Royalty Claims: Mineral Code Demands and Remedies

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I. Introduction 

Ownership of land in Louisiana includes the ownership of solid minerals occurring naturally on the property, but excludes ownership of oil, gas and other minerals occurring naturally or in liquid or gaseous form. Although a landowner does not own oil, gas and other fugitive minerals below the surface of his property, he “has the exclusive right to explore and develop his property for the production of these minerals, and to reduce them to possession and thus ownership.” The landowner may convey, reserve or lease these otherwise exclusive mineral rights, effectively severing them from the surface rights of the landowner. The Mineral Code establishes three modes for accomplishing this: the mineral servitude, the mineral royalty, and the mineral lease, all of which can give rise to interests in production of oil and gas, or royalties. This paper focuses on the remedies available when royalties are not paid timely. Specifically, with respect to mineral leases granted by a landowner or servitude owner, this paper focuses on Mineral Code articles 137 through 143 applicable to disputes over failure to pay royalties to lessors, as well as the lessor’s privilege set forth in Mineral Code articles 146 through 148. With respect to remedies available to mineral royalty owners other than lessors, such as owners of overriding royalties and mineral royalties, this paper discusses the remedies set forth in Mineral Code articles 212.21 through 212.23. Finally, this paper addresses remedies available when an overpayment of royalties has occurred. 

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3 Id. 
4 LA. REV. STAT. ANN. §31:6 (2009). On the other hand, solid minerals occurring naturally on the property “are insusceptible of ownership apart from the land until reduced to possession.” Id. 
8 References herein to the Mineral Code are references to the Louisiana Mineral Code codified at LA. REV. STAT. ANN. §31:1 et seq (2009). Thus, references herein to Mineral Code articles are references to the articles bearing the same number under Title 31 of the Louisiana Revised Statutes.
The remedies available to those due payments from production of oil and gas vary depending upon the exact nature of the payment. For example, Mineral Code articles 137 through 143—applicable only to certain disputes involving mineral lease royalties defined by Mineral Code article 213(5)—require, among other things, written notice by the lessor and an opportunity for the lessee to respond and remedy a default before certain damages are awarded or a lease is terminated for failure to pay lease royalty timely. On the other hand, failure to make other payments due under a mineral lease, such as delay rentals, can result in automatic termination of the lease without notice of default by the lessor or an opportunity to cure the default. Thus, when analyzing a mineral interest owner’s remedies for nonpayment of royalties, it is critical to ascertain the true nature of the payment at issue. While it is not the purpose of this paper to describe in depth the various payments that may be due under a mineral lease, any discussion about remedies related to underpayment of mineral lease royalties would be incomplete without at least a cursory description of the nature and scope of mineral lease royalty, and how it differs from a “mineral royalty” and other leasehold payments, such as bonuses, rentals and overriding royalties.

II. Overview of Mineral Lease Royalties and Other Mineral Interests

A. The Mineral Lease Royalty

Mineral Code article 213(5) defines “royalty,” as used in connection with mineral leases, broadly. It means “any interest in production, or its value, from or attributable to land subject to a mineral lease, that is deliverable or payable to the lessor or others entitled to share therein.” Royalty also includes sums payable to the lessor that are classified by the lease as constructive production. Such interests can be created in the mineral lease itself or by a separate instrument; the interests are

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9 Acquisitions, Inc. v. Frontier Explorations, Inc., 432 So. 2d 1095, 1100 (La. App. 3d Cir. 1983) (noting that the requirement of notice as a prerequisite to judicial demand under Mineral Code article 137 applies only to royalty, as defined by article 213(5)).

10 “The jurisprudence...recognizes that there are other types of express resolutory conditions which may occur, such as failure to meet a drilling obligation within the time stated or failure to pay delay rentals, the occurrence of which automatically dissolves the lease.” LA. REV. STAT. ANN. §31:133 cmt. (2009). “[W]hen such resolutory conditions occur, no putting in default is necessary as a prerequisite to an action seeking to have the lease declared terminated.” Id.

11 For example, the Third Circuit Court of Appeal analyzed whether shut-in payments are royalties or rentals. Acquisitions, 432 So. 2d at 1101. After concluding that the lease designated the shut-in payments as royalties and that the parties intended them as royalties, the Court concluded that the lessor was required to give the lessee written notice of nonpayment pursuant to Mineral Code article 137. Id.


13 Id.
“royalty” as long as “they comprise a part of the negotiated agreement resulting in execution of the lease.”

Royalties paid to the lessor on production are considered “rent.” Such royalties, or rent, are regarded in the same sense as rent received by a lessor from an ordinary lease. In other words, after a well begins producing oil and gas, it is typically maintained by rental payments to the lessor in the form of royalties. A mineral lessee must “make timely payment of rent according to the terms of the contract or the custom of the mining industry in question if the contract is silent.” Such royalties, or rent, may be based on both actual production and constructive production.

Where royalty payments are predicated on actual production, the amount of royalty payments is determined by the agreed upon fractional interest of the lessor in the actual production or the value thereof free of ordinary drilling and production costs. The royalty may, however, still be subject to certain costs, such as costs to render the oil and gas marketable and costs of transporting the product to market. Most leases specify the amount of the lessor’s interest; historically, the agreed royalty due a landowner on actual production was 1/8 of production or the value thereof, but parties can and frequently do agree to other fractional shares, such as 1/4 and variable interests that change depending upon the price of oil and gas. Many leases are silent on when the first royalty payment is due after production. “The custom in the oil and gas industry, when the

14 Id. It is axiomatic that a mineral lease royalty cannot be due absent the existence of a mineral lease. Whether a transaction has given rise to a mineral lease, mineral servitude or mineral royalty is beyond the scope of this paper.

15 Royalties are often paid to the landowner in his capacity as lessor; however, the landowner is not always the lessor, as he may have conveyed his mineral rights to another by the creation of a mineral servitude. If the mineral servitude owner is the lessor, then the royalty belongs to the mineral servitude owner. See Luther L. McDougal III, Louisiana Oil and Gas Law, §5.1, at 247 (1993).


17 Succession of Doll, 593 So. 2d 1239, 1246 (La. 1992) (citations omitted).


20 McDougal, supra note 15, §5.1, at 247. Lessors can take their share of oil in kind, as oil is capable of being stored; however, lessees often have the option to purchase the lessor’s share of oil at market price. See id. Because a lessor is usually unable to store or transport natural gas, “oil and gas leases usually provide for gas royalties in terms of a fractional share of the market value of the gas or the amount realized by the lessor in the sale of the gas free of drilling and production costs.” Id. (citations omitted).

