

5-1-2014

## Shale in Sale—Adaptive Resolution of Mineral Rights Disputes Through Warranty Law and Veil-Piercing Remedies

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# Shale in Sale—Adaptive Resolution of Mineral Rights Disputes Through Warranty Law and Veil-Piercing Remedies

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## INTRODUCTION

In March 2008, Chesapeake Energy Corporation (Chesapeake) pivotally announced its discovery of a profitable method for extracting natural gas from the mineral-rich Haynesville Shale in northern Louisiana.<sup>1</sup> Although the Haynesville Shale has long been known for its extraordinarily rich natural gas reserves, until 2008, scientists were unable to access the wealth it contained.<sup>2</sup> Once Chesapeake announced its findings, a “gas rush” ensued in which dozens of companies dispatched agents, known as “landmen,” to obtain mineral leases on the land.<sup>3</sup> This gas rush sparked considerable unrest in the Haynesville area—both courtrooms and records rooms in northern Louisiana filled to the brim as landmen searched for the true owners of the valuable mineral rights.<sup>4</sup>

A flood of litigation followed Chesapeake’s discovery as individuals and corporations alike vied for a piece of the Haynesville pie.<sup>5</sup> This litigation highlights an alarming practice involving real estate transfers. Likely anticipating the windfall resulting from the Chesapeake discovery, many sellers of property have quietly and creatively attempted to exclude mineral rights from the sales of their properties. Imagine the following, typical scenario:

Buyer purchases from Seller real estate in northern Louisiana under a typical sale conferring full warranty of title. Suddenly, as a result of the Haynesville Shale rush, landmen are knocking on doors all around the parish, promising overnight fortune. When no one knocks on Buyer’s door, Buyer learns that according to the warranty deed, the sale of the land was made “subject to servitudes of record” and that, at the time of the sale, a third-party corporation owned the mineral rights pursuant to a mineral servitude. Seller now argues that this language served as notice of the third-party corporation’s mineral servitude, which was recorded in the public records. As a final stab,

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1. Ben Casselman, *U.S. Gas Fields Go from Bust to Boom*, WALL ST. J. (Apr. 30, 2009, 11:59 PM), <http://online.wsj.com/article/SB124104549891270585.html> [<http://perma.cc/6DW3-M3C8>] (archived Mar. 3, 2014).

2. *Id.*

3. *Id.*

4. Adam Nossiter, *Gas Rush Is On, and Louisianians Cash In*, N.Y. TIMES (Jul. 29, 2008), [http://www.nytimes.com/2008/07/29/us/29boom.html?hp=&page\\_wanted=all&\\_r=0](http://www.nytimes.com/2008/07/29/us/29boom.html?hp=&page_wanted=all&_r=0) [<http://perma.cc/4BNM-K2QF>] (archived Mar. 3, 2014).

5. *E.g.*, *Cascio v. Twin Cities Dev., LLC*, 48 So. 3d 341 (La. Ct. App. 2010); *Alyce Gaines Johnson Special Trust v. El Paso E & P Co., L.P.*, 773 F. Supp. 2d 640 (W.D. La. 2011); *Adams v. JPD Energy, Inc.*, 46 So. 3d 751 (La. Ct. App. 2010); *Marin v. Exxon Mobil Corp.*, 48 So. 3d 234 (La. 2010).

Buyer learns that the third-party owner is actually Seller's wholly owned and operated corporation.

This scenario brings to light a number of unresolved legal issues residing at the intersection of Louisiana's law governing both sales and corporations. First is the issue of whether the seller's "subject to servitudes of record" declaration is sufficient notice of a preexisting mineral servitude to preclude the buyer's claim for breach of the warranty against eviction.<sup>6</sup> Although the Civil Code requires that the seller warrant against eviction—that is, promise that the buyer will obtain ownership and maintain peaceful possession of the thing—this obligation does not apply to encumbrances "declared" at the time of the sale.<sup>7</sup> At present, neither jurisprudence nor doctrine has articulated how precise a declaration must be to relieve the seller of liability for breach of the warranty against eviction.<sup>8</sup> Second, if the seller is found liable for breach of warranty, the question then becomes whether a court should award the buyer traditional damages or instead force the seller's "alter ego" corporation to transfer the mineral rights to the buyer.<sup>9</sup> Although a corporation's separate identity generally protects it from the obligations of its shareholders, courts must decide whether to "pierce the veil" to prevent a shareholder from using a wholly owned corporation to thwart the law.<sup>10</sup>

A recent trilogy of cases in the Louisiana Second Circuit Court of Appeal—*Tealwood Properties, L.L.C. v. Succession of Graves, Coleman Group v. Burgundy Oaks*, and *Spillman v. Gasco, Inc.*—addressed both of these questions.<sup>11</sup> The fact that these cases have all arisen in the past two years highlights the escalation of the importance of this area of the law and the lack of clarity involved in

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6. See discussion *infra* Part II.

7. See LA. CIV. CODE art. 2500 (2014) ("The seller warrants the buyer against eviction, which is the buyer's loss of, or danger of losing, the whole or part of the thing sold because of a third person's right that existed at the time of the sale. The warranty also covers encumbrances on the thing that were *not declared* at the time of the sale, with the exception of apparent servitudes and natural and legal nonapparent servitudes, which need not be declared." (emphasis added)).

8. See *infra* Part I.

9. See *infra* Part III.

10. "Veil-piercing" is a remedy whereby the court disregards the corporate entity in cases where the corporation's dominant shareholder is using the corporation "to defeat public convenience, justify wrong, protect fraud, or defend crime." *Glazer v. Comm'n on Ethics for Pub. Emps.*, 431 So. 2d 752, 758 (La. 1983).

11. *Tealwood Props., L.L.C. v. Succession of Graves*, 64 So. 3d 397 (La. Ct. App. 2011); *Coleman v. Burgundy Oaks, L.L.C.*, 71 So. 3d 352 (La. Ct. App. 2011); *Spillman v. Gasco, Inc.*, 110 So. 3d 150 (La. Ct. App. 2012).

the issues presented.<sup>12</sup> Further, despite the fact that the cases involved strikingly similar issues and were all brought before the same circuit, the results are inconsistent, evidencing that courts are struggling to apply the law to the unprecedented issues.<sup>13</sup>

This Comment provides courts with the comprehensive analysis needed to tackle these questions, not only in light of existing law but also in light of the interests at stake. Part I dissects the Second Circuit trilogy and highlights the inconsistencies and inaccuracies contained in those decisions. Parts II and III set forth the analytical framework that courts should use when addressing similar cases in the future. In particular, Part II addresses the seller's obligation to warrant the buyer against eviction and argues that because the law places a burden on the seller to unambiguously express his or her obligations to the buyer, routine "servitudes of record" provisions do not satisfy the seller's obligations in warranty. Finally, Part III explains the balancing of interests that must be undertaken when applying veil-piercing circumvention theory and argues that veil-piercing is appropriate when corporations are used to evade the seller's duty to the buyer. This Comment concludes that in such a case, it is proper for the court to "pierce the corporate veil" and transfer the mineral rights to the buyer by making the seller's "alter ego" liable for the seller's warranty obligations.

#### I. A COMMON TREND: THE SECOND CIRCUIT TRILOGY

The three Second Circuit cases discussed in this Section all paint a similar picture: The plaintiff in each bought real estate and sought recompense for the defendant-vendor's alleged failure to disclose a preexisting mineral servitude.<sup>14</sup> In each scenario, the mineral rights were reserved by the defendant-vendor's "alter ego" corporation through a transaction executed prior to the act of sale with the plaintiff.<sup>15</sup> With few, if any, previous cases dealing with these particular issues, existing precedent provided little guidance for the courts. As a result, the Second Circuit's reasoning in the three decisions is largely inconsistent and undeveloped.

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12. *Tealwood*, 64 So. 3d at 399; *Coleman*, 71 So. 3d at 353; *Spillman*, 110 So. 3d at 152.

13. *Tealwood*, 64 So. 3d at 399; *Coleman*, 71 So. 3d at 353-54; *Spillman*, 110 So. 3d at 159.

14. *Tealwood*, 64 So. 3d at 399-400; *Coleman*, 71 So. 3d at 353-54; *Spillman*, 110 So. 3d at 152-53.

15. *Tealwood*, 64 So. 3d at 400; *Coleman*, 71 So. 3d at 353-54; *Spillman*, 110 So. 3d at 152-53.

## A. Tealwood Properties, L.L.C. v. Succession of Graves

In the first case, *Tealwood Properties, L.L.C. v. Succession of Graves*, the determination of whether the sellers breached the warranty against eviction was straightforward.<sup>16</sup> The Graves affirmatively conveyed, under full warranty of title, the mineral rights to the land to Tealwood Properties, LLC (Tealwood).<sup>17</sup> However, third-party and co-defendant Dale Oil Company (Dale) owned a preexisting mineral servitude to the land and thus held the mineral rights that the Graves purported to convey.<sup>18</sup> Because Dale's recorded ownership dispossessed and evicted Tealwood from the mineral rights, the Graves were clearly liable to Tealwood for breach of warranty against eviction.<sup>19</sup>

The relationship that existed between the two defendants, the Graves and Dale, is what makes *Tealwood* a noteworthy case. Tealwood alleged that the Graves, who were sole owners and managers of Dale, were mere "alter egos" of the company; in particular, Tealwood alleged that the Graves were using the corporation as a protective shield to retain the mineral rights despite their agreement to sell the same mineral rights to Tealwood.<sup>20</sup> The public records doctrine protects the recorded ownership of third parties, like Dale, when a seller purports to convey their property.<sup>21</sup>

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16. *Tealwood*, 64 So. 3d at 399.

17. The deed contained the following provision:

Vendor does hereby convey and transfer any and all rights to oil, gas and other minerals lying on or under said property *except* any production produced by that certain well named F.A. Baker No. 4, having Serial No. 163340, exploration by Novy Oil & Gas Company, Inc., which is hereby reserved by Vendor.

