; however, no evidence of this is filed in the public records. On December 1, 2009, Company B takes a lease from Mr. X.

Query: Can Company B assert status as a protected third person because of the absence from the public records of any evidence indicating that the drilling condition had been met?

Louisiana Civil Code article 3339 provides that the occurrence of a suspensive or resolutory condition is effective as to a third person although not evidenced of record. This article is logical and practical in light of practices common in the oil and gas industry. It is extremely rare (if it ever occurs at all) that a mineral lessee would record evidence that it has timely drilled a well in accordance with a condition imposed by its mineral lease. Similarly, a lessee is not expected to record evidence that it has timely paid a delay rental.

Given the high value and the competitive nature of the Haynesville Shale play, mineral leases and the particular conditions imposed by them have come under intense scrutiny by lessors and competing lessees. Louisiana Civil Code article 3339 makes it clear that such persons need to look beyond the public records to determine whether a lease has expired as a result of a condition imposed by the lease.

VI. Errors in Names of Parties

Because of the competitive nature of the Haynesville Shale leasing activity, many brokers and landmen unfamiliar with the particular re-

quirements of Louisiana law were utilized to acquire leases. For example, Louisiana law requires that all recorded instruments shall contain the following particular information when appropriate for its type and nature:

(1) The full name, domicile, and permanent mailing address of the parties.

(2) The marital status of all of the parties who are individuals, including the full name of the present spouse or a declaration that the party is unmarried.

(3) A declaration as to whether there has been a change in the marital status of any party who is a transferor of the immovable or interest or right since he acquired it, and if so, when and in what manner the change occurred.

(4) The municipal number or postal address of the property, if it has one.

(5) The last four digits of the social security number or the taxpayer identification number of the mortgagor, whichever is applicable.

(6) The notary's identification number or the attorney's bar roll number and the typed, printed, or stamped name of the notary and witnesses if the instrument is an authentic act of, or an authenticated act by, a notary.[32]

The article then provides that the omission of the required information does not impair the validity of the instrument or the effect given to its recordation. These requirements were previously contained in the Revised Statutes. The relocation to the Civil Code seems to have elevated their importance. Note that errors or omissions made by the recorder in the clerk's office do not affect the effect of recordation.[33]

Although landmen obviously are sure to include the names of the lessors on mineral leases, a common problem with some of the recently acquired mineral leases is that the names contained therein are sometimes indefinite, incomplete, or erroneous. Louisiana Civil Code article 3353 provides as follows:

> **La. Civ. Code art. 3353. Effect of indefinite or incomplete name**
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> A recorded instrument is effective with respect to a third person if the name of a party is not so indefinite, incomplete, or erroneous as to be misleading and the instrument as a whole reasonably alerts a person examining the records that the instrument may be that of the party. (Emphasis added)

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32 La. Civ. Code art. 3352.

33 La. Civ. Code art. 3347.

How incorrect must the lessor's name be to render it so indefinite, incomplete, or erroneous that it becomes misleading to a third party? There are no reported decisions which have interpreted this article since its July 1, 2006, effective date. One author gives the example of the following variations in a name: Robert J. Walker, John Walker, Bob Walker, and R. J. Walker. This author suggests that if all of the instruments which contained one of these name variations specifically described the property of the Walker under investigation, then a greater variation in the name may be acceptable than if the instruments did not describe any property, such as a court judgment. With property descriptions included, there may be enough information, despite the variations in the name, to "reasonably alert" the person examining the public records that the instruments may be that of the party in question.[34]

