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# Del-Ray Oil & Gas, Inc. v. Henderson Petroleum Corp.: Warranty Owed by Assignors and Sublessors of Mineral Interests

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*Del-Ray Oil & Gas, Inc. v. Henderson Petroleum Corp.:*  
Warranty Owed by Assignors and Sublessors of Mineral  
Interests

In Louisiana, a well established distinction exists between an assignment and a sublease of a mineral lease. An assignment, which involves a transfer of all rights in a lease, is treated as an ordinary sale governed by the Civil Code articles on sales, while a sublease, which results when the transferor retains some interest in the lease, is treated as an ordinary mineral lease governed by the Mineral Code and the Civil Code articles on lease.<sup>1</sup> In *Del-Ray Oil & Gas, Inc. v. Henderson Petroleum Corp.*,<sup>2</sup> the United States Fifth Circuit Court of Appeal was recently faced with determining what effect this distinction has on the warranty owed by an assignor and that owed by a sublessor as the result of a transfer of mineral interests.<sup>3</sup>

Henderson Petroleum purchased a forty-nine percent interest in a mineral lease from each Del-Ray Oil and Krutzer, and the remaining two percent interest from Latour. This suit arose when Henderson learned that the landowner, who assumed that the lease had expired, had negotiated a new lease with a third party. Henderson settled with both Del-Ray Oil and the third party lessee, and proceeded against Krutzer and Latour charging breach of warranty.

The court held that Krutzer's transfer was a sublease, as Krutzer had reserved a "one-sixteenth working interest in the property,"<sup>4</sup> and that Latour's transfer was an assignment, since Latour had conveyed all of his interest to Henderson. As an assignment, Latour's transfer was held to be subject to the warranty provisions of the Louisiana Civil Code articles pertaining to sales. Conversely, the court found that Krutzer's sublease was "subject to article 120 of the Mineral Code, which allows mineral lessors to exclude warranty of title, rather than the

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1. *Broussard v. Hassie Hunt Trust*, 231 La. 474, 91 So. 2d 762 (1956); *Tomlinson v. Thurmon*, 189 La. 959, 181 So. 458 (1938).

2. 797 F.2d 1313 (5th Cir. 1986).

3. Also at issue was whether the lease had expired or whether certain work performed on the land constituted reworking operations which would have continued the existence of the lease. If the lease had expired, then the warranty issue would also have had to have been determined on remand.

4. Since only a "working interest" was retained, as opposed to an overriding royalty, the transfer may not have been a sublease; however, neither party questioned this. See *Broussard*, 231 La. at 481-82, 91 So. 2d at 764-65; 8 H. Williams & J. Meyers, *Oil and Gas Law* 838 (Matthew Bender 1981).

conflicting articles of the Civil Code" which apply to an assignment.<sup>5</sup> The court then remanded the case to the district court with instructions to apply the appropriate codal authority.

This note will discuss the warranties owed by an assignor to an assignee and by a sublessor to a sublessee, including any differences between the two, and will raise certain material questions that should have been asked by the court in *Del-Ray Oil*.

### *Warranty Owed by an Assignor Under the Civil Code*

The Louisiana Mineral Code provides specifically for agreements in which a lease or sublease of mineral interests is created, but does not address the assignment of mineral interests.<sup>6</sup> It has long been decided that since the assignor retains no interest in an assignment of either a corporeal or an incorporeal,<sup>7</sup> the assignor is treated as an ordinary vendor.<sup>8</sup> The court in *Del-Ray Oil* looked to the Civil Code to determine what warranty this vendor, Latour, owed, but failed to recognize that this warranty was practically the same as that owed by lessors and sublessors under the Mineral Code. Two warranties imposed by the Civil Code on vendors are the warranty against eviction and the warranty of the existence of the incorporeal assigned.<sup>9</sup>

