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Recent Developments - Cases and Legislation

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1. Recent Case Law

1. Lessor's Lawsuit Against Lessee for Breach of Mineral Lease Dismissed as Premature

In Lucky v. Encana Oil & Gas (USA), Inc., 45,413 (La.App. 2 Cir. 8/11/10); 46 So.3d 731, the Second Circuit affirmed a district court's ruling granting a lessee's exception of prematurity and dismissing the lessor's lawsuit. The lessor sued its lessee, Fite Oil & Gas, Inc. ("Fite"), for dissolution of mineral leases, asserting that Fite had breached various provisions of leases restricting access to a particular road, requiring fencing around wells, and maintaining a bridge in reasonable condition. Id. at 731. The leases contained the following provision requiring written notice of a breach and a sixty day period for a lessee to comply:

[IN] the event Lessor considers that operations are not being conducted in compliance with this contract, Lessee shall be notified in writing of the facts relied upon as constituting a breach and Lessee shall have sixty (60) days after receipt of such notice to comply with the obligations imposed by virtue of this instrument. [Id.]

Here, the lessor sent written notice to Fite's assignee, Encana, which notice Encana forwarded to Fite. The lessor also sent written notice to Fite, but that notice was within sixty days of filing suit. Id. The Second Circuit held that the “letter to Encana was not sufficient notice pursuant to the leases, even if Encana subsequently forwarded the letter to Fite, because the lease provision clearly envisions notice provided by the “Lessor” . . . to the “Lessee” . . . .” Id. At 732. The Second Circuit also held that the letter to Fite was not sufficient notice because it “was inside the sixty day window created by the leases.” Id. The Second Circuit declined to treat the sixty-day written notice provision as an unenforceable “technicality,” but rather observed that the leases “created a legal relationship with contractual duties between the parties....” Id.

Lucky is significant because the notice provision at issue in Lucky is commonly found in Louisiana mineral leases, and because the Louisiana Supreme Court has held that written notice often is not required under Louisiana Mineral Code article 136. See Broussard v. Hilcorp Energy Co., 24 So.3d 813 (La. 2009). Lucky explained that, had the leases failed to contain the written notice provision, “Broussard would be controlling and Article 135 of the Mineral Code would dictate.” Id. At 734. Thus,
Lucky recognizes that parties to a mineral lease may contractually alter or expand the notice provision of Louisiana Mineral Code article 136.

2. Mineral Lease is Not Rescinded Even Though Lessor Was Unaware of Existence of Haynesville Shale Below Property

In Cascio v. Twin Cities Development, LLC, 45,634 (La.App. 2 Cir. 9/22/10); 48 So.3d 341, a lessor sought rescission of a mineral lease, claiming that, when the land was leased, it was unaware the Haynesville Shale existed below its property. Id. at 342. The district court granted a partial summary judgment in favor of the defendant, Twin Cities Development, an undisclosed agent for Chesapeake Louisiana, L.P. Id.

Under Louisiana law, consent to a contract may be vitiated by error. La. Civ. Code art. 1927. Here, the lessor argued that the lease “should be rescinded based on error regarding the object of the contract or a substantial quality thereof.” Id. at 743. In other words, the lessor argued it was unaware of the exceptional quality of the land as being situated above the Haynesville Shale. Id. The Second Circuit rejected this argument, observing that “both the plaintiffs and the defendants could speculate as to the existence and value of minerals found” on the property. Id. at 344. Moreover, it should have been apparent to the lessor that the lessee “entered into such a lease agreement in order to explore for and hopefully discovery and produce oil, gas, and minerals from the land.” Id. The Second Circuit also reasoned that “a claim of error . . . regarding the value of a mineral lease is synonymous with a claim of lesion beyond moiety,” and that mineral leases are not subject to rescission on that basis. Id. *4 (citing La. R.S. § 31:17). The Second Circuit noted that the United States District Court for the Western District of Louisiana reached a similar holding in a case involving similar facts. Id. (citing Thomas v. Pride Oil & Gas Properties, Inc., 633 F.Supp.2d 238 (W.D.La. 2009)).

3. Mineral Lease Rescinded Due to Incorrect Royalty Provision

In Adams v. JPD Energy, Inc., 45,420 (La.App. 2 Cir. 8/11/10); 46 So.3d 751, a lessor executed a lease with JPD Energy, Inc. (“JPD”), an independent landman company retained by Chesapeake Exploration, L.L.C. (“Chesapeake”). The lessor testified that, during negotiations, he was promised a 1/4 royalty and a limit on the depth of the lease. Id. at 752. After executing the lease, he learned that it contained a 1/8 royalty provision and no depth limitation. The lessor then filed a suit to rescind the lease. Id. JPD’s landman acknowledged that the 1/8 royalty provision was incorrect, stating that the lease actually should have contained a 1/5 royalty provision, which was the standard royalty paid at the time. Id. at 753.

Although lessor signed the lease after reading it slowly, the Second Circuit affirmed the district court’s judgment rescinding the lease, finding that there was no meeting of the minds. The Second Circuit
observed that the provisions of the Louisiana Mineral Code are supplementary law, and that courts regularly interpret mineral leases using general rules of contract interpretation, which require a meeting of the minds to constitute consent. Id. at 755 (citations omitted). Here, notwithstanding that the lessor read the lease before signing it, the Second Circuit determined that there was no meeting of the minds, as even JPD's landman acknowledged that the mineral lease incorrectly set forth a 1/8 royalty. Id. 755-56.

4. Exercise of Option to Extend Mineral Lease Binding on Third Party Even Though Not Recorded

In Sparks v. United Title & Abstract, LLC, – So.3d –, 2010 WL 5099665 (La. App. 2nd Cir. Dec. 15, 2010), the Court of Appeal held that “the exercise of an option to renew contained in a recorded lease need not be recorded to be effective against third parties.” Id. *1. In Sparks, the plaintiffs allegedly received an offer to lease of $20,000 per acre from XTO Energy, Inc. (“XTO”); however, XTO declined to proceed with the transaction after a title examination revealed that plaintiffs had only a 25% interest in the mineral rights. Id. Plaintiffs filed suit against the defendant title company and title insurer, alleging that the title documents misstated the percentage of plaintiffs' mineral interests and caused plaintiffs to be unable to lease their mineral interests to XTO. Id.