21 See, e.g., 3 Howard R. Williams & Charles J. Meyers, Oil and Gas Law §642.3 (2007).

22 See McDougal, supra note 15, §5.1, at 247; 3 Williams & Meyers, supra note 21, §642.1.
lease is silent, is to pay royalty within ninety days after production is first obtained, and monthly thereafter.»

Constructive production royalties "commonly include shut-in royalty payments and compensatory royalty payments that, when paid under the terms of some leases, are regarded as production under the habendum clause of the lease or otherwise as the equivalent of production." To prevent termination of a lease after substantial investment by the lessee, "shut-in royalty" or "in lieu payment" clauses in the habendum clause "authorize the lessee to make payments of specified sums to the lessor to maintain the lease both during and after the primary term when the lessee has to shut in a well capable of producing in paying quantities." These royalties are usually paid annually or quarterly. When such payments are made, they are deemed to be constructive production such that the lease does not terminate pursuant to the habendum clause. "Because these clauses apply only when a well is shut in for lack of a market or available pipeline, a well shut in for other purposes would not qualify, and the lease might in these instances terminate unless another clause, such as a force majeure clause, preserves the lease." Shut-in royalties are distinguishable from shut-in rentals. One must carefully consider the specific language of the shut-in clause to ascertain the true nature of the payment. If they are rentals, as opposed to royalties, a lessor is not required to give notice of breach of the lease under Mineral Code article 137. "Compensatory" or "in lieu" royalties may also be used to satisfy the requirement of constructive production absent actual production in paying quantities. "A lessee pays these royalties when a well on nearby land is draining oil and gas from under the leased land." The lessee is

23 See McDougal, supra note 15, §5.4, at 265 (footnote omitted).
25 McDougal, supra note 15, §3.8, at 145.
26 Id. §5.1, at 247a.
28 McDougal, supra note 15, §3.8, at 145.
29 See infra note 51 and accompanying text.
30 See, e.g., Lapeze v. Amoco Prod. Co., 842 F.2d 132, 133 n.3 (5th Cir. 1988) (noting that whether payments are shut-in royalties versus shut-in delay rentals affects whether notice is required under article 137). For an in-depth discussion of the distinction between shut-in royalties and shut-in rentals, see McDougal, supra note 15, §3.8.
paying the lessor "royalties 'in lieu' of drilling an offset well until some
later date."32 As with shut-in payments, one must examine the specific
lease language to determine whether such a clause creates a royalty or a
rental.33

Royalties are not, however, always strictly based upon the existence
of actual production or constructive production. Sometimes, royalty can
be a hybrid of the two. "Minimum" royalty clauses, for example,
"provide that the lessee will pay the lessor a certain minimum royalty
after production in paying quantities has been achieved" to guarantee a
certain amount of income to the lessee. If the lessor's royalties exceed
the minimum, then the clause is disregarded.34 "Production payment"
clauses also may be considered royalties. These payments are for a fixed
amount and may be payable out of all or a portion of lessee's share of
initial production. Id. Sublessors also may "reserve a 'production
payment' in future production from the leased premises."35

The Mineral Code also acknowledges the right to create an
overriding royalty,36 which is a royalty—i.e., a nonoperating "interest in
production, or its value from or attributable to land subject to a mineral
lease"37—carved out of a working interest38 created by an oil and gas
lease.39 In other words, an overriding royalty is an interest in production
carved out of the lessee's share of oil and gas in favor of a third person or
reserved by the lessee when he conveys his interest to another.40 Lessees

32 McDougal, supra note 15, §5.1, at 247a.
33 See id.
34 Id. §5.1, at 247b.
35 Id. (noting that Mineral Code article 213 is silent on the classification of this type
of production payment, and that how courts analyze them will be important to
determining whether lessors and lessees will be governed by the procedure and remedies
pertaining to failure to pay royalties under Mineral Code articles 137 through 142.)
36 John M. McCollam, A Primer for the Practice of Mineral Law Under the New
Louisiana Mineral Code, 50 Tul. L. Rev. 729, 828 (1976) (noting that the "right to create
such [overriding royalty] interests is specifically confirmed by the [Mineral] Code")
38 "The term 'working interest' is synonymous with the extent of a lessee's 'leasehold
interest' in a tract or subsurface geological strata thereunder." Pinnacle Operating Co. v.
Etco Enters., Inc., 914 So. 2d 1144, 1145 n.1 (La. App. 2d Cir. 2005).
39 Id. at 1145 n.3; 2 Howard R. Williams & Charles J. Meyers, Oil And Gas Law
§418.1, at 356 (2007); 5 Eugene O. Kuntz, A Treatise on the Law of Oil and Gas
§63.2, at 217-218 (1991). For example, in Ascher v. Midstates Oil Corp., 64 So. 2d 182,
185 (La. 1953), the Louisiana Supreme Court described the overriding royalty at issue as
"an interest in an existing oil and gas lease that was reserved by the lessee when
transferring the lease; it is not an obligation imposed upon or affecting the land. It is an
appendage to the lease, in other words, not an appendage of the immovable itself . . . ."
40 See Pinnacle Operating Co., 914 So. 2d at 1146 n.3. Mineral Code article 213(5)
expressly provides that a royalty arising from a lease can be "deliverable or payable to
may retain an overriding royalty interest when they sublease, and they may also convey overriding royalties to lease brokers, geologists and investors in exchange for services and financing. An overriding royalty ceases to exist upon expiration of a lease. Like the lessor’s royalty, it is “free of the expenses of development, operation and production.” As discussed below, different Mineral Code articles govern the rights and remedies afforded lessors and overriding royalty interest owners.

B. Mineral Lease Bonus

A “bonus” is defined by the Mineral Code as “money or [] property given for the execution of a mineral lease, except interests in production from or attributable to property on which the lease is given.” A bonus is usually paid up front in order to entice a lessor to grant a mineral lease as advance consideration for the right to explore for oil and gas. Because a bonus is not tied to the production of oil and gas, unlike a royalty, it does not represent a lessor’s share of production. Bonuses are also distinguishable from royalties insofar as there is an absolute obligation to pay the bonus regardless of whether there is production from the mineral lease. Like mineral lease royalties, however, bonuses are classified as rent, and as such they must be paid timely. However, a nonpaying mineral lessee is not afforded the procedural protections in Mineral Code articles 137 through 143 (which apply only to mineral lease royalties) requiring the lessor to give the lessee notice of default and an opportunity to respond prior to filing suit for damages and lease dissolution. Rather,

the lessor or others entitled to share therein.” LA. REV. STAT. ANN. §31:213(5) (2009) (emphasis added). In the case of an overriding royalty interest, royalties are deliverable to “others.”