Prior to the enactment of Louisiana Civil Code article 3353 and an earlier version of this article found in Louisiana Revised Statutes 9:2728, the Louisiana Fourth Circuit Court of Appeal applied a much harsher result to an erroneous name scenario in a 1987 case.[35] In that case, title to the subject property was in the name "William D. Napier." The first mortgage affecting the subject property was taken and duly recorded in the name of "William D. Napier." Thereafter, a second mortgage affecting the subject property was taken and recorded in the name of "William P. Napier," although the signature of the mortgagor on the face of the mortgage read "William D. Napier." William D. Napier then sold the subject property to a third party purchaser and did not disclose the existence of the second mortgage. The court held that the mortgage executed and recorded by the second mortgagee with the incorrect middle initial of the mortgagor was not effective as to subsequent third party purchasers. The court found that the second mortgagee failed to use the name by which the property ownership had been inscribed according to record title, was in a better position to inscribe said mortgage with the correct name, and even had the duty of "properly styling and recording the name 'William D. Napier' in the act of mortgage."[36] This case cited an earlier, controversial decision by the Louisiana Fourth Circuit Court of Appeal which held that third party purchasers who undertake a title examination are free of the duty to search for variations of names and may instead search solely under the name of the record owner when reviewing the

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[34] *See* Thomas A. Harrell, *The Public Records Doctrine in Louisiana and Its Effect Upon the Examination of Title*, found in the proceedings of the October 26, 2006, Short Course on Title Examination of the Louisiana Mineral Law Institute, published by the Center of Continuing Professional Development of the L.S.U. Law Center, for a complete review of the public records doctrine in Louisiana and the effect it has upon the examination of title.

[35] *Dixie Savings and Loan Assn. v. Sharp*, 505 So.2d 157 (La. App. 4th Cir. 1987), *writ denied*, 506 So.2d 1225 (La. 1987).

[36] *Id.* at 159.

public records for conventional encumbrances.[37] Since these decisions were rendered prior to this new article and its earlier version, the results of these decisions would likely be different today based on this new legislation.

Note that former Louisiana Revised Statutes 9:2728 dealt only with mortgages. It provided that a conventional or collateral mortgage shall not be deemed inferior and subordinate to another security device solely by reason of its inclusion, or failure to include, the middle name or initial of the mortgagor or the use of any reasonable variation of a mortgagor's name. Louisiana Civil Code article 3353, on the other hand, is not limited to mortgages. It addresses all recorded instruments and provides that such instruments are effective as to third persons if the names of the parties to the instruments are not so indefinite, incomplete, or erroneous as to be misleading and if the instrument as a whole reasonably alerts a person examining the records that the instrument may be that of the parties.

VII. Notice or Extract of Lease

Landowners in Northwest Louisiana have become more sophisticated with the valuable Haynesville Shale play, and also are more likely to engage attorneys for lease negotiations than was previously the case. Often landowners band together in "neighborhood associations" in order to increase their bargaining power. These factors have resulted in tougher lease terms for the lessee. To ensure the confidentiality of such lease terms, it has become more common to record an "extract" or "notice" of lease rather than the lease itself.

The law regarding the recording of a notice of lease has gone through several changes in recent years, particularly with the enactment of the new recording act which was effective July 1, 2006. The law in effect immediately prior to the enactment of the new recording act allowed the recording of an extract of a lease of immovable property in lieu of recording the lease itself. The law did not specifically state whether it was applicable to mineral leases. A copy of Louisiana Revised Statutes 9:2721.1, which was in place prior to the enactment of the new recording act, is contained in Exhibit "A" attached hereto. In this writer's opinion, it seemed to be the general consensus among title lawyers in North Louisiana that an extract or notice of a mineral lease could be recorded under this statute, and this was a customary practice in the oil and gas industry in North Louisiana.

The new recording act repealed Louisiana Revised Statutes 9:2721.1, but still provided for the recordation of a notice of lease. The new law is contained in what is now Louisiana Revised Statutes 44:104.[38] This statute, which was effective July 1, 2006, specifically ex-

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[37] *First Financial Bank, F.S.B. v. Johnson*, 477 So.2d 1267 (La. App. 4th Cir. 1985).