### *Warranty Against Eviction*

The warranty against eviction guarantees the purchaser's "peaceable possession,"<sup>10</sup> unless excluded by agreement of the parties. In *Del-Ray Oil*, the landowner's creation of a new lease disturbed Henderson's peaceable possession, but recovery for eviction was not automatic, since in Latour's assignment to Henderson the parties had stipulated that the transfer was being made "without warranty either express or implied."<sup>11</sup> Inclusion of this stipulation necessitated application of Civil Code article 2505. Article 2505 provides: "Even in case of stipulation of no warranty, the seller, in case of eviction, is liable to a restitution of the price, *unless* the buyer was aware, at the time of the sale, of the danger of the eviction, and purchased at his peril and risk."<sup>12</sup>

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5. *Del-Ray Oil*, 797 F.2d at 1317 (emphasis added).

6. La. R.S. 31:120 (1975).

7. *Tomlinson*, 189 La. at 961, 181 So. at 460.

8. *Id.* at 962, 181 So. at 460.

9. La. Civ. Code art. 2476 sets out the warranties owed by the seller. La. Civ. Code arts. 2500-2519 pertain to the warranty against eviction in particular. La. Civ. Code art. 2646 addresses the warranty of the existence of incorporeals.

10. La. Civ. Code art. 2476.

11. *Del-Ray Oil*, 797 F.2d at 1317.

12. La. Civ. Code art. 2505 (emphasis added).

The prevailing interpretation of article 2505 was established long ago by the Louisiana Supreme Court in *New Orleans & Carrollton Railroad Co. v. Jourdain's Heirs*.<sup>13</sup> The court interpreted article 2505 as providing for two types of warranty stipulations. Under the first type of stipulation, the parties exclude warranty by an express clause in their agreement, but they do not intend that the warranty against eviction be excluded, and the purchaser has no knowledge of the danger of eviction. If the purchaser is later evicted, this type of clause frees the seller from damages, but the purchase price must be returned.<sup>14</sup> In the second type of stipulation, the purchaser buys expressly "at his peril and risk," and no restitution of purchase price is required upon eviction.<sup>15</sup> Therefore, under *Jourdain*, for a purchaser to buy "at his peril and risk," there must be either a clause expressly excluding warranty, along with "actual knowledge"<sup>16</sup> of the danger of eviction, or simply an express stipulation that the sale is made "at purchaser's peril and risk." This interpretation of the "unless clause" in article 2505 creates two separate tests, either of which when satisfied makes the transfer at the assignee's "peril and risk," because the court construed the conjunctive "and" in article 2505 as the disjunctive "or."<sup>17</sup> This interpretation is consistent with the Code Napoleon provision from which article 2505 was derived.<sup>18</sup>

Further jurisprudential interpretation of article 2505 has permitted the same results as from an express stipulation of "at purchaser's peril and risk" to be achieved by inclusion of quitclaim terminology in the contract of sale.<sup>19</sup> *Waterman v. Tidewater Associated Oil Co.*<sup>20</sup> held that, to determine if a transfer is a quitclaim deed, the language of the agreement must be considered to ascertain whether it was the parties' intent to convey "only the right, title and interest of the vendor."<sup>21</sup> As under *Jourdain*, the intent of the parties must be determined before the correct interpretation can be given to the agreement. *Jourdain* and

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13. 34 La. Ann. 648 (1882).

14. *Jourdain*, 34 La. Ann. at 650.

15. *Id.* at 650-51.

16. *Id.* at 652 ("[actual knowledge] which must be brought home to him by direct proof, or by implication from references to, or proof of, collateral facts, so strong to be the equivalent thereto").

17. *Id.* at 650.

18. French C. Civ. art. 1629 provides: "Even in case of stipulation of no warranty, the seller, in case of eviction, is liable to a restitution of the price, unless the buyer was aware, at the time of the sale, of the danger of eviction, or purchased at his peril and risk." (emphasis added).

19. *Waterman v. Tidewater Associated Oil Co.*, 213 La. 588, 35 So. 2d 225 (1947); *Butler v. Bazemore*, 303 F.2d 189 (5th Cir. 1962).

20. 213 La. 588, 35 So. 2d 225 (1947).