41 MCDOUGAL, supra note 15, §5.1, at 249.
43 Pinnacle Operating Co., 914 So. 2d at 1146 n.3 (quoting WILLIAMS & MEYERS, OIL AND GAS LAW, §418 (1991)).
44 A lessor’s rights and remedies generally are governed by Mineral Code articles 137 through 143 and 146 through 148, see discussion supra Section III, whereas an overriding royalty interest owner’s rights and remedies generally are governed by Mineral Code articles 212.21 through 212.23, see discussion supra Section IV.
46 Succession of Doll, 593 So. 2d at 1246 (citations omitted).
47 Id.
48 Id. (citing Mt. Forest Fur Farms of Am., Inc. v. Cockrell, 179 La. 795 (1934)).
49 Id. Mineral Code article 123 provides that, in addition to royalties (actual and constructive) paid to the lessor, a lessor’s rent includes payments “for the maintenance of a mineral lease without drilling or mining operations or production or for the maintenance of a lease during the presence on the lease or any land unitized therewith of a well capable of production in paying quantities.”
if a bonus is not timely paid, the lease may automatically terminate in accordance with Mineral Code article 133.50

C. The Mineral Lease Rental

The Mineral Code defines “rental” as “money or other property given to maintain a mineral lease in the absence of drilling or mining operations or production of minerals,” and provides that it excludes “payments classified by a lease as constructive production.” Rentals include “sums designated as delay rentals payable prior to drilling or mining operation, or after unsuccessful operations, but also include so-called ‘shut-in rentals’ commonly found in many oil and gas leases as a means of maintaining the leases when a well producing gas or gaseous substances in paying quantities is shut-in.”51 These payments are distinguishable from constructive payments in the form of shut-in royalties under the habendum clause of a mineral lease. Like failure to pay a bonus, failure to pay a shut-in rental may result in automatic lease termination in accordance with Mineral Code article 133.52

D. The Mineral Royalty

Mineral Code articles 80 through 104 address mineral royalties. A “mineral royalty” is defined as “the right to participate in production of minerals from land owned by another or land subject to a mineral servitude owned by another.”53 “Unless expressly qualified by the parties,” it is a “right to share in gross production free of mining or drilling costs.”54 Unlike a landowner or mineral servitude owner, the “owner of a mineral royalty has no executive rights” and thus he cannot lease or convey mineral rights as a landowner or mineral servitude owner can.55 He also has no “right to conduct operations to explore for or produce minerals.”56 Essentially, a mineral royalty owner has “only a passive interest in a stipulated fraction of production recovered from lands burdened by such interest, free of costs,” if and when production occurs.57 The mineral royalty owner has no right to share lease bonuses or rentals, or to sue to enforce the terms of a mineral lease.58

50 Mineral Code article 133 provides that a “mineral lease terminates at the expiration of the agreed term or upon the occurrence of an express resolutory condition.” For an in-depth discussion of mineral lease rentals, see McDougal, supra note 15, §§3.5 & 3.8.
54 Id.
56 Id.
57 See McCollam, supra note 36, at 761 (citation omitted).
58 Id.
Importantly for purposes of this paper, mineral royalties are not subject to the procedures and remedies set forth in Mineral Code articles 137 through 143, or the lessor’s privilege established by Mineral Code article 146. Mineral royalty owners, however, are not without a remedy if they have not been paid timely. Mineral Code articles 212.21 through 212.23 provide the statutory framework for asserting such claims. 59

III. Mineral Code Remedies for Nonpayment of Mineral Lease Royalties

There are several options available to mineral lessors who have not been paid royalties timely by lessees or sublessees. 60 Pursuant to Mineral Code articles 137 through 143, mineral lessors can seek recovery of royalties, penalties, interest, attorney’s fees and lease dissolution. Summary eviction proceedings are inapplicable to mineral leases. 61 Additionally, pursuant to Mineral Code articles 146 through 148, lessors may assert a lessor’s privilege. 62 These articles apply to all mineral royalty disputes, even if the underlying lease predated the effective date of the Mineral Code. 63

A. Mineral Code Articles 137 through 143

Mineral Code articles 137 through 143 establish procedures and remedies available to a lessor seeking payment of royalties. Under these articles, the lessor must provide written notice to the lessee prior to making judicial demand for damages or lease dissolution. 64 The lessee

59 See discussion infra at Section IV.
60 Mineral Code article 127 provides that a “lessee’s interest in a mineral lease may be assigned or subleased in whole or in part.” Both the lessee/assignor and sublessee/assignee remain liable to the lessor for performance of the lease obligations. LA. REV. STAT. ANN. §31:128 (2009) (“To the extent of the interest acquired, an assignee or sublessee acquires the rights and powers of the lessee and becomes directly responsible to the original lessor for performance of the lessee’s obligations.”); LA. REV. STAT. ANN. §31:129 (2009) (“An assignor or sublessor is not relieved of his obligations or liabilities under a mineral lease unless the lessor has discharged him expressly and in writing.”).
62 See discussion infra at Section III.B.
63 MCDougAL, supra note 15, §5.4, at 273 (Mineral Code articles 137 through 141 “are merely procedural and should be applicable to leases executed prior to the effective date of the Mineral Code. Another way of stating this proposition is that the articles apply to any dispute between lessors and lessees about the nonpayment of royalties that arise after the effective date of the Mineral Code. Either way of stating the proposition produces the same result, and, today, all disputes about the failure to make timely or proper payments should be held to fall within the scopes of articles 137-141.”) (footnotes omitted).
64 LA. REV. STAT. ANN. §31:137 (2009) (“If a mineral lessor seeks relief for the failure of his lessee to make timely [] payment of royalties, he must give his lessee written notice of such failure as a prerequisite to a judicial demand for damages or dissolution of the lease.”). Acceptance of inaccurate royalty checks “does not
has thirty days after receipt of the written notice to pay the royalties due or explain in writing “reasonable cause for nonpayment.” 65 Whether the lessee exercises one of these options within thirty days substantially affects the remedies available to a lessor, which potentially include an award of the royalties due plus double the royalties due, interest from the date due, attorney’s fees, interest on attorney’s fees from the date of judgment, and lease dissolution. Lease dissolution should be granted only “if the conduct of the lessee, either in failing to pay originally or in failing to pay in response to the required notice, is such that the remedy of damages is inadequate to do justice.”66 If lease dissolution is appropriate, the lease “may be dissolved partially or in its entirety.”67 “A decree of partial dissolution may be made applicable to a specified portion of land, to a particular stratum or strata, or to a particular mineral or minerals.”68

Following the adoption of the Mineral Code in 1974 (effective January 1, 1975), courts regularly held that application of this statutory framework is mandatory. However, at least one court has recently held that language in a mineral lease can trump these articles. In *Stream Family Ltd. P’ship v. Marathon Oil Co.*,69 the Third Circuit Court of Appeal held that a mineral lease automatically terminated for failure to pay royalties even though the lessor did not provide written notice pursuant to Mineral Code article 137. In that case, the mineral lease expressly provided that the lessor was only required to give the lessee 21 days written notice of untimely or improper payment of royalties prior to filing a lawsuit; however, if the untimely or improper payments were willful or persistently late, no such notice was required and the lease would dissolve immediately.70 The lower court having found that the lessee had acted willfully or made persistently late payments, the Court was called upon to consider whether the lessor was obligated to provide written notice to the lessee in accordance with article 137,

65 LA. REV. STAT. ANN. §31:138 (2009) (“The lessee shall have thirty days after receipt of the required notice within which to pay the royalties due or to respond by stating in writing a reasonable cause for nonpayment. The payment or nonpayment of the royalties or stating or failing to state a reasonable cause for nonpayment within this period has the following effect on the remedies of dissolution and damages [described in the succeeding Mineral Code articles].”).