[38] This portion of the new recording act was originally d· ·gnated as La. R.S. 44:112.

cluded application of the extract or notice provision to mineral leases by Paragraph "E." thereof. A copy of this statute is contained in Exhibit "B" attached hereto. Acts 2007, No. 8, Section 1, amended this statute to provide that an extract or notice of mineral lease could be recorded in lieu of recording the entire lease. The statute, as amended, and as it currently reads, is contained in Exhibit "C" attached hereto.

We point out that Acts 2007, No. 8, Section 2, provides as follows:

> "This Act shall become effective upon signature by the governor or, if not signed by the governor, upon expiration of the time for bills to become law without signature by the governor, as provided by Article III, Section 18 of the Constitution of Louisiana. If vetoed by the governor and subsequently approved by the legislature, this Act shall become effective on the day following such approval."

According to the website of the Louisiana Legislature, this bill was signed by the governor on June 18, 2007. Thus, as of June 18, 2007, a notice of mineral lease could be recorded rather than the lease itself. The new recording act (Acts 2005, No. 169), which expressly stated that the extract of lease provision was not applicable to mineral leases, was effective July 1, 2006. Therefore, it appears that a notice or extract of mineral lease which was recorded between July 1, 2006, and June 18, 2007, could be subject to challenge. There are no reported decisions regarding the effectiveness of a notice of mineral lease which was recorded during this period.

Acts 2005, No. 169, Section 9, provided in pertinent part as follows:

> Any instrument that is filed, registered, or recorded before the effective date of this Act, that is not given the effect of recordation by virtue of existing law, shall be given such effect on the effective date of this Act that it would have if it were first filed on that effective date.

Acts 2007, No. 8, Section 2, which changed Louisiana Revised Statutes 44:104 to allow recordation of a notice of mineral lease, did not have a similar provision regarding its retroactive effect. Because the act amending Louisiana Revised Statutes 44:104 did not address the validity a notice of lease filed during the time period from July 1, 2006, to June 18, 2007, a brief examination of the general rules regarding retroactive application of laws is warranted.

Louisiana Civil Code article 6 provides as follows:

> **La. Civ. Code art. 6. Retroactivity of laws**
>
> In the absence of contrary legislative expression, substantive laws apply prospectively only. Procedural and interpretive laws apply

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Pursuant to the statutory revision authority of the Louisiana State Law Institute, in Chapter 2 of Title 44 as revised in 2005, La. R.S. 44:112 was redesignated as La. R.S. 44:104.

both prospectively and retroactively, unless there is a legislative expression to the contrary.

The changes which were made to Louisiana Revised Statutes 44:104 appear to have been neither procedural nor interpretive. "Substantive laws" are laws that impose new duties, obligations or responsibilities on parties, or laws that establish new rules, rights and duties or change existing ones.[39] It can be argued that Acts 2007, No. 8, Section 1 changed an existing rule regarding mineral leases; and that, therefore, this change is substantive and should not be applied retroactively. Furthermore, according to Louisiana jurisprudence, a law will not be applied retroactively if the retroactive application would operate to disturb vested rights.[40]

Another issue has arisen with more frequency due to the Haynesville Shale leasing activity. Due to the fast pace, and the relative inexperience of some of the landmen involved, many of the extracts or notices of leases filed in connection with this play contain errors and omissions. A question will likely arise as to whether a court would require strict compliance, or merely substantial compliance, with the "notice of lease" statute in order for the notice to be effective as to third parties. There are no reported decisions which address this issue under the current "notice of lease" statute,[41] or under the previous statute on this subject.[42] Under the current statute, a notice of lease "must" contain the following:

(a) A declaration that the property is leased, and the names and addresses of the lessor and lessee.

(b) A description of the leased property.

(c) The date of the lease, its term, and the provisions of any extensions and renewals of the term provided for in the lease.

(d) A reference to the existence of an option, right of first refusal, or other agreement of the lessor to transfer all or any part of the leased premises.