The defendant title company and title insurer argued that plaintiffs had suffered no damages because the mineral rights were the subject of an existing mineral lease in favor of another lessee. In fact, prior to plaintiffs' acquisition of the property, a mineral lessee had timely exercised an option to extend a mineral lease covering the subject property. Id. *1. Plaintiffs responded that, because the exercise of the option was not recorded, it was not effective against plaintiffs and XTO. Id. *2.

Affirming its prior decision in Thomas v. Lewis, 475 So.2d 52 (La. App. 2nd Cir. 1985), the Court of Appeal rejected plaintiffs’ position. The Court of Appeal observed that the plaintiffs acquired their interests subject to all of the provisions of the mineral lease, including an option for an additional two year term in exchange for payment of an additional bonus prior to the end of the primary term. Id. *4. Thus, they “were no longer third persons to that lease.” Id. More importantly, noted the Court of Appeal, is that the exercise of an option to renew included in the recorded lease need not be recorded to be effective as to third parties, such as XTO. Id. *4-5. Rather, “a recorded document that contains an option...suffices to put third persons on notice of a potential adverse claim....” Id. *5.
5. Award of Damages Arising Out of Most Favored Nation Clause Affirmed

In Stephenson v. Petrohawk Properties, LP, 45,296 (La.App. 2 Cir. 6/2/10); 37 So.3d 1145, the court of appeal affirmed an award of $1.92 million in damages plus interest for breach of a “most favored nation clause” (the “MFNC”) in a mineral lease. Id. at 1146. The MFNC generally required the lessee to pay the lessor the difference between the lessor’s bonus ($4,250 per acre) and any bonus paid to another lessor for a mineral lease entered within 12 months and covering any portion of a certain geographic area within two miles of the leased premises. Id. at 1147. At issue in Stephenson was an exception to the MFNC that exempted “a lease covering a tract of land of less than 20 acres.” Id. at 1146. The lessee, Petrohawk Properties, LP (“Petrohawk”), entered into another lease covering various noncontiguous tracts of land covering over 4,000 acres for which it paid a lease bonus of $18,500 per acre. Id. at 1147. Of those various tracts, one totaling 7.36 acres was within 1.89 miles of the plaintiff’s property. Id. at 1148. Petrohawk argued that the MFNC was not triggered because only one leased tract, which was less than 20 acres, fell within the geographic area of the MFNC. Id. The plaintiff, on the other hand, argued that the MFNC exception was inapplicable because Petrohawk had entered into only one lease and it covered 4,000 acres, a portion of which fell within 2 miles of the leased premises. Id.

In affirming the district court’s award of damages to the plaintiff, the court of appeal noted that general rules of contract interpretation apply when interpreting contracts involving mineral rights. Id. at 1149. The court of appeal concluded that the MFNC was clear and unambiguous, finding that the phrase “a lease covering a tract of land of less than 20 acres” refers to single lease of less than 20 acres of land. Id. at 1149-50. The court of appeal noted that there is no requirement in the MFNC that all of the leased land fall within the geographic area of the MFNC, and Petrohawk’s interpretation would treat a single lease covering multiple non-contiguous tracts as separate leases. Id. at 1153. The court of appeal concluded that a Petrohawk’s interpretation of the MFNC would ignore the plain meaning of the MFNC, lead to absurd results, and disregard the purpose of the MFNC. Id. at 1152.

6. District Court Has Subject Matter Jurisdiction Over Oilfield Site Remediation Claims

In Duhon v. Petro “E,” LLC, 09-1150 (La.App. 3 Cir. 4/7/10); 34 So.3d 1065, a landowner sought damages against various defendants arising out of oilfield pollution, including storage and disposal of toxic oilfield waste in unlined pits. Id. at 1066. One defendant asserted an exception of lack of subject matter jurisdiction, arguing that, under La.R.S. 30:29 (also known as Act 312), the district court had discretion...
to refer the dispute to the Louisiana Department of Natural Resources (the “LaDNR”). Id. at 1067. Several defendants also asserted exceptions of prematurity, arguing that the surface and mineral leases at issue had not expired and thus no restoration was yet due. Id. The district court granted the exceptions and referred the matter to the LaDNR to allow review and action by that agency in advance of further consideration by the district court. Id. The court of appeal reversed the district court, finding that both exceptions should have been denied. Id. at 1066.

The court of appeal first addressed the exception of lack of subject matter jurisdiction, observing that, in M.J. Farms, Ltd. v. Exxon Mobil Corp., 998 So.2d 16, 37 (La. 1998), the Louisiana Supreme Court made it clear that the district court must under Act 312 determine whether environmental damage exists and who the responsible parties are prior to referral of the matter to the LaDNR. Id. at 1067. Indeed, M.J. Farms expressly observed that “Act 312 does not divest the district court of original jurisdiction.” Id. (quoting M.J. Farms, 998 So.2d at 37). The court of appeal also noted that cases discussing the doctrine of primary jurisdiction cited by the defendants predate Act 312, which established a procedure for resolving oilfield remediation claims initiated by litigation in a district court. Id. The court of appeal further observed that Act 312 authorizes the LaDNR to intervene in the lawsuit or assert its own enforcement action, but makes no provision for referral of the matter to the LaDNR prior to determination of environmental damages and responsible parties. Accordingly, the district court erred by granting the exception of lack of subject matter jurisdiction. Id.

The court of appeal next addressed the defendants’ exceptions of prematurity, noting that the exceptors had the burden of proof. Id. at 1068. Because they did not introduce any evidence that the leases had expired, the district court was required to accept as true the allegations in the plaintiff’s petition that the leases had terminated. Id. Accordingly, the district court also erred by granting the exceptions of prematurity. Id.