68 Id.


70 Id. at *3.
notwithstanding the contradictory language in the mineral lease. The Court agreed with the lower court that judicial demand for dissolution under Mineral Code article 137 was unnecessary.\textsuperscript{71}

*Stream Family* illustrates the importance of mineral lease terms in resolving a royalty dispute, as lease provisions may trump the procedures and remedies mandated by Mineral Code articles 137 through 143. Absent contrary provisions in the lease, the lessor must proceed in a royalty dispute by first providing written notice pursuant to Mineral Code article 137 in order to preserve his right to damages, dissolution and attorney’s fees.

1. The Lessor’s Written Notice

With the exception of *Stream Family*, it is well-settled that written notice by a lessor to a lessee that the lessor has not been paid royalties timely is an indispensible prerequisite to filing a lawsuit for damages or dissolution of a lease arising out of nonpayment of mineral royalties.\textsuperscript{72}

While the task of providing written notice appears relatively uncomplicated and fool-proof, it has given rise to a number of disputes, in part, because Mineral Code article 137 does not specify the precise requirements for such a demand; rather, article 137 only generally

\textsuperscript{71} Id. at *5.

\textsuperscript{72} Rivers v. Sun Exploration & Prod. Co., 559 So. 2d 963, 969 (La. App. 2d Cir. 1990); Bickham v. Amoco Prod. Co., 1993 WL 302677 *3 (E.D. La. Aug. 5, 1993); Willis v. Franklin, 420 So. 2d 1243, 1245 (La. App. 3d Cir. 1982); Rebstock v. Birthright Oil & Gas Co., 406 So. 2d 636, 643 (La. App. 1st Cir. 1981), writ denied, 407 So. 2d 742 (La. 1981). One issue which has not been addressed by appellate courts is whether Mineral Code article 137 requires written notice prior to judicial demand when the lessor is only seeking to recover the actual royalties due—not damages or dissolution. Mineral Code article 137 states that written notice is only a prerequisite to a judicial demand “for damages or dissolution of the lease.” LA. REV. STAT. ANN. §31:137 (2009). Mineral Code articles 139 and 140 both authorize a court to “award as damages double the amount of royalties due, interest on that sum from the due date, and a reasonable attorney’s fee.” LA. REV. STAT. ANN. §31:139 & 140 (2009) (emphasis added). If “damages” do not include the underlying unpaid royalties, which may be separately awardable, see infra notes 131-35 and accompanying text, arguably written notice is not a prerequisite to a suit seeking only the payment of royalties. On the one hand, this makes sense; a suit under Mineral Code article 139, for example, would be unnecessary, as that article only applies where royalties have been paid. On the other hand, Mineral Code article 139 contemplates that the late payment would be made “in response to the required notice.” LA. REV. STAT. ANN. §31:137 (2009). As a practical matter, this circumstance is not likely to arise frequently, as lessors rarely will file suit without the leverage of a demand for damages and lease dissolution. Perhaps this is the reason why appellate courts have disregarded this nuance and broadly characterized Mineral Code articles 137 through 141 as evidence of a “legislative determination that a mineral lessor does not have a right of action to judicially complain of the failure of his lessee to make timely or proper payments of royalties until he gives written notice of such failure to his lessee and allows him thirty days after receipt of the required notice to either pay the royalties due or state a reasonable cause” therefor. Rebstock, 406 So. 2d at 642.
requires a lessor to “give his lessee written notice of such failure” to timely pay royalties due the lessor.73

Courts have generally adopted the rule that the written notice must be “more than a mere recitation of the lessee’s contractual and statutory duty to pay royalties.”74 Otherwise, “a lessee would be at a severe disadvantage as any prudent lessor would regularly and routinely send out such a general demand regardless of whether he knew of any specific problem with the payment of his royalties.”75 Such general notices “would defeat the obvious purpose of La.R.S. 31:137 which is to give the lessee reasonable notice of a problem or deficiency with the payment of royalties and the opportunity to correct it.”76 Indeed, it is the intent of the Mineral Code that “notice be of a more specific nature so as to reasonably alert the lessee and to allow for an appropriate investigation of the problem by the lessee.”77 The notice period affords a lessee the opportunity to evaluate the demand and make an informed decision as to whether royalties are owed.78

A lawsuit seeking damages or lease dissolution filed after written notice is made but before the expiration of the 30 day period should be dismissed in response to an exception of prematurity, as “the option of informed judgment, especially when statutory penalties and attorney’s fees are involved,” would be undermined.79 Moreover, where the original

73 LA. REV. STAT. ANN. §31:157 (2009); Rivers, 559 So. 2d at 968; Lewis, 698 So. 2d at 1010.
74 Rivers, 559 So. 2d at 969; Lewis, 698 So. 2d at 1010.
75 Rivers, 559 So. 2d at 969; Lewis, 698 So. 2d at 1010.
76 Rivers, 559 So. 2d at 969; Lewis, 698 So. 2d at 1010.
77 Rivers, 559 So. 2d at 969; Lewis, 698 So. 2d at 1010.
78 Rivers, 559 So. 2d at 969 (collecting cases).
79 Massey v. TXO Prod. Corp., 604 So. 2d 186, 188-89 (La. App. 2d Cir. 1992) (noting that a petition or “judicial demand” does not constitute written notice under article 137); Franklin, 420 So. 2d at 1246 (affirming trial court’s ruling granting exception of prematurity and allowing lessor fifteen days to amend to allege written notice was made prior to 30 days before instituting the lawsuit); Rebstock, 406 So. 2d at 643 (noting that a judicial demand cannot satisfy the writing prerequisite under Mineral Code article 137 to a judicial demand).