21. *Id.* at 602, 35 So. 2d at 230.

*Waterman* should give guidance in the application of article 2505 to an assignment of a mineral lease. They suggest that one should look at the knowledge and intent of the parties, as well as the wording of their agreement.

In the agreement under which Latour transferred his interest to Henderson, the parties stipulated that the transfer was being made " 'without warranty either express or implied.' " <sup>22</sup> In analyzing this stipulation, the court emphasized the importance of determining whether Henderson had actual knowledge at the time of the transfer of the danger of eviction, and remanded the case for such a determination. The court dismissed the need for any further analysis of whether the wording of the stipulation supported a waiver of the warranty of eviction, on the grounds that prior jurisprudence found similar language not to have been the equivalent of a quitclaim deed. <sup>23</sup> This was the extent of the court's analysis of the remedy afforded by article 2505. Despite *Jourdain* and *Waterman*, the court failed to suggest that on remand the lower court should evaluate the intent of the parties in including the warranty stipulation. Moreover, by simply relying on an analysis of similar language in a different agreement which was the subject of dispute in an entirely different case, the court illustrated that the intent of the parties was not at all a consideration in its resolution of the warranty issue, for intent is a unique element in every contract, and can only be uncovered through independent analysis of the agreement at hand. With all due respect, for the court neither to engage in such an independent analysis, nor to require the lower court to do so on remand, was error in light of the Louisiana jurisprudence.

Louisiana courts have experience in applying an analysis similar to that delineated by *Jourdain* and *Waterman* in determining whether an agreement is a "compromise," as provided for in article 3071 of the Civil Code. Those courts have consistently held that the agreement need not expressly state that it is a compromise, if the required intent of the parties reciprocally to make concessions to end or prevent a lawsuit is expressed in the agreement. <sup>24</sup> Because the outcome of the lawsuit is undetermined, the parties are uncertain as to what they are transferring (i.e., what right they may be giving up), but each side's hope of gaining is balanced by its fear of losing. This is analogous to the assignment of a mineral lease by which the assignor transfers what interest he owns and neither party has any intent that the transfer be warranted. In either

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22. *Del-Ray Oil*, 797 F.2d at 1317.

23. *Id.* at 1318. The court cited *Sabine Prod. Co. v. Guaranty Bank & Trust Co.*, 432 So. 2d 1047, 1052-53 (La. App. 1st Cir. 1983).

24. *Gaylor v. Copes*, 16 F. 49 (E.D. La. 1883); *Karl Hansen Co. v. Beekman*, 16 La. App. 112, 132 So. 799 (1931); *Eaglin v. Southern Kraft Corp.*, 200 So. 63 (La. App. 2d Cir. 1941).

situation it is the intent, as expressed in the agreement, that determines what meaning is given to the agreement. A similar analysis is also used in determining whether an agreement is a sale of a hope under Civil Code article 2451.<sup>25</sup>

### *Warranty of Existence*

In evaluating Henderson's rights against Latour, the court in *Del-Ray Oil* also addressed the additional complication created by Civil Code article 2646, which provides for the warranty of existence that applies to the sale of an incorporeal right. In the end, however, the court left the decision of its applicability to the lower court.<sup>26</sup> The court was uncertain as to whether this warranty was operative, simply because, under a literal reading of 2646, the article would not have applied to the *Del-Ray Oil* facts. Article 2646 provides: "He who sells a credit or an incorporeal right, warrants its existence at the time of the transfer *though no warranty be mentioned in the deed.*"<sup>27</sup> Since it is unclear whether article 2646 was intended to create an implied warranty of existence only if warranty was not mentioned, or rather whether or not warranty was mentioned, it is helpful to look to the history of article 2646 and to how the courts have previously applied the article.