7. Lawsuit for Accounting Not a Collateral Attack on Louisiana Commissioner of Conservation Orders Permitting Alternate Unit Wells

In EOG Resources, Inc. v. Chesapeake Energy Corp., 605 F.3d 260 (5th Cir. 2010), the United States Court of Appeals for the Fifth Circuit was called upon to determine whether a lawsuit filed by EOG Resources, Inc. (“EOG”) against Chesapeake Energy Corporation (“Chesapeake”) constituted a collateral attack on orders of the Louisiana Commissioner of Conservation (the “Commissioner”). Id. at 262. EOG and Chesapeake were parties to a 1957 Operating Agreement that required Chesapeake, as operator, to obtain EOG’s consent prior to drilling in certain zones of Section 18 of Bossier Parish, Louisiana. Id. In 2006, Chesapeake filed applications with the Louisiana Office of Conservation seeking to
designate certain alternate unit wells for areas covered by the Operating Agreement. *Id.* at 263. After hearings, which EOG did not attend, the Commissioner permitted the drilling of three alternate wells. Pursuant to the Operating Agreement, Chesapeake sent letters to EOG proposing the alternate wells, but EOG did not consent. Chesapeake then withdrew its proposals pursuant to the Operating Agreement, and re-proposed drilling the wells pursuant to La.R.S. 30:10 (the “Risk Fee Statute”). *Id.* EOG again did not consent. Chesapeake proceeded to drill the three wells. Upon completion, Chesapeake suspended EOG’s share of revenues, offset EOG’s portion of drilling and completion costs, and offset an additional 100 percent risk fee. *Id.*

EOG filed suit against Chesapeake seeking an accounting of the wells’ proceeds pursuant to the Operating Agreement without deduction for well expenses or application of the Risk Fee Statute. *Id.* at 266. EOG argued that Chesapeake breached the Operating Agreement’s consent requirement and thus could not enforce its right to collect development costs. Chesapeake argued that, regardless of whether it breached the Operating Agreement (which it denied), EOG’s suit was an impermissible collateral attack on the Commissioner’s orders permitting the alternate wells. *Id.*

The Fifth Circuit began its analysis by discussing the Commissioner’s broad authority, indeed obligation, to issue orders and regulations aimed at preventing waste of Louisiana’s oil and gas resources. The Commissioner has the right to determine drilling units, permit designated unit wells, and force pool interests. *Id.* In the case of force pooling, absent an agreement between tract owners allocating costs and proceeds, Louisiana’s Risk Fee Statute controls. That statute permits the developing party to recoup expenses from unit owners, or failing their prompt payment of expenses, to receive from them a “risk fee” on top of drilling costs equal to 100% of those costs (which amount has recently been increased to 200%). However, neither forced pooling nor the statutory allocation of costs shall modify or change the rights and obligations under any contract between or among owners having a tract or tracts in the unit. La.R.S. 30:10(A) (2) (g). *Id.*

The Fifth Circuit considered the following three inquiries to determine whether EOG’s lawsuit constitutes an impermissible collateral attack on the Commissioner’s orders:

1. Does the plaintiff seek relief that would require the defendant to violate the Commissioner’s order?
2. Would resolution of the claim require that the court to reconsider the Commissioner’s factual findings?
3. Would the Commissioner have had the authority to grant the relief requested by the plaintiff if the claim had been presented at the hearing?[*Id.* at 266].
After undertaking these inquiries, the Fifth Circuit determined that EOG's lawsuit was not a collateral attack on the Commissioner's orders. Id. at 267. The Commissioner's orders gave Chesapeake permission to drill the alternate wells, but did not mandate that Chesapeake do so. Moreover, EOG did not seek to enjoin Chesapeake from further operation of the wells, but rather sought an accounting without deduction of well expenses or application of the Risk Fee Statute. Id. The Fifth Circuit also observed that, while the Commissioner has the power to allocate development and production costs among tract owners, that power may only be exercised after he has exercised his power of forced pooling, which was not done here. Id. Otherwise, the Commissioner has no power to modify or change the rights and obligations of the parties. Id.

8. Louisiana Supreme Court Finds Tort Claims, including Punitive Damages Claims, in Oilfield Legacy Case are Prescribed, and Declines to Require Restoration to Original Pre-lease Condition

In a 4-3 decision (with one judge in the majority sitting ad hoc for the Chief Justice), the Louisiana Supreme Court handed down its decision in Marin v. Exxon Mobil Corp., 09-2368 (La. 10/19/10); 48 So.3d 234. Marin is a much-anticipated decision by those in Louisiana involved in the growing number of “legacy” lawsuits alleging oilfield contamination from decades of exploration and production activity. Marin analyzed when a landowner's tort claims (which are the sole basis for an award of punitive damages in Louisiana) are prescribed (a concept similar to common law jurisdictions’ statutes of limitation). In so doing, Marin reversed an approximately $21 million punitive damages award against Exxon Mobil Corporation (“Exxon”). Id. at 251. Marin also addressed the scope of plaintiffs’ breach of contract and Louisiana Mineral Code claims, affirming an award of approximately $21 million for soil excavation, groundwater management during excavation, and canal contamination. In affirming the award of compensatory damages, the Court concluded that defendants were only liable for amounts sufficient to restore the property to regulatory standards under Statewide Order 29-B, and not the property’s original pre-lease condition. Id. at 247. The Court also rejected plaintiffs’ claims for nearly $200 million in groundwater restoration damages. These issues are addressed in turn below.

(A) Prescription of Tort Claims, Including Punitive Damages

Marin first observed the basic rule that tort, or “[d]elictual actions[,] are subject to a liberative prescription of one year’ and for damage caused to immovable property, ‘‘the one year prescription commences to run from the day the owner of the immovable acquired, or should have acquired, knowledge of the damage.’” Id. at 244 (quoting La. Civ. Code.
However, there are four factual scenarios in which the doctrine of contra non valentem prevents the running of prescription: 

1. where there was some legal cause which prevented the courts or their officers from taking cognizance of or acting on the plaintiff's action;

2. where there was some condition coupled with the contract or connected with the proceedings which prevented the creditor from suing or acting;

3. where the debtor himself has done some act effectually to prevent the creditor from availing himself of this cause of action; or

4. where the cause of action is neither known or reasonably knowable by the plaintiff even though plaintiff's ignorance is not induced by the defendant. [Id.]

The Court first addressed the fourth exception, known as the “discovery rule.” The discovery rule is also encompassed in the prescriptive period prescribed by Louisiana Civil Code article 3493, “as both essentially suspend prescription until the plaintiff knew, or reasonably should have known of the damage.” Id.

