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Patrick G. Tracy Jr.

THE EFFECTS OF TOP LEASING IN THE LOUISIANA LAW OF OIL AND GAS

*Patrick G. Tracy, Jr.**

> In the oil and gas vernacular to toplease is to secure a lease on land covered by an existing lease to the end that the toplease will be effective after the expiration of the existing lease and the interest of one or more leases thereby eliminated. Topleasing has the same invidious characteristics as claim jumping.[1]

An old, seldom used exploration tool has come of age in the Louisiana oil and gas industry. Although once much maligned, as suggested above by Judge Breitenstein of the Tenth Circuit Court of Appeals, the practice of "top leasing" has become a competitive necessity for operators hoping to maintain or gain an acreage position in many of the tightly-leased geologic provinces extending from the Tuscaloosa Trend in South Louisiana to the Williston Basin in Montana.[2] For many of these operators, large and small alike, top leasing provides the only effective way to gain a foothold in areas heavily leased by larger operators and then "shelved" for a closer look near the end of the primary or extended lease term.[3] When used in this manner, this exploration tool often spurs increased drilling in areas of genuine geologic interest, prompting operators toward earlier development of their lease blocks in order to maximize their ability to preserve valuable lease acreage which has been "topped."

Quite simply, a top lease is a lease acquired on a mineral interest which is subject to a valid, existing prior lease. A top lease can be created only when a prior lease is in existence and should be distinguished from a "renewal lease," whereby an existing lessee may acquire a second lease from the mineral owner while the first lease is still in existence. The "renewal lease" is stipulated to take effect only after the expiration of the term of the prior lease, and thus there is no overlapping of lease terms.[4]

A top lease can exist in two situations, each producing distinct legal effects. In the first situation, often referred to as the "two-party"

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* Member, Louisiana Bar Association.

1. Frankfort Oil Co. v. Snakard, 279 F.2d 436 (10th Cir. 1960).

2. In the past, top leasing a competitor was considered by many an illegal and immoral act of interference, speculating on the expiration of valuable lease rights in others. For a perspective on the industry attitude, see Ernest, *Topleasing—Legality v. Morality*, 26 ROCKY MTN. MIN. L. INST. 957 (1980).

3. *See* Brown, *Effect of Top Leases: Obstruction of Title and Related Considerations*, 30 BAYLOR L. REV. 213, 242 (1978).

4. *Id.* at 242 n.253.

or "same-party" top lease, the same lessee (or his successor in title) secures a second lease from the same lessor (or his successor in title) covering all or part of the same interest, prior to the expiration of the first lease. Used in this fashion, top leasing functions as one of several devices available to an operator to preserve leasehold rights in a situation where, for example, he is doubtful about the validity of a former lease or his ability to preserve that lease in the face of impending expiration. The legal effect of primary concern to the operator in a "two-party" top lease situation is novation. In the second situation, generally referred to as the "third-party" top lease, the original lessor (or his successor in title) executes a subsequent lease in favor of a lessee who is a title stranger to the first lessee. The legal effect of primary concern in the "third-party" top lease situation is obstruction of title, usually commencing with the disturbance in law of the possession of the first lessee.

The practice of top leasing is neither proscribed by the Louisiana Mineral Code nor regarded as invalid in the jurisprudence of this state. As a legal right, the top lease exists at its inception as a mere hope or expectancy in the extinction of existing superior leasehold rights, which extinction will confer upon the top lease owner the essence of a mineral lease, *i.e.*, the right to explore for and produce minerals. As such, "the top lease is analogous to the situation in which a landowner who has already sold minerals attempts to convey his reversionary right to the outstanding minerals."[5] Unlike the top lease, however, under the Louisiana law, the reversionary right is not an object of commerce.[6] This anomaly appears justified by the manner in which the conveying of these oil and gas interests accords with the civilian policy that encumbrances not keep immovables from commerce for long periods of time, a policy grounded in title simplicity and security in transfers of land (or mineral rights therein).[7] Sale of the reversionary right would introduce into mineral titles an entirely new interest apart from the outstanding mineral interest, permitting a landowner to circumvent the public policy of this state that, in the absence of use, the right to explore for oil, gas, and other minerals revert to the landowner after a period of ten years. Furthermore, if frequently transferred and divided, such an interest would severely

5. Comment, *The Top Lease and the Reversionary Right in the Louisiana Law of Oil and Gas*, 18 LA. L. REV. 300, 301 (1958).

