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Restrictions on Assignment Redux: Consent to Assign Provisions 20 Years Later

*Aimee Williams Hebert**

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INTRODUCTION

In Louisiana, there is a long standing public policy against restricting the free alienation or assignment of interests in immovable property.¹ This policy is embodied in many articles of the Louisiana Civil Code (the “Civil Code”).² These Civil Code articles either prohibit such restrictions altogether or limit the restriction to a specified duration.³ There is tension between the policy of free alienation and the use of limited restrictions on assignment in oil and gas contracts.⁴ Many authors opine that limited restrictions on assignment serve a valid commercial purpose in oil and gas agreements.⁵ Significantly, the public policy against restricting the alienation of immovable property is not absolute in Louisiana; limited restrictions are sanctioned under Louisiana law, affording players in the industry the flexibility to include restrictions in their agreements within the limits of law.⁶

Consent to assign provisions are one such restriction commonly seen in oil and gas contracts, particularly in mineral leases. When drafting agreements, consideration should be given to whether it is advisable to include a consent to assign provision, and if so, what qualifications should

1. *Gueno v. Medlenka*, 117 So. 2d 819 (La. 1960); *Wright v. DeFatta*, 142 So. 2d 489 (La. Ct. App. 2d 1962), *aff'd*, 152 So. 2d 10 (La. 1963); *River Rouge Minerals, Inc. v. Energy Res. of Minn.*, 331 So. 2d 878 (La. Ct. App. 2d. 1976); *Mardis v. Braneley*, 717 So. 2d 702 (La. Ct. App. 2d. 1998).

2. *See, e.g.*, LA. CIV. CODE ANN. art. 1468 (West 2012); LA. CIV. CODE ANN. art. 1520 (West 2012); LA. CIV. CODE ANN. art. 2567–68 (West 2019); LA. CIV. CODE ANN. art. 2620–28 (West 2019); LA. CIV. CODE ANN. art. 3448 (West 2005).

3. *See, e.g.*, LA. CIV. CODE ANN. art. 1468 (West 2012); LA. CIV. CODE ANN. art. 1520 (West 2012); LA. CIV. CODE ANN. art. 2567–68 (West 2019); LA. CIV. CODE ANN. art. 2620–28 (West 2019); LA. CIV. CODE ANN. art. 3448 (West 2005).

4. Gary B. Conine, *Property Provisions of the Operating Agreement - Interpretation, Validity and Enforceability*, 19 TEX. TECH L. REV. 1236, 1310 (1988).

5. Terry I. Cross, *The Ties that Bind: Preemptive Rights and Restraints on Alienation that Commonly Burden Oil and Gas Properties*, 5 TEX. WESLEYAN L. REV. 193 (1999); B.J. Duplantis & Martin P. Averill, *Preferential Rights and Consents to Assign*, 46 MIN. LAW INST. 1 (1999); George F. Kutzschbach, *Operating Agreement Considerations in Acquisitions of Producing Properties*, 36 SW. LEGAL FOUND. OIL & GAS INST. 7-1, 7-11 (1985); Harlam Albright, *Preferential Right Provisions and Their Applicability to Oil and Gas Instruments*, 32 SW. L.J. 803, 804 (1978); *see also* Conine, *supra* note 4.

6. *Mardis*, 717 So. 2d at 709.

or should not come within its purview. This article addresses some of the basic issues encountered when consent to assign provisions are included in contracts involving mineral rights and addresses how these issues are handled by Louisiana law. It touches on select authorities and cases from other states, highlights certain statutory and codal laws that may impact such restrictions, and examines Louisiana case law relating to these restrictions.

I. CONSENT TO ASSIGNMENT PROVISIONS—GENERAL PRINCIPLES

The consent to assign provision is one of the limited restrictions on the alienability of property found in many oil and gas contracts. Despite reference to “assignments,” and depending on the language employed by the parties, such a provision may also apply to other transfers of mineral rights—for example, an exchange. Consent to assign provisions may be found in operating agreements, right-of-way agreements, purchase and sale agreements, farmout agreements, participation agreements, and various other agreements relating to oil and gas properties but are most commonly found in oil and gas leases.⁷ Therefore, this article primarily focuses on this provision’s application in mineral leases.

With respect to mineral leases, consent to assign provisions are generally viewed as beneficial to lessors.⁸ There are various reasons why lessors seek to include consent to assign provisions in their mineral leases. A lessor may have concerns about a potential lessee’s reputation, skill, or financial status;⁹ about the creation of too many interests in the mineral

7. See Duplantis & Averill, *supra* note 5, at 16; John S. Lowe, *Analyzing Oil & Gas Farmout Agreements*, 3 OIL & GAS, NAT. RES. & ENERGY J. 263, 371–76 (2017); John B. McFarland & Paul G. Yale, *Let’s Make a Deal: Select Issues When Negotiating Modern Oil & Gas Leases*, 67 ROCKY MNT. MIN. L. INST. 21–28 (2021).

8. PATRICK S. OTTINGER, *LOUISIANA MINERAL LEASES: A TREATISE* 922 (2016); David E. Pierce, *An Analytical Approach to Drafting Assignment*, 44 SW. L.J. 943, 949–50 (1990); T. Ray Guy & Jason E. Wright, *The Enforceability of Consent-to-Assign Provisions in Texas Oil & Gas Leases*, 71 SMU L. REV. 447, 479 (2018); Blake A. Watson, *Do I Have to Be Reasonable?: The Right to Arbitrarily Restrict Transfer and Occupancy and Mineral Leases*, 47 CAP. U. L. REV. 27, 51–54 (2019) [hereinafter Watson I]; Blake A. Watson, *Right to Limit or Prohibit Lease Transfers*, 34 A.B.A. PROB. & PROP. 46, 48 (2020) [hereinafter Watson II].

9. OTTINGER, *supra* note 8, at 923; Guy & Wright, *supra* note 8, at 479; Pierce, *supra* note 8, at 950; Watson I, *supra* note 8, at 36; Watson II, *supra* note 8, at 48; Katy Pier Moore & Corey F. Wehmeyer, *Consent to Assignment*

lease, which could dilute the operator's net revenue interest and deter development;¹⁰ or "bifurcating"¹¹ the lease, resulting in oil and gas operations at multiple locations on the leased premises, or even on the same surface location when the lease has been horizontally divided.¹² A lessor may also wish to include the provision as leverage to obtain additional money or concessions in exchange for the lessor's consent.¹³

Conversely, lessees will wish to avoid such a provision because it may reduce the value of the lease, impede the lessee's ability to market the lease, or obstruct the lessee's ability to market or develop prospects including the lease.¹⁴ This is a particular concern when the landowner has extensive acreage, a history of being difficult or unreasonable, or both.¹⁵ Having a restricted right to assign a lease also becomes an issue when hydrocarbon discoveries or developments in the vicinity of the lease increase the value of the leasehold after the lease is taken. Some authors have observed that the lessee may surrender a lease to avoid future obligations to the lessor.¹⁶ But the right to surrender a lease is a small comfort, particularly when the initial acquisition cost was high and the value cannot be recovered because the lessee is restrained from subleasing, assigning, or farming out the lease.¹⁷ Generally speaking, it is easy to see how an undue restraint on alienability can hinder the commercial use of any immovable property, including mineral rights.¹⁸

Provisions in Texas Oil & Gas Leases: Drafting Solutions to Negotiation Impasse, 48 TEX. TECH. L. REV. 335, 336–37 (2016).

10. Pierce, *supra* note 8, at 950.

11. Mineral Code article 130 provides: "A partial assignment or partial sublease does not divide a mineral lease." LA. REV. STAT. ANN. § 31:130 (West 2000). Bifurcation objections are practical concerns, not necessarily tied to the legal consequences of an assignment or sublease.

12. McFarland & Yale, *supra* note 7, at 27–28.

13. OTTINGER, *supra* note 8, at 923; Pierce, *supra* note 8, at 950, 953; Watson I, *supra* note 8, at 51–52; McFarland & Yale, *supra* note 7, at 39–40; Guy & Wright, *supra* note 8, at 480.