*Id.* at 399–400. This express conveyance of the mineral rights is an important factual distinction between *Tealwood* and the other two cases. See *infra* Part I.B–I.C.

18. Ms. Meeker, the mother of the Graves, conveyed the mineral rights to Dale Corporation in August 1990. *Tealwood*, 64 So. 3d at 400. The tract of land was sold in December 1990 in a separate transaction to the Graves. *Id.*

19. As opposed to *Coleman* and *Spillman* where it was in question whether the warranty against eviction had been breached, it is without question that the failure to transfer ownership of a thing *expressly* conveyed under warranty would create a cause of action for the plaintiff. See LA. CIV. CODE arts. 2500, 2506 (2014).

20. The appellate court opined that the trial court could find that the plaintiff intended to purchase the mineral rights possessed by the defendants and the defendants could not escape their obligation through their wholly owned LLC. Tealwood alleged that the Graves were sole owners of Dale. *Tealwood*, 64 So. 3d at 400, 407–08.

21. See A. N. YIANNOPOULOS, PREDIAL SERVITUDES § 6.23, in 4 LOUISIANA CIVIL LAW TREATISE 405 (3d ed. 2004) (“[A] valid recorded instrument

Thus, although the Graves would be liable for breach of warranty, they would maintain ownership of the valuable mineral rights that Tealwood sought to purchase with the land. However, the Second Circuit found it inequitable to treat Dale as a true “third party” and held that the Graves and Dale could be treated as the same person for the breach of warranty claim through veil-piercing doctrine.<sup>22</sup>

Veil-piercing, the court asserted, is a flexible doctrine through which a court may prevent a shareholder from taking advantage of a corporation’s separate identity when it “appears to be blocking a just result.”<sup>23</sup> The court adopted Professor Glenn Morris’s “circumvention” veil-piercing theory, which allows the court to “pierce the veil” and disregard the separate existence of a corporation to prevent the shareholder of the corporation from avoiding some restriction on his or her own freedom of action.<sup>24</sup> The Second Circuit reversed and remanded the case to the trial court, stipulating that if the plaintiff offered sufficient evidence of Dale’s alter ego status with the Graves, the trial court should pierce the veil to require Dale to fulfill the warranty obligations of the Graves, specifically to transfer the mineral rights to the plaintiff.<sup>25</sup>

Two judges in *Tealwood* did not sign the majority opinion.<sup>26</sup> Of particular note is Judge Moore’s dissent, which suggested that veil-piercing was inappropriate because the defendants had not behaved fraudulently; thus, Moore opined, Tealwood lacked a legitimate cause of action against Dale.<sup>27</sup>

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establishing a predial servitude may be asserted against the acquirer of the servient estate.”).

22. *Tealwood*, 64 So. 3d at 407.

23. *Id.* at 406 (quoting Glenn G. Morris, *Piercing the Corporate Veil in Louisiana*, 52 LA. L. REV. 271, 271 (1991)) (internal quotation marks omitted).

24. The restriction on the Graves’ own freedom of action that they sought to usurp was the inability to warrant the sale of the minerals and retain ownership of the same minerals. *Id.* (citing Morris, *supra* note 23). It is important to note here that the alter ego nature of the corporation or L.L.C. is sufficient to pierce the veil—fraud and misuse being irrelevant—where the dominant shareholders or members use the veil of the corporation’s separate personality to do something that they could not lawfully do themselves. *See supra* note 10.

25. *Tealwood*, 64 So. 3d at 407–08.

26. *Id.* at 408.

27. The only cause of action Tealwood might have had against Dale—fraud—had prescribed. *Id.* at 410 (Moore, J., dissenting). Moore further noted that Tealwood waited until the emergence of Haynesville Shale exploration and development to bring its claims. *Id.* at 409–10. By pointing this out, he is either arguing that the intention of the buyer was not to obtain mineral rights until he later discovered their value or that the buyer should not be rewarded after failing to give more attention to the public records. Moore wrote the majority opinion in *Spillman*, and he made similar statements in that opinion, although he claimed he

*B. Coleman v. Burgundy Oaks, L.L.C.*

In the second case of the trilogy, *Coleman v. Burgundy Oaks, L.L.C.*, a number of residential homeowners (the Coleman Group) brought breach of warranty against eviction claims against their seller Burgundy Oaks LLC (Burgundy) after learning that the property they had purchased did not include valuable mineral rights.<sup>28</sup> Unlike the sellers in *Tealwood*, Burgundy did not expressly convey the rights to minerals.<sup>29</sup> Various deeds were involved; some provided that the land was sold subject to servitudes of record and others contained no “subject to” language at all.<sup>30</sup> The court, however, treated them all the same and did not address the varying legal effects these deeds trigger.<sup>31</sup>

A mineral servitude was, in fact, recorded in the local parish records, and the defendants asserted that this put the plaintiffs on notice that they were buying the land without the mineral rights.<sup>32</sup> Similar to the seller and third-party corporation in *Tealwood*, the “third-party” owner of the recorded mineral servitude in *Coleman* was a limited liability company nearly wholly owned by the sellers.<sup>33</sup> The two defendants shared common office space, common administration, and a centralized accounting system.<sup>34</sup> The *Coleman* court adopted the *Tealwood* veil-piercing analysis and held that “[i]nferences most favorable to [the] plaintiff drawn from the undisputed facts” suggested that the conveyances of the mineral rights to the third-party company were meant to disguise the reservation of mineral rights.<sup>35</sup>

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was not overruling *Tealwood*. See *Spillman v. Gasco, Inc.*, 110 So. 3d 150 (La. Ct. App. 2012); *infra* Part II.B.

28. *Coleman v. Burgundy Oaks, L.L.C.*, 71 So. 3d 352, 353–54. (La. Ct. App. 2011).

29. *Id.* at 353.

30. At least one of the examined deeds declared that the land was “subject to the easements, set back requirements and other real rights, running with the land . . . and further subject to the Declaration of Covenants, Conditions and Restrictions, as amended, filed in the record of Caddo Parish, Louisiana.” *Id.* at 355 (emphasis omitted). Other deeds, however, provided more broadly that the land was conveyed “subject to all recorded servitudes, restrictions, rights-of-way and easements.” *Id.* Finally, at least one deed did not contain any “subject to” language at all. *Id.*

31. See *id.*

32. *Id.* at 357.

33. *Id.* at 353.

34. *Id.* at 356.

35. *Id.*

The *Coleman* court did not examine the issue of whether the seller breached the warranty against eviction in detail.<sup>36</sup> However, the court did conclude that the warranty against eviction had been breached.<sup>37</sup> After determining that the veil-piercing theory could be used to show the lack of distinction between the seller and its wholly owned corporation, the court reasoned that the seller could not obligate himself to deliver the thing sold and warrant title and then, *by his own act or claim*, derogate from or assert rights to the thing contrary to his obligations.<sup>38</sup> Although the court did not explicitly address the sufficiency of the “subject to servitudes of record” language, an implicit aspect of the court’s holding is its assumption that the provisions did not exclude the sale of the mineral rights.<sup>39</sup> As discussed below, the *Spillman* court did not so readily accept this assumption.

### C. *Spillman v. Gasco*

In the final case, *Spillman v. Gasco*, the sale at issue was made with full warranty of title, and the act of sale included a provision in the warranty deed stating that the sale was subject to “any restrictions, easements and servitudes of record.”<sup>40</sup> As in *Tealwood* and *Coleman*, the seller—Gasco—failed to transfer the mineral rights to the buyer because another individual, Frank Scott Moran, owned a recorded mineral servitude that burdened the property.<sup>41</sup> The plaintiffs alleged that Moran was either the sole or majority stockholder of Gasco and that, like the “third-party” defendants in *Tealwood* and *Coleman*, Moran was not a true third party to the warranty deed.<sup>42</sup> The plaintiffs sought a judgment enforcing the warranty and requiring Moran to transfer the mineral rights to them by piercing Gasco’s corporate veil.<sup>43</sup>

Although *Spillman* was decided less than a year following the Second Circuit’s decisions in *Tealwood* and *Coleman* and involved almost identical facts, the analysis in *Spillman* is remarkably distinct from the court’s previous two decisions.<sup>44</sup> The *Spillman* court was

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36. *See id.*

37. *Id.* at 357.

38. *Id.*

39. *See id.* The mineral servitudes were properly recorded at the time in the public records. *Id.* at 353.

40. *Spillman v. Gasco, Inc.*, 110 So. 3d 150, 152 (La. Ct. App. 2012).

41. The sale and mineral reservation between Moran and Gasco occurred in July 1999; the sale of the land between Gasco and the plaintiffs occurred in April 2001. *Id.*

42. *Id.* at 152–53.

43. *Id.* at 152.

44. The *Coleman* decision, Judge Moore asserted, did not address the “subject to” language in the deed, and this distinction justified the *Spillman* court’s

the first to squarely address the issue of whether the “servitudes of record” language adequately disclosed the third-party ownership of the mineral servitude.<sup>45</sup> Judge Moore, who authored *Spillman* and dissented in *Tealwood*, agreed with the *Spillman* defendants that the “servitudes of record” language was unambiguous and sufficient to put the plaintiffs on notice that they were buying property subject to servitudes recorded in the public records.<sup>46</sup> He substantiated his decision by surmising that it was common practice in residential lot transactions to use general “subject to” language regarding restrictions and nonapparent servitudes that would not affect its intended use as residential property.<sup>47</sup>

Because Judge Moore concluded that a breach had not occurred, the buyer was not entitled to a remedy.<sup>48</sup> In dicta, however, Judge Moore also rejected the veil-piercing analysis of the Second Circuit’s prior decisions.<sup>49</sup> Restating his dissent in *Tealwood*, Judge Moore held that veil-piercing was inappropriate where the plaintiffs failed to show that the defendants had engaged in any “nefarious act.”<sup>50</sup> Essentially, this rejection of veil-piercing assumed that fraud is the *sine qua non* for piercing the veil.