6. *See* LA. MIN. CODE: LA. R.S. 31:76 & 31:104 (1974); Hicks v. Clark, 225 La. 133, 72 So. 2d 322 (1954).

7. This policy is expressed by the Louisiana Mineral Code in articles 27 (mineral servitude), 85 (mineral royalty), and 115 (mineral lease). *See* Comment, *supra* note 5, at 311-12.

complicate mineral titles. While a top lease complicates mineral titles to some degree, safeguards inherent in the nature of the interest conferred by top lease, as opposed to the interest conferred by reversionary right, preclude severe disruption of title. Once the drilling rights vest, the top lease carries with it many operating responsibilities which must be performed in order to preserve the leasehold interest over the stipulated term.[8] Thus this interest is far less likely to be the subject of numerous transfers by speculators, and the property can not be taken out of commerce for an extensive period of time without exercise of the exploration and development rights conferred in the lease.

SAME-PARTY TOP LEASE: NOVATION

In *Placid Oil Company v. Taylor*,[9] the Louisiana Third Circuit Court of Appeal ruled that an oil, gas, and mineral lease entered into by a lessor as to mineral rights subject to two prior leases granted by his predecessors in title to the same lessee effected a novation of the prior leases, extinguishing those leases as to the affected mineral interest and substituting the latest lease in their place. The top lease was granted for a royalty of twice that of the original, or bottom, leases and included previously unleased mineral rights acquired by the lessor in the lands affected by the bottom leases. The top lease contained no provision regarding its effect upon the former leases granted by the lessor's predecessors in title.

Novation is the conventional transformation of an existing obligation into another obligation which is substituted in its place.[10] Novation may be express or tacit, but it is not presumed. Accordingly, the determining factor in establishing novation—the intent of the parties—cannot result from equivocal acts susceptible of construction for or against novation, but must readily appear from examining the character of the transaction, the facts and circumstances surrounding it, or the terms of the agreement itself.[11] In finding the requisite intent to novate, two major considerations of the court of appeal in *Placid* were the absence of specific reference in the top lease to the existence of the prior leases affecting the same property, particularly in light of the substantial increase in the royalty payable to the lessor

8. Consider, for example, the offset well obligation, the drilling or production obligation in the secondary term, and the implied obligations of exploration and development.

9. 325 So. 2d 313 (La. App. 3d Cir. 1975), *writ denied*, 329 So. 2d 455 (La. 1976).

10. LA. CIV. CODE art. 2185.

11. LA. CIV. CODE art. 2190; Placid Oil Co. v. Taylor, 325 So. 2d at 316.

under the top lease,[12] and an appropriate motive of the parties to support the intent to novate—the inclusion in the top lease of an additional fractional mineral interest not covered by the earlier leases.[13]

Curiously, no mention is made in *Placid* of *Stacy v. Midstates Oil Corp.*,[14] an earlier Louisiana Supreme Court decision involving a "same-party" top lease. At issue in *Stacy* was whether the same lessee's taking of top leases in 1937 covering a portion of the lands affected by a prior existing lease taken in 1919 evidenced an intent on the part of the lessee to effect a novation of the prior lease. Although there was an express provision in the top leases stipulating that they superseded the preexisting leasehold contracts affecting the leased property, the court deemed such recital in the top leases insufficient, of itself, to support an intent to abandon the bottom lease. Each top lease contained the following provision: "21. This lease shall supersede the present oil and gas leasehold contracts of The Ohio Oil Company affecting the above described lands . . . ."[15] No mention is made in the reported opinion of any additional consideration delivered to the lessors under the top lease as evidence of their intent to abandon the bottom lease. The court noted that the only evidence introduced to reflect the intent to abandon the bottom lease as to the "topped" acreage was the above quoted provision in each lease which was deemed insufficient, standing alone, to support the intent to abandon. The court stated:

Nor do we consider the taking of the top leases as being entirely

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12. It is inconceivable, we think, that the parties would omit a reference to the 1964 leases, if they actually intended that the lessee was to pay only a one-eighth royalty on the production from the Watson and Pap C. Taylor mineral interests instead of the *one-fourth* royalty provided in the 1965 lease covering the same interests.