(e) If of a sublease, the notice shall also contain reference to the recordation information of the primary lease or notice of lease that is subleased; however, the omission of this information does not affect the efficacy of the notice.

As to mineral leases, in addition to the requirements provided above, the notice shall include the primary term of the lease, as well as any additional period during which the lease may be maintained by the payment of rentals.

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39 *Jacobs v. City of Bunkie*, 1998-2510 (La. 5/18/99); 737 So.2d 14.

40 *Graham v. Sequoia Corporation*, 478 So.2d 1223 (La. 1985).

41 La. R.S. 44:104.

42 La. R.S. 9:2721.1.

The law in effect prior to enactment of the new recording act, Louisiana Revised Statutes 9:2721.1, listed the information that a notice or extract of lease "shall" contain. However, the current statute Louisiana Revised Statute 44:104 lists all the information that a notice or extract of lease "must" contain.

An argument can be made that the change from the word "shall" to the word "must" in the statute setting forth the requirements for a notice or extract of lease indicates the legislature's intent to change the law. According to Louisiana jurisprudence, where a new statute is worded differently from a preceding statute, the legislature is presumed to have intended to change the law.[43] The United States Supreme Court indicated that "shall" generally means "must" but legal writers sometimes use or misuse "shall" to mean "should," "will" or even "may."[44] The Louisiana Supreme Court, in addressing the situation where a statute originally contained the word "must" which was replaced with the word "shall," indicated that these words are virtually synonymous.[45] In concluding that the change of the word "must" to "shall" was merely a stylistic change, the court quoted the following definitions from Black's Law Dictionary:[46]

> Must. This word, like the word "shall," is primarily of mandatory effect; and in that sense is used in antithesis to "may."
>
> Shall. As used in statutes, contracts, or the like, this word is generally imperative or mandatory. . . . The word in ordinary usage means "must" and is inconsistent with a concept of discretion.[47]

Based on the foregoing, in this writer's opinion, it seems unlikely that a court would interpret the change in the wording from "shall" to "must" as an indication of the legislature's intent to change the meaning of the statute.

As was indicated above, there are no reported decisions which address the standard of compliance for a notice or extract of lease in regard to the requirements set forth in Louisiana Revised Statutes 44:104. Similarly, there are no reported decisions setting forth the standard of compliance necessary to meet the requirements for a notice or extract of operating agreement or of a trust. Louisiana Revised Statutes 44:104 lists several items of information that an extract of mineral lease "must" contain. As discussed above, "must" is primarily of mandatory effect; and, like

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43 *Brown v. Texas-LA Cartage, Inc.*, 1998-1063 (La. 12/1/98); 721 So.2d 885.

44 *Martinez v. Lamagno*, 515 U.S. 417 (1995).

45 *Borel v. Young*, 2007-0419 (La. 11/27/2007); 989 So.2d 42.

46 *Black's Law Dictionary* 1019, 1375 (6th Edition 1990).

47 *Borel*, 989 So.2d at 58.

the word "shall," the word is generally imperative or mandatory. Louisiana Civil Code article 9 provides:

> When a law is clear and unambiguous and its application does not lead to absurd consequences, the law shall be applied as written and no further interpretation may be made in search of the intent of the legislature.

Further, the words of a law must be given their generally prevailing meaning.[48] Therefore, a strict interpretation of Louisiana Revised Statute 44:104 would imply that all information required therein must be contained in a notice of mineral lease for it to be valid and effective as to third persons. However, in other areas of the law, Louisiana courts have allowed substantial compliance with a particular statute, even when the statute provided that certain requirements "must" or "shall" be met. For example, in situations involving statutory dedications by the filing of a subdivision plat, Louisiana Revised Statutes 33:5051 sets forth seven pieces of information which "shall" be contained on the subdivision plat filed in the parish where the property is located. Louisiana courts have consistently held that complete and detailed compliance with this statute is not required and that mere substantial compliance will suffice.[49] Courts have also stated that there is no set test as to what constitutes substantial compliance with the dedication statute and that the facts in each case must be considered.[50]