14. Moore & Wehmeyer, *supra* note 9, at 337.

15. *Id.*

16. Watson I, *supra* note 8, at 74; Luke Meier & Rory Ryan, *The Validity of Restraints on Alienation in an Oil and Gas Lease*, 64 BUFF. L. REV. 305, 343 (2016).

17. *Id.*

18. Gary B. Conine & Bruce M. Kramer, *Property Provisions of the Joint Operating Agreement*, 2008 No. 2 ROCKY MNT. MIN. L. INST. Paper No. 3 (2008).

The validity of consent to assignment provisions in mineral leases remains somewhat theoretical.¹⁹ Courts in some states hold that these provisions are unenforceable; other courts avoid the issue or simply assume such provisions are valid without addressing the issue *vel non*.²⁰ The prevailing view, however, appears to be that the clause is enforceable depending on the language used by the parties.²¹ That said, recent scholarship continues to debate the enforceability of such provisions in oil and gas agreements, particularly when a consent to assign provision grants the unqualified right to withhold consent.²² Some suggest that withholding consent must be “reasonable,” even if the agreement fails to express such a qualification.²³

Most Louisiana cases involving consent to assign provisions relate to commercial leases²⁴ with relatively few cases addressing the issue with

19. See 4 EUGENE KUNTZ, A TREATISE ON THE LAW OF OIL & GAS § 51.3, at 307–08 (1990).

20. See e.g., *Shields v. Moffat*, 683 P.2d 530, 534 (Okla. 1983) (“We hold that the lease clause in the case at bar purporting to restrict alienation by the lessee of the oil and gas lease without the consent of the lessors is void and of no force or effect.”); *Watson I*, *supra* note 8, at 64–71 (discussing judicial authorities addressing the validity of restrictions on assignments and detailing the approaches taken in different states).

21. See OTTINGER, *supra* note 8, at 922–27; Cross, *supra* note 5, at 222; Meier & Ryan, *supra* note 16, at 307–08; Lowe, *supra* note 7, at 374 (a court could view a broadly drafted restriction upon assignment in a farmout agreement as an unenforceable disabling restraint against alienation); Guy & Wright, *supra* note 8, at 496–504; *Watson I*, *supra* note 8, at 71–75; *Watson II*, *supra* note 8, at 51; Jason E. Wright, *Updated Guidance on Consent-to-Assign Provisions in Texas Oil and Gas Leases*, 6 OIL & GAS, NAT. RES. & ENERGY J. 411, 417 (2021).

22. Meier & Ryan, *supra* note 16, at 308 (concluding that consent to assign provisions should be enforceable in mineral leases); Guy & Wright, *supra* note 8, at 496–504 (observing that the enforceability of a consent to assign provision is not guaranteed even if the contract includes the requirement that the lessor act reasonably); *Watson I*, *supra* note 8, at 99–100 (concluding that there is a right to limit assignments but that the “silent” consent provision should be construed to mean that consent will not be unreasonably withheld); *Watson II*, *supra* note 8, at 51 (reviewing the various approaches and concluding that the right to limit transfers should be upheld); *McFarland & Yale*, *supra* note 7, at 21–30 (noting authorities that suggest a reasonableness requirement salvaged the validity of an otherwise unenforceable consent provision).

23. Guy & Wright, *supra* note 8, at 496–504; *Watson I*, *supra* note 8, at 99–100; *McFarland & Yale*, *supra* note 7, at 21–30.

24. The Civil Code recognizes various types of leases. LA. CIV. CODE ANN. art. 2671 (West 2005). The term “commercial leases” as used herein means leases other than mineral leases.

respect to oil and gas leases.²⁵ With respect to commercial leases, Louisiana courts have held that consent to assign provisions are enforceable.²⁶ Like commercial leases, mineral leases are contracts.²⁷ However, unlike commercial leases, a mineral lease, as one of the basic mineral rights recognized by the Louisiana Mineral Code (the “Mineral Code”), is also a real right in immovable property.²⁸ Because of this, certain rules generally applicable to commercial leases may not apply to mineral leases. Indeed, the comments to Civil Code article 2672 state that “before resorting to this title [Title IX. Lease], as opposed to other titles of the Civil Code, one should bear in mind that a mineral lease is a real right and differs in many respects from an ordinary lease.”²⁹

Although some authors opine that the requirement of reasonableness should be implied when the contract is silent,³⁰ Louisiana courts appear

25. Compare *Illinois Cent. Gulf R.R. Co. v. Int’l Harvester Co.*, 368 So. 2d 1009 (La. 1979) (lease of premises for truck sales), and *Caplan v. Latter and Blum*, 468 So. 2d 1188 (La. 1985) (commercial real estate lease), and *Truschinger v. Pak*, 513 So. 2d 1151 (La. 1989) (lease of restaurant space), and *Gamble v. New Orleans Hous. Mart, Inc.*, 154 So. 2d 625 (La. Ct. App. 4th 1963) (lease of building space), and *Triftee Oil Co. v. W.B. Partin*, 209 So. 2d 557 (La. Ct. App. 2d 1968) (surface lease), and *Serio v. Stewart*, 427 So. 2d 692 (La. Ct. App. 4th 1983) (lease of building and lot), and *La. Casino Cruises, Inc. v. Capital Lake Properties, Inc.*, 845 So. 2d 447 (La. Ct. App. 1st 2003) (surface lease), and *Kano Invs., L.L.C. v. Kojis Constr., L.L.C.*, 113 So. 3d 1113 (La. Ct. App. 3d 2013) (lease of building space), and *Tenet HealthSystem Surgical, L.L.C. v. Jefferson Par. Hosp. Serv. Dist. No. 1*, 426 F.3d 738 (5th Cir. 2005) (lease of space in shopping center), and *STC Five v. Mudbugs West Bank Dev. Corp., Inc.*, No. 09-3163, 2010 WL 497760 (E.D. La. 2010) (lease of communication towers), with *Cydeco Corp. v. PetroQuest Energy, L.L.C.*, 497 F.3d 485 (5th Cir. 2007) (applying Texas contract law to assignment and assuming that a consent to assign provision in a Louisiana mineral lease was valid), and *Terrebonne Par. Sch. Bd. v. Castex Energy, Inc.*, 878 So. 2d 522 (La. Ct. App. 1st 2004) (considering the effect of the failure to obtain the lessor’s consent to assign mineral lease on third party demand for indemnity), and *Phoenix Assocs. Land Syndicate, Inc. v. E.H. Mitchell & Co., L.L.C.*, 970 So. 2d 605 (La. Ct. App. 1st 2007) (applying a consent to assign provision in a sand and gravel lease).

26. See, e.g., *Illinois Cent. Gulf R.R. Co.*, 368 So. 2d at 1009 (La. 1979); see also *Truschinger*, 513 So. 2d at 1151 (La. 1987).

27. LA. REV. STAT. ANN. § 31:114 (West 2000).

28. *Id.* §§ 31:16, 18 (West 2000).

29. LA. CIV. CODE ANN. art. 2672 cmt. revision 2004 (West 2005).

30. Thomas W. Merrill & Henry E. Smith, *The Property/Contract Interface*, 101 COLUM. L. REV. 773, 829 n.184 (2001); Guy & Wright, *supra* note 8, at 484, 496–504; Watson I, *supra* note 8, at 32, 99–100; McFarland & Yale, *supra* note 7, at 21–30.

unwilling to overlay a reasonableness requirement in commercial leases where consent is required and the contract has not otherwise specified that it may not be unreasonably withheld.³¹ In cases analyzing provisions without the reasonableness restriction in that context, the parties seeking assignments resort to the abuse of rights theory.³² There appears to be no cases in which a party successfully argues that withholding consent to the assignment is an abuse of right. However, the issue is fact intensive, requiring a court to examine the motive of the party refusing consent.