In Marin, the lower courts concluded that the landowners' tort claims had not prescribed because, although the landowners had some knowledge of the problems, prescription did not begin to run “until they 'gained knowledge of the nature and extent of the damages as set forth in the initial report of their expert, Greg Miller.” Id. at 245. The trial court had also found that “prescription does not begin to run until the plaintiffs had full knowledge of the extent of the damage,’ as reported by Mr. Miller.” Id. The Louisiana Supreme Court reversed the lower courts, stating that they “interpreted the fourth category of contra non valentem too broadly,” and that that it applies only in “exceptional circumstances.”” Id. (citations omitted). “When this jurisprudential doctrine was first recognized, ‘we specifically clarified that '[t]his principle will not exempt the plaintiff’s from the running of prescription if his ignorance is attributable to his own willfulness or neglect; that is, a plaintiff will be deemed to know what he could by reasonable diligence have learned.’” Id. at 246 (citations omitted). “Specifically regarding property damage claims, knowledge sufficient to start the running of prescription ‘is the acquisition of sufficient information, which if pursued, will lead to the true condition of things.’ This date has been found to be the date the damage becomes apparent.” Id. (citations omitted). “[T]he ultimate issue is determining whether a plaintiff had constructive knowledge sufficient to commence a prescriptive period is the reasonableness of the plaintiff’s action or inaction in light of his education, intelligence, and the nature of defendant’s conduct.” Id. In other words, the question is whether a plaintiffs’ knowledge of facts...
"constitutes 'the acquisition of sufficient information, which, if pursued, will lead to the true condition of the things.'" *Id.* (citation omitted).

The Court specifically characterized the discovery rule inquiry in the context of an oilfield legacy case as whether "knowledge of [certain] facts [should] have put the plaintiffs on notice that further inquiry and investigation was necessary, and would further inquiry have led to knowledge that land was contaminated with oilfield wastes." *Id.* at 249. 

"[T]he question is whether plaintiffs should have hired an expert, or taken the soil and/or groundwater to a laboratory for testing, based on the knowledge they had . . ., or based on knowledge they had . . . or whether it was reasonable to wait to do so." *Id.* 

"[P]rescription runs from the date a person "first suffers actual and appreciable damages, even though he may thereafter come to a more precise realization of the damages he has incurred or incur further damages as a result of the completed tortious act." *Id.* at 250. (quoting *Harvey v. Dixie Graphics, Inc.*, 593 So.2d 351, 354 (La.1992) (internal cites omitted)).

In *Marin*, the plaintiffs knew that sugarcane would not grow properly in the pit areas on their property and had made demand on Exxon to clean and close the pits so that they could grow sugarcane. *Id.* at 251. However, they waited eight years after their attempts to grow sugarcane would have succeeded to file suit against Exxon. *Id.* 

"Even though the damage they discovered later was more extensive, the sugarcane damage was an outward sign of 'actual and appreciable damage,' and was sufficient information to excite attention and put plaintiffs on guard and call for inquiry." *Id.* *Marin* also noted that the plaintiffs' lawsuit was based upon the same information they had access to several years before they filed suit. *Id.* 

"Had [the *Marin* plaintiffs] hired an expert at that time, they would have learned [the] extent of the contamination, just as they learned in 2003." *Id.* 

"The fact that it may take an expert to determine the extent of damage in an oilfield contamination case does not prolong the prescriptive period until an expert is actually hired and has performed his testing." *Id.* Accordingly, the delay by the *Marin* plaintiffs in filing suit was unreasonable. *Id.*

After addressing the discovery rule, the Court analyzed the third exception to prescriptive prescription, rejecting the plaintiffs' argument that Exxon prevented plaintiffs from availing themselves of their causes of action by conduct which rises to the level of concealment, misrepresentation, fraud or ill practice. *Id.* at 251. The Court observed that, "[w]hile Exxon misled plaintiffs by not disclosing the extent of the contamination when they learned of it, they certainly did nothing to prevent plaintiffs from investigation the cause of the sugarcane loss," and it was "unreasonable for plaintiffs to wait 12 years thinking that Exxon was going to come back and fix any damage on those particular pits." *Id.* at 252.
The Court also addressed plaintiffs' argument that Exxon's conduct was a continuing tort upon which prescription does not begin to run until the pollution is removed from the property. \textit{Id.} at 253 The Court was not persuaded by testimony that the pollution will continue to migrate. \textit{Id.} “Simply because the contaminants may have continued to dissolve into, or move with, the groundwater with the passage of time does turn this into a continuing tort.” \textit{Id.} at 254. Rather, when the pits were closed, Exxon's conduct ceased. “Any continued dissolution into the groundwater is the continuation of the harm caused by the previous, but terminated conduct, and falls under the category of 'progressively worsening damages,' not damage-causing conduct.” \textit{Id.}

Because plaintiffs' tort claims were prescribed, plaintiffs were not entitled to an award of punitive damages under former Louisiana Civil Code art. 2315.3.\textsuperscript{1} \textit{Id.} at 255.

\textbf{(B) Plaintiffs' Contract and Mineral Code Claims}

Having dismissed plaintiffs' tort claims, the Court analyzed whether any of plaintiffs' contract claims were premature or had prescribed. \textit{Id.} First, the Court noted that a landowner is not under an obligation to wait until lease termination to sue a lessee for damage to his property. \textit{Id.} However, where a mineral lease has terminated, a breach of contract action is subject to prescription of ten years. \textit{Id.} Accordingly, in this case, breach of contract claims under two active leases were upheld, while claims under a terminated lease were prescribed.

The Court next considered plaintiffs' argument that an approximately $21 million award of compensatory damages was insufficient because it was based upon the cost to restore the property to regulatory standards under Statewide Order 29-B and not the property's original condition. \textit{Id.} at 256-57. Plaintiffs argued that the applicable leases expressly required such restoration, and that restoration to original condition was required under \textit{Terrebonne Parish School Board v. Castex Energy, Inc.}, 893 So.2d 789 (La. 1995). The Court rejected these arguments.