#### *D. Significance of the Second Circuit Split*

Although the *Spillman* court failed to acknowledge the true force of its decision, it effectively overturned *Coleman* by refusing to grant the plaintiff a remedy under the similar factual circumstances presented in these cases.<sup>51</sup> The implicit holding in *Coleman* was that the warranty against eviction was breached by the seller’s failure to declare mineral servitudes with specificity, whereas *Spillman* found similar “servitudes of record” language adequate to put the plaintiffs on notice that their sale was limited.<sup>52</sup> Much of the debate in *Spillman* centered on whether a blanket disclosure of “servitudes of

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departure from that case. *Id.* at 154–55. Judge Moore next distinguished *Tealwood* because the warranty deed in that case had a specific provision that *expressly* conveyed some mineral rights and withheld certain others. *Id.* at 158.

45. *Id.* at 154.

46. *Id.*

47. *Id.* at 158.

48. *Id.* at 158–59.

49. *Id.* at 159.

50. *Id.*

51. *Spillman* distinguished *Coleman* but did not overrule the case outright. *Id.* at 158 (“We conclude that *Coleman v. Burgundy Oaks, Inc.*, *supra*, is not controlling in this case.”).

52. *Id.* at 159.

record” sufficiently notified the buyer of the mineral servitude’s existence, while *Coleman* mostly ignored this issue.<sup>53</sup> *Tealwood* stands alone in that the warranty deed in that case expressly conveyed the mineral rights to the land.<sup>54</sup>

Thus, no court has fully and adequately explained the law on warranty with regard to the sufficiency of broad “servitudes of record” language. *Tealwood* and *Coleman* attempted to reconcile the issues of fairness and injustice that the facts of these cases presented, while *Spillman* clearly sought not to upset the purportedly common practice of using these blanket statements.<sup>55</sup> However, the prevalence of mineral servitudes in resource-rich Louisiana ensures that this issue will arise again in the future and will likely be litigated due to the high value of the mineral rights at stake. Without certainty in the law, sellers are deprived of clear guidelines as to the language necessary to be relieved of their warranty obligations. This will almost certainly lead to future litigation, with no clear answer for judges faced with these issues and no guidance for the private settlement of disputes.

Moreover, the courts in *Tealwood* and *Coleman* both held that veil-piercing was an appropriate remedy for the plaintiffs where the seller and its corporation were alter egos.<sup>56</sup> The reasoning of these cases adopted Professor Morris’s circumvention veil-piercing theory, which stands for the proposition that individuals cannot do through their corporations what they cannot do themselves.<sup>57</sup> In *Spillman*, however, Judge Moore suggested that veil-piercing is inappropriate where the seller’s actions are not fraudulent or “nefarious.”<sup>58</sup> Ultimately, he rejected the notion that circumventing the law and one’s own contractual obligations through an alter ego is alone sufficient to justify piercing the veil. If, however, the absence of “nefarious” or fraudulent acts precludes a court from piercing the veil, shareholders will be able to thwart their contractual obligations through the shield of corporate identity. The *Spillman* court failed to acknowledge the altered doctrine in circumvention veil-piercing cases, which considers a different balancing of policies than the court recognized.

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53. *Id.* at 157–59. See generally *Coleman v. Burgundy Oaks, L.L.C.*, 71 So. 3d 352, 355 (La. Ct. App. 2011).

54. *Tealwood Props., L.L.C. v. Succession of Graves*, 64 So. 3d 397, 400 (La. Ct. App. 2011).

55. *Tealwood*, 64 So. 3d 397; *Coleman*, 71 So. 3d 352; *Spillman*, 110 So. 3d at 157–59.

56. *Tealwood*, 64 So. 3d at 405; *Coleman*, 71 So. 3d at 357.

57. See *supra* Part I.A–C.

58. *Spillman*, 110 So. 3d at 159.

## II. RETHINKING SUFFICIENCY OF DECLARATIONS IN WARRANTY AGAINST EVICTION

*Tealwood*, *Coleman*, and *Spillman* all implicated the seller's warranty against eviction and, in particular, the seller's obligation to disclose the existence of nonapparent servitudes such as those granting mineral rights to third parties.<sup>59</sup> Thus, the proper resolution of those cases, and the many analogous cases that are sure to come in the future, requires a complete analysis of the scope of the seller's warranty against eviction as it pertains to mineral servitudes.

Louisiana Civil Code article 2475 sets forth the obligations of the seller, and among those obligations is the seller's duty to warrant the buyer "ownership and peaceful possession of . . . the thing" sold.<sup>60</sup> This article imposes the warranty against eviction<sup>61</sup> on the seller by law, even without a contractual stipulation to that effect.<sup>62</sup> Proper analysis of a claim for breach of the warranty against eviction involves two distinct steps. First, it must be determined whether the buyer has been evicted.<sup>63</sup> Second, if an eviction has occurred, then the buyer's remedies must be determined according to the act of sale and the buyer's knowledge of the danger of eviction.<sup>64</sup>

### A. Scope of the Warranty Against Eviction: The "Thing" Covered

The obligation to warrant against eviction is further delineated in Louisiana Civil Code article 2500. Article 2500 defines "eviction"

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59. *Tealwood*, 64 So. 3d 397; *Coleman*, 71 So. 3d 352; *Spillman*, 110 So. 3d 150.

60. "The seller is bound to deliver the thing sold and to warrant to the buyer ownership and peaceful possession of, and the absence of hidden defects in, that thing. The seller also warrants that the thing sold is fit for its intended use." LA. CIV. CODE art. 2475 (2014).

61. "To evict is, properly speaking, to take something from a person, in virtue of a sentence. *Evincere est aliquid vincendo auferre*. An eviction is the abandonment, which one is obliged to make, in pursuance of a sentence, by which he is condemned to do so." R.J. POTHIER, TREATISE ON THE CONTRACT OF SALE § 83, at 50 (L.S. Cushing trans., 1839). Pothier's definition captures the traditional Roman law notion of eviction, for it involved eviction through a judgment. DIAN TOOLEY-KNOBLETT & DAVID GRUNING, SALES § 10:14, in 24 LOUISIANA CIVIL LAW TREATISE 418 (2012). Now, however, a judgment is not required for an eviction to arise where there is a "danger" of losing the thing. *Id.* § 10:5, at 418–19.

62. YIANNOPOULOS, *supra* note 21, § 6.23, at 407. The warranty against eviction is "implied in every sale unless modified or excluded by the parties." TOOLEY-KNOBLETT & GRUNING, *supra* note 61, § 10:1, at 415.

63. LA. CIV. CODE art. 2500 (2014).

64. *Id.* art. 2503.

as “the buyer’s loss of, or danger of losing, the whole or part of the thing sold because of a third person’s right that existed at the time of the sale.”<sup>65</sup> This definition sets forth three important elements of eviction. First, by defining eviction as the buyer’s “loss of, or danger of losing,” the thing, no civil action is required for the buyer to be evicted; if a third party lawfully asserts a right to the property, the buyer is thus evicted automatically.<sup>66</sup> Second, the eviction may be in “whole” or in “part.”<sup>67</sup> Partial eviction arises when the buyer is evicted from only part of the thing sold and may still make use of the thing without this portion of the property.<sup>68</sup> And finally, the rights of the third party must have existed prior to the sale.<sup>69</sup>

Although article 2500 makes clear that the seller’s obligations in warranty extend to encumbrances on the property, the obligations of a seller in fact turn on the type of encumbrance at issue.<sup>70</sup> For certain types of servitudes, it is the buyer’s duty to be aware of them, and as such, the seller does not warrant their existence.<sup>71</sup> These include legal servitudes—those established by law for the benefit of the public—and natural servitudes—those created by the natural situation of estates.<sup>72</sup> The seller need not declare natural and legal servitudes because the buyer is deemed to have knowledge of these encumbrances; they are set forth in the laws of the state, and all persons are bound to know the law.<sup>73</sup> In addition to natural and legal servitudes, the seller need not declare the existence of apparent conventional servitudes in order to escape the obligation of warranty

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65. *Id.* art. 2500 (“The seller warrants the buyer against eviction, which is the buyer’s loss of, or danger of losing, the whole or part of the thing sold because of a third person’s right that existed at the time of the sale. The warranty also covers encumbrances on the thing that were not declared at the time of the sale, with the exception of apparent servitudes and natural and legal nonapparent servitudes, which need not be declared.”).

66. “It is true that actual eviction is not necessary, ‘if a perfect title exists in some third person, whereby it is rendered legally certain that his vendor had no title.’” *Bickham v. Kelley*, 110 So. 637, 640 (La. 1926) (quoting *Robbins v. Martin*, 9 So. 108, 112 (La. 1891)). *See also* art. 2500; TOOLEY-KNOBLETT & GRUNING, *supra* note 61, § 10:3, at 417.

67. Art. 2500.

68. *Id.* art. 2511; TOOLEY-KNOBLETT & GRUNING, *supra* note 61, § 10:3, at 417–18.

69. Art. 2500. This “definition makes clear that the seller does not warrant the buyer against acts committed by trespassers.” TOOLEY-KNOBLETT & GRUNING, *supra* note 61, § 10:3, at 417. *See also id.* § 10:6, at 421.

70. Art. 2500.

71. *Id.*

72. *Id.* arts. 654, 659.