When a contract provides that consent may not be unreasonably withheld, courts review the lessor's stated motive for denying consent to determine whether it is (1) a pretext³³ or (2) in fact, unreasonable.³⁴ Because of the nature of the inquiry, summary judgment may not be available to resolve the issue in most cases.³⁵

Some authors suggest the provision may afford a "right with no remedy" since, if limited to damages, the lessor may find it difficult to prove harm.³⁶ Louisiana cases suggest that the harsh remedy of lease cancellation may be available to the lessor in the event of a breach by the lessee.³⁷ Damages may be available to the lessee in the event of the lessor's breach.³⁸

31. See, e.g., *Truschinger v. Pak*, 513 So. 2d 1151 (La. 1989), *but see* *Gamble v. New Orleans Hous. Mart, Inc.*, 154 So. 2d 625 (La. Ct. App. 4th 1963).

32. See, e.g., *Truschinger*, 513 So. 2d at 1154 ("When a lease contains only the stipulation that the lessor's written consent is necessary to sublease, the lessor's right to refuse will be judicially protected unless the lessor has abused that right.").

33. See *Caplan v. Latter and Blum*, 468 So. 2d 1188 (La. 1985).

34. See *Tenet HealthSystem Surgical, L.L.C. v. Jefferson Par. Hosp. Serv.* Dist. No. 1, 426 F.3d 738 (5th Cir. 2005).

35. See generally *La. Onshore Props., Inc. v. Manti Res., Inc.*, 755 So. 2d 988 (La. Ct. App. 3d 1999); *Coastal Drilling Co., LLC v. Shinn Enters., Inc.*, No. 05-4007, 2008 WL 2178070 (E.D. La. 2008); *STC Five v. Mudbugs West Bank Dev. Corp., Inc.*, No. 09-3163, 2010 WL 497760.

36. Cross, *supra* note 5, at 222; Moore & Wehmeyer, *supra* note 9, at 338; Guy & Wright, *supra* note 8, at 490.

37. Moore & Wehmeyer, *supra* note 9, at 338; Guy & Wright, *supra* note 8, at 490.

38. Moore & Wehmeyer, *supra* note 9, at 338.

II. LOUISIANA LAW GOVERNING AND APPLYING TO CONSENT TO ASSIGN PROVISIONS.

A. Louisiana Codal and Statutory Schemes Applicable to Mineral Leases.

Before discussing Louisiana jurisprudence concerning consent to assign provisions, it is important to first consider the codal and statutory scheme in which these provisions operate.

Article 2 of the Mineral Code states that “the provisions of [the Mineral Code] are supplementary to those of the [Civil Code] and are applicable specifically to the subject matter of mineral law . . . If this Code does not expressly or impliedly provide for a particular situation, the Civil Code or other laws are applicable.”³⁹ Thus, the Civil Code articles relating to leases apply to mineral leases to the extent that they are consistent with the Mineral Code.⁴⁰ And as discussed, mineral leases are real rights as well as contracts.⁴¹ Both the Civil Code and the Mineral Code provide a default rule that leases may be freely transferred without the express consent of the lessor,⁴² and both allow freedom to modify the default rules by contract for matters not contrary to public policy.⁴³

1. The Civil Code.

The Civil Code articles on leases include certain rules not found in the Mineral Code, and it is unclear the extent to which these Civil Code articles overlay the default rules in the Mineral Code. As noted, the comments in the Civil Code caution that the articles on leases may not apply to mineral leases, and that application of other provisions in the Civil Code may be more appropriate given the nature of a mineral lease.⁴⁴ There

39. LA. REV. STAT. ANN. § 31:2 (West 2000).

40. *Id.*; *see also* LA. CIV. CODE art. 2672 (2005) (“A mineral lease is governed by the Mineral Code.”); Succession of Doll, 593 So. 2d 1239, 1246–47 (La. 1992).

41. LA. REV. STAT. ANN. §§ 31:16, 18, 114 (2000).

42. *See* LA. CIV. CODE art. 2713 (2005); *see also* LA. REV. STAT. ANN. § 31:127 (2000).

43. *See* LA. CIV. CODE art. 1971 (2008); *see also* LA. REV. STAT. ANN. § 31:3 (2000).

44. LA. CIV. CODE art. 2672 cmt. revision 2004 (2005). *See* LA. REV. STAT. ANN. §§ 31:16, 18 (2000) (mineral rights are real rights; mineral leases are one of the basic mineral rights); *cf.* Meier & Ryan, *supra* note 16, at 306 (generally discussing the sui generis nature of mineral leases and general principles regarding restraints on alienation as applied to mineral leases); *cf.* Guy & Wright, *supra* note

are, however, no cases in which a lessee has challenged the application of the Civil Code to a mineral lessor's right to restrict the lessee's ability to freely transfer a mineral lease. Indeed, few cases address issues related to consent to assign provisions in mineral leases, and none analyze whether the rules in the Civil Code should apply.⁴⁵ But Louisiana oil and gas scholars and authors opine that the rules in the Civil Code remain applicable to mineral leases even after the adoption of the Mineral Code.⁴⁶

The Civil Code articles relating to leases underwent a significant overhaul in 2004.⁴⁷ Prior to this overhaul, article 2725 of the Louisiana Civil Code of 1870 addressed the right of a lessor to restrict the lessee's right to sublease or assign a lease. This article provided that "[t]he lessee has the right to underlease, or even to cede his lease to another person, unless this power has been expressly interdicted. The interdiction may be for the whole, or for a part; and this clause is always construed strictly."⁴⁸

Most Louisiana cases addressing consent to assign provisions pre-date the 2004 revisions and apply article 2725 of the Louisiana Civil Code of 1870, rather than the current law. With respect to the rule of strict construction in former article 2725, there are conflicting opinions regarding whether consent to assign provisions should be strictly construed for or against the lessee.⁴⁹ The adoption of Civil Code article 2713, effective January 1, 2005, settles that issue.⁵⁰

Louisiana Civil Code article 2713 reads:

The lessee has the right to sublease the leased thing or to assign or encumber his rights in the lease, unless expressly prohibited by the contract of lease. A provision that prohibits one of these rights

8, at 483 (noting that mineral leases are "fee simple" estates and that restraints on alienation are greatly disfavored); *cf.* Watson I, *supra* note 8, at 55–56.

45. Phoenix Assocs. Land Syndicate, Inc. v. E.H. Mitchell & Co., L.L.C., 970 So. 2d 605 (La. Ct. App. 1st 2007); Terrebonne Par. Sch. Bd. v. Castex Energy, Inc., 878 So. 2d 522 (La. Ct. App. 1st 2004); Cydeco Corp. v. Petroquest Energy, 497 F.3d 485 (5th Cir. 2007).

46. OTTINGER, *supra* note 8, at 919; John M. McCollam, *A Primer for the Practice of Mineral Law Under the New Louisiana Mineral Code*, 50 TUL. L. REV. 732, 783 (1976); Duplantis & Averill, *supra* note 5, at 16.

47. William E. Crawford & Cordell H. Haymon, *Louisiana State Law Institute Recognizes 70-year Milestone: Origin, History and Accomplishments*, 56 LA. B.J. 85, 91 (2008) (recognizing revisions to Louisiana Civil Code, Book III, Title IX, Lease, Chapters 1–4, revised by Acts 2004, No. 821).

48. LA. CIV. CODE art. 2725 (repealed 2005).

49. Compare Caplan v. Latter and Blum, 468 So. 2d 1188 (La. 1985), with Truschinger v. Pak, 513 So. 2d 1151 (La. 1989).

50. LA. CIV. CODE ANN. art. 2713 (West 2005).

is deemed to prohibit the others, unless a contrary intent is expressed. In all other respects, a provision that prohibits subleasing, assigning, or encumbering is to be strictly construed against the lessor.⁵¹

Civil Code article 2713 includes essentially three rules: (1) a restriction of the right to sublease, assign, or encumber a lease must be expressly stated in the contract; (2) a restriction of one such right pertains to all three, unless a contrary intention is expressed; and (3) in all other respects, provisions prohibiting the right to sublease, assign, or encumber a lease are strictly construed against the lessor. According to the comments, the first rule is not new, the second rule is new, and the third rule clarifies prior case law.⁵²

The new rule in article 2713 (that a provision prohibiting the right to either sublease, assign, or encumber a lease is construed to be a restriction of all three) has the potential to expand the scope of a consent to assign provision—particularly by extending such provisions to include encumbrances in the absence of express language. It remains unclear how the courts will apply this new provision. For instance, will a consent provision requiring consent to exercise two of the three rights within its purview (requiring consent for only assignments and subleases for example) be deemed to restrict the third (encumbrances)? What constitutes an encumbrance? Could the provision apply to assignments of overriding royalties,⁵³ which are carved out of the lessee's interest but are not assignments of the lease itself?⁵⁴ What about other interests in production, such as net profit interests or production payments? Does it apply to other transfers such as exchanges or donations?