While a lessee may prefer the dilatory approach of filing an exception of prematurity, a lessee need not bring such an exception to preserve its right to receive written notice. Lessees may also raise the issue, for example, by asserting an exception of no cause of action (if notice is not properly pled). See, e.g., Rebstock, 406 So. 2d at 636 (granting exceptions of no right of action and no cause of action, and noting that the statutory scheme set forth in Mineral Code articles 137 through 141 means that a “lessor does not have a right of action to judicially complain” about not receiving royalty payments until he gives written notice to his lessee and allows 30 days to elapse). Litigants have also addressed the issue through motions for summary judgment, see, e.g., Rivers, 559 So. 2d at 970, and at trial, O’Neal v. JLH Enterprises, Inc., No. 37,432 (La. App. 2d Cir. 1/22/04); 862 So. 2d 1021. In an abundance of caution, a lessee should also

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lease has been subleased or assigned, and the lessor has been given written notice of the sublease or assignment and it has been recorded pursuant to Mineral Code article 132, the lessor should give written notice under Mineral Code article 137 not only to the original lessee, but also to any assignee/sublessee who might be affected by lease termination or against whom relief is sought. 80

The adequacy of written notice is determined on a case-by-case basis. 81 In Rivers v. Sun Exploration and Production Co., the Second Circuit Court of Appeal, considering the specific facts at issue, concluded that a lessor’s notice was deficient. 82 The notice stated that the lessors had “noted their royalty interest in . . . unit was being paid at different rates and that division of royalty would be contrary to the obligations under the various leases.” 83 The letter further demanded that, “within 30 days of receipt,” the royalties due under theses leases “should be paid and accounted for at the maximum price” any owner had received. 84 “The letter also stated that it was a demand for an accounting and payment of all production saved and marketed during the three years prior to March, 1985,” and that an action would be filed seeking “a judgment that ordered the payment of royalty in accordance with the leases as well as penalties, interest and attorney’s fees and cancellation of the lease on which the royalty payment had not been made in accordance with the lease.” 85

The Court concluded that the foregoing notice was inadequate, as the lessee could have reasonably concluded that it was intended as a


While an exception of prematurity is appropriate to defeat a lawsuit seeking damages or lease dissolution where no written notice was received timely, it may not be used to dismiss a lawsuit where written notice was issued and the lessee responded in writing setting forth the reason for nonpayment. Arceneaux v. Hawkins, 376 So. 2d 362, 365-66 (La. App. 3d Cir. 1979) (Although the Mineral Code does not set forth the effect of a nonpayment within 30 days where a reasonable response is timely made by the lessee, the intent of Mineral Code articles 137 through 141 is to provide a lessor with an opportunity to contest the reasonableness of the response.).

80 See Massey, 604 So. 2d at 188 (holding that notice to a sublessee of lease cancellation under Mineral Code articles 132 and 137 was not effective against the original lessee); Lamson v. Austral Oil Co., Inc., No. 97-1596 (La. App. 3d Cir. 6/10/98); 712 So. 2d 1081, 1084-85 (finding that written notice under Mineral Code article 137 by a lessor to a sublessee and other working interest owners was ineffective against a sublessee who did not receive a written notice).

81 Rivers, 559 So. 2d at 969.

82 Id. at 970.

83 Id. at 965.

84 Id. (emphasis original).

85 Id.
notice of an alleged deficiency in the price paid for production and not the failure to pay royalties for production.\textsuperscript{66} The Court observed that the record supported the conclusion that the lessees construed the demand letter to be based on “the single issue of whether royalty should be based on the actual price received by each lessee or on the highest price received by any lessee when the working interest in a mineral lease was co-owned by several lessees.”\textsuperscript{87}

In \textit{O’Neal v. JLH Enterprises, Inc.}, the Second Circuit Court of Appeal again concluded that a lessor’s written notice was not adequate under Mineral Code article 137.\textsuperscript{88} In that case, the lessor wrote to the lessee as follows:

After repeated telephone demands made during the months of December 1998, January 1999 and February 1999, for my royalties from the above-referenced well you have sent me a check for the production month of November 1998 which I received during March 1999.

The lessee added that, if the lessee failed to respond to the demand for payment within 30 days, the lessor would seek a remedy under Mineral Code article 140.\textsuperscript{89} The Court concluded that the letter only informed the lessee that the lessor had received a payment more than 30 days after telephoned demands for payment.\textsuperscript{90} The letter “was neither a desire for performance nor used to inform [the lessee] that it has not paid royalties.”\textsuperscript{91}

The written notice in \textit{Bailey v. Franks Petroleum Co.} was also deemed deficient.\textsuperscript{92} In \textit{Bailey}, the lessor wrote a letter to a lessee advising that it had conducted a review of royalty and production records for two wells and requesting the information necessary to determine what company should be remitting royalty checks for the two wells.\textsuperscript{93} However, a subsequent formal letter of demand, advising that no royalty payments for condensate had been made, was considered proper written notice under article 137.\textsuperscript{94}

Courts have reached differing conclusions about whether written notice by a class representative can satisfy the notice requirements as to

\begin{footnotesize}
\begin{enumerate}
\item \textit{Rivers}, 559 So. 2d at 970.
\item \textit{Id.} at 965.
\item \textit{Id.} at 965.
\item \textit{862 So. 2d} at 1031.
\item \textit{Id.}
\item \textit{Id.}
\item \textit{Id.}
\item \textit{479 So. 2d} 563, 568 (La. App. 1st Cir. 1985).
\item \textit{Id.}
\item \textit{Id.}
\item \textit{Id.} at 565.
\end{enumerate}
\end{footnotesize}
all class members. In the first Louisiana case to touch on the issue, *Stoute v. Wagner & Brown*, the First Circuit Court of Appeal affirmed a district court’s denial of class certification to a lessor that had filed suit on his behalf and behalf of all similarly situated royalty owners in a single Louisiana field. The Court did not specifically address whether class-wide demand was adequate, but it did adopt the lower court’s opinion as its own. The lower court had determined that any class could consist solely of those royalty owners who had made timely written demand. However, the Court’s decision emphasized the lower court’s finding that there were numerous contracts, rights, remedies and defenses at issue that would render class treatment of the case inefficient.

A few years after *Stoute* was decided, the First Circuit Court of Appeal tackled the issue directly. In *Lewis v. Texaco Exploration and Production Co., Inc.*, the Court, in a two to one decision, concluded that notice by a class representative can satisfy the written notice requirements. The Court reasoned that “[n]owhere in the statute is there a requirement that a notice be given by each and every mineral lessor individually,” and that there are no specific jurisprudential requirements for the notice, the adequacy of which is determined on a case-by-case basis. In this case, the Court concluded, after careful review of the specific wording of the notice, that it was sufficient to notify the lessee of the demands of the class representatives and putative class members.