First, the Court found that the applicable mineral lease was silent as to the type of restoration required, and the applicable surface lease only required that the lessee would, upon termination of the surface lease, “reasonably restore the premises as nearly as possible to their present condition (in 1994),” and not the pre-1941 lease condition. \textit{Id.} at 258. Noting that “[c]ontracts have the effect of law for the parties,” and that

\textsuperscript{1} Article 2315.3 was effective from its enactment in 1984 until its repeal effective April 16, 1996. To recover punitive damages under former Article 2315.3, a plaintiff must show that the defendant had actual possession or control of the hazardous or toxic substance that caused injury, and then handled or otherwise dealt with that substance at some time prior to the injury-causing event. \textit{Ross v. Conoco, Inc.}, 828 So.2d 546, 556 (La. 2002).
"[i]nterpretation of a contract is the determination of the common intent of the parties," the Court held that none of the applicable leases required restoration to the original pre-lease condition of the property. *Id.*

Second, the Court rejected the argument that *Castex* requires restoration beyond the standards established by Statewide Order 29-B. Statewide Order 29-B was amended by the Louisiana Department of Natural Resources in 1986 to require the registration and closure of existing unlined oilfield pits. *Id.* at 240. Statewide Order 29-B also requires remediation of oilfield pollution to certain standards. *Id.* The Court held that "the duty to remediate oilfield contamination exists under the prudent operator standard" both under *Castex* and the Louisiana Civil Code. *Id.* at 260. "However, that does not necessarily mean that the lessee has a duty to restore the land to its pre-lease condition, particularly where . . . subsurface contamination is not overt and cannot be considered 'wear and tear.'" *Id.* Instead, "Exxon's additional restoration duty is the duty to correct the contamination," and the lower courts both correctly recognized this point and held that remediation to 28B standards satisfied the *Castex* requirements." *Id.*

Finally, the Court rejected plaintiffs' claims for $199,129,592 to restore groundwater to original condition. The Court also rejected plaintiffs' alternative claims for $124,716,219 to restore groundwater to regulatory compliance. Plaintiffs argued that Exxon had contaminated a Class II aquifer, and, as such the Groundwater Act, La. R.S. § 30:2015.1, applies. Alternatively, they argued that, even if the aquifer is a Class III aquifer, *Castex* requires restoration to original condition. *Id.* at 261. The Court rejected both of these arguments, holding that the trial court's finding that the aquifer was a Class III aquifer was not manifestly erroneous, and further that "plaintiffs failed to prove the necessary remediation to be performed on a Class III aquifer. The Court stated as follows:

In our view, it seems illogical to award the landowner money to remediate unusable groundwater, with no oversight by the DNR, when the statute enacted to classify and protect groundwater does not require a cleanup. Further, it is unclear from the record what additional damage this contaminated groundwater caused, beyond what was caused by the contaminated soil. *Id.* at 261-62.

9. Subsequent Purchaser of Property Can Assert Claims Against Prior Lessees/Operators, as Duty to Restore is Real Right

In *Wagoner v. Chevron USA Inc.*, --- So.3d ----, 2010 WL 3239240 (La. App. 2nd Cir. Aug. 18, 2010), the Second Circuit considered a frequently debated issue in oilfield legacy litigation — whether a subsequent purchaser of property can sue for damages arising prior to the landowner's acquisition of the property. Presently, there is a split in the circuits on this issue. See, e.g., *Lejuene Bros., Inc. v. Goodrich*
Petroleum Co., L.L.C., 981 So.2d 23 (La. App. 3rd Cir. 1987), writ denied, 978 So.2d 23 (La. 1998) (finding restoration is a personal right which must be assigned to be asserted by a subsequent surface owner); Marin v. Exxon Mobil Corp., 08-1724 (La. App. 1st Cir. Sept. 30, 2009) (finding restoration is a real right that attaches to the land), reversed in part and affirmed in part on other grounds, 2010 WL 4074948 (La. Oct. 19, 2010).

In this case, operations began on the plaintiffs’ property in 1945. When suit was filed, the leases were still in effect due to ongoing production. Id. *1-2. Plaintiffs sued numerous defendants which previously had interests in the property and had operated it, including the original lessee, Chevron USA, Inc. (“Chevron”), and two assigns, Merit Energy Company, LLC (“Merit”) and Devon Energy Production Company LP (“Devon”). Id. *1. None of these companies operated the property after the plaintiffs acquired it in 2004. Id. The act of sale to plaintiffs did “not include a specific assignment of the right to sue for property damages that may have occurred prior to the acquisition of the property.” Id. *3. Chevron, Merit and Devon argued that the right to assert a restoration claim is a personal right that was not transferred to the plaintiffs. Id. The district court agreed with the defendants. The district adopted the Third Circuit’s rationale in Lejuene Bros., in which the Third Circuit held that a claim for damages under a mineral lease or predial servitude is a personal right. As such, it must be specifically assigned in order for a subsequent purchaser of the property to assert it. Id. *2 (citing Lejuene Bros., 981 So.2d at 32).

The Second Circuit reversed the district court’s ruling, finding instead that a “mineral lease is a real right and burden on the immovable.” Id. *4. The Second Circuit reasoned that a subsequent surface owner “may not prohibit the lessee or its assigns access to the land,” and that Chevron, Merit and Devon “have a continuing and correlative responsibility as to the surface owner.” Id. The Second Circuit also relied upon Magnolia Coal Terminal v. Phillips Oil Company, 576 So.2d 475 (La. 1991), for the conclusion that “the right to restoration of damaged property is a real right and as such, attaches to the property.” Id. In rejecting the holding of the Third Circuit in Lejeune Bros., the Second Circuit found that the Third Circuit had failed to explain or distinguish Magnolia Coal Terminal. Id. *4. Instead, the Second Circuit concurred with the First Circuit’s decision in Marin.2

The Second Circuit also affirmed a portion of the district court’s ruling that plaintiffs failed to state a cause of action for “civil fruits or storage.” Under Louisiana Civil Code article 486, “a possessor in bad

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2 The Louisiana Supreme Court granted a writ application in Marin in part to consider the rights available to subsequent purchasers of property. Marin, 2010 WL at *1. However, the Court ultimately did not analyze the issue, deciding the case on other grounds. Id.
faith is bound to restore to the owner the fruits he has gathered, or their value, subject to his claim for reimbursement of expenses.” *Id.* *4. The Second Circuit held that the savings or economic benefit realized by defendants by not having to dispose of waste offsite was not a “civil fruit.” *Id.*

10. *Second Assignee of Mineral Leases is Indispensable Party to Action Brought for Rescission of Prior Assignment*

In *Morgan v. Winbeau Oil & Gas. Co., Inc.*, --- So.3d ----, 2011 WL 526419 (La. App. 2d Cir. 2011), plaintiff, Robert W. Morgan a/k/a Morgan Enterprises, Inc. (“Morgan”), filed suit against Winbeau Oil & Gas Co., Inc. (“Winbeau”) and Eugene Farr (“Farr”) seeking money damages or rescission of the assignment of mineral leases to the Winbeau. *Id.* *1. Winbeau had subsequently assigned the mineral leases to Petrohawk Properties, L.P. (“Petrohawk”), which was not a party to the lawsuit. *Id.*