In any event, to the extent that the new provision in article 2713 is a substantive change in the law, it should not be retroactively applied to impair the rights included in leases granted before its effective date.⁵⁵

51. LA. CIV. CODE ANN. art. 2713 (2005).

52. LA. CIV. CODE ANN. art. 2713 cmt. revision 2004 (2005).

53. See *Johnco, Inc. v. Jameson Interests*, 741 So. 2d 867, 872 (La. Ct. App. 3d Cir. 1999) (“secret” overriding royalty was not an encumbrance).

54. Sara E. Mouledoux, *A Primer on Overriding Royalties*, 57TH ANN. INST. ON MIN. L., 158 (2010) (citing EUGENE KUNTZ, LAW OF OIL & GAS § 63.2, 217 (2009)).

55. *Born v. City of Slidell*, 180 So. 3d 1227, 1235–36 (La. 2015); *Block v. Reliance Ins. Co.*, 433 So. 2d 1040, 1044 (La. 1983).

2. *The Mineral Code.*

With regard to the right to grant subleases and assignments of a mineral lease, article 127 of the Mineral Code simply provides: “[t]he lessee’s interest in a mineral lease may be assigned or subleased in whole or in part.”⁵⁶ Article 127 is part of a suite of articles designed to address the relationship between the original lessor and the assignee or sublessee, and also to define the rights, obligations, and other legal consequences of the transaction.⁵⁷ Many of these articles depart from the rules developed through pre-Code case law and were designed to ensure “certain common results flowing from the execution of either an assignment or sublease.”⁵⁸ The Mineral Code articles addressing subleases and assignments do not address whether the right to assign and sublease may be restricted. However, consent to assign provisions are commonly included in mineral leases and are generally understood to be enforceable.⁵⁹

It should be noted that, even if consent to an assignment is required and given by the lessor, the original lessee remains bound by the lease unless the lessor expressly releases the original lessee from liability in writing.⁶⁰ Because the assignor or sublessor remains liable for the lease obligations, concerns about the proposed transferee’s ability to perform lease obligations are minimized. The Mineral Code thus allays one of the underlying concerns spurring the common use of consent to assign provisions.⁶¹ Further, in the event of an assignment or sublease, the transferee also becomes directly responsible to the lessor.⁶² So, an

56. LA. REV. STAT. ANN. § 31:127 (West 2000).

57. *See id.* §§ 31:126–32 (2000).

58. McCollam, *supra* note 46, at 829.

59. OTTINGER, *supra* note 8, at 922; Cross, *supra* note 5, at 167.

60. LA. REV. STAT. ANN. § 31:129 (2000).

61. Many authors have noted that primary concerns motivating the inclusion of a consent to assign provision are about the transferee’s financial responsibility and ability to meet the lease obligations. McFarland & Yale, *supra* note 7, at 27–28; Watson I, *supra* note 8, at 36–37, 51–54; Pierce, *supra* note 8, at 949–51; Guy & Wright, *supra* note 8, at 479; Watson II, *supra* note 8, at 48. In Texas, two authors have observed that printed lease forms usually provide that an assignment of the mineral lease “shall, to the extent of the interest of such assignment, relieve and discharge Lessee of any obligations hereunder.” McFarland & Yale, *supra* note 7, at 21–27. This is not the case in Louisiana. One way to assuage the lessor’s concerns is to include a lease provision that the original lessee will remain bound by the contract after the assignment, which is the default rule in Louisiana. Compare McFarland & Yale, *supra* note 7, at 21–28, and Pierce, *supra* note 8, at 950–51, with LA. REV. STAT. ANN. § 31:129 (2000).

62. LA. REV. STAT. ANN. § 31:128 (2000).

assignment or sublease arguably puts the lessor in a more favorable position by having multiple parties from whom to demand performance. That said, the lessor must accept performance by the assignee or sublessee and may not demand performance by the original lessee unless the sublessee or assignee has not performed.⁶³

Assignments of leases and subleases are subject to the laws of registry. Accordingly, the Mineral Code provides that an assignee or sublessee is bound by notice sent to the original lessee, unless the lessor has been given prior written notice of the assignment and the assignment has been filed for registry.⁶⁴

B. Louisiana Cases Addressing the Result of Lack of Consent.

1. Under What Circumstances May Consent be Withheld?

As noted above, it is widely recognized that consent to assign provisions are enforceable; however, this does not answer the question of whether there are any limitations to denying consent once it is sought. There are a number of cases in which lessees have asserted certain legal theories to challenge the lessor's reasons for withholding consent. The theories of "abuse of rights" and challenges of the "reasonableness" of the lessor's refusal to consent have been made by lessees and proposed sublessees and assignees. Some challenges have been met with limited success, yet other courts have allowed a lessor to refuse consent altogether, even when it is used as a tactic to extract more money out of a lessee.

However, the Louisiana cases in which the lessee's arguments fail do not involve mineral leases, and many rely on the erroneous view that a provision restricting the transfer of a lease should be construed *against the lessee*.⁶⁵ The latter issue is resolved by the adoption of Civil Code article 2713, which states that "a provision that prohibits subleasing, assigning, or encumbering is to be strictly construed *against the lessor*."⁶⁶ A different

63. *Id.* § 31:121 (West 2000).

64. *Id.* § 31:132 (West 2000).

65. *See* Illinois Cent. Gulf R.R. Co. v. Int'l Harvester Co., 368 So. 2d 1009, 1013 (La. 1979); *see also* Truschinger v. Pak, 513 So. 2d 1151, 1154 (La. 1989).

66. LA. CIV. CODE art. 2713 (2005) (emphasis added). According to the comments, this provision is not new, and because this provision may be viewed as interpretive, it should be retroactively applied. LA. CIV. CODE art. 6 (2013); *see* Jacobs v. City of Bunkie, 737 So. 2d 14, 19 (La. 1999) (citing Sudwischer v. Est. of Hoffpauir, 705 So. 2d 724, 728 (La. 1997) ("Interpretative laws are those which clarify the meaning of a statute and are deemed to relate back to the time that the law was originally enacted. Procedural laws prescribe a method for enforcing a

result may prevail if the courts reexamine these issues. Consistent with the tenet that a restriction against assignment should be strictly construed, several scholars reviewing cases in other states have recognized the modern view that consent to assign provisions should be read to imply a “reasonableness” standard, even in the absence of such language.⁶⁷ The cited bases to imply that consent may not be “unreasonably withheld” are: (1) the general principle that a contract should be performed in good faith; (2) the expectations of the parties; and (3) the general policy disfavoring restraints on alienation.⁶⁸

Moreover, even before the Civil Code clarified that restrictions should be strictly construed against the lessor, courts did not allow a lessor to refuse consent when they found the reason for the refusal to actually be a pretext or guise.

a. “Silent” Consent Provisions Requiring Consent Without Qualification.

As alluded to above, Louisiana courts historically found that, unless it constitutes an abuse of rights, a lessor may withhold consent for any reason unless the contract expressly states that consent may not be unreasonably withheld. These cases arise in the commercial lease context.

Illinois Central Gulf Railroad Co. v. International Harvester Co. is the leading case in Louisiana addressing under what circumstances a lessor may withhold consent with an otherwise silent contract.⁶⁹ The case involved the lease of a building used as a truck sales and service center.⁷⁰ After the lease was confected, the Superdome was constructed directly across the street and the value of the property dramatically increased.⁷¹ The lessee approached the lessor about subleasing the property for the purpose of developing a parking facility.⁷² The lessor refused to grant consent to the sublease, and after protracted negotiations between the

substantive right and relate to the form of the proceeding or the operation of the laws.”)).