325 So. 2d at 317.

13. When the court of appeal first heard the case, it applied the literal language of Louisiana Civil Code article 2190 and reached the opposite result, concluding that novation could not be presumed by the mere execution of a top lease which did not by express provision indicate an intent to extinguish the bottom leases or to substitute in their place a new lease of those interests with a higher royalty. *See* Placid Oil Co. v. Taylor, 313 So. 2d 626, 629 (La. App. 3d Cir.), *denial of rehearing vacated and matter remanded*, 318 So. 2d 40 (La. 1975). On remand from the Louisiana Supreme Court, the court of appeal, citing French doctrinal sources, gave broader application to article 2190, noting that the intent to novate may be shown by the nature of the contract made and by the external circumstances of the transaction, as well as by the agreement itself. *See* 325 So. 2d at 316. *See generally* 6 C. AUBRY & C. RAU, DROIT CIVIL FRANCAIS § 324 (6th ed. Bartin 1942) in A. YIANNOPOULOS, 1 CIVIL LAW TRANSLATIONS 228 (1965).

14. 214 La. 173, 36 So. 2d 714 (1947).

15. 214 La. at 185, 36 So. 2d at 718 (quoting from the terms of the top leases).

> inconsistent with the continued existence of the original lease. It is a matter of common knowledge that lessees often take top leases when they are doubtful about the validity of a former lease, without intending to impeach the title of a former lessor, or to surrender their rights under any former lease which may turn out to be valid.[16]

The court remanded the case to receive further evidence on whether the lessee, by taking the top leases, had abandoned all rights under the original lease. However, affirming exceptions of no cause and no right of action on rehearing, the court pretermitted further resolution of the novation issue. The statements of the supreme court in *Stacy* are difficult to reconcile with the reasoning of the court of appeal in *Placid.* Perhaps the *Placid* court, when establishing the intent to novate the prior leases, placed undue significance on the inclusion in the top lease of the formerly unleased mineral interest. Notably, however, the top lease in *Placid* was taken only eleven months after the commencement of the term of the bottom lease, and there was little evidence in the record to suggest that the top lease was taken out of concern over the validity or impending expiration of the bottom lease. Nonetheless, the supreme court denied certiorari in *Placid,* reflecting its approval of the result reached by the lower court.

After *Stacy* and *Placid,* it appears clear that the mere execution of a top lease in favor of the same lessee will not of itself result in novation under Louisiana law and the language of the instrument itself is but one of several factors to consider in finding an intent to novate, unless, of course, the novation of the original lease agreement is expressly stipulated in clear and unmistakable terms. If the common purpose of top leasing in the situation is protection,[17] the mere execution of a top lease, silent as to its effect on the existing lease, should not result in the extinction of the original lease by novation.[18] It is certainly unreasonable in such event to assume the lessee's intent to abandon a bottom lease generally carrying a greater net revenue in-

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16. 214 La. at 186, 36 So. 2d at 718.

17. Top leasing is commonly used to preserve a lessee's acreage position in a prospect near the end of the primary term of the bottom lease, often in the face of pending drilling operations or compulsory unitization proceedings affecting the leased tract or offsetting acreage and often at the expense of a substantially increased lease royalty burden.

18. *See* LA. CIV. CODE art. 21: "In all civil matters, where there is no express law, the judge is bound to proceed and decide according to equity. To decide equitably, an appeal is to be made to natural law and reason, or received usages, where positive law is silent."

terest to him when such lease might on the occurrence of an uncertain event be maintained in whole or part beyond its primary term.[19] Nonetheless, it is logical to assume that the lessor intends a substitution of leases in such circumstances, unless the limitation of the effect of the top lease is expressly stipulated, since the lessor usually has far less to gain by the granting of such an "insurance" lease. *Placid* suggests that the better policy would place the burden of clarifying the nature and intent of the transaction on the lessee, who negotiates and usually drafts the top lease agreement, with the inference favoring novation when the agreements are silent. In light of this inference, operators using the top lease in this fashion should proceed with caution.

A collateral novation problem is also frequently encountered with the "same-party" top lease. Often a top lease is taken not by the original lessee but by another operator in privity of contract with the original lessee either by assignment, sublease, or pursuant to the terms of a farm-out or joint venture agreement. In order for novation to operate on the original lease in such circumstances, the novation must take place in two steps: (1) a new debtor is substituted for the old debtor through a transfer of interest in the bottom lease, with the consent and approval of the creditor, and (2) the substitute debtor contracts a new debt (top lease) to his creditor, which new debt is substituted for the old one, which is extinguished.[20] Under article 128 of the Louisiana Mineral Code, to the extent of the interest acquired, an assignee or sublessee acquires the rights and powers of the lessee and becomes responsible directly to the original lessor for the performance of the lessee's obligations. Therefore, a form of novation may result from the substitution of a new debtor (*i.e.*, the assignee or sublessee) by such assignment or sublease when the creditor (*i.e.*, the lessor) consents thereto.[21] This kind of novation can occur with the consent of the lessor to the delegation by the assignor[22] or even

19. *See* Brown, *supra* note 3, at 237.