Morgan obtained a preliminary default. After a hearing to confirm the preliminary default, the district court granted judgment in favor of Morgan rescissiing and declaring null and void the assignment between Morgan and Winbeau. The district court’s judgment did not determine the validity of the assignment to Petrohawk. *Id.* Winbeau appealed the district court’s decision. *Id.*

In the district court, Morgan testified that Farr contacted him to buy leases that Morgan held in Red River Parish. *Id.* *2. Morgan purchased the leases in 1995 and was unsure if the leases were still in effect. Several days later, Farr again contacted Morgan and informed him that he had checkd on the leases and they were no longer in effect; nevertheless, Farr still wanted to by them. Morgan did not personally check the validity of the leases and assigned the leases to Winbeau through Farr for a price of $7,000. *Id.* Thereafter, Morgan found out that Winbeau had sold the leases to Petrohawk. *Id.* When asked whether he would have assigned the leases to Winbeau if he had known they were still in effect, Morgan answered, “No, not, certainly not for that price....” *Id.*

On appeal, Winbeau asserted that the trial court erred by granting the default judgment and questioned whether the default judgment was a final judgment. *Id.* Arguing that Morgan Enterprises, Inc., rather than Morgan individually, owned the leases and was the party to the assignment, but that Morgan, in his individual capacity, is the plaintiff in this suit, Winbeau filed an exception of no right of action in the appellate record. *Id.* The court of appeal reached neither issue, however.

The court of appeal noted that the sale to Petrohawk was recorded six months afte: Morgan transferred his interest to Winbeau, and thus, as a third party, Petrohawk may be entitled to the protections afforded by the public records doctrine. *Id.* at *3. The court of appeal concluded that,
because Petrohawk is the record owner of the leases, it was a party "needed for just adjudication" (formerly called an "indispensable party"). Id. Accordingly, the court of appeal reversed and remanded the matter for plaintiff to amend its petition to add Petrohawk as a party and to thereafter seek nullification, or alternatively, monetary damages. Id.

11. Operator Acted Reasonably by Initiating Concursus Proceeding to Determine Rightful Owners of Royalties

Louisiana Mineral Code articles 212.21 through 212.23 govern the remedies available to mineral royalty owners other than lessors, such as owners of overriding royalties and mineral royalties. Under these articles, after proper written notice by the royalty owner, the obligor has thirty days from receipt of the notice to pay the royalties or production payments or provide a written response setting forth "reasonable cause for nonpayment." La.R.S. 31:212.22. If, in response to a written notice, the obligor pays the royalties or production payments due plus legal interest from the date the payment was due, the owner has no further claim with respect to the payments. Id. § 31:212.23(A). If, on the other hand, the obligor does not pay, but instead states reasonable cause for nonpayment, damages are limited to legal interest on the amounts due from the due date. Id. § 31:212.23(B). If the obligor neither pays nor provides a written statement of reasonable cause, a court has discretion to award "damages double the amount due, legal interest on that sum from the date due, and reasonable attorney's fees regardless of the cause of the original failure to pay." La.R.S. 31:212.23(C). There are scant reported cases applying these articles. Indeed, in 2007, one court of appeal observed that "[o]nly one case involving La. R.S. 31:212.21-23 has been reported." CLK Co. v. CXY Energy, Inc., 972 So.2d 1280, 1290 (La. App. 3d Cir. 1997), writ denied, 977 So. 2d 937 (La. 2008); see also Columbine II Ltd P'ship v. Energen Res. Corp. 129 Fed. Appx. 119, 123 (5th Cir. 2005).

In Cimarex Energy Co. v. Mauboules, 09-1170 (La. 4/9/10); 40 So.3d 931, the Louisiana Supreme Court added to the list of reported cases discussing Mineral Code articles 212.21 through 212.23. The court determined that Cimarex Energy Company ("Cimarex") was protected from statutory damages when it instituted a concursus proceeding instead of paying mineral royalties to the Orange River Group ("Orange River"). Id. at 933. The Louisiana Supreme Court's ruling overturned the court of appeal's ruling affirming an award of approximately $3.2 million in royalties plus statutory double damages of approximately $6.4 million. Id. at 952.

The facts of Cimarex are somewhat unique. The landowners (the "Mauboules Family") sold mineral royalties to Ereunao Oil & Gas, Inc. ("Ereunao"). Relying upon the public records, Orange Group later acquired the mineral royalties from Ereunao. Id. at 933. The deeds
contained clauses that provided for three years prescription of nonuse; however, they also contained clauses that provided for interruption of prescription by certain off-premise production. Id. at 934. After three years, a dispute arose between the Mauboules Family, which argued that the provisions allowing for interruption of prescription had been fraudulently asserted in the deeds, and Ereunao, which maintained that the deeds were valid. Id. With the dispute framed, Cimarex, desiring to enter into a mineral lease with the Mauboules Family, agreed to pay the Mauboules Family up to $7,500 for legal expenses in connection with an action the Mauboules Family would bring within 12 months against Ereunao. If that action was unsuccessful, Cimarex agreed to pay the Mauboules Family a cash bonus of $75,000 upon 150% payout of the well. Id.

After Cimarex leased the minerals from the Mauboules Family, Orange River made demand on Cimarex for payment of royalties. Id. at 934. With knowledge of the Mauboules Family’s allegation that they owned 100% of the royalties, Cimarex instituted a concursus proceeding. Orange River argued that they were good faith purchasers entitled, as matter of law, to rely upon the public records doctrine and thus Cimarex had no reasonable cause to withhold payment of royalties. Orange River also argued that Cimarex had “unclean hands” because it only filed the concursus proceeding as part of an agreement with the Mauboules Family in order to obtain the lease. Id.

The Louisiana Supreme Court concluded that the “court of appeal erred in imposing a duty on Cimarex to investigate or evaluate the relative strengths and merits of the underlying claims,” concluding that “such a duty undermines the purpose of the concursus proceeding.” The court stopped short of opining that a concursus should be granted whenever it is invoked, but stated that “courts should allow concursus liberally.” Id. at 945.