67. Merrill & Smith, *supra* note 30, at 829 n.184; Guy & Wright, *supra* note 8, at 484–85; Watson I, *supra* note 8, at 32–33, 83–86.

68. Merrill & Smith, *supra* note 30, at 829 n.184; Guy & Wright, *supra* note 8, at 484–85; Watson I, *supra* note 8, at 47, 75–79.

69. *Illinois Cent. Gulf R.R. Co.*, 368 So. 2d at 1009.

70. *Id.* at 1010.

71. *Id.*

72. *Id.*

lessee and lessor, the lessee sublet the property without the lessor's consent.⁷³

The trial court awarded lease cancellation to the lessor as a remedy for the breach of the consent to assign provision.⁷⁴ The lessee argued on appeal to the Louisiana Supreme Court that the lessor impliedly consented to the sublease by accepting rental payments for 18 months after the sublease. However, the court found that unequivocal evidence was required to prove acquiescence to the sublease.⁷⁵ The court recognized that the lessee's proposal would expand the use of the leased premises beyond what was contemplated in the agreement.⁷⁶ Because the lessor initially opposed the sublease and was unaware that the sublessee made the lease payments until shortly before the suit was filed, the court found that there was no implied consent.⁷⁷

The lessee also argued that the lessor's withholding of consent to the assignment constituted an "abuse of right."⁷⁸ The court reasoned that Louisiana cases strictly construe prohibitions on assignment against the lessee.⁷⁹ The court found that the abuse of rights doctrine applies when:

- (1) the primary object of exercising the right is to cause harm,
- (2) there is no serious and legitimate reason for exercising the right,
- (3) exercising the right is against moral rules, good faith, or elementary fairness, or
- (4) the right is exercised for a purpose other than that for which it was granted.⁸⁰

In this situation, the court found that the primary motivation for withholding consent was to negotiate cancellation of the lease since the property's value significantly increased after the original lease was granted.⁸¹ Following a detailed analysis of Illinois Central's conduct, the court determined that the lessor's refusal to give consent did not qualify as an abuse of right. Thus, the doctrine provided no defense for the breach of contract.⁸²

73. *Id.* at 1010–11.

74. *Id.* at 1011.

75. *Id.* at 1012.

76. *Id.* at 1013.

77. *Id.*

78. *Id.*

79. *Id.* The result could be different under the current law, which now recognizes that a restriction on the right to assign should be strictly construed against the lessor in most respects. LA. CIV. CODE art. 2713 (2005).

80. *Illinois Cent. Gulf R.R. Co.*, 368 So. 2d at 1014.

81. *Id.*

82. *Id.* at 1015.

Similarly, in *Truschinger v. Pak*, the lessee was to receive \$80,000 from the sublessee for the sublease of a commercial lease, and the lessor demanded half of this sum for his consent to the sublease.⁸³ The lessee refused and sued for damages due to the lessor’s “unreasonable” failure to consent to the sublease. The court reasoned that the consent to assign provision should be strictly construed *against the lessee* and contained no express provision that consent would not be “unreasonably” withheld. Accordingly, the court found that the lessee’s only recourse was through the abuse of rights doctrine.⁸⁴ The court concluded that the refusal was not an abuse of rights because the lessor’s primary motive was economic—not a desire to harm the lessee.⁸⁵

The Louisiana Fourth Circuit Court of Appeal reached a different result in *Gamble v. New Orleans Housing Mart, Inc.*⁸⁶ In *Gamble*, the court held that a lessor “cannot unreasonably, arbitrarily or capriciously withhold his consent,” even when the lease contains no express language that consent could not be unreasonably withheld.⁸⁷ This holding in *Gamble* was later cited with approval by the Louisiana Supreme Court in *Caplan v. Latter & Blum, Inc.*⁸⁸

b. Provisions Stating That Consent May Not be “Unreasonably” Withheld.

When a consent to assign provision expressly states that consent shall not be unreasonably withheld, courts examine the lessor’s motives behind withholding consent. Lessors should be mindful that unreasonably withholding consent could result in a successful claim for damages by the lessee, if an economic loss results from the refusal to give consent.

In *Caplan*,⁸⁹ the Louisiana Supreme Court examined the application of a consent to assign provision in a commercial lease that would not allow consent to be “unreasonably” withheld. The lessor asserted that consent was withheld because: (1) the proposed sublessee did not meet its financial criteria; (2) certain improvements proposed by the sublessee were cost prohibitive; and (3) the sublease did not meet the terms of the original lease because it would increase the rent on the property. After the sublessee

83. *Truschinger v. Pak*, 513 So. 2d 1151 (La. 1989).

84. *Id.* at 1154.

85. *Id.* at 1154–55.

86. *Gamble v. New Orleans Hous. Mart, Inc.*, 154 So. 2d 625 (La. Ct. App. 4th 1963).

87. *Id.* at 627.

88. *Caplan v. Latter & Blum Inc.*, 468 So. 2d 1188, 1191 (La. 1985).

89. *Id.* at 1189.

dropped its proposal for improvements, the lessor again refused to consent. In this case, the court found that the reasons given by the lessor for withholding consent were pretextual and not a valid cause for withholding consent.

The court found the sublessee's financial status immaterial because the lessee would remain obligated under the lease, and the variance in terms (the higher rent) was anticipated by the lessor—who had in fact endorsed a higher rent on another occasion.⁹⁰ The court noted that the professed reasons for withholding consent were not sufficient grounds for a “reasonably prudent business person to deny consent.”⁹¹ Under these circumstances, the court found withholding consent constituted a violation of the express terms of the contract.⁹²

Similarly, in *Associates Commercial Corp. v. Bayou Management, Inc.*, the Louisiana First Circuit Court of Appeal found that the lessor violated the terms of the commercial lease at issue by failing to consent to an assignment.⁹³ The court approved of the trial court's finding that the lessee provided the “best proof possible” and that the sublessee met all the requirements of the lessor because the lessor subsequently leased another property to the proposed sublessee.⁹⁴

Conversely, in a more recent case, *Louisiana Casino Cruises, Inc. v. Capitol Lake Properties, Inc.*, the same court found a lessor's reasons for withholding consent to a leasehold mortgage to be reasonable.⁹⁵ In *Louisiana Casino Cruises*, the lessee, Louisiana Casino, requested the lessor, Capital Lake, to allow Louisiana Casino to mortgage its leasehold interest as guarantor of a \$350,000,000 loan to its parent company.⁹⁶ Louisiana Casino sought Capital Lake's consent by asking it to execute a waiver and estoppel form.⁹⁷ Capital Lake repeatedly refused consent on the grounds that: (1) Louisiana Casino had defaulted under the lease and at least one default was incurable, and (2) the estoppel agreement contained requests for actions that were not required by the lease.⁹⁸

90. *Id.* at 1191.

91. *Id.*

92. *Id.*

93. *Assoc. Com. Corp. v. Bayou Mgmt., Inc.*, 426 So. 2d 672 (La. Ct. App. 1st 1982).

94. *Id.* at 674.

95. *La. Casino Cruises, Inc. v. Cap. Lake Props., Inc.*, 845 So. 2d 447 (La. Ct. App. 1st 2003).

96. *Id.* at 448.

97. *Id.*

98. *Id.* at 448–49.