According to Planiol, under French law a seller warrants the existence of an incorporeal right at the time of the transfer; however, this warranty can be modified or excluded in the same manner as allowed by the Louisiana Civil Code with respect to the implied warranty against eviction.<sup>28</sup>

The Louisiana Supreme Court has consistently held that both the warranty against eviction and the warranty of existence apply to the sale of an incorporeal.<sup>29</sup> The court in *Del-Ray Oil* mentioned the correct translation of the original Code Napoleon article which provides for the warranty of existence *even though* "it be made without warranty," referring to the agreement itself, rather than "though no warranty be

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25. La. Civ. Code art. 2451 provides for the sale of an "uncertain hope." The supreme court in *Jourdain* recognized the sale of an "uncertain hope" as a means of contracting at the purchaser's "peril and risk." 34 La. Ann. 651 (1882); see also *St. Martin Land Co. v. Pinckney*, 212 La. 605, 33 So. 2d 169 (1947) (sale of a mineral royalty is a sale of an uncertain hope).

26. *Del-Ray Oil*, 797 F.2d at 1318-19.

27. La. Civ. Code art. 2646 (emphasis added).

28. 2 M. Planiol §§ 1629, 1632, at 904, 905 (11th ed. 1959); *Jourdain*, 34 La. Ann. at 650.

29. *Corcoran v. Riddell*, 7 La. Ann. 268 (1852); *Tomlinson*, 189 La. 959, 181 So. 458.

mentioned in the deed," as appears in our present article 2646.<sup>30</sup> This correct translation, along with Planiol's comments would suggest that article 2646 creates an implied warranty of existence, whether warranty is mentioned or not, which can be excluded in the same manner as the warranty against eviction. This is the logical meaning of article 2646; however, the courts have not always applied the article in this manner.

In *Lemoine v. City of Shreveport*,<sup>31</sup> the Louisiana Supreme Court held that in a transfer of paving certificates, without recourse, article 2646 did not apply *since warranty was mentioned* in the agreement; the court applied article 2505 instead. Thus the court, due to the illogical result produced from a literal reading of article 2646, used article 2505 to define the warranty of the existence of incorporeals that was intended to be defined by article 2646. Nevertheless, the court reached a logical and fair result despite the ambiguous language of article 2646 by using the "unless" clause in article 2505 to determine whether restitution of the purchase price was appropriate.

Similarly, in the early Louisiana Supreme Court case of *Jenkins v. Parish of Caddo*,<sup>32</sup> the court resorted to the "principle" of the rule of article 2505, to determine whether the purchase of an incorporeal "without recourse" was made at the purchaser's "peril and risk." Although the court did not, as in *Lemoine*, find that the inclusion of warranty language precluded application of the warranty of existence, it resolved the issue, as in *Lemoine*, according to the standards employed under the analysis used with respect to the warranty against eviction.<sup>33</sup>

The confusion that exists in the jurisprudence is unsatisfactory.<sup>34</sup> The most sensible approach is that the warranty of existence applies even when the parties have made a reference to warranty in their agreement, and that the critical determination is what the parties intended by that reference. This determination should involve consideration of the same factors as those resorted to in the analysis under the warranty against eviction. Ultimately, the problem is not with the results achieved by the courts, but with the lack of a sensible and straightforward approach.

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30. *Del-Ray Oil*, 797 F.2d at 1318. See also French C. Civ. art. 1693 (1976) ("even though it be made without guaranty") and La. Civ. Code art. 2646 (history of article mentions translation error).

31. 184 La. 221, 165 So. 873 (1936).

32. 7 La. Ann. 559, 561 (1852).

33. *Id.* at 561.

34. See *Jenkins*, 7 La. Ann. at 561 (The transfer was made without recourse; however, the court held that the parties had not agreed to exclude the warranty of existence.); *Corcoran*, 7 La. Ann. at 269 (The court held that even though the transfer was made without recourse, the incorporeal right must be in existence.); Note, Mines and Minerals—Oil and Gas—Assignment of Lease—Warranty Against Eviction—Article 2505, Louisiana Civil Code of 1870, 13 Tul. L. Rev. 471 (1938-39).