Similarly, in applying what is now Louisiana Civil Code article 1577, which lists several things that the testator, notary and witnesses "shall" do when executing a notarial testament, courts have allowed substantial compliance with the article to find testaments valid. In applying the substantial compliance standard, Louisiana courts focus on the public policy of finding a person's will valid and on the legislative intent of the article, which was to guard against fraud.[51]

It is this writer's opinion that the public policy behind the requirements of Louisiana Revised Statutes 44:104 is to put third parties on notice that a particular tract of land is subject to a mineral lease. In order to serve that interest, strict compliance with this statute would not be necessary. On the contrary, substantial compliance would put a third party on notice that the tract of land was subject to a mineral lease. If a court adopted an analysis similar to one of those discussed above for examining an incomplete notice or extract of lease, the determination of substan-

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48 La. Civ. Code art. 11.

49 *St. Charles Parish School Bd. v. P&L Inv. Corp.*, 95-2571 (La. 5/21/96); 674 So.2d 218, *abrogated in part on other grounds by Cenac v. Public Access Water Rights Assn.*, 2002-2660 (La. 6/27/2003); 851 So.2d 1006.

50 *Cavaness v. Norton*, 96-1411 (La. App. 1 Cir. 5/9/97); 694 So.2d 1174.

51 *Succession of Guezuraga*, 512 So.2d 366 (La. 1987).

tial compliance would be made on a case-by-case basis. Further, the outcome would likely be based on the type of information that was erroneous or omitted. For example, if only the addresses of the lessor and lessee were omitted, a court may find that the statute had been substantially complied with, and that the information supplied was sufficient to serve the purpose of the statute and give third parties notice of the mineral lease. If, however, the land had not been described or the term of the lease had been omitted, a court would likely find that there had not been substantial compliance. Because of the extraordinary value of the Haynesville Shale play, this issue will likely become the subject of litigation in the near future. Since there is no jurisprudence on this issue, a title examiner should still require strict compliance with the statute. Hopefully, this would ensure that no challenge to the effectiveness of the notice would ever be made.

EXHIBIT"A"

La. R.S. 9:2721.1. Recordation of extract of lease[52]

A. (1) With respect to leases of immovable property, it shall not be necessary to file the entire lease. In such a case, an extract of the lease may be recorded in the office of the parish recorder of the parish where the immovable property is situated.

(2) For purposes of recording an extract of the lease, such an extract shall include:

(a) The names and signatures of the lessor and lessee;

(b) The date of execution of the lease;

(c) A brief description of the leased property;

(d) The term of the lease; and

(e) A reference to the existence of any renewal or purchase option contained in the lease.

B. The provisions of this Section are remedial and shall be applied retroactively to any instrument heretofore filed for record which is in substantial compliance with the provisions of this Section, and such instrument shall affect third persons and third parties as of the date of recordation.

[52] This statute was repealed by the new recording act effective July 1, 2006.

EXHIBIT "B"

La. R.S. 44:104. Notice of lease; requirements and effect[53]

A. (1) In lieu of recording a written lease or sublease or any amendment or modification thereof, as provided by Civil Code Article 3338, a party may record a notice of lease or sublease, signed by the lessor and lessee of the lease or sublease.

(2) Recordation of a notice makes the lease or sublease and any subsequent amendment or modification thereof effective as to third persons to the same extent as would recordation of the instrument evidencing it.

(3) The notice of lease must contain the following:

(a) A declaration that the property is leased, and the names and addresses of the lessor and lessee.

(b) A description of the leased property.

(c) The date of the lease, its term, and the provisions of any extensions and renewals of the term provided for in the lease.

(d) A reference to the existence of an option, right of first refusal, or other agreement of the lessor to transfer all or any part of the leased premises.