On appeal, Louisiana Casino argued, *inter alia*, that the reasons espoused by Capital Lake for withholding consent (prior breaches of the lease and requests for subordination) had been cured or withdrawn.⁹⁹ However, the court found other sound economic reasons for withholding consent. Specifically, the arrangement resulted in a significant increase in Louisiana Casino's debt, and its parent company's debt-equity ratio was twice the industry standard.¹⁰⁰ Under these circumstances, Capital Lake had sufficient "reasonable" grounds for withholding consent.¹⁰¹

Even if the reason given is not pretextual, the question of whether the reason for withholding consent is, in fact, reasonable remains. In *Tenet HealthSystem Surgical, L.L.C. v. Jefferson Parish Hospital Service District No. 1*, the Fifth Circuit examined the "reasonableness standard," concluding that an objective standard applies to determine whether consent was reasonably withheld.¹⁰²

Tenet HealthSystem Surgical involved a lease of building space "for out patient [*sic*] surgical procedures and general medical and physicians [*sic*] offices, including related uses and for other purposes reasonably acceptable to Landlord," which included a consent to assign provision that consent "shall not be unreasonably withheld."¹⁰³ The lease was granted to the plaintiff, Tenet HealthSystem Surgical, L.L.C. ("Tenet"), by Marrero Shopping Center, Inc. ("MSC").¹⁰⁴ Tenet initially used the lease premises as an outpatient surgical center.¹⁰⁵

The property was located adjacent to West Jefferson hospital, and West Jefferson Medical Center ("West Jeff") later purchased the property from MSC subject to Tenet's lease.¹⁰⁶ Tenet ceased operating as a surgical center shortly after West Jeff purchased the property and then sought to assign the lease to Pelican Medical-West, L.L.C. ("Pelican") for use as an occupational medicine clinic.¹⁰⁷ Tenet requested West Jeff's consent to allow an assignment to Pelican.¹⁰⁸ West Jeff refused and explained that one of its reasons for denying its consent was that Pelican proposed using the leased premises in a manner that would compete with West Jeff's own

99. *Id.* at 449–50.

100. *Id.* at 450.

101. *Id.*

102. *Tenet HealthSystem Surgical, L.L.C. v. Jefferson Par. Hosp. Serv. Dist. No. 1*, 426 F.3d 738 (5th Cir. 2005).

103. *Id.* at 740.

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.*

operations.¹⁰⁹ Tenet filed suit against West Jeff claiming, *inter alia*, that West Jeff breached the lease by unreasonably withholding its consent.¹¹⁰

West Jeff argued that its refusal to grant consent to the assignment was reasonable for two reasons: (1) the contemplated use exceeded those permitted under the lease; and (2) Pelican's operations would compete with West Jeff's operations at the adjacent hospital.¹¹¹ With respect to the first argument, the court examined the contract language and Pelican's proposed services and concluded that Pelican's services fell within the permitted use of the premises.

The more difficult question was whether West Jeff could withhold its consent because the proposed sublessee would compete with West Jeff's own business. Tenet argued that reasonableness must be viewed from the perspective of the parties' expectations at the inception of the contract—when the lessor was not a competitor.¹¹² Prior cases noted that “withholding consent is unreasonable where there is no ‘sufficient grounds for a reasonably prudent business person to deny consent.’”¹¹³ Louisiana courts had not yet dealt with a situation in which the identity of the lessor changed and the new lessor refused consent for personal reasons.¹¹⁴

The Fifth Circuit concluded that an objective standard applies.¹¹⁵ The court reasoned that the lessor's “personal tastes or convenience” are not factors to consider.¹¹⁶ Rather, in determining whether a “reasonably prudent business person” would grant consent, the only factors to consider are those that “relate to the landlord's interest in preserving the leased property or in having the terms of the prime lease performed.”¹¹⁷ The factors considered by the court are essentially: (1) the financial responsibility of the proposed subtenant; and (2) the proposed use and nature of the occupancy.

In this regard, Louisiana mineral lessees may be better positioned than those holding general commercial leases to argue that consent should not be withheld. As noted, the original lessee remains responsible to the lessor, which mitigates any concerns about the financial responsibility of the proposed sublessee or assignee; by the very nature of a mineral lease, the use and occupancy by a sublessee or assignee will be the same as the

109. *Id.*

110. *Id.*

111. *Id.* at 742.

112. *Id.*

113. *Id.* at 743.

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.*

original lessee's. If an objective test is applied, refusing consent to assign a mineral lease may be limited to situations in which the proposed transferee has an objectively bad track record, including incidents of prior regulatory or lease violations, such as environmental compliance failures or improper payment of royalties.

2. *Lessor's Acquiescence to a Sublease or Assignment.*

Several courts have found that a party's acquiescence to an assignment relieved the other party from the requirement of obtaining express consent. Acquiescence can be shown by proving that the lessor accepted the benefit of payment by a sublessee or assignee for an extended period of time without complaint. However, the lessor's acceptance of payment must be made with knowledge that it is being paid by the assignee or sublessee.

In *Moore v. Bannister*, the Louisiana Fourth Circuit Court of Appeal found that permitting a sublessee to stay on the premises for more than six months and accepting rental payments during that period was a tacit acceptance of the sublease.¹¹⁸ In *Moore*, the lessor sought information regarding the sublessee's financial status, and considerable correspondence took place between the lessor and the original lessee. However, after two months of correspondence, the sublessee moved onto the premises without the lessor's consent. The lessor was made aware of the sublease about a month later but made no objection for over six months.¹¹⁹

The Louisiana Supreme Court later harmonized this result in *Illinois Central Gulf Railroad Co.*, endorsing the approach taken in *Moore*, but reaching a different result by noting that acquiescence is a factual question of intent.¹²⁰ In *Illinois Central*, the court relied on the trial court's finding of fact that there was no evidence of acquiescence.¹²¹

The defense of acquiescence was again raised in *Louisiana Onshore Properties, Inc. v. Manti Resources, Inc.*¹²² The court in this case examined a consent to assign provision in an oil and gas participation agreement that required all participants to consent to any assignment of the agreement. Shell Onshore Ventures, Inc. and Shell Western E & P, Inc. (collectively "Shell") assigned their interests in the participation agreement to Louisiana Onshore Properties, Inc. ("Louisiana Onshore")

118. *Moore v. Bannister*, 269 So. 2d 291 (La. Ct. App. 4th 1972).

119. *See* *Major v. Hall*, 251 So. 2d 444 (La. Ct. App. 1st 1971), *rev'd on other grounds*, 263 So. 2d 22 (La. 1972).

120. *Illinois Cent. Gulf R.R. Co. v. Int'l Harvester Co.*, 368 So. 2d 1009, 1013.

121. *Id.* at 1012.

122. 755 So. 2d 988 (La. Ct. App. 3rd 1999).

without obtaining written consent from one of the participants, Energy Investments Company (“Energy Investments”). Thereafter, Louisiana Onshore demanded that one of the original participants, Manti Resources, Inc. (“Manti”), turn its operations over to Louisiana Onshore. When Manti refused, Louisiana Onshore filed suit seeking a declaratory judgment that it was the operator under the terms of the participation agreement. The trial court granted summary judgment to Manti.

The Louisiana Third Circuit Court of Appeal found that, even though written consent was not obtained from Energy Investments, it may have consented through its actions.¹²³ Specifically, after the assignment, Energy Investments sought the approval and consent from Louisiana Onshore when it assigned its own interest in the agreement to Enron Capital and Trade Resources (“Enron”).¹²⁴ Further, Energy Investments sent a letter to Louisiana Onshore requesting that all further correspondence regarding elections under the participation agreement be sent to Enron.¹²⁵ Accordingly, the court reversed.

Because the decision is a reversal of summary judgment, the court did not hold that the facts were sufficient to show acquiescence to the assignment—only that a genuine issue of material fact as to Energy Investments’ consent remained.

Reliance on lessor acquiescence is not advisable because of the difficulties of proof. A lessee will have to show that the lessor’s acquiescence occurred with knowledge that the interest was transferred and that the lessor did not object for an extended period of time. With respect to mineral leases, this could be difficult, if not impossible, to prove if the transferee is a non-operator who does not pay royalties to the lessor and subsequent notice of the transfer was not given to the lessor.

3. Assignee’s Rights Against the Lessor or the Lessee When Consent is Refused.

In *Litiwanti Enterprises v. Walden Books, Co.*, the Louisiana Fourth Circuit Court of Appeal examined whether a prospective sublessee had a claim against the lessor for refusing to consent to a proposed sublease and ultimately concluded that no such right existed. The prospective sublessee argued that the lessor “intentionally interfered” with its proposed contract with the original lessee by refusing to consent to the assignment.¹²⁶ The

123. *Id.* at 994.