*Warranty Owed by a Sublessor Under the Mineral Code*

In analyzing the warranty issues concerning Krutzer's sublease, the court in *Del-Ray Oil* correctly stated: "The provisions in the Louisiana Mineral Code that control the rights and obligations of lessors and lessees of mineral rights also control the rights and obligations of sublessors and sublessees of mineral rights."<sup>35</sup> Thus, the court found article 120 of the Louisiana Mineral Code, which allows a lessor/sublessor to exclude warranty of title, to be controlling.<sup>36</sup> Ultimately, the court required the lower court on remand to make a factual finding as to whether the parties intended to warrant title;<sup>37</sup> that disposition of the issue is not questioned here. What is questioned, however, is the court's statement that: "In contrast to articles 2505 and 2646 of the Civil Code, article 120 of the Mineral Code provides that a mineral lessor may exclude warranty of title."<sup>38</sup> Again, the court was suggesting that some difference exists between the warranties under the two codes. In the following paragraphs, the application of the Mineral Code to a lease/sublease will be discussed, and compared with the application of the Civil Code to an assignment.

Before the adoption of the Mineral Code, the mineral lessor, like ordinary lessors under the Civil Code, warranted peaceable possession, but did not warrant title.<sup>39</sup> Consequently, if a mineral lessee discovered a defect in the lessor's title or that the lessor's title covered only a portion of the mineral rights, the lessee could not complain until his occupancy was actually disturbed.<sup>40</sup> Under Mineral Code article 120, mineral lessors now warrant title, which means that the lessee no longer has to wait until occupancy is actually disturbed to bring an action.<sup>41</sup> It is notable, however, that the adoption of the Mineral Code in general,

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35. *Del-Ray Oil*, 797 F.2d at 1316.

36. La. R.S. 31:120 (1975) provides:

A mineral lessor impliedly warrants title to the interest leased unless such warranty is expressly excluded or limited. The liability of the lessor for breach of warranty is limited to recovery of money paid or other property or its value given to the lessor for execution or maintenance of the lease and any royalties delivered on production from the lease.

37. *Del-Ray Oil*, 797 F.2d at 1317.

38. *Id.* at 1316-17 (emphasis added).

39. La. Civ. Code arts. 2682, 2692; *Coyle v. North Am. Oil Consol.*, 201 La. 99, 114, 9 So. 2d 473, 478; *Dees v. Hunt Oil Co.*, 123 F. Supp. 58, 60 (W.D. La. 1954).

40. *Sabine Lumber Co. v. Broderick*, 88 F.2d 586, 588 (5th Cir. 1937); *Williams v. Reynolds*, 448 So. 2d 845, 847 (La. App. 2d Cir. 1984).

41. When a lessor expressly warranted title, before warranty of title was codified in the Mineral Code, the court held actual eviction was not a condition precedent to recovery. *Berwick Mud Co. v. Stansbury*, 205 So. 2d 147, 151 (La. App. 3d Cir. 1967). With the codification of the warranty of title, the courts should reach the same result in cases decided since the Mineral Code.



and of article 120 in particular, has not rendered obsolete the warranty of peaceable possession imposed by the Civil Code. The Mineral Code clearly provides that where pertinent Civil Code articles on lease do not conflict with the Mineral Code articles, the Civil Code articles are also applicable.<sup>42</sup> The warranty of peaceable possession provided for by the Civil Code is certainly not in conflict with the warranty of title now imposed by the Mineral Code. Accordingly, a mineral lessor under the Mineral Code still owes the warranty of peaceable possession under Civil Code articles 2682 and 2692.<sup>43</sup>

Prior to the adoption of the Mineral Code, it was customary for the parties to a mineral lease to include a "warranty of title clause."<sup>44</sup> Article 120 of the Mineral Code codified this practice, and in addition specifically provided that this warranty could be "expressly excluded," and limited recovery if warranty of title was breached.<sup>45</sup> The warranty of title under article 120 is the near equivalent of a vendor/assignor's warranty against eviction.<sup>46</sup> Thus, if a mineral lessor breaches this warranty of title, the lessee will be in the same situation as a vendee/assignee who has been evicted under the Civil Code. Whether the breach of warranty is referred to as a breach of the warranty against eviction or of title should make little difference as to the availability of a right of action.