In *Duhe v. Texaco, Inc.*, Third Circuit Court of Appeal likewise dismissed the argument that every individual class member must issue a written notice to the lessee. The *Duhe* court stated that Mineral Code article 137 “does not require that the notice be given by each and every mineral lessor individually.” Rather, “[i]t is sufficient if the notice fully and completely notifies the lessee of the demands of the named

95 No. 93-1207 (La. App. 1 Cir. 5/20/94); 637 So. 2d 1199, 1201, writ denied, No. 94-1665 (La. 10/7/94); 644 So. 2d 638.
96 Id.
97 Id.
98 Id.
99 No. 96-1458 (La. App. 1 Cir. 7/30/97); 698 So. 2d 1001, 1011. The First Circuit has also held that a class action for nonpayment of mineral lease royalties cannot be maintained where not even the putative class representatives have issued written notice pursuant to Mineral Code article 137. *Wilson v. Palmer Petroleum, Inc.*, No. 97-2386 (La. App. 1 Cir. 3/13/98); 706 So. 2d 142, 146, writ denied, No. 97-3204 (La. 3/13/98); 712 So. 2d 879.
100 *Lewis*, 698 So. 2d at 1009.
101 Id.
102 No. 99-2002 (La. App. 3d Cir. 2/7/2001); 779 So. 2d 1070, 1087, writ denied, No. 2001-0637 (La. 4/27/01); 791 So. 2d 637.
103 Id.
plaintiffs, as well as the intention of those named plaintiffs to demand royalty payments on behalf of a class of royalty owners."

Making an "Erie guess" in *Chevron USA, Inc. v. Vermillion Parish School Board*, the United States District Court for the Western District of Louisiana has also weighed in on whether written notice by a class representative satisfies the written notice requirement for all class members. The Court noted that the plain language of Mineral Code article 137—providing that the lessee "must give his lessee written notice"—is clear and unambiguous, and does not lead to absurd consequences. Accordingly, the Court concluded that the Louisiana Supreme Court would interpret article 137 as requiring individual notices by each member of a class. The Court noted the importance of the issue, which "could have far reaching effects not only on the parties before the Court but for potentially thousands of people beyond, as well as the oil and gas industry in Louisiana and beyond" and urged that the question be certified to the Louisiana Supreme Court. When the ruling was appealed, the Louisiana Supreme Court declined to certify the question. Subsequently, the lower court again ruled that class-wide notice was impermissible. The United States Court of Appeal for the Fifth Circuit eventually affirmed the decision.

The Fifth Circuit observed that "permitting class notice, particularly in a case such as this, upsets the careful balance established by Mineral Code Article 137-141 between providing an incentive to lessees to promptly pay royalties, yet giving the lessee a reasonable way to avoid the harsh remedy of lease cancellation." The Fifth Circuit also observed that permitting class-wide notice creates a number of procedural problems not contemplated by Mineral Code article 137. For example, allowing class-wide notice "would deprive the lessee of any real ability to respond within the relatively short time period allowed and

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104 Id.
106 Id. at 967. Although not in the class action context, other courts have reached similar conclusions about the written notice requirement in Mineral Code article 137. See, e.g., Willis, 420 So. 2d at 1245 ("The 'written notice' requirement of Article 137 is clear and unambiguous.");
107 128 F.Supp.2d at 969.
110 *Chevron USA, Inc. v. Vermillion Parish School Bd.*, 377 F.3d 459 (5th Cir. 2004).
111 Id. at 464. Following the Fifth Circuit's lead, one federal district court has declined to certify a class action because, in part, individual notice under Mineral Code article 137 was not provided by all lessors and thus the plaintiff's claims would have applied only to Texas leases. *Hunter v. Exxon Corp.*, 2005 WL 357682 *5 & n.6 (W.D.Tex. Jan. 7 2005).
upset the balance of rights between lessor and lessee carefully established by the Louisiana Legislature in Mineral Code Articles 137 to 141." The Fifth Circuit also observed that class-wide notice "increases the burden of responding to an Article 137 notice by the additional complexity necessarily related to multiple and unidentified lessors, multiple leases, multiple contracts between lessors and their purchasers of oil and gas, and expanded geographic area with no clear provision that the lessees would be protected in the event that they are unable to resolve the question raised by the notice within the thirty day period allowed for a response." The Fifth Circuit noted several other practical problems created by permitting class-wide notice.

Notably, requiring individual written notice by each royalty owner is not inherently inconsistent with the procedure and objectives of class actions. For example, requiring a mineral lessor to deliver a letter to his lessee is not so costly or burdensome that lessors will be denied access to the judiciary. Additionally, Mineral Code articles 139 and 140 permit the Court to award reasonable attorney’s fees to a plaintiff (and many leases may provide for the recovery of attorney’s fees). Moreover, if the prerequisites of a class action are satisfied, the class could consist of all similarly situated royalty owners who have taken the necessary step of providing the lessee with written notice. Furthermore, appellate courts have not yet specifically addressed whether a claim solely for royalties is permissible where the lessor has not provided written notice pursuant to

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112 *Chevron USA, Inc.*, 377 F.3d at 463.

113 *Id.* at 463-64.

114 The Fifth Circuit commented as follows:

Allowing demand to be made on a class basis also raises other questions not answered by these Mineral Code provisions. It is questionable whether class notice can satisfy the statutory prerequisite to litigation for the putative class members because it is unclear whether the putative class representatives have the legal authority to make demand under Article 137 for lessors who do not know that demand is being made on their behalf. It is also unclear to whom the lessees should respond. Does a reasonable, timely response to the putative class representative protect the lessee from owing statutory penalties to the individual class members who do not receive a response? If the lessee elects to respond by paying royalties due, to whom should the payments be made, to the putative class representative or to individual lessors and royalty owners? These questions which arise under the interpretation urged by the Royalty Owners but which would not arise under our reading of these articles are a significant consideration leading us to conclude that class notice does not satisfy the requirements of the Mineral Code as to unnamed members of the class.

*Id.* at 464.

115 See Alba Conte & Herbert Newberg, *Newberg on Class Actions* §1.8, at 27-28 (4th ed. 2002) (noting one objective of the class action is allowing "access to judicial relief for small claimants").
Mineral Code article 137. If courts adopt the position that no written notice is required for a lawsuit to recover unpaid royalties or to enforce the lessor’s privilege, but not seeking damages or lease dissolution, a class action to recover unpaid royalties, arguably could proceed without written notice by each individual class member, albeit not for damages or lease dissolution, and assuming, of course, that all of the criteria for certifying a class are otherwise satisfied. Thus, requiring individual written notice is not inconsistent with the class action objectives of promoting judicial economy and efficiency, and protecting defendants from inconsistent obligations.