73. *Id.* art. 2500; TOOLEY-KNOBLETT & GRUNING, *supra* note 61, § 10:12, at 433. The law establishes legal servitudes for the benefit of the general public or particular persons. Art. 659. The vendor does not implicitly warrant the non-existence of legal servitudes. *Id.* art. 2500.

against eviction.<sup>74</sup> The reasoning behind this limitation is that it is incumbent on the buyer to examine property and know what he or she is buying.<sup>75</sup>

Unlike those servitudes of which the buyer is deemed to have knowledge, article 2500 requires a seller to “declare” the existence of nonapparent conventional servitudes that burden property and thereby inform the buyer of the limits of the seller’s ownership.<sup>76</sup> The purpose of the declaration is to notify the buyer of nonapparent conventional servitudes that limit the seller’s ownership where a diligent buyer would not readily perceive their existence.<sup>77</sup> If the vendor does not sufficiently declare a nonapparent conventional servitude that burdens the property, he or she warrants its non-existence.<sup>78</sup>

Importantly, however, the declaration requirement and its exceptions all concern the buyer’s knowledge. If a buyer has *actual* knowledge of an encumbrance, he or she “has not suffered any failure of cause for which relief should be granted.”<sup>79</sup> Therefore, if a buyer is aware of a nonapparent conventional servitude despite the seller’s failure to sufficiently declare its existence, “he is not evicted—he gets exactly what he expects.”<sup>80</sup>

Mineral servitudes are generally conceived of as nonapparent conventional servitudes if there are no perceivable signs of their existence on the property.<sup>81</sup> Thus, so long as no visible signs exist to

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74. Art. 2500. Conventional servitudes are created by juridical act and destination by the owner. *Id.* art. 697.

Predial servitudes are either apparent or nonapparent. Apparent servitudes are those that are perceivable by exterior signs, works, or constructions; such as a roadway, a window in a common wall, or an aqueduct. Nonapparent servitudes are those that have no exterior sign of their existence; such as the prohibition of building on an estate or of building above a particular height.

*Id.* art. 707.

75. It is the “buyer’s business not to be ignorant,” and he or she cannot claim warranty against apparent servitudes on the property. *Richmond v. Zapata Dev. Corp.*, 350 So. 2d 875, 880 (La. 1977). Likewise, the jurisprudence recognizes a fourth exception for declarations of which the buyer is aware. TOOLEY-KNOBLETT & GRUNING, *supra* note 61, § 10:12, at 433.

76. *Richmond*, 350 So. 2d at 880; *Dillon v. Morgan*, 362 So. 2d 1130, 1132 (La. Ct. App. 1978); *Herring v. Price*, 4 So. 2d 17, 20 (La. Ct. App. 1941); art. 2500.

77. *Richmond*, 350 So. 2d at 880; TOOLEY-KNOBLETT & GRUNING, *supra* note 61, § 10:12, at 431.

78. YIANNOPOULOS, *supra* note 21, § 6.23, at 407.

79. TOOLEY-KNOBLETT & GRUNING, *supra* note 61, § 10:12, at 433.

80. *Id.* § 10:12, at 434.

81. *Richmond*, 350 So. 2d at 880; *Dillon*, 362 So. 2d at 1132; *Herring*, 4 So. 2d at 20.

give the buyer notice of the mineral servitude, the seller is obligated to declare the existence of the servitude or must compensate the buyer for breach of the warranty of title should the buyer be evicted.<sup>82</sup> Thus, the critical question is whether language in an act of sale is a sufficient declaration to relieve the seller of the obligation to warrant against eviction.

### *B. Determining the Sufficiency of Declarations*

The Civil Code does not explain what is sufficient, and the case law—particularly the conflicting *Coleman* and *Spillman* decisions—illustrates the difficulty that courts face when addressing this area of the law.

#### *1. Declarations in Doctrine and Jurisprudence: Traditional Notions*

The Civil Code provides for the warranty against eviction to safeguard the buyer, and the doctrine and jurisprudence interpreting warranty law consistently focus on this purpose.<sup>83</sup> Article 2474 puts the burden on the seller to define his or her obligations in warranty: The seller “must *clearly* express the extent of his obligations arising from the [warranty] contract, and any obscurity or ambiguity in that expression must be interpreted against the seller.”<sup>84</sup> In relation to the warranty against eviction, French doctrine has interpreted the obligation to impose an obligation on the seller to give detailed declarations to effectuate actual notice of an encumbrance under article 2500. Planiol wrote that the seller “should declare *with care* in the act all charges, servitudes, or other rights which exist on the property sold, which are not apparent.”<sup>85</sup> Therefore, although neither

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82. The mineral servitudes at issue in *Tealwood*, *Coleman*, and *Spillman* were nonapparent. *See* *Tealwood Props., L.L.C. v. Succession of Graves*, 64 So. 3d 397, 400 (La. Ct. App. 2011); *Coleman v. Burgundy Oaks, L.L.C.*, 71 So. 3d 352, 353–54 (La. Ct. App. 2011); *Spillman v. Gasco, Inc.*, 110 So. 3d 150, 156–57 (La. Ct. App. 2012).

83. *See, e.g.*, LA. CIV. CODE art. 2503 (2014). In the scenario where the seller limits the warranty and the buyer is evicted, the seller must still return the price of the thing. There are three exceptions to this rule: (1) where the buyer clearly was aware of the danger of eviction, or (2) the buyer has declared that he or she is buying at his or her peril and risk, and (3) where the seller’s obligation has been expressly excluded. Thus, the buyer must exclude his or her obligation in warranty, *and* the buyer must either be aware of the danger of eviction or buy at his or her peril and risk. TOOLEY-KNOBLETT & GRUNING, *supra* note 61, § 10:20, at 446.

84. LA. CIV. CODE art. 2474 (2014) (emphasis added).

85. 1 MARCEL PLANIOL, TREATISE ON THE CIVIL LAW, PART 1, at 833 (La. St. Law Inst. trans., 12th ed. 1959) (emphasis added).

the Louisiana Civil Code nor French doctrine specifies precisely how declarations must be made, every indication is that it is the seller's duty to fully explain the existence of nonapparent conventional servitudes.<sup>86</sup> This burden on the seller is practicable because the seller, not the buyer, is in the best position to know the extent of his or her ownership. In light of this obligation, it may be deduced that broad, omnibus "servitudes of records" provisions do not meet the standard set forth in the doctrine simply because of their lack of specificity.

Additional considerations also lead to the conclusion that omnibus declarations fail to relieve the seller of responsibility in warranty. A declaration referring generally to recorded servitudes, without detailing individual servitudes with specificity, assumes that the existence of a servitude in the public records is sufficient to defeat a warranty claim. However, recordation is required to ensure that the servitude is effective against *third parties* to the act, including a later buyer of the property burdened by the servitude.<sup>87</sup> Thus, the warranty against eviction can apply to recorded servitudes only—a non-recorded servitude cannot be asserted against the buyer.<sup>88</sup> Moreover, both doctrine and jurisprudence<sup>89</sup> have made clear that the "constructive notice" afforded by the public records is insufficient to relieve the seller of his or her obligation to declare the existence of nonapparent conventional servitudes.<sup>90</sup> In sum, although the buyer is charged with the knowledge of natural and legal nonapparent servitudes, as well as apparent conventional

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86. Before the 1993 revision, Louisiana Civil Code article 2474 required that the seller "explain" his or her obligations to the buyer, and that language has been changed to "express." Nonetheless, the redactors have indicated that the change in terms was not meant to change the law. Art. 2474 cmt. a.

87. YIANNOPPOULOS, *supra* note 21, § 6:23, at 405.

88. *Id.*

89. In *Richmond v. Zapata Development Corp.*, after reviewing French doctrine on the sufficiency of declarations, the Supreme Court asserted that "[b]ecause the registry laws are intended only as notice to third parties and have no application whatever between parties to a contract, a vendee is under no obligation to search the record in order to ascertain what his vendor has sold and what it has not." *Richmond v. Zapata Dev. Corp.*, 350 So. 2d 875, 878 (La. 1977).

90. "Though it is sometimes said that the recordation of an instrument gives constructive notice to the world, a buyer ought not to be treated as though he has knowledge of an encumbrance just because it is recorded." TOOLEY-KNOBLETT & GRUNING, *supra* note 61, § 10:12, at 435. See also YIANNOPPOULOS, *supra* note 21, § 6:23, at 405; *Spillman v. Gasco, Inc.*, 110 So. 3d 150, 155 (La. Ct. App. 2012); *Collins v. Slocum*, 317 So. 2d 672, 681 (La. Ct. App. 1975); *New Orleans & C.R.R. v. Jourdain Heirs*, 34 La. Ann. 648, 651–52 (La. 1882).

servitudes, the buyer is *not* charged with knowledge of nonapparent conventional servitudes simply because they are recorded.<sup>91</sup>

In light of the well-established rule that constructive notice is insufficient as actual notice to the buyer, it is apparent that the broad “declarations” used by the sellers in *Coleman* and *Spillman* merely informed the buyer that there is notice through the public records. These provisions do nothing more than put the buyer on notice of what is recorded—notice he or she already has by law as “constructive notice” and which is insufficient to convey “actual notice.” *Spillman*’s holding completely subverts this well-established principal of warranty law. If the seller may not escape his or her obligations in warranty through constructive notice, yet the seller may declare the existence of servitudes by indicating that notice through the public records is available, then the seller is essentially escaping his or her liability in warranty through constructive notice.<sup>92</sup>

In practice, permitting sellers to escape warranty obligations through “servitudes of record” provisions would completely supplant warranty doctrine by deeming constructive notice sufficient to give actual notice to the buyer.<sup>93</sup> Thus, stating that there are servitudes without informing the buyer of any actual servitudes<sup>94</sup> and instead charging the buyer with knowledge of those found in the public records is clearly inadequate.<sup>95</sup> At the very least, these omnibus declarations do not meet Planiol’s requirement that the seller declare “with care” the limitations of his or her obligations.<sup>96</sup> It is unfair to the buyer for the seller to portray that the underlying transaction is protected under warranty and to use these omnibus clauses to escape all warranty obligations with respect to servitudes.

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91. YIANNOPOULOS, *supra* note 21, § 6:23, at 405; TOOLEY-KNOBLETT & GRUNING, *supra* note 61, § 10:12, at 435.