Therefore, the distinction that once existed between the warranty owed by the assignor and by the sublessor would then have related only to *when* an action could be brought. The distinction as to when the suit may be brought, generally, does not exist today.<sup>47</sup> Other differences are also difficult to detect. A lessor impliedly warrants title under the Mineral Code and impliedly warrants against eviction under both the Civil Code and the Mineral Code.<sup>48</sup> And, although an assignor impliedly warrants only against eviction of the vendee under the Civil Code, the language of Civil Code articles 2500 and 2501 includes within the def-

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42. La. R.S. 31:2 (1975).

43. La. Civ. Code arts. 2682 and 2692 obligate the lessor to deliver the thing, maintain the thing, and cause the lessee to remain in peaceable possession. Similar obligations also appear in the Mineral Code, La. R.S. 31:119 (1975).

44. La. R.S. 31:120 (1975) (Comments to article 120 of the Mineral Code discuss the customary practice of including a warranty of title clause in the lease.).

45. *Id.*

46. La. Civ. Code arts. 2500-2501. The terminology used in these articles will cover many of the situations contemplated under article 120 of the Mineral Code. See *infra* text accompanying notes 49-50. For a good discussion of the eroding distinction between the warranty against eviction and the warranty of title in Louisiana, see Comment, "Warranty of Title" or Warranty of Peaceable Possession in Louisiana, 15 Tul. L. Rev. 115 (1940-41).

47. Comment, *supra* note 46.

48. La. R.S. 31:120-121 (1975); La. Civ. Code arts. 2682, 2692.

inition of eviction most situations contemplated under the "warranty of title" provision in the Mineral Code.<sup>49</sup> The courts generally have had no trouble in finding that the assignee has been evicted as required for the application of the Civil Code articles.<sup>50</sup>

In *Del-Ray Oil*, Henderson Petroleum was both an assignee and a sublessee. Whether we say Henderson was evicted or that it held a title that failed is irrelevant. The court actually did not have to choose, because with regard to the assignment, Henderson had been evicted, and with regard to the sublease, the warranty of title had been breached. The issue presented involved the type of relief that was required under the two codes (i.e., whether return of the purchase price would be appropriate).

In the leading case involving the application of the Mineral Code warranty provisions to leases and subleases, the court avoided the confusion that has resulted from the application of the Civil Code to assignments. No confusing distinctions were made between warranty against eviction, warranty of existence, and transfers at the purchaser's "peril and risk." Instead, in applying the Mineral Code, the court recognized that the parties' contractual freedom to "expressly" exclude warranty of title deserved the utmost attention.<sup>51</sup>

In *Texas General Petroleum Corp. v. Brown*,<sup>52</sup> the Louisiana Second Circuit Court of Appeal made it clear that the wording of the agreement must be considered to determine what intent the parties had when they entered into it. In *Brown*, the lessee wished to recover the bonus paid

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49. La. Civ. Code art. 2500 provides: "Eviction is the loss suffered by the buyer of the totality of the thing sold, or of a part thereof, *occasioned by the right or claims of a third person.*" (emphasis added); La. Civ. Code art. 2501 provides:

Although at the time of the sale no stipulations have been made respecting the warranty, the seller is obliged, of course, to warrant the buyer against the eviction *suffered by him from the totality or part of the thing sold, and against the charges claimed on such thing, which were not declared at the time of the sale.*

(emphasis added).

50. See *Jourdain*, 34 La. Ann. 648 (1882); *Toler v. Swayze*, 2 La. Ann. 880 (1847); *Templeman v. Hamilton & Co.*, 37 La. Ann. 754 (1885); *Tomlinson*, 189 La. 959, 181 So. 458. For cases in which the court held that the buyer need not actually be dispossessed, see *McDonald & Coon v. Vaughan*, 14 La. Ann. 716, 718 (1859); *Bonvillain v. Bodenheimer*, 117 La. 793, 807-08, 42 So. 273, 277-78 (1960). See also S. Litvinoff, *Sale and Lease in the Louisiana Jurisprudence* 342-51 (2d rev. ed. 1986).