While requiring individual written notice by each royalty owner is not inherently inconsistent with the procedure and objectives of class actions, disregarding the individual written notice mandate is inconsistent with the procedure and objectives of Mineral Code articles 137 through 141. Mineral Code article 137 plainly requires a lessor to provide written notice to a lessee, and Mineral Code article 138 plainly requires the lessee to respond in writing or pay the disputed royalties. However, the identities of the putative class members to whom a response is owed may be uncertain. Moreover, some royalty owners may opt out of the class. Accordingly, and because what it is good for the goose is good for the gander, the lessee should be excused from responding in writing except to the class representative’s individual demand. However, excusing the lessee from providing a written response is inconsistent with the plain language of Mineral Code article 140, suggesting that the Fifth Circuit in Chevron correctly held that class-wide notice is improper under Mineral Code article 137.

Outside of the class action context, the foregoing jurisprudence demonstrates that the seemingly simple task of providing written notice of unpaid royalty can be an obstacle to obtaining damages or lease dissolution if care is not taken when drafting it. The notice should unambiguously state that the lessor believes royalties have been underpaid and the reasons therefor. Although not mandatory, the notice should also specifically reference Mineral Code articles 137 through 141 in an effort to avoid ambiguity. Moreover, a lessor should take appropriate steps to ensure that all affected lessees, sublessees and assignees receive written notice. Each royalty owner should also provide individual written notice to the lessee. If notice by a class representative on behalf of himself and similarly situated class members can satisfy the written notice requirement of article 137, as held in Lewis and Duhe,

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116 See supra note 72.
117 See infra note 261 and accompanying text.
118 Id.
119 See supra note 122 and accompanying text.
arguably, by analogy, notice by a lessor on behalf of himself and other royalty owners, albeit not for purposes of establishing a class action, might be permissible. However, the better approach is to require individual notice, in accordance with the clear and unambiguous language of Mineral Code article 137. Royalty owners can be contacted by other royalty owners to determine if they want to issue a written notice and join in a mass action. To the extent a royalty owner does not know who the other royalty owners are, that information could potentially be obtained through public records or discovery. Moreover, as discussed below, the doctrine of contra non valentem will, in appropriate situations, apply to prevent the running of prescription. Additionally, pretermitting the propriety of allowing a class-wide notice by a class representative, in the class action context, the class member is considered a representative of all other similarly situated royalty owners. That is not necessarily the case among co-lesseors, unless there has been an agency relationship established, such as in the case of the attorney-client relationship.

2. The Lessee’s Response

A lessee who has received proper notice under Mineral Code article 137 has two options if he desires to avoid the risks of damages and lease dissolution. He must pay the royalties due within 30 days, or respond in writing stating a reasonable cause for nonpayment. A lessee electing to pay the royalties should take care to ensure that the royalties are actually received by the lessee within 30 days. If payment is made by check, the cautious lessee should deliver the check to the royalty owner by hand delivery, overnight courier or other reliable means. “After being put on notice of failure to pay royalty in accordance with [article 137], the mere mailing of a check by the lessee pursuant to usual procedures is not sufficient to constitute payment of royalty where the check is not delivered to or received by the lessor” within the 30 day period.

By analogy, a lessee electing to respond in writing by stating a reasonable cause for nonpayment should take the appropriate steps to assure that the writing is delivered to the lessee within the 30 day period allowed by

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120 Such was the case in Willis, in which the plaintiff wrote a letter to the lessee demanding payment of royalties due him and a co-lessee and asking the reason for nonpayment; however, this particular notice issue was not raised on appeal in that case, as the co-lessee had withdrawn from the lawsuit. 420 So. 2d at 1244-45; see also Lewis, 698 So. 2d at 1010 n.7.

121 See infra note 195 and accompanying text.


123 Fuller v. Franks Petroleum Co., 501 So. 2d 1024, 1031 (La. App. 2d Cir. 1987) (holding that lessor’s mailing of royalty checks in the ordinary course of business did not constitute timely payment under article 137 where the checks were not received by the lessor within the statutory 30 day period).
Mineral Code article 138. Furthermore, a lessee will not be excused from providing such a written explanation even where the lessor already knows the reasons for nonpayment. For example, in *Broussard v. Union Pacific Resources Co.*, the Third Circuit Court of Appeal, in *dicta*, observed that a written response is mandatory even where the lessor was aware of the lessee's reason for not paying the additional royalty. This comports with the clear and unambiguous language of Mineral Code article 138, and is consistent with the lessor's obligation to provide written notice to a lessee of a royalty claim.

3. The Lessor's Remedies

Remedies available to a lessor who has been underpaid royalties and who has provided timely notice to the lessee under Mineral Code article 137 depend upon whether the lessee responds timely by paying the royalties due and whether the lessee's nonpayment was reasonable, negligent, willful or fraudulent. If the lessee pays the royalties due within the allowed thirty day period and the failure to pay was not fraudulent, willful or unreasonable, the lessor's damages are limited to interest on the royalties due from the date due and reasonable attorney's fees. Under this scenario, which includes circumstances where the original nonpayment was the result of mere oversight or neglect, the lessor shall not be entitled to dissolution of the lease. In sum, a lessee who mistakenly fails to pay mineral lease royalties, but pays them within thirty days of receipt of a written demand, will be liable only for the interest on the royalties from the date due and may, at a court's discretion, be liable for reasonable attorney's fees.

On the other hand, if the lessee pays the royalties due within the allowed thirty day period and the original failure to pay was fraudulent, willful or unreasonable, a court "may award damages double the amount of royalties due, interest on that sum from the date due, and reasonable attorney's fees."
attorney’s fees. Similarly, if the lessee neither pays royalties due nor informs the lessor of a reasonable cause therefor within the allowed 30 day period, a court “may award [...] damages double the amount of royalties due, interest on that sum from the date due, and reasonable attorney’s fees, regardless of the cause for the original failure to pay royalties.” The court also has the discretion to dissolve the lease.

The phrase “damages double the amount of royalties due” has created some disagreement as to whether a lessor may recover unpaid royalties plus double the amount of royalties, i.e., treble damages, or simply twice the amount of royalties due, i.e., double damages. In Wegman v. Central Transmission, Inc. the Second Circuit Court of Appeal concluded that the phrase means a lessor can recover his actual royalties plus twice the royalties due, i.e., treble damages. One rationale which has been offered to support this conclusion is that a court may, in its discretion, award “double the amount of royalties due” even where the lessor, pursuant to Mineral Code article 138, already paid all

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128 Id. The phrase “interest on that sum from the date due” has been the subject of different interpretations. Query whether “that sum” modifies the word “royalties” or “damages” in the preceding clause, and when such sum would be “due.” Applying Mineral Code article 140, one court totaled the unpaid royalties and double royalties together, and then awarded interest on that amount from the date of judicial demand. See infra note 282. In a case involving a parallel provision under Mineral Code article 212.23(C), another court has commented that interest could have accrued from the date of written demand. Id. Notably, Mineral Code articles 137 and 212.21 do not require that the written notice demand performance. LA. REV. STAT. ANN. §31:137 cmt. (2009). Rather, written notice, at least under Mineral Code article 137, is intended “merely to inform the lessee that he has not paid royalties deemed by the lessor to be due.” Id. There appears to be no basis to distinguish the intent of Mineral Code article 212.21 from its sister provision, Mineral Code article 137. Thus, it is questionable that the date of written notice or demand is the proper date on which to begin calculating interest.