92. Similarly, in the case *Phillips v. Parker*, the Supreme Court noted that the public records are not sufficient to deprive a possessor of their “good faith” status. *Phillips v. Parker*, 483 So. 2d 972, 976 (La. 1986). The Court reasoned that to impose constructive knowledge as notice to the possessor and thereby implicate lack of good faith, the “theory of constructive notice would write ten-year acquisitive prescription completely out of the Code.” *Id.* at 977.

93. *Id.*

94. *Spillman v. Gasco, Inc.*, 110 So. 3d 150, 152 (La. Ct. App. 2012).

95. Indeed the public records are available and put all third persons on notice of those transactions therein recorded; so, such a statement would not change the law. YIANNOPOULOS, *supra* note 21, § 6:23, at 406–07.

96. *See, e.g., Richmond v. Zapata Dev. Corp.*, 350 So. 2d 875, 880 (La. 1977).

## 2. Declarations in “Practice”

There is some evidence that the French doctrine requiring the seller to carefully declare any encumbrances burdening property is not followed in practice. In his practice guide, Louisiana real estate expert Peter Title sets forth two examples of declarations of encumbrances that may be used in real estate transactions.<sup>97</sup> The first example is detailed and, by chance, involves a declaration of mineral servitudes on the land:

Mineral reservation with Release of Surface Rights referred to in Act of Cash Sale by \_\_\_\_\_ to \_\_\_\_\_ recorded on \_\_\_\_\_ at COB \_\_\_\_\_, Folio \_\_\_\_\_, in the official records of the Parish of \_\_\_\_\_, State of Louisiana.<sup>98</sup>

Peter Title suggests that it is “good practice” for the seller to provide specific declarations in the act of sale to prevent the buyer from attempting to rescind the sale due to an undisclosed encumbrance.<sup>99</sup> He does not, however, indicate that detailed declarations are required by law. Rather, he concedes that at times the seller will only give a “blanket declaration” of encumbrances and indeed provides a form for such a declaration:

This sale is made subject to any servitudes, rights of way, mortgages, judgments, liens, mineral leases and any other instruments or encumbrances of record in the Records of \_\_\_\_\_ Parish, Louisiana, affecting the property hereby conveyed by Vendor to Purchaser.<sup>100</sup>

Title gives two limitations to the use of blanket declarations. First, he suggests that typical blanket declarations are more commonly present in transactions between “related persons.”<sup>101</sup> Second, he advises the buyers of property to require the seller to list any exceptions to title by reference to the name of the document and the recording information as provided in the first, more detailed form.<sup>102</sup> By advising the buyer to *request* that the seller give more detailed declarations, Title is implying that the burden, at least in practice, rests with the buyer. This practice contravenes warranty

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97. PETER S. TITLE, LOUISIANA REAL ESTATE TRANSACTIONS § 10:33, *in* 1 LOUISIANA PRACTICE SERIES 745 (2007).

98. *Id.* § 10:110, at 805.

99. *Id.* § 10:33, at 745.

100. *Id.* § 10:111, at 806.

101. *Id.* § 10:33, at 745.

102. *Id.* § 10:33, at 745–46.

doctrine's placement of the obligation to describe encumbrances of property on the seller.

In addition to Title's practice guide, some jurisprudence indicates that it is sometimes the practice for warranty deeds to use blanket, omnibus declarations of encumbrances in the sales of immovable property. For instance, the opinion of the Louisiana Third Circuit Court of Appeal in *Fontenot v. Saxby*, a case involving a claim of breach of warranty in a transaction of exchange, discussed such a provision.<sup>103</sup> The act of exchange in dispute declared that the property was conveyed "subject to any and all servitudes, restrictions, mineral leases and reservations on file and of record in Calcasieu Parish, Louisiana."<sup>104</sup> The court granted summary judgment in favor of the defendant, finding that no breach of warranty had occurred.<sup>105</sup> In reaching this holding, the court determined that Fontenot failed to set forth evidence that would support her claim that she lacked actual knowledge<sup>106</sup> of the building restrictions that were recorded in the public records.<sup>107</sup> Although the court's reasoning is unclear, the court apparently considered the omnibus provision sufficient to put the buyer on notice of the existence of the building restrictions. However, the court's finding that Fontenot had actual knowledge may have rested on facts other than this provision, e.g., the fact that the plaintiff procured a title opinion clearly stating the existence of certain building restrictions.<sup>108</sup> Additionally, the court in *Fontenot* relied on a comment to Louisiana Civil Code article 776, which states that "[b]y virtue of the public records doctrine, an acquirer of immovable property burdened with recorded restrictions is presumed to have

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103. See *Fontenot v. Saxby*, 34 So. 3d 477 (La. Ct. App. 2010).

104. *Id.* at 481.

105. *Id.*

106. The court wrongly suggested that Louisiana Civil Code article 2503 precludes a claim for breach of warranty against eviction where the buyer has actual knowledge. *Id.* at 483. The court's finding that actual knowledge would preclude a claim for breach of warranty, however, is not altogether correct. Professor Tooley describes a fourth exception to warranty of encumbrances that is not expressly provided for under article 2500 but is well established in the jurisprudence. This fourth exception arises in circumstances where the buyer has actual knowledge that the encumbrance exists. TOOLEY-KNOBLETT & GRUNING, *supra* note 61, § 10:12, at 433–34. The court in *Fontenot* applied the correct doctrine, but it was incorrect in the source it provided for the law because article 2503 only applies to situations where the warranty is limited, and the deed in *Fontenot* did not indicate a limitation of warranty as implied under article 2503.

107. *Fontenot*, 34 So. 3d at 481.

108. The title opinion provided: "3.1 Restrictive Covenants were established by act dated October 27, 1971, as recorded in Conveyance Book 1168, page 791, and also attached to a Cash Sale Deed dated March 16, 1989, recorded under Clerk's file No. 2020478." *Id.* at 482.

notice.”<sup>109</sup> This application of constructive notice to defeat the plaintiff’s claim for breach of warranty is inaccurate, however, for the reasons discussed above.<sup>110</sup>

Additional evidence of the norm of general declarations is cited in the *Coleman* case, where two title attorneys filed affidavits stating that mineral rights are not typically mentioned in residential deeds.<sup>111</sup> One of the attorneys testified specifically that “[p]rior to 2008 and the publicity surrounding the Haynesville Shale . . . purchasers of homes seldom inquired about mineral rights in connection with or at the time of closing.”<sup>112</sup>

Thus, both doctrinal and jurisprudential evidence suggests that omnibus declarations may occasionally be used in practice. This development gives rise to the present question of whether these provisions sufficiently act as actual notice to the buyer that mineral servitudes are not conveyed under the warranty deed. However, the fact that sellers are utilizing these blanket declarations does not give them legal effect.

### *3. Going Forward: A “Reasonableness” Test for Determining Sufficiency of Declarations*

The discord between the opinions in *Coleman* and *Spillman* regarding the sufficiency of omnibus declarations highlights that the lack of jurisprudential guidance is troubling courts. The court’s reasoning in *Spillman* reflects a gross error in jurisprudential efforts to balance the conflict between tradition and practice. Judge Moore’s concerns of rewarding the buyers in *Spillman* who he believed to be indifferent to the minerals at the time of the sale resulted in a holding that—moving forward—will empower sellers to repeal all warranty law without any expense.<sup>113</sup> If “subject to

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109. LA. CIV. CODE art. 776 cmt. c (2014).

110. “In reality, judicial declarations concerning constructive notice merely restate the rule that a valid recorded instrument establishing a predial servitude may be asserted against the acquirer of the servant estate.” YIANNOPOULOS, *supra* note . See *supra* Part II.B.1.

111. *Coleman v. Burgundy Oaks, L.L.C.*, 71 So. 3d 352, 354–55 (La. Ct. App. 2011).

112. *Id.* at 354.

113. Turning to the question of the sufficiency of the declaration, Moore noted: We are mindful that the relatively recent Haynesville Shale development has dramatically changed the landscape regarding the value of mineral rights even for small residential lots. Prior to the Haynesville Shale, mineral rights to residential lots were of minimal value, and typically, prospective homeowners rarely were concerned with whether their deed to a residential lot was subject to a prior mineral reservation, especially since the object of their real estate purchase was for residential purposes.

servitudes of record” provisions are deemed sufficient to give actual notice to the buyer, the seller will *never* be liable for eviction because a buyer can *only* be evicted by recorded servitudes.<sup>114</sup> The seller thus escapes liability in warranty without limiting the warranty outright and without the seller explaining his or her obligations with care as required by article 2474.<sup>115</sup>

Moving forward, courts should adopt the test established by doctrine: A declaration is sufficient only if it gives a *reasonable* buyer actual knowledge of the servitude encumbering the property sold.<sup>116</sup> Professor Tooley emphasizes the impact of declarations on cause and explains that a buyer with actual knowledge “has not suffered any failure of cause for which relief should be granted.”<sup>117</sup> Although actual knowledge of the buyer is the goal of article 2500, the article requires only a declaration sufficient to convey actual knowledge.<sup>118</sup> Thus, if a declaration should have conveyed notice to a reasonable buyer that a servitude encumbered the property, the seller would not be liable even if the buyer did not know of the servitude by his or her own fault.

Civilian doctrine has always made clear that declarations must be made unambiguously and with care, a requirement implying that declarations must be made with specificity.<sup>119</sup> Mineral servitudes present particularly strong reasons for requiring declarations made with specificity in order to effectuate actual notice.<sup>120</sup> The jurisprudential classification of mineral rights as servitudes was eventually codified in 1975 in Louisiana Revised Statutes section 31:21 of the Mineral Code.<sup>121</sup> Despite the long history of this classification, Louisiana remains an outlier among American jurisdictions in categorizing minerals as servitudes.<sup>122</sup> Therefore, a

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Spillman v. Gasco, Inc., 110 So. 3d 150, 156 (La. Ct. App. 2012).