While Cimarex should give operators some additional comfort that they can avoid statutory penalties for non-payment of royalties by instituting a concursus proceeding, it leaves unanswered questions about other provisions of Mineral Code articles 212.21 through 212.23. In this regard, the lower court’s interpretation of other provisions of Mineral Code articles 212.21 et seq. is insightful, particularly in light of the scarcity of jurisprudence discussing those provisions. For example, the lower court, interpreting the penalty provision of Mineral Code article 212.23(C), affirmed an award of the actual royalties due plus twice that amount. Cimarex Energy Co. v. Mauboules, 6 So.3d 399, 408 (La. App. 3d Cir. 2009), rev’d on other grounds, 2010 WL 1531363. Thus, according to the lower court court, Mineral Code article 212.23(C) effectively allows a court to award a royalty owner three times the royalties due. In her dissent in Cimarex, Justice Knoll took issue with
this award, stating that the “far more natural reading of article 212.23(B) is to permit the plaintiff a total award of double the amount of unpaid royalties.” In other words, Justice Knoll would have permitted Orange River to recover a penalty of approximately $3.2 million, whereas the lower court affirmed a penalty award of approximately $6.4 million. The lower court also implied that damages may, at the discretion of the fact finder, include other consequential damages, *Id.* at 410, and held that interest under Mineral Code article 212.23 begins to accrue, at the latest, from the date of judicial demand, not the date of judgment, *Id.* at 407.

The lower court in *Cimerax* also observed that non-lessor mineral royalty owners have a direct cause of action against lessees and sublessees for non-payment of royalties. *Id.* at 409. “Just as the sublessee would, to the extent of interest acquired, be responsible to assignees of the lessor, he is likewise responsible to assignees of the lessor’s mineral royalty interests,” provided that the sublessee was put on notice of the mineral royalty by the public records. *Id.* at 410.

12. Whether Drilling a Dry Hole Interrupts Prescription of Nonuse of Mineral Servitude Is a Question of Fact

In Louisiana, selling or reserving ownership of oil and gas results in the creation of a mineral servitude, which gives the servitude owner the right to enter onto the property and extract the minerals. Mineral servitudes, however, extinguish by prescription resulting from ten years of nonuse. Prescription commences when the mineral servitude is created, and is interrupted only by good faith operations for the discovery and production of minerals, as set forth in La.R.S. 31:29. That statute provides that, for operations to be deemed good-faith operations, they must be:

1. commenced with reasonable expectation of discovering and producing minerals in paying quantities at a particular point or depth;
2. continued at the site chosen to that point or depth, and
3. conducted in such a manner that they constitute a single operation although actual drilling or mining is not conducted at all times.

At issue in *Indigo Minerals, LLC v. Pardee Minerals, LLC*, 45,160 (La.App. 2 Cir. 5/28/10); 37 So.3d 1122, was whether the drilling of two non-producing wells interrupted prescription of nonuse of a mineral servitude in accordance with La.R.S. 31:29. *Id.* at 1124. The two wells at issue — the Sutton Well and the Famcor Well — did not reach their permitted depths and were abandoned as dry holes after encountering drilling difficulties. *Id.* The plaintiffs sought a declaratory judgment that they owned 100% of the mineral rights and an accounting and payment of production proceeds from a series of completed wells which El Paso
had spent tens of millions of dollars to drill believing it had obtained a valid lease of the mineral rights. *Id.*

The district court determined that prescription of nonuse had been interrupted by drilling of the prior dry holes. Therefore, the district court granted El Paso’s motion for summary judgment and denied the plaintiffs’ motion for summary judgment. The court of appeal reversed in part, finding that genuine issues of material fact precluded entry of summary judgment in favor of El Paso. *Id.* at 1126. The court suggested that a servitude owner’s good faith under La.R.S. 31:29 is “not appropriate for decisions on motions for summary judgment.” *Id.* The court of appeal noted that courts may evaluate the credibility of witnesses at trial, as well as a lengthy (non-exclusive) list of factors, to determine the presence or absence of good faith. Those factors include the geology of the drilling site and surrounding area based upon prior wells and seismic data; the expertise and experience of the geologists, petroleum engineers, and oil men making the recommendations and decisions; the depth of review of the available geology; the timing of the lease and its terms; the expenses incurred in the operation; the permit applications; the various types of testing performed; the analysis of formations encountered during drilling; the keeping of well logs; the time put into drilling; the depth drilled; and the size of pipes used. *Id.* at 1126.

In this case, there was conflicting deposition and affidavit testimony regarding the geology of the area and expectations of the prior operator that drilled the Fan:cor Well. The court of appeal did observe that neither of the dry holes was drilled to its permitted depths, which could mean that La.R.S. 31:29(2)’s requirement that the well be “continued at the site chosen to that point or depth” may not be satisfied. *Id.* at 1129. However, the court of appeal concluded that a question of fact remained as to whether any point or depth had been reached at which the operators of both wells reasonably expected, at the commencement of operations, to discover and produce minerals in paying quantities. *Id.* at 1132.

13. Compromise Did Not Interrupt Prescription of Mineral Servitude Pursuant to La.R.S. 31:75

In *Petitjean v. Samson Contour Energy E & P, LLC*, 10-496 (La.App. 3 Cir. 12/3/10); 51 So.3d 200, the plaintiffs sought information (and presumably royalties) regarding drilling activity from a well operator concerning a well drilled in 2006. The plaintiffs claimed to be mineral servitude owners pursuant to a 1993 judicial compromise. The defendant operator, however, argued that plaintiffs’ mineral servitude had prescribed. Indeed, Louisiana mineral servitudes are extinguished by prescription resulting from nonuse for ten years. La.R.S. 31:27(1). Such nonuse was undisputed in this case. *Id.* at *2. Prescription of nonuse can be interrupted, though, and plaintiffs made just such an argument,
contending that language in the 1993 judicial compromise interrupted prescription of nonuse by triggering La.R.S. 31:75.

La.R.S. 31:75 permits interruption of prescription of nonuse by certain operations conducted on lands not burdened by the mineral servitude. Specifically, La.R.S. 31:75 provides as follows:

The rules of use regarding interruption of prescription on a mineral servitude may be restricted by agreement but may not be made less burdensome, except that parties may agree expressly and in writing, either in the act creating a servitude or otherwise, that an interruption of prescription resulting from unit operations or production shall extend to the entirety of the tract burdened by the servitude tract regardless of the location of the well or of whether all or only part of the tract is included in the unit.