124. *Id.*

125. *Id.*

126. *Litiwanti Enters., Inc. v. Walden Book Co.*, 670 So. 2d 558 (La. Ct. App. 4th 1996).

court found that the original lessor owed no duty to the proposed sublessee—a required element of a claim for intentional interference with contract.¹²⁷ Further, the court noted that, while the Louisiana Supreme Court recognized a cause of action for “intentional interference with contract” under its holding in *9 to 5 Fashions v. Spurrey*,¹²⁸ no court had ever recognized a cause of action for “intentional interference with a *proposed* contract.”¹²⁹

After addressing the sublessee’s primary argument, the court turned to whether the abuse of rights doctrine applied.¹³⁰ The court found that the sublease would not economically benefit the lessor because the market value of the lease increased since the execution of the original lease. Thus, the lessor could obtain a higher rental by withholding consent and granting a new lease.¹³¹ The court further noted that the sublease would violate the terms of the original lease, which required a bookstore in the leased premises.¹³² Under these circumstances, the court held that withholding consent was not an abuse of right.¹³³

With respect to whether a prospective transferee has rights against its transferor in the event that a lessor withholds or conditions consent, the United States Fifth Circuit Court of Appeals in *Cedyco Corp. v. PetroQuest Energy, LLC* provides some guidance.¹³⁴

Cedyco Corp. involved a contract to sell certain working interests, including wells and a sublease of a mineral lease in Louisiana (the “Louisiana Assets”) resulting from an auction conducted by the Oil & Gas Asset Clearinghouse (the “Clearinghouse”) in Houston. The Louisiana Assets were subject to a consent to assign provision in a sublease granted by Exxon Mobil Corporation (“Exxon”) to the defendant, PetroQuest Energy, LLC (“PetroQuest”).¹³⁵

In connection with the auction, PetroQuest distributed a data sheet which noted that the Louisiana Assets were “subject to a consent to assign.”¹³⁶ Plaintiff, Cedyco Corp. (“Cedyco”), was the successful bidder for the Louisiana Assets with a bid of \$1,000. PetroQuest sought Exxon’s

127. *Id.* at 560.

128. 538 So. 2d 228 (La. 1989).

129. *Litiwanti Enters.*, 670 So. 2d at 560 (emphasis added).

130. *Id.* at 561.

131. *Id.*

132. *Id.*

133. *Id.*

134. 497 F.3d 485 (5th Cir. 2007).

135. *Id.*

136. *Id.* at 487.

consent to the assignment to Cedyco.¹³⁷ However, because of concerns about Cedyco's credit history and regulatory compliance history, Exxon would only consent if PetroQuest agreed to indemnify Exxon.¹³⁸ PetroQuest notified Clearinghouse that it could not sell the Louisiana Assets to Cedyco because it could not obtain Exxon's unqualified consent to the assignment.¹³⁹ Almost two years later, PetroQuest sold the same assets for \$125,000. Cedyco then sued PetroQuest for breach of contract, specific performance, and conversion.¹⁴⁰

The district court awarded summary judgment in favor of Cedyco, reasoning that the sale at auction was a final sale.¹⁴¹ The Fifth Circuit reversed, finding that the agreement was not a present sale but a contract to sell subject to the suspensive condition of obtaining Exxon's consent. The Fifth Circuit concluded that Exxon's conditional consent did not satisfy the suspensive condition, finding that "[n]othing in the contract mandated or even suggested that PetroQuest must accept Exxon's condition in order to obtain consent. To hold otherwise would force PetroQuest to accept whatever limited consent Exxon gives."¹⁴² Because the condition was not satisfied, PetroQuest had no obligation to conclude the sale.

While *Cedyco Corp. v. PetroQuest* involves a consent to assign provision in a Louisiana mineral sublease, the court applied Texas law to determine the meaning of "consent."¹⁴³ The case, nonetheless, provides some guidance with respect to whether potential sublessors or assignors are obligated to obtain consent at all cost.

4. Potential Consequences When Consent is Not Obtained.

a. Dissolution of the Lease.

With respect to commercial leases, the Louisiana Supreme Court has held that lease dissolution is an available remedy for the breach of an unqualified consent to assign provision.¹⁴⁴ Similarly, the Louisiana First

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.* at 487–88.

142. *Id.* at 490.

143. *Id.* at 489–90.

144. *Illinois Cent. Gulf R.R. Co. v. Int'l Harvester Co.*, 368 So. 2d 1009, 1015–16.

Circuit Court of Appeal has held that dissolution is an available remedy where a consent to assign provision in a mineral lease was breached.¹⁴⁵

Phoenix Association Land Syndicate Inc. v. E. H. Mitchell & Co., L.L.C., involved a mineral lease for mining sand and gravel.¹⁴⁶ The case neither analyzed nor addressed whether consent could be withheld under the provision at issue. Rather, the case addressed whether two operating agreements constituted subleases for the purposes of triggering a clause that required prior written consent of the lessor to the sublease.¹⁴⁷ It further addressed the availability of dissolution as a potential remedy for breach.¹⁴⁸

It was undisputed that no consent was sought from or given by the lessor before the defendant granted the operating agreements at issue.¹⁴⁹ Thus, the lessor's actions were not at issue. The operating agreements stated that they should not be construed as a lease or sublease; however, the court found that the characterization by the parties to the operating agreements was not controlling.¹⁵⁰ The court reasoned that the characterization of the contract was a matter of law that could not be dictated by the parties to the contract.¹⁵¹ Instead, it should be determined by the contract's substance and legal effects—the best evidence of which is “what the parties agreed to do.”¹⁵²

The court noted that “[a] lease is a contract by which [a] party gives to another the enjoyment of the thing [leased] for a fixed price.”¹⁵³ Both operators were granted the right to use roads, bring outside materials to the leased premises, use existing utilities on the leased premises, and have exclusive use over the designated mining area.¹⁵⁴ Under both agreements, the operators became the owners of the gravel, soil, and minerals produced.¹⁵⁵ The court reasoned that granting these rights constituted a dismemberment of the ownership of the land subject to the operating

145. *Phoenix Ass'n Land Syndicate Inc. v. E.H. Mitchell & Co., LLC*, 970 So. 2d 605, 616 (La. Ct. App. 2007). The Mineral Code applies to both fugacious and solid minerals. LA. REV. STAT. § 31:4 (2000).

146. *Phoenix Ass'n Land Syndicate Inc.*, 970 So. 2d at 616.

147. *Id.* at 610.

148. *Id.*

149. *Id.* at 612.

150. *Id.* at 613.

151. *Id.* at 613–14.

152. *Id.* at 614.

153. *Id.*

154. *Id.* at 615.

155. *Id.*

agreements, resulting in a sublease or a personal servitude.¹⁵⁶ Thus, it affirmed the trial court's ruling on this issue.

The court also concluded that by executing the operating agreements, the putative sublessor "caused a 'subletting-without-consent' breach" of the mineral lease.¹⁵⁷ The court noted that the distinction between active and passive breaches is preserved in the Mineral Code and found that the failure to obtain the lessor's consent was an active breach of the lease.¹⁵⁸ It therefore found that there was no error in awarding the remedy of dissolution.¹⁵⁹

Phoenix Association Land Syndicate Inc. is a cautionary tale for lessees. The case was decided by summary judgment, indicating that the harsh remedy of dissolution was granted as a matter of law. But there may have been additional factors motivating the decision. While the above synopsis focuses on the limited facts germane to the issue of consent, the opinion also notes that the putative sublessor previously filed an unsuccessful petition for bankruptcy, failed to pay or underpaid royalties, took soil without remuneration to the lessor, allowed other third parties on the leased premises to mine without written permission by the lessor, and continued operations before negotiating a necessary lease extension. Even when such failures have not occurred, lessees and their potential sublessees and assignees should be mindful that the harsh remedy of dissolution is a potential remedy in the event of a breach.¹⁶⁰

156. *Id.* at 616.

157. *Id.* at 613.

158. *Id.*

159. *Id.* at 616.