51. *Texas Gen. Petroleum Corp. v. Brown*, 408 So. 2d 288, 289 (La. App. 2d Cir. 1981); La. R.S. 31:120 (1975). By creating an implied warranty of title, Mineral Code article 120 codified the customary practice of including a warranty of title clause in every mineral lease. Such clauses, in pre-Mineral Code cases, were enforced in recognition of the parties contractual freedom and no change has resulted from the codification of this practice. *Berwick Mud Co.*, 205 So. 2d 147, 151.

52. 408 So. 2d 288 (La. App. 2d Cir. 1981).

to the lessor when the lessor allegedly breached his warranty of title. The court looked at the wording of the agreement and decided that the warranty was excluded. The court stated: "Each lease excluded warranty against pre-existing leases, the existence of which were known by [the] lessee."<sup>53</sup> The court held that where the agreement "expressly excluded" warranty as to possible pre-existing leases, the lessee could not later complain that the lessor had breached his warranty of title.<sup>54</sup>

The court's analysis in *Brown* contained consideration of factors similar to those used in the warranty analysis developed under the Civil Code provisions concerning assignments—i.e., the wording of the agreement, the knowledge of any danger, and the intention of the parties. Thus, not only are the actions for breach of warranty under the Mineral and Civil Codes triggered by similar fact patterns, but the analysis used is in the end indistinguishable.

#### *Assignment or Sublease: What are the Real Questions?*

The distinction between an assignment and a sublease of a mineral lease will surely continue in Louisiana for reasons other than warranty.<sup>55</sup> This author suggests that in cases such as *Del-Ray Oil*, where warranty is the issue, this distinction should only lead the courts to the appropriate code articles, but should not affect the analysis used.

In *Del-Ray Oil*, there was both an assignment and a sublease of mineral interests. The assignment contained a stipulation that "excluded any express or implied warranty" and the sublease contained a stipulation "that excluded warranty of title."<sup>56</sup> As to assignments, the courts must determine whether the clause was merely an express clause excluding warranty, and if so, whether there was actual knowledge of any danger. If both of these factors are present, the transfer should be considered made at the assignee's risk. Alternatively, the courts must consider whether the parties intended that the clause alone create a transfer at the assignee's risk.<sup>57</sup> The court must go through the same analysis to discover the intent of the parties before they can determine the warranty, if any, owed by the sublessor to the sublessee. When the courts seek to discover the intention of the parties as expressed in the agreements,

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53. *Id.* at 289.

54. *Id.* at 291. The court found that the parties' knowledge of the danger of pre-existing leases was the reason for the inclusion of the clause excluding warranty in the agreement.

55. The distinction still guides the relationship, as to matters other than warranty, between the parties; the lessor, lessee, assignor and assignee; the lessor, lessee, sublessor, and sublessee.

56. 797 F.2d at 1314.

57. *Jourdain*, 34 La. Ann. at 650-51; *Waterman*, 213 La. at 602, 35 So. 2d at 230.

the interpretation of the same clause excluding warranty, in two different cases, can result in completely opposite holdings.

In searching for the parties' intent, it is possible that a court could determine that each party intended that a different meaning be given to their agreement. This author suggests that at that point in the analysis, warranty will no longer provide appropriate relief. The question which must then be raised is how differing the contracting parties' intentions must be before a court would decide that there is error as to the cause, which would nullify the contract, and avoid the warranty issue completely.<sup>58</sup> Such an inquiry can only appropriately be made, however, after an initial evaluation of the intent of the parties.

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58. See, e.g., *Lyons Milling Co. v. Cusimano*, 161 La. 198, 108 So. 414 (1926); *Calhoun v. Teal*, 106 La. 47, 30 So. 288 (1901); *Deutschman v. Standard Fur Co., Inc.*, 331 So. 2d 219 (La. App. 4th Cir. 1976).