Plaintiffs urged that the following language in the 1993 judicial compromise satisfied the express writing requirement of this statute: “All mineral interests pertaining to any properties partitioned will remain in undivided ownership whether currently under production or not, for the maximum allowable period of time.” Id. at *3.

Even if operations on lands outside of the mineral servitude were conducted between 1993 and 2003, and some portion of the mineral servitude was encompassed within the well unit inside which the operations were conducted, the Court of Appeal concluded that prescription was not interrupted. Id. at *3. The Court of Appeal reasoned that the language of the 1993 judicial compromise did not amount to an express agreement under La.R.S. 31:75. Rather, the 1993 judicial compromise “merely states that [the] mineral interests will remain in undivided ownership for the maximum allowable period of time-making not mention of La.R.S. 31:75 or its intention to have prescription interrupted on the entirety of the tract regardless of well location.” Id. at *3. While La.R.S. 31:75 need not be specifically mentioned in the agreement, “the language must leave no question that the parties intend to invoke the benefit of having the interruption of prescription extended to lands beyond what would occur under the default operation of law.” Id. “It is not enough that the party’s intent be discernable from a close reading of the contract.” Id. The Court of Appeal also appeared concerned about the ability of third parties to understand whether prescription has been interrupted, noting that an agreement under La.R.S. 31:75 “must be lucid enough to outside parties as to alert them that prescription will be interrupted and mineral rights will be preserved by operations conducted on lands not burdened by the mineral servitude.” Id.

The lesson to the oil and gas transactional lawyer is clear here. Under Petitjean, agreements pursuant to La.R.S. 31:75 should clearly and unambiguously express the parties’ intent to trigger La.R.S. 31:75.
Although it is not mandatory, one may be able to avoid disputes by expressly referencing the statute in the written agreement.

14. Property Description in Mineral Lease Adequately Put Third Parties on Notice

In *Nitro Energy, L.L.C. v. Nelson Energy, Inc.*, 45,201 (La.App. 2 Cir. 4/14/10), 34 So.3d 524, the court of appeal considered whether the property description in a mineral lease was so inaccurate or faulty as to be misleading and therefore ineffective against third parties. The property at issue was a portion of several tracts of land totaling 227 acres located in Claiborne and Lincoln Parishes, and the deed was properly recorded in both parishes. *Id.* at 525. Richard Nelson ("Nelson") acquired a mineral lease (the "Nelson Lease") purportedly covering the entire tract of land. By mistake, Nelson only recorded the mineral lease in Claiborne Parish. The Nelson Lease described the property leased and referred to the deed recorded in the Lincoln Parish. Nelson did not record the Nelson Lease in Claiborne Parish until January 3, 2006.

On December 21, 2005, Donald Faust ("Faust") obtained a mineral lease (the "Faust Lease") covering a portion of the same 227 acre tract covered by the Nelson Lease. *Id.* at 525. The Faust Lease was recorded on the same day in Claiborne Parish, i.e., before the Nelson Lease was recorded in Claiborne Parish. *Id.* Nitro Energy, Inc. and Faust filed suit seeking, among other relief, that the Faust Lease was the ranking and valid lease for the Claiborne Parish acreage. *Id.* at 525-26. On cross-motions for summary judgment, the district court ruled that the Faust Lease had priority. *Id.* at 526.

The court of appeal affirmed the district court's judgment. Nelson argued that the property description in the recorded Faust Lease was inaccurate and misleading primarily because it referred to the deed recorded in Lincoln Parish and not Claiborne Parish. However, the court of appeal observed that the Faust Lease described the leased property in three ways: (1) that it was part of a 227 acre tract of land located in Section 14, Township 19 Range 5 West; (2) that it was only that portion of the tract located in Claiborne Parish; and (3) that it was conveyed by deed dated August 26, 2002, from the Woodard sellers to Rickey K. Swift. The fact that the lease also gave recordation information for the deed in Lincoln Parish, which identified the entire tract of land and not just the portion being leased, was not misleading. "It would not throw someone off the scent of tracking down the Woodard deed in the Claiborne Parish conveyance records, even though the recordation information was not applicable in Claiborne Parish." *Id.* at 528. The court of appeal added that, "while not entirely and completely accurate in and of itself, the property in the Faust Lease is described with a degree of particularity as to leave no doubt as to the property intended to be affected." *Id.*

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II. Water Rights Legislation

New legislation introduced by State Representative Jim Morris, R-Oil City, calls for some regulation of surface water withdrawals. The Shreveport Times noted that “while the bill is not industry-specific, it falls in line with the oil and gas industry’s use in recent months of the Red River as source for hydraulic fracturing of Haynesville Shale wells.” Vickie Welborn, Revised water bill gains Senate committee support, Shreveport Times, May 19, 2010.

The bill was signed into law by Governor Jindal on July 2, 2010 and created La. R.S. 30:961-963, effective as of that date. The law authorizes a person or entity to enter into a cooperative endeavor agreement with the Secretary of the Department of Natural Resources (the “Secretary”) or certain agencies or subdivisions of the state to withdraw running surface water. La.R.S. 30:963. Cooperative endeavor agreements shall not effect the rights of riparian owners in existing law. Id. § 30:963(A). Such agreements must be in the public interest, in writing, for fair market value, contained on an uniform form developed by the State Mineral and Energy Board, and limited to a term of two years. La.R.S. 30:961(B)-(E). However, such two-year terms may be renewed until December 31, 2020. Id. § 30:961(E).

Cooperative endeavor agreements shall be most advantageous to the state and consistent with the policies and regulation implemented pursuant to law. The new law requires the Secretary to evaluate such agreements to ensure that each is in the public interest and is based on best management practices and sound science and consistent with existing law requirement of balancing environmental and ecological impacts with economic and social benefits. He must also consider the effects on sustainability of the water body and on navigation. Id. § 30:961(D). The law also authorizes the Secretary to reduce or terminate withdrawals otherwise agreed to in order to protect the resource and maintain sustainability. Id. § 30:961(F). The law states that such agreements shall be consistent with integrated coastal protection, and approval of agreements does not remove the necessity to obtain permits required by existing law. Id. § 30:961(H).