114. See *supra* Part II.B.1.

115. LA. CIV. CODE art. 2474 (2014).

116. See *supra* Part II.B.1.

117. TOOLEY-KNOBLETT & GRUNING, *supra* note 61, § 10:12, at 433.

118. See LA CIV. CODE art. 2500 (2014); TOOLEY-KNOBLETT & GRUNING, *supra* note 61, § 10:12, at 431.

119. For an example of a declaration made with specificity, see TITLE, *supra* note 97, § 10:110, at 805. For certain types of servitudes, courts may find that broad “servitudes of record” provisions do not create liability for the seller. Utility servitudes, for example, are for the most part salutary. Thus, the buyer’s cause is not affected by their existence, and the buyer will not be able to seek diminution in price under article 2506 because the servitude increases the value of the property. See LA. CIV. CODE art. 2506 (2014). For a discussion of cause, see TOOLEY-KNOBLETT & GRUNING, *supra* note 61, § 10:12, at 433.

120. See *supra* Part II.B.1.

121. The original classification arose in a Supreme Court case in 1920. See Frost-Johnson Lumbar Co. v. Salling’s Heirs, 91 So. 207, 245 (1920).

122. 58 C.J.S. *Mines and Minerals* § 191 (2013).

layperson or an attorney from another jurisdiction may not be *effectively* notified that the deed concerns rights to minerals by the broad term “servitudes.” *Coleman* and *Spillman* are at least practical examples of the failure of those declarations to effectuate notice.<sup>123</sup> Thus, for many laypersons, the “servitudes of record” provisions will not convey actual notice to the buyer that the seller’s ownership of the mineral rights to the land is limited.

Further, although the court in *Spillman* downplayed the buyer’s interest in the mineral rights at the time of the sale, it is likely that the buyer’s cause will be affected in most transactions where mineral rights are excluded without the buyer’s knowledge.<sup>124</sup> As opposed to typical predial servitudes and utility servitudes, which merely limit an owner’s use of the property, a mineral servitude allows the record owner to actually extract a valuable product from the land and claim ownership of it.<sup>125</sup> Because the value of the minerals could far surpass the value of the land itself, it would be unreasonable to assume that the buyer’s cause will not be affected by an encumbrance affecting the mineral rights.

Although doctrine makes clear that omnibus declarations do not effectively inform the buyer of the existence of servitudes encumbering property, equitable concerns also support this conclusion. First, putting the onus on the seller is sensible because he or she is in the best position to know the extent of his or her ownership. This is particularly true where—as was the case in *Tealwood*, *Coleman*, and *Spillman*—the servitude is held by the seller’s alternate legal personality.<sup>126</sup> Second, any argument that this replacement is too onerous for the seller can be dispelled as well. If a seller does not have actual knowledge of a servitude due to an improper declaration by his or her own ancestor in title, the seller will be able to pass liability onto his or her own seller.<sup>127</sup> The buyer will be subrogated to the rights of the seller and thereby enabled to pursue remote vendors, thus protecting a seller who is unaware for

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123. *Spillman v. Gasco, Inc.*, 110 So. 3d 150, 152 (La. Ct. App. 2012); *Coleman v. Burgundy Oaks, L.L.C.*, 71 So. 3d 352, 353 (La. Ct. App. 2011).

124. Landowners in Louisiana have an interest in these servitudes due to the prevalence of mineral wealth in the state. OFFICE MINERAL RES., MARGINAL OIL AND GAS PRODUCTION IN LOUISIANA: AN EMPIRICAL EXAMINATION OF STATE ACTIVITIES AND POLICY MECHANISMS FOR STIMULATING ADDITIONAL PRODUCTION (2004), available at [http://dnr.louisiana.gov/assets/docs/mineral/formspubs/Royalty-Relief-Report-2004\\_.pdf](http://dnr.louisiana.gov/assets/docs/mineral/formspubs/Royalty-Relief-Report-2004_.pdf) [<http://perma.cc/F85N-XRME>] (archived Mar. 3, 2014).

125. LA. REV. STAT. ANN. § 31:21 (2000).

126. See *supra* Part I.

127. LA. CIV. CODE art. 2503 (2014) (“The buyer is subrogated to the rights in warranty of the seller against other persons, even when the warranty is excluded.”).

reasons other than his or her own negligence.<sup>128</sup> Third, determining the sufficiency of declarations based on whether they will give actual notice to a “reasonable buyer” should comfort the seller as well. Because this is an objective test, it protects a seller whose buyer should have been informed by the warranty deed but who by his or her own fault is not actually informed—e.g., a buyer who does not properly examine the deed.

The fact that sellers are using overly broad language with little effect is a public policy concern for Louisiana. Many deeds will likely include broad “servitudes of record” provisions because they are simple, cost-free, routine, and may be of some value. Lawyers use omnibus provisions as a fallback measure that they can cite to try to protect their clients from liability. However, omnibus declarations simply do not have the effect intended by most attorneys. The consequence of the reasoning in *Spillman* would be the elimination of warranty as to mineral rights in virtually *all* transactions without any cost to the seller—e.g., reduction in the purchase price—that might accompany a non-warranty deed.<sup>129</sup> Therefore, courts should apply doctrine in a fashion that would set forth a bright-line rule for mineral rights that declarations that specifically mention minerals<sup>130</sup> are required and omnibus provisions are *per se* unreasonable.<sup>131</sup>

### C. Determining the Rights of the Evicted Buyer

Once a breach of the seller’s warranty against eviction is established, the second step of traditional warranty analysis is to determine how to restore the buyer’s rights in accordance with article 2503. When presented with the particular facts of *Tealwood*, *Coleman*, and *Spillman*, the issue for the Second Circuit became whether the buyer could pursue a remedy not only against the seller but also against the seller’s “alter ego.”

#### 1. Traditional Rights

The traditional remedies available to a buyer for breach of the warranty against eviction depend on several variables.<sup>132</sup> First is the

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128. TOOLEY-KNOBLETT & GRUNING, *supra* note 61, § 10:10, at 430.

129. *Spillman v. Gasco, Inc.*, 110 So. 3d 150, 154–55 (La. Ct. App. 2012).

130. *See supra* Part II.B.1.

131. *See supra* Part II.B.1.

132. Both the extent of the warranty and the buyer’s knowledge control the buyer’s warranty claim. The Civil Code weighs so heavily in favor of protecting the buyer that it entitles the buyer to rescission of the sale *even if* he or she had actual knowledge of the threat of eviction, but in such a case the buyer cannot seek damages. *Collins v. Slocum*, 317 So. 2d 672, 681 (La. Ct. App. 1975). It is also

extent of the warranty at issue. Parties may agree to increase or limit the warranty, and they may even go so far as to exclude it.<sup>133</sup> If the title is under full warranty and a servitude encumbers the land, the buyer is only partially evicted.<sup>134</sup> If the buyer is partially evicted, he or she may obtain either diminution in price or, in some cases, rescission of the sale.<sup>135</sup> In order to obtain rescission, the magnitude of the encumbrance must be such that the court would assume that the buyer would not have bought the property if he or she had been aware of its existence.<sup>136</sup> Although a seller's failure to declare a nonapparent mineral servitude is generally considered partial eviction, courts may find that such a breach in the warranty requires rescission of the deed plus damages.<sup>137</sup> If the buyer is not entitled to rescission, he or she maintains the right to diminution in price proportionate to the value of the loss because it is assumed that the buyer would have paid less for the thing had he or she known of the limitation on the purchase.<sup>138</sup>

The remedy provided by the Civil Code, then, would afford the buyer with the ability to seek some cure for the loss of the mineral rights.<sup>139</sup> When the third party who holds the rights to the mineral servitude is a "true" innocent third party—one whose personality is separate both legally and practically from that of the seller—these

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true in the case of servitudes that even if a buyer acquires actual knowledge by searching the public records, he or she is nonetheless entitled to a remedy if the seller's failure to properly declare the encumbrance evicts the buyer. *Richmond v. Zapata Dev. Corp.*, 350 So. 2d 875, 880 (La. 1977); YIANNOPOULOS, *supra* note . This further supports this Comment's conclusion with regard to the futility of "servitudes of record" provisions.

133. LA. CIV. CODE art. 2503 (2014). They may recover the price paid and the value of the fruits that must be returned to the evictor. *Id.* art. 2506. If the act of sale is under full warranty of title and the buyer is evicted, he or she is entitled to rescission of the sale and additionally may recover any damages suffered due to the eviction. *Id.*

134. *Id.* art. 2511.

135.

When the buyer is evicted from only a part of the thing sold, he may obtain rescission of the sale *if he would not have bought the thing without that part*. If the sale is not rescinded, the buyer is entitled to a diminution of the price in the proportion that the value of the part lost bears to the value of the whole at the time of the sale.

*Id.* (emphasis added).

136. *Collins*, 317 So. 2d at 678. See TOOLEY-KNOBLETT & GRUNING, *supra* note 61, § 10:11, at 431; *see also* Art. 2511.

137. *E.g.*, *Collins*, 317 So. 2d at 678.

138. Art. 2511; ALAIN LEVASSEUR & DAVID GRUNING, LOUISIANA LAW OF SALE AND LEASE: A PRÉCIS 69 (2d ed. 2011); TOOLEY-KNOBLETT & GRUNING, *supra* note 61, § 10:11, at 431.

139. *See supra* Part II.

traditional remedies are all the law can afford without disrupting the third party's rights, which the public records doctrine seeks to protect.