20. LA. CIV. CODE art. 2189.

21. Difficulties are presented, however, in the absence of an assignment or sublease, when there exist in the lessee taking the top lease only operating rights under a farm-out agreement entitling such lessee to earn an assignment or sublease after successfully complying with certain drilling obligations. With no contractual obligations flowing directly from such lessee to the lessor under the bottom lease agreement, there can be no novation of the lease.

22. LA. CIV. CODE art. 2192 provides: "The delegation, by which a debtor gives to the creditor another debtor who obliges himself towards such creditor, does not operate a novation, unless the creditor has expressly declared that he intends to discharge his debtor who has made the delegation."

without the concurrence of the assignor (*i.e.*, the original or former debtor),[23] provided in all cases it proceeds from the lessor's discharge of the original lessee from the assigned obligations under the bottom lease.[24]

Difficult legal questions arise when a sublessee owns, as is often the case, full operating rights in the bottom lease, but subject to an overriding royalty interest reserved by his sublessor which is convertible at a subsequent point in time to a working interest in the bottom lease. Can the sublessee under such circumstances effect a novation of the original lease by his unilateral execution of a top lease agreement with the original lessor? If article 128 of the Louisiana Mineral Code permits a sublessee to release the base lease in full to the original lessor and thereby extinguish the rights of his sublessor, it certainly follows that a sublessee can effect a novation of the original lease by the execution of a top lease.[25] Further, articles 2189, 2191, and 2192 of the Louisiana Civil Code support the proposition that if the original lessee assigns his full operating rights under the lease retaining only a passive interest in production therefrom, a sublessee holding such operating rights can operate, with the consent and approval of the original lessor to the lease, a kind of expromission (*i.e.*, a substitution of debtors to the obligations of the lessee) and novation of the original lease which would not require concurrence of the original lessee.

THIRD-PARTY TOP LEASE: OBSTRUCTION OF TITLE

A mineral lessor is bound to deliver the leased premises for use by the lessee and to refrain from interference with his lessee's possession.[26] The mineral lessor may breach his covenant of peaceful possession and obstruct the operations of his lessee by his unequivocal (and unwarranted) repudiation of the lease or his challenge to the exercise of his lessee's lawful operating rights thereunder. Such repudiation may take the form of physical acts of interference with the lessee's operations on the premises, a formal declaration by the

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23. This latter substitution of lessees is recognized by Civil Code article 2191 and embodies a kind of subjective novation known in French and Roman law as expromission. *See generally* 6 C. AUBRY & C. RAU, *supra* note 13, § 324, in A. YIANNOPOULOS, at 229.

24. *See* LA. MIN. CODE: LA. R.S. 31:129 (1974).

25. It is not clear, however, that article 128 of the Louisiana Mineral Code empowers a sublessee to act in this manner. *See* Plauche, *The Impact of the Louisiana Mineral Code on Oil, Gas and Mineral Leases* (pt. 1), 22 INST. ON MIN. L. 107, 114-17 (1975).

26. LA. MIN. CODE: LA. R.S. 31:119 (1974)

lessor of the termination of the lease and a demand for release of same, or, in certain circumstances, the granting to a third party of a top lease which purports to be presently effective. When such obstruction of title occurs and causes a failure on the part of the lessee to comply with the terms of the lease, the lessee generally is not forced to suffer the loss of the lease as a result of the hindrance; instead, he is granted an extension of time in which to comply with his obligations.[27] The effects of obstruction of title vary from jurisdiction to jurisdiction. Some jurisdictions, including Louisiana,[28] hold that the obstruction serves to toll the lease term, thereby allowing the lessee an extension for the period of time which was remaining under the original lease term when the obstruction came into existence. Other jurisdictions allow the lessee, once the obstruction is removed, such additional period of time as is reasonable under the circumstances.[29]

Among common law jurisdictions, there appears to be a divergence of views regarding the extent to which top leasing constitutes an obstruction of the existing lessee's title. A lessor's granting of a top lease, for example, has been held to constitute an election to declare the existing lease at an end, thereby clouding the title of the original lessee and obstructing such lessee's exercise of his leasehold rights.[30] Another view affirms the right of the landowner to execute an oil and gas lease covering land that is already subject to an unexpired prior lease without repudiating the title of the original lessee. The latter view recognizes that if the first lease is valid and binding, the subsequent lessee cannot interfere with operations thereunder until the prior lease is terminated.[31] Often the matter is resolved by the use of limiting language in the top lease (*e.g.*, "subject to" the prior