(e) If of a sublease, the notice shall also contain reference to the recordation information of the primary lease or notice of lease that is subleased; however, the omission of this information does not affect the efficacy of the notice.

B. A notice of lease may also designate a person authorized to certify in writing on behalf of a party the terms of the lease, whether it is in full force and effect, and the extent to which the obligations of the lease have been performed. The certification shall have the same effect that it would have if it were signed by the person on whose behalf it is made.

C. (1) A change in a lease with respect to any matter that is required to be included in a notice of lease is not effective as to a third person unless the parties record a signed amendment to the notice that describes the change.

(2) If the amendment is of a transfer of a party's rights, the notice shall be signed by the transferor and transferee.

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[53] This statute was enacted by the new recording act effective July 1, 2006. This portion of the new recording act was originally designated as La. R.S. 44:112. Pursuant to the statutory revision authority of the Louisiana State Law Institute, in Chapter 2 of Title 44 as revised in 2005, La. R.S. 44:112 was redesignated as La. R.S. 44:104. The above statute was amended effective June 18, 2007, by Acts 2007, No. 8, Section 1. The amended version is shown on Exhibit "C."

(3) If the amendment only designates a different person to certify the matters described in Subsection B of this Section, the amendment need only be signed by the person on behalf of whom the certification is to be made.

D. The effect of recordation of a notice of lease ceases:

(1) Upon recordation of an instrument signed by the parties to the lease or their successors declaring that the lease has terminated; or

(2) On the date that the lease may finally terminate as set forth in the notice of lease.

E. This Section does not apply to mineral leases that are subject to the provisions of the Louisiana Mineral Code.

EXHIBIT "C"

La. R.S. 44:104. Notice of lease; requirements and effect[54]

A. (1) In lieu of recording a written lease or sublease or any amendment or modification thereof, as provided by Civil Code Article 3338, a party may record a notice of lease or sublease, signed by the lessor and lessee of the lease or sublease.

(2) Recordation of a notice makes the lease or sublease and any subsequent amendment or modification thereof effective as to third persons to the same extent as would recordation of the instrument evidencing it.

(3) The notice of lease must contain the following:

(a) A declaration that the property is leased, and the names and addresses of the lessor and lessee.

(b) A description of the leased property.

(c) The date of the lease, its term, and the provisions of any extensions and renewals of the term provided for in the lease.

(d) A reference to the existence of an option, right of first refusal, or other agreement of the lessor to transfer all or any part of the leased premises.

(e) If of a sublease, the notice shall also contain reference to the recordation information of the primary lease or notice of lease that is subleased; however, the omission of this information does not affect the efficacy of the notice.

B. A notice of lease may also designate a person authorized to certify in writing on behalf of a party the terms of the lease, whether it is in full force and effect, and the extent to which the obligations of the lease have been performed. The certification shall have the same effect that it would have if it were signed by the person on whose behalf it is made.

C. (1) A change in a lease with respect to any matter that is required to be included in a notice of lease is not effective as to a third person unless the parties record a signed amendment to the notice that describes the change.

(2) If the amendment is of a transfer of a party's rights, the notice shall be signed by the transferor and transferee.

(3) If the amendment only designates a different person to certify the matters described in Subsection B of this Section, the amendment need only be signed by the person on behalf of whom the certification is to be made.

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[54] This statute reflects the amendment to La. R.S. 44:104 effective June 18, 2007, made by Acts 2007, No. 8, Section 1.

D. The effect of recordation of a notice of lease ceases:

(1) Upon recordation of an instrument signed by the parties to the lease or their successors declaring that the lease has terminated; or

(2) On the date that the lease may finally terminate as set forth in the notice of lease.

E. This Section shall apply to mineral leases that are subject to the provisions of the Louisiana Mineral Code. As to mineral leases, in addition to the other requirements provided under this Section, the notice shall include the primary term of the lease, as well as any additional period during which the lease may be maintained by the payment of rentals.