## 2. Creative Resolution

In *Tealwood*, *Coleman*, and *Spillman*, the sellers virtually held the mineral rights through separate legal personalities.<sup>140</sup> In addressing this distinct set of facts, the court in *Tealwood* correctly identified veil-piercing as a means of requiring the defendants to transfer the mineral rights to the buyer.<sup>141</sup> Specific performance is not listed among the remedies for a buyer whose seller has breached the warranty, yet it is alluded to as the solution in *Tealwood*.<sup>142</sup> The Civil Code does not list specific performance because the question of ownership is one of law and not of fact. If the seller owns the property, the seller's ownership of the mineral servitude would, by law, transfer to the buyer upon the act of sale.<sup>143</sup> Piercing the veil and disregarding the separate identities of the seller and his or her third-party "alter ego" would make the third party liable for the seller's obligations.<sup>144</sup> Thus, the rights to the minerals would transfer by operation of law. Although transferring the mineral rights would not normally be a plausible remedy for the buyer, the peculiar facts of *Tealwood*, *Coleman*, and *Spillman* allow a court to entirely mend the buyer's eviction.

### III. VEIL-PIERCING

The judges in *Tealwood* and *Coleman* considered it inherently inequitable for a vendor to "obligate himself to deliver and to warrant title and peaceable possession to [the] buyer of a thing and then by his own act or claim to derogate from, or to assert rights to

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140. *Tealwood Props., L.L.C. v. Succession of Graves*, 64 So. 3d 397, 399 (La. Ct. App. 2011); *Coleman v. Burgundy Oaks, L.L.C.*, 71 So. 3d 352, 353 (La. Ct. App. 2011) (noting that there was at least "one other person" who was a co-owner of the third-party L.L.C. that held the mineral servitude in that case, which may call for line-drawing when judges consider the facts of each case); *Spillman v. Gasco, Inc.*, 110 So. 3d 150, 152 (La. Ct. App. 2012).

141. *Tealwood*, 64 So. 3d at 406–07.

142. *Id.* at 407–08 ("Tealwood has made factual allegations sufficient to state a cause of action against Dale 'for the specific performance of transferring the mineral rights' of the Tract to Tealwood by a reformation of the Deed.").

143. *Dillon v. Morgan*, 362 So. 2d 1130, 1132 (La. Ct. App. 1978). Of course, the peculiarity of *Tealwood*, *Coleman*, and *Spillman* is that the seller actually *did* own the mineral servitude through a separate legal entity also controlled by the seller either individually or with one or two other stockholders. *Tealwood*, 64 So. 3d at 399; *Coleman*, 71 So. 3d at 353; *Spillman*, 110 So. 3d at 152.

144. *Tealwood*, 64 So. 3d at 405–06.

the thing contrary to, his obligations.”<sup>145</sup> Faced with this clear injustice, the courts provided a means through veil-piercing and reformation of the deed whereby the plaintiffs could recover mineral rights from the defendants despite the availability of other remedies to plaintiffs whose vendors breach their warranty.<sup>146</sup> This expansion of circumvention veil-piercing theory into the realm of warranty law—with the goal of creating an equitable solution for the courts in mind—is an important exploration of this Comment. If followed, the Second Circuit’s use of this theory in *Tealwood* and *Coleman* extends the remedy available to courts when corporate identity has been used to thwart the law to the detriment of others in a contractual setting.

*A. “Piercing the Corporate Veil” to Prevent Circumvention of the Law*

*1. Traditional Veil-Piercing Doctrine*

Corporate identity is a fiction used to achieve many desired effects, including limited liability, perpetual life, and simplification of ownership.<sup>147</sup> Veil-piercing doctrine allows courts to ignore this fiction in order to deny the normal legal protections that corporate identity affords.<sup>148</sup> In particular, the traditional purpose of veil-piercing is to impose personal liability on a shareholder for a corporation’s debts, thereby eliminating limited liability.<sup>149</sup> Before piercing the veil, however, courts must balance the policies behind protecting the fiction of corporate separateness with the facts at hand that may compel a more equitable remedy than corporate law would normally allow.<sup>150</sup> Corporate law strongly favors maintaining the separate identity of limited liability companies and corporations.<sup>151</sup> However, courts recognize that this concept of separateness is a legal fiction and should be disregarded when corporate identity is abused.<sup>152</sup>

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145. *Coleman*, 71 So. 3d at 357; *Tealwood*, 64 So. 3d at 408.

146. *See supra* Part I.

147. GLENN MORRIS & WENDELL H. HOLMES, BUSINESS ORGANIZATIONS § 32.01, in 8 LOUISIANA CIVIL LAW TREATISE 50–52 (1999).

148. Morris, *supra* note 23, at 271.

149. *Id.*

150. STEPHEN B. PRESSER, PIERCING THE CORPORATE VEIL § 2:19 (2004).

151. For a critique on single business enterprise analysis and the undermining of limited liability, see James Dunne, *Taking the Entergy Out of Louisiana’s Single Business Enterprise Theory*, 69 LA. L. REV. 691, 702–03 (2009).

152. *Glazer v. Comm’n on Ethics for Pub. Emps.*, 431 So. 2d 752, 754 (La. 1983).

When deciding whether to pierce the corporate veil, courts often use a “totality of the circumstances” test that evaluates a corporation’s compliance with corporate formalities, which manifest the corporation’s intention to maintain a separate identity from its shareholders.<sup>153</sup> Ultimately, however, compliance with corporate formalities is not dispositive.<sup>154</sup> Instead, veil-piercing generally requires some wrongdoing on the part of the shareholders to the detriment of the corporation’s creditors or its tort victims.<sup>155</sup> For example, courts will impose liability on the shareholders when there is evidence of fraud or deceit or when facts exist demonstrating that the corporation abused its status as a separate entity.<sup>156</sup> In keeping with this trend, Judge Moore cited the lack of fraud or other “nefarious” acts of the seller to argue against veil-piercing in both his dissent in *Tealwood* and his majority opinion in *Spillman*.<sup>157</sup>

The hesitance of Louisiana courts to resort to veil-piercing stems from the same policies that corporate law seeks to encourage.<sup>158</sup> Shielding shareholders from personal liability promotes commerce, entrepreneurship, and industrial growth.<sup>159</sup> Similarly, imposing personal liability too often may discourage capital contributions to corporations because shareholders will not want to expose their personal wealth to “the risks of business.”<sup>160</sup> However, veil-piercing doctrine maintains that it is against public policy to allow a shareholder to use a corporation for the sole purpose of shielding itself from responsibility to others.

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153. *E.g.*, *Riggins v. Dixie Shoring Co.*, 590 So. 2d 1164, 1168 (La. 1991) (“Some of the factors courts consider when determining whether to apply the alter ego doctrine include, but are not limited to: 1) commingling of corporate and shareholder funds; 2) failure to follow statutory formalities for incorporating and transacting corporate affairs; 3) undercapitalization; 4) failure to provide separate bank accounts and bookkeeping records; and 5) failure to hold regular shareholder and director meetings.”).

154. *See Morris*, *supra* note 23, at 277; Robert W. Hamilton, *The Corporate Entity*, 49 TEX. L. REV. 979, 981 (1971); Elvin R. Latty, *The Corporate Entity as a Solvent of Legal Problems*, 34 MICH. L. REV. 597, 634–35 (1936).

155. PRESSER, *supra* note 150, § 2:19.

156. *Union Local P-1476 of Amalgamated Meatcutters v. Union Citizens Club of Terrebonne*, 408 So. 2d 371, 373 (La. Ct. App. 1981).

157. *Tealwood Props., L.L.C. v. Succession of Graves*, 64 So. 3d 397, 408–09 (La. Ct. App. 2011); *Spillman v. Gasco, Inc.*, 110 So. 3d 150, 159 (La. Ct. App. 2012).

158. PRESSER, *supra* note 150, § 2:19.

159. “The purpose of the insulation and limited liability of shareholders is to promote commerce and industrial growth by encouraging them to make capital contributions to corporations without subjecting all of their personal wealth to the risks of business.” *Glazer v. Comm’n on Ethics for Pub. Emps.*, 431 So. 2d 752, 757 (La. 1983).

160. *Id.*

## 2. *Circumvention Veil-Piercing Theory*

In *Tealwood* and *Coleman*, the Second Circuit used “circumvention” veil-piercing theory,<sup>161</sup> a specific type of veil-piercing that is unique among other traditional forms because it does not impose personal liability on the corporation’s owner.<sup>162</sup> Instead, the court simply prevents a shareholder from doing through his or her corporation that which he or she could not lawfully do individually.<sup>163</sup> It thus precludes *circumvention* of the law through the legal fiction of corporate separateness.<sup>164</sup>

In *Glazer v. Commission on Ethics for Public Employees*, the Louisiana Supreme Court declared that separate corporate identity is a privilege that will not be recognized to permit an individual to foil other important public interests that the State seeks to protect through either legislation or regulation.<sup>165</sup> According to the Court:

Separate corporate identity is a privilege conferred by law to further important underlying policies, such as the promotion of commerce and industrial growth. Consequently, the privilege may not be asserted for a purpose which does not further these objectives in order to override other significant public interests which the state seeks to protect through legislation or regulation.<sup>166</sup>

In *Glazer*, the Court found that where a conflict of interest clearly prohibited Mr. Glazer—a State Mineral Board member—from transacting individually with certain oil companies, the same conflict of interest prohibited Mr. Glazer from doing so through his wholly owned corporation, Glazer Steel Corporation.<sup>167</sup> Recognition of Glazer Steel Corporation’s separate existence from Mr. Glazer for that purpose would “be a misuse of the privilege of separate capacity

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161. See *Morris*, *supra* note 23, at 311; *Tealwood*, 64 So. 3d at 406; *Coleman*, 71 So. 3d at 356–57.

162. See *Morris*, *supra* note 23, at 311.

163. *Id.* at 310–11.

164. *Id.*

165. *Glazer*, 431 So. 2d at 754.