160. Another case that bears mentioning is *Amoco Prod. Comp. v. Tex. Meridian Res. Expl., Inc.*, 180 F.3d 664 (5th Cir. 1999). This case involved a joint exploration agreement between the plaintiff, Amoco Production Company ("Amoco"), and defendant, Texas Meridian Resources Exploration, Inc. ("Texas Meridian"), for a lease covering land owned by Amoco. *Id.* at 666–67. The joint exploration agreement included the requirement that Texas Meridian obtain Amoco's consent to operate in a restricted area. *Id.* at 667. Texas Meridian sought consent to drill a well in the restricted area, which was denied by Amoco. *Id.* at 667–68. Nonetheless, Texas Meridian proceeded to drill without Amoco's consent, and Amoco filed suit. *Id.* at 668. The district court found that the agreements gave Amoco the unconditional right to deny access to the restricted area. The judgment canceled the entire lease pursuant to a provision in the agreements and awarded Amoco \$10,561,800 in damages, attorney fees pursuant to article 207 of the Mineral Code, and interest as of the date of judicial demand. *Id.* However, it offset Amoco's damages by \$2,817,905.57 for the cost of improvements and labor incurred by Texas Meridian. *Id.* The Fifth Circuit affirmed, in part, and only reversed the award of interest. *Id.* at 674.

b. The Assignment Is Ineffective.

In an often overlooked holding, *Terrebonne Parish School Board v. Castex Energy Inc.*,¹⁶¹ the Louisiana First Circuit Court of Appeal concluded that, when a mineral lease is subject to a consent to assign provision, the subsequent assignment of such lease without consent renders the assignment ineffective.¹⁶² The case involved a consent to assign provision in a mineral lease granted by the Terrebonne Parish School Board (the “School Board”) over Section 16 lands.¹⁶³ The provision stated:

It is further agreed and understood that the rights of Lessee may be assigned or transferred in whole or in part but no transfer, whether in whole or part, of the herein leased property shall be valid unless such transfer or assignment be approved by the Lessor.¹⁶⁴

The mineral lease transferred through a series of approved assignments to Samson Hydrocarbon Company and Samson Resources Company (collectively “Samson”).¹⁶⁵ Thereafter, Samson assigned its interest to Castex Energy, Inc. (“Castex”) without obtaining the School Board’s approval of the assignment.¹⁶⁶

The School Board filed suit against Samson and others claiming that, under Mineral Code article 122, the mineral lease included an implied obligation to restore the lease premises.¹⁶⁷ Samson filed an incidental demand against Castex, contending that Castex must indemnify Samson in the event of an adverse judgment.¹⁶⁸ The trial court denied Samson’s claim for indemnity because the conveyance to Castex was not approved

161. 878 So. 2d 522, 539 (La. Ct. App. 1st 2004).

162. The issue of the effect of the failure to obtain the lessor’s consent is overshadowed by the central issue in the case—whether Mineral Code article 122 required restoration of the leased premises in the absence of express lease language. *Id.* at 525.

163. *Id.* at 525.

164. *Id.* at 538.

165. *Id.* at 526.

166. *Id.* at 526.

167. *Id.* at 527–29.

168. *Id.* at 525.

by the School Board, as required by the lease.¹⁶⁹ The Louisiana First Circuit Court of Appeal affirmed.¹⁷⁰

The court of appeal reasoned that the assignment to Castex was subject to an implied suspensive condition that Samson would obtain the School Board's approval of the assignment.¹⁷¹ The court found that because approval was not obtained, the condition never came to fruition, and the assignment never became effective.¹⁷² Thus, it held that the assignment was "regarded as not having existed"; therefore, Samson had no claim for indemnity related to operations pursuant to that lease.¹⁷³

On the principal demand, the trial court rendered judgment for the School Board against the remaining defendants, including Samson. That judgment was vacated by the Louisiana Supreme Court, which concluded that there was no need to address whether Samson's assignment to Castex was effective.¹⁷⁴ Therefore, the First Circuit's holding regarding the effect of consent to assign provisions remains unchallenged.

An interesting consequence of the First Circuit's holding is that the lessor has no claim for breach of the lease against the putative transferee in the event that no consent was given. Depending on the circumstances, the lessor may have other claims against a putative transferee who commences operations in the absence of a valid sublease or assignment, possibly arising out of tort or other theories of law.

C. The Special Problem of State Leases.

Mineral leases granted by the State of Louisiana are limited by a statutory consent to assign provision.¹⁷⁵ Under the Louisiana Revised Statutes, express approval of the Louisiana State Mineral Board (the "Board") must be sought and obtained in order to transfer a lease of mineral rights owned by the state.¹⁷⁶ Without such approval, the transfer

169. *Id.* at 527. The School Board also sued Castex for a restoration of the land subject to the lease. The trial court dismissed the School Board's claims against Castex on the same basis as those of Samson. The School Board did not appeal this decision. *Id.* at 527 n. 5.

170. *Id.* at 539.

171. *Id.* at 538–39.

172. *Id.* at 538.

173. *Id.*

174. *Terrebonne Par. Sch. Bd. v. Castex Energy, Inc.*, 893 So. 2d 789, 820 (La. 2005).

175. LA. REV. STAT. ANN § 30:128(A) (West 2007).

176. *Id.* However, this restriction does not apply to mortgages or other security interests, nor does it apply to transfers of overriding royalties, production

is invalid.¹⁷⁷ Prospective lease holders must be registered with the Office of Mineral Resources.¹⁷⁸ The failure to obtain the Board's approval within 60 days of a transfer subjects the transferor to a penalty of \$100 per day until approval is obtained, up to a maximum of \$1,000.¹⁷⁹ This penalty may be waived by the Board, but it is not advisable to rely on this provision.¹⁸⁰

In addition to the economic risk of failing to obtain the Board's consent, other consequences affecting both the assignor and assignee may follow. In *Transworld Drilling Co. v. Texas General Petroleum Corp.*, the Louisiana Fourth Circuit Court of Appeal addressed whether an assignment of a state lease was effective prior to obtaining the Board's approval to determine whether the assignee was bound by a notice of lis pendens, which was filed prior to the Board's approval but after the assignment.¹⁸¹ The court refused to recognize the assignment as conveying any rights to the lease until the date of the Board's approval, holding that the "assignment did not come into being until September when the Mineral Board approved the assignment pursuant to R.S. 30:128. Strata [the assignee] was a stranger and third party [to the lease] when the suit was filed."¹⁸² Thus, the assignee took the State lease subject to a lien that was filed prior to the Board's approval, but after the date on which the actual assignment occurred.¹⁸³ The court found that any loss suffered was the result of "premature payment of consideration before the assignment was made valid."¹⁸⁴ Accordingly, the court afforded the assignee no relief.

CONCLUSION.

There are many pitfalls and uncertainties when a consent to assignment provision is included in an oil and gas contract. When litigation occurs, many of the problems may be avoided from the outset through careful drafting. Rather than blind reliance on boilerplate provisions found in the many lease forms commonly used throughout the

payments, net profit interests, or other similar interests. LA. REV. STAT. ANN § 30:128(C) (West 2007).

177. LA. REV. STAT. ANN § 30:128(A) (West 2007).

178. *Id.*

179. *Id.* § 30:128(B)(1) (West 2007).

180. *Id.*

181. *Transworld Drilling Co. v. Texas Gen. Petroleum Corp.*, 480 So. 2d 323 (La. Ct. App. 4th Cir. 1985).

182. *Id.* at 325.

183. *Id.*

184. *Id.*

industry, a careful assessment of a form's language is essential. Though forms provide the practitioner with a sound starting point and provide the client with a degree of security by weighing the known risks, forms should be reviewed with an eye towards obviating known pitfalls. Essential to this assessment is an understanding of the client's reasonable goals. A lessor will want to incorporate broad language to include any type of transfer within its purview and attempt to include language clearly expressing that consent is in its sole discretion. Conversely, a lessee may desire to remove a consent provision in its entirety and choose to make other concessions to lessen the concerns of the lessor. If a provision is included, both the lessor and lessee will generally benefit if the consent to assign provision: (1) defines the types of transfers to which it does or does not apply; (2) states the reasons for which consent may be withheld; and (3) states the remedies available in the event of a breach by either the lessor or lessee. With careful drafting and an inventive mind, oil and gas lawyers can pilot their clients through the hazards of such restriction on assignment.