27. In Williams v. James, 188 La. 884, 178 So. 384 (1938), the Louisiana Supreme Court stated:

> There is no reason why the lessor should be allowed to deprive the lessee of a part of the term of his lease by withholding possession of the leased premises without just cause. It has been decided, with regard to oil and gas leases, that, if the lessee is prevented by a lawsuit from beginning operations within the time stipulated, he is entitled to an extension for the time of such hindrance, if he is successful in the lawsuit.

188 La. at 891, 178 So. at 386.

28. *See* Baker v. Potter, 233 La. 274, 65 So. 2d 598 (1952); Knight v. Blackwell Oil & Gas Co., 197 La. 237, 1 So. 2d 89 (1941); Fomby v. Columbia County Dev. Co., 155 La. 705, 99 So. 537 (1924).

29. *See* Ernest, *supra* note 2, at 964-65, and authorities cited therein.

30. Simons v. McDaniel, 154 Okla. 168, 7 P.2d 419 (1932).

31. *See* Jennings v. Elliott, 186 Okla. 285, 97 P.2d 67 (1939).

lease) that operates to negate an intention in the lessor to repudiate title to the bottom lease.[32]

As noted by one author, "[t]he essence of the doctrine [of obstruction of title] . . . is that a lessor by his actions has unequivocally declared a particular lease to be terminated so that the lessee cannot reasonably be expected to take any further steps to develop the mineral estate or continue production."[33] One might reasonably conclude that the execution by a lessor of a top lease purporting to be presently effective and warranting title thereto represents by implication a declaration by the lessor that the existing lease is at an end. However, when such a top lease is granted without the knowledge of the lessee under the existing lease, no operating right or interest is openly asserted thereunder, and the top lease is not recorded until after the first lease has expired, the top lease generally is not regarded as an obstruction to the continuing operations of the lessee under the bottom lease.[34] Moreover, some jurisdictions place the burden upon the lessee of the bottom lease to prove actual notice of the existence of the top lease and detrimental reliance thereon in suspending operations.[35]

An early Louisiana Supreme Court decision, *Standard Oil Co. v. Webb*,[36] recognized that a lessor has no power to prejudice the rights of his lessee by conveying those rights to a third party, noting that a lessor has nothing to sell save an interest contingent upon the failure of the parties to the earlier recorded lease to comply with their respective obligations. If the prior recorded lease is valid and subsisting, the subsequent lessee is precluded from unlawfully interfering with the rights of the original lessee. Furthermore, Louisiana procedural law permits the owner of the bottom lease, without the concurrence, joinder, or consent of the owner of the land, to assert, protect, and defend his leasehold rights in the same manner as one would assert, protect, and defend the ownership or possession of other immovable property.[37] Thus, in order to be maintained in his possession of the leased premises and his enjoyment of his leasehold operating rights when he has been disturbed in the exercise thereof or in order to be restored to the possession or enjoyment thereof when he has been

32. For a general review of the common law authorities, see Brown, *supra* note 3, at 215-31.

33. Brown, *supra* note 3, at 215-16.

34. Ernest, *supra* note 2, at 963.

35. *See* Atlantic Richfield Co. v. Hilton, 437 S.W.2d 347 (Tex. Civ. App. 1969).

36. 149 La. 245, 88 So. 808 (1921).

37. LA. CODE CIV. P. art. 3664 & comment.

evicted, the bottom lessee is entitled to maintain a possessory action provided he allege and prove, among other things, a disturbance of his possession either in fact or in law.[38] Under article 3659 of the Louisiana Code of Civil Procedure, a disturbance in fact requires an eviction or any other physical act which prevents the possessor of the mineral lease from enjoying his possession quietly or which throws any obstacle in the way of his enjoyment. A disturbance in law is the execution, recordation, registry, *or* continuing existence of record of any instrument which asserts or implies a right of ownership or right to possession of immovable property or a real right (*e.g.*, a mineral lease) or which asserts or implies any claim or pretension of ownership or right to the possession thereof (*e.g.*, a top lease which purports to be presently effective) except in an action or proceeding adversely to the possessor of such property or right.