166. *Id.*

167. The Code of Ethics for Governmental Employees specifically prohibits any public servant from receiving anything of economic value for or in consideration of services rendered to or for any person if such public servant knows or reasonably should know that such person has or is seeking to obtain contractual or other business or financial relationships with the public servant’s agency. *Id.* at 756. Here, Mr. Glazer was selling steel on a non-bid-negotiated basis to seven companies that held mineral leases with the State of Louisiana. *Id.* at 755. Mr. Glazer was the sole shareholder, chief administrative officer, president, and chairman of the board of Glazer Steel Corporation. *Id.*

and further none of its proper functions and objectives,” such as capacity to enter contracts, sue and be sued, have limited liability, and have continuous existence.<sup>168</sup>

An earlier Louisiana Supreme Court case, *Keller v. Haas*, is also instructive because it involved facts similar to those in *Tealwood*, *Coleman*, and *Spillman*.<sup>169</sup> Defendant Haas purchased his co-owners’ interests in a tract of land at a tax sale and later transferred the property to his wholly owned corporation to spoil the co-owners’ redemption rights.<sup>170</sup> The Court stated that:

It is well settled that where an individual forms a corporation of which he is the sole and only stockholder or owns such control of the stock that the act of the corporation is his own, that he may not use the screen of the corporate entity to absolve himself from [sic] responsibility.<sup>171</sup>

The Court disregarded the separate personality of the corporation by recognizing the co-owners’ right to redeem their undivided interests in the property directly from the corporation.<sup>172</sup>

In both *Glazer* and *Keller*, the Court did not impose personal liability on the corporations’ owners for the corporations’ debts.<sup>173</sup> This limitation on the remedy that the Court provided is important in the balancing test that veil-piercing entails. A court that seeks to disregard limited liability must find that the corporation’s “alter ego” either disregarded corporate formalities or used the corporate form to commit fraud.<sup>174</sup> However, in *Glazer*, the Supreme Court held that when an “alter ego” uses corporate identity to frustrate an important regulatory policy—to circumvent the law—fraud or failure to comply with corporate formalities is not required.<sup>175</sup> The policies that favor protection of corporate identity—e.g., encouraging people to invest without risking their personal wealth—are not compromised.<sup>176</sup> Because of this reduced incentive to respect corporate identity, the Court is more willing to pierce the veil when shareholders are circumventing the law.

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168. *Id.* at 758.

169. *Keller v. Haas*, 12 So. 2d 238, 239 (La. 1943).

170. *Id.* at 239–40.

171. *Id.* at 240. This language also reflects the negativity with which courts used to view solely owned corporations. For further discussion see MORRIS & HOLMES, *supra* note 147, § 32.12, at 92–93.

172. *Keller*, 12 So. 2d at 240.

173. *Glazer*, 431 So. 2d at 757–58; *Keller*, 12 So. 2d at 240.

174. *Glazer*, 431 So. 2d at 757.

175. *See id.* at 757–58.

176. “[T]he same factual scenario may result in recognition of a separate corporate identity for some purposes, i.e. insulation of shareholders from liability, and a disallowance of the separate corporate entity privilege for others.” *Id.* at 758.

*B. Circumvention Veil-Piercing Applied to Warranty Law*

When a vendor breaches the warranty against eviction by attempting to retain minerals in property sold through a separate corporate entity,<sup>177</sup> the court must determine whether to pierce the veil to cure the buyer's eviction by transferring the mineral rights to the buyer. Importantly, piercing the veil would provide a remedy for plaintiffs that article 2506 does not.<sup>178</sup> Buyers who were not put on sufficient notice that mineral rights were withheld would be able to actually obtain the mineral rights to the land as opposed to obtaining either mere rescission of the sale or rescission plus damages. This solution provides significant protections for the buyer in the event that, for instance, the seller is insolvent. It would require that the seller hand over any mineral leases on the property, essentially making the buyer the lessor.<sup>179</sup>

Whether circumvention veil-piercing was an appropriate remedy was the crux of the issue in *Coleman* and *Tealwood*, and both found in favor of applying this remedy in the warranty setting.<sup>180</sup> As *Coleman* pointed out, the seller should not be able to warrant the sale of the mineral rights with one hand, while withholding those very mineral rights through the veil of his or her corporation with the other.<sup>181</sup> Judge Moore advocated, perhaps correctly, that the vendors did not act fraudulently,<sup>182</sup> but his implication that fraud is necessary for circumvention veil-piercing cannot be reconciled with the Louisiana Supreme Court's decisions in *Glazer* and *Keller*. Without the threat of veil-piercing as a remedy, a vendor of property could legally sell land to itself under the guise of a legal separate entity, reserving the mineral servitude. After protecting the mineral

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177. See *Tealwood Properties, L.L.C. v. Succession of Graves*, 64 So. 3d 397, 397 (La. Ct. App. 2011); *Coleman v. Burgundy Oaks, L.L.C.*, 71 So. 3d 352, 352 (La. Ct. App. 2011). But see *Spillman v. Gasco, Inc.*, 110 So. 3d 150, 152 (La. Ct. App. 2012).

178. Louisiana Civil Code article 2506 does not provide a remedy for specific performance. Instead, the buyer may seek rescission of the sale and damages if evicted. LA. CIV. CODE art. 2506 (2014).

179. *Tealwood*, 64 So. 3d at 407–08.

180. See *id.* at 406–07; *Coleman*, 71 So. 3d at 356. Other cases, such as *Glazer* and *Keller*, applied circumvention theory where the defendant had circumvented the laws set forth by the Legislature as opposed to private laws created by contract. See *Glazer*, 431 So. 2d 752; *Keller v. Haas*, 12 So. 2d 238, 239 (La. 1943).

181. *Coleman*, 71 So. 3d at 357 (“The jurisprudence is that a seller should not be allowed to obligate himself to deliver and to warrant title and peaceable possession to a buyer of a thing and then by his own act or claim to derogate from, or to assert rights to the thing contrary to, his obligations.”). See also *Tealwood*, 64 So. 3d at 397. But see *Spillman*, 110 So. 3d at 152.

182. *Spillman*, 110 So. 3d at 152.

rights, the vendor could sell the same land and minerals to a buyer when, in fact, the land was protected under a “third party’s” name.<sup>183</sup> Courts’ endorsement of these transactions in which the seller lacks fraudulent intent enables sellers to obstruct their own contractual obligations and circumvent the contract, which is exactly what the Court in *Glazer* and *Keller* sought to prevent.<sup>184</sup>

Meanwhile, veil-piercing involves a balancing of policies. A court must weigh the benefits of corporate personality and separateness against the public policies set forth by the Louisiana Legislature elsewhere in the law—here, particularly those policies the Legislature aimed to establish in the Civil Code articles regulating the enforceability of contracts of sale.<sup>185</sup> As Professor Glenn Morris notes in his treatise on Business Organizations, courts are more liberal in granting the veil-piercing remedy in the circumvention category of cases because such a remedy does not jeopardize limited liability.<sup>186</sup> With limited risks to corporate identity involved, the reasons weighing against veil-piercing in circumvention cases lack real footing. Not only is it unwise and unnecessary to allow this type of circumvention of contractual duties to take place, but also the danger to corporate interests is low in this area, and thus, the policies against veil-piercing are slight.

Allowing the transactions involved in *Tealwood*, *Coleman*, and *Spillman* would promote constructive fraud to avoid delivery of the thing sold, one of the primary obligations of the seller under the Civil Code.<sup>187</sup> Thus, according to the balancing test of *Glazer*, the weight of public policy in contract law and warranty tips in favor of using veil-piercing to afford the plaintiffs a remedy. The use of veil-piercing circumvention theory in cases like these would prevent transactions meant to retain ownership of property that has been transferred by law.

#### CONCLUSION

Although the Haynesville Shale developments brought prosperity to many individuals in Louisiana, disputes have also arisen as some seek to obtain the fortunes that they feel have been wrongfully taken. Certainly, the public records recently became

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183. See *Tealwood*, 64 So. 3d at 397.

184. *Coleman*, 71 So. 3d at 357 (“The jurisprudence is that a seller should not be allowed to obligate himself to deliver and to warrant title and peaceable possession to a buyer of a thing and then by his own act or claim to derogate from, or to assert rights to the thing contrary to, his obligations.”); *Dillon v. Morgan*, 362 So. 2d 1130 (La. Ct. App. 1978).

185. *Glazer*, 431 So. 2d at 757.

186. MORRIS & HOLMES, *supra* note 147, § 32.01, at 50–52.

187. LA. CIV. CODE art. 2475 (2014).

more relevant to the people of northern Louisiana than ever before. Where conflict between the deed of sale and the public records arises, the law is firmly settled that the buyer should prevail in an action for breach of warranty. In light of uncertainty in jurisprudence and the tendency among Louisiana vendors to state their obligations ambiguously, this Comment suggests that courts should structure their decisions regarding sufficiency of declarations based on the reasonableness of “subject to” provisions. Reasonableness should be judged by the subjective knowledge of the buyer and the objective degree of burden or injury that the servitude imposes on the property. Omnibus provisions stating that the seller’s land is transferred “subject to servitudes of record” are wanting, and a seller thus expressing the mineral servitudes on the property to the buyer should be liable under the warranty against eviction for failing to notify the buyer.

Finally, the second consideration of this Comment is the appropriateness of using veil-piercing to impose contractual obligations on a seller whose alter ego is a protected “third party” to the transaction. If a seller conveys rights to property that he or she, in fact, owns either personally or through a corporation of which he or she is a majority owner, the balancing test required in veil-piercing analysis weighs in favor of piercing the corporate veil. It is clearly against public policy, as set forth in article 2500, for the vendor to withhold rights to property that he or she has conveyed. The incentives for allowing a seller to shield him or herself as a “third party” do not find themselves in corporate law but, instead, in the seller’s attempt to protect property in a way that the law does not allow.

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\* J.D./D.C.L. 2014, Paul M. Hebert Law Center, Louisiana State University. The author would like to thank Professors Melissa T. Lonegrass and Glenn G. Morris, without whose invaluable guidance, patience, and support this Comment would not have been possible. The author is also grateful for Professor Dian Tooley-Knoblett’s kindness in providing constructive insight and instruction throughout the writing process.