Although the foregoing indicates that the simple execution and recording of a top lease is a disturbance in law of the possession of the leasehold estate of the bottom lessee, this disturbance does not automatically create an obstruction of title in the sense heretofore discussed. Indeed much of the Louisiana jurisprudence on obstruction of title suggests that something more is required either by the disturbance *in fact* of the quiet and peaceful possession of the lessee by actual eviction by the original lessor by obstructing access or use rights under the prior lease, by formal declaration to the lessee that the former lease is deemed terminated and the institution of litigation thereon, or by actual trespass by operation of the top lessee on the premises.[39] Whether the mere execution and recordation of a top lease, standing alone, constitutes an obstruction of title such as to suspend the obligations of the lessee under the bottom lease is not specifically addressed in any reported Louisiana decision. However, the jurisprudence clearly indicates that the disturbance in law of the possession of the bottom lessee resulting from the execution and recordation of a top lease is not sufficient to strip the right of possession of such lessee, since to interrupt such right of possession, the disturbance must bring home to the actual possessor the realization that his dominion is being seriously challenged.[40] Thus, judicial application of obstruction of title theory to "third-party" top leasing

38. LA. CODE CIV. P. art. 3658.

39. *See* Baker v. Potter, 223 La. 274, 65 So. 2d 598 (1952); Standard Oil Co. v. Webb, 149 La. 245, 88 So. 808 (1921); Leonard v. Busch-Everett Co., 139 La. 1099, 72 So. 749 (1916). *But see* Perkins v. Long-Bell Petroleum Co., 227 La. 1044, 81 So. 2d 389 (1955).

40. *See* Pitre v. Tenneco Oil Co., 385 So. 2d 840 (La. App. 1st Cir. 1980); Chauvin v. Kirchhoff, 194 So. 2d 805 (La. App. 1st Cir. 1967).

should turn on a case by case basis, looking to such factors as actual notice to the bottom lessee of the existence of the conflicting top lease and the extent to which the actions or assertions of the original lessor and top lessee with respect to the preexisting lease might reasonably be expected to deter the bottom lessee in the conduct of his subsequent operations on the lease.

CONCLUSION

Top leasing can provide protection to an existing lessee when faced with possible extinction of his lease rights near the end of the primary term. Top leasing also can provide a competitor the opportunity to gain an acreage position in a tightly-leased prospect upon the termination of an existing leasehold. In either case, some undesired legal consequences may follow from the standpoint of the top lessee (and his lessor) unless appropriate caution is exercised.

If a "same-party" top lease is involved, an operator should consider the possibility of novation, with the concomitant extinction of his preexisting leasehold contracts. Where appropriate, the operator should act to avoid this consequence by inserting in his top lease express provisions recognizing the prior lease and acknowledging that the top lease is taken subject and subordinate to all subsisting rights and obligations of lessor and lessee under the bottom lease.

From the standpoint of the lessor, the granting of a "third-party" top lease can result in his liability to a bottom lessee for breach of the covenant of peaceful possession[41] (whether the disturbance be one in law or in fact) when the top lease purports to be presently effective and does not properly recognize the superior rights of the existing lessee. The top lease also may establish an obstruction of title to the operating rights of the bottom lessee which could suspend or toll the existing lease term until the obstruction is removed. From the standpoint of the top lessee, the execution and recording of a top lease purporting to be presently effective creates a disturbance in law entitling the bottom lessee to a possessory action to remove the disturbance and provides the framework for obstruction of title to be interposed as a defense to an action seeking cancellation of the bottom lease (for the bottom lessee's failure to continue operation). To preclude such exposure and the resulting cloud on the title to the lease rights at the expiration of the bottom lease, a top lessee (and his lessor) should consider including language in the top lease acknowledging that the lease is granted subject to the prior existing lease and that the

41. LA. MIN. CODE: LA. R.S. 31:120 (1974).

top lessee shall not interfere with the existing lease or exercise any rights of entry, use, or possession until the existing lease has expired by its terms.[42] Furthermore, the top lessee should secure from his lessor a convenant that he shall execute no agreements to renew or extend the terms of the prior existing lease.

The hostile attitude of the oil industry in the past toward the practice of "third-party" top leasing has by no means wholly abated, and an operator would still be wise to consider the practical effects of a decision to top lease on future business dealings with the bottom lessee. The moderation in the oil and gas operator's perspective on top leasing, however, has been an inevitable consequence of today's highly competitive oil and gas market in which top leasing, if properly and cautiously used, can be an invaluable and often essential exploration tool.

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42. For suggested language and alternative conveyancing techniques, see Ernest, *supra* note 2, at 972-80.