129 LA. REV. STAT. ANN. §31:140 (2009) (“If the lessee fails to pay royalties due or fails to inform the lessor of a reasonable cause for failure to pay in response to the required notice, the court may award as damages double the amount of royalties due, interest on that sum from the date due, and a reasonable attorney’s fee regardless of the cause for the original failure to pay royalties. The court may also dissolve the lease in its discretion.”).

130 Id.


132 In Matthews v. Sun Exploration & Prod. Co., 521 So. 2d 1192, 1193 (La. App. 2d Cir. 1988), the Second Circuit Court of Appeal described the trial court’s damages award as “double the royalties” due on unpaid royalties. However, it is unclear whether the trial court had construed this as the maximum award available, or whether it was merely exercising discretion in capping the penalty at twice the royalties due. The issue was not addressed on appeal, as the Second Circuit concluded that the lessee had acted reasonably in responding to the lessor’s notice and thus deleted the award of double the amount of royalties and attorney’s fees. Id. at 1197.
royalties in response to a written notice. It has been suggested that any contrary interpretation of this phrase in Mineral Code article 139 arguably would render the phrase superfluous, as this article applies only to situations where the lessee has paid all royalties due. This argument suggests that an “award of double the amount of royalties due” would be meaningless, as no royalties would be due. Proponents of this view further argue that, in the context of Mineral Code article 140—where the lessee has not paid any royalties due, it arguably would lead to absurd consequences to suggest that the penalties available to that lessor are limited to double damages, where the penalties available to a lessor who has already been paid the royalties due include treble damages. Notably, courts interpreting a parallel provision in Mineral Code article 212.23(C) have concluded that, under that article, a lessor may recover the actual royalties due plus damages in the amount of double the royalties due. On the other hand, penalty statutes are to be narrowly construed, and other Louisiana statutes that intend treble damages expressly use the term “treble damages.”

In 1992, the Louisiana Legislature added Mineral Code article 138.1, which addresses the impact of a division order on a lessee’s obligation to pay mineral royalties to a lessor, and the damages available to a lessee where royalty payments are withheld because a lessor refuses to sign a division order. Under Mineral Code article 138.1, a lessee is prohibited from withholding royalty payments because a lessor has refused to sign a division order. Mineral Code article 138.1 makes clear that a division order does not alter or amend the terms of a mineral lease. 

133 In Bailey v. Franks Petroleum, Inc., the First Circuit Court of Appeal described a trial court’s judgment under Mineral Code article 139 as being in the amount of $106,499.38—or double the royalties due. 479 So. 2d 563, 566-67 (La App. 1st Cir. 1985). The lessor had already received the actual royalties due, and thus the lessee was given a credit. Id. at 565. The issue was not considered on appeal.

134 See infra notes 279 & 286 and accompanying text.

135 Jonathan A. Hunter, Louisiana Royalty Disputes, 12 Nat. Resources & Env’t 61, 63 (1997) (commenting that the “double damages” language of the Mineral Code articles arguably should not be read to support a treble damages award).

136 Mineral Code article 138.1(A) defines a division order as “an instrument setting forth the proportional ownership in oil or gas, or the value thereof, which division order is prepared after examination of title and which is executed by the owners of the production or other persons having authority to act on behalf of the owners thereof.” LA. REV. STAT. ANN. §31:138.1(C) (2009).

137 Mineral Code article 138.1(C) provides as follows: “The execution of a division order is not a condition precedent to receiving payment from a lessee. The lessee shall not withhold royalty payments because his lessor has not executed a division order.” LA. REV. STAT. ANN. §31:138.1(C) (2009).

138 Mineral Code article 138.1(B) provides as follows: “A division order may not alter or amend the terms of the oil and gas lease. A division order that varies the terms of the
not executed a division order..., the court shall award as damages double the amount of royalties due, legal interest on that sum from the date due, and reasonable attorney’s fees. However, if the lessor fails to supply the name, address, and tax identification number upon written request of the lessee, the lessee’s failure to pay royalties shall be deemed reasonable.”

Articles 137 through 141 are intended to provide lessors with a “meaningful remedy besides recovery of interest which will assure that [lessors] receive timely payment of production royalties.” On the same hand, the remedies are intended to give lessees a reasonable way to avoid the harshness of lease dissolution, which can involve the loss of millions of dollars invested in developing a lease. For that reason, lease dissolution is not favored; “dissolution should be granted only if the conduct of the lessee, either in failing to pay originally or in failing to pay in response to the required notice, is such that the remedy of damages is inadequate to do justice.” A review of published decisions reveals that interest and reasonable attorney’s fees are occasionally awarded, but penalties in the form of double the royalties due are rarely awarded. Even rarer is lease dissolution, which has occurred in only one post-Mineral Code published decision.

oil and gas lease is invalid to the extent of the variance, and the terms of the oil and gas lease take precedence.” LA. REV. STAT. ANN. §31:138.1(B) (2009).

141 Id.
142 Wegman, 499 So. 2d at 453; see also Rivers, 559 So. 2d at 968 (noting the “harshness of cancelling a lease which may involve the investment of millions of dollars because of the nonpayment of an insignificant sum of money”); McDowell v. PG & E Res. Co., No. 26,321 (La. App. 2d Cir. 6/23/95); 658 So. 2d 779, 784 (“Cancellation obviously is a harsh remedy” and thus, as a result of an implied obligation to market diligently, dissolution “will be subject to judicial control according to the factual circumstances of each case.”) (citation omitted); Rathborne Land Co. v. Ascent Energy, Inc., No. 05-2452, 2008 WL 5427751 *2 (E.D. La. Dec. 31, 2008) (noting in case involving dispute over lessee’s failure to produce in paying quantities, that “lease cancelation, including partial lease cancellation, is an extremely harsh and rarely granted remedy”).


144 See Wegman, 499 So. 2d at 439. “Under Louisiana law, cancellation is a remedy because royalty payments are considered rentals.” Tri M Petroleum Co. v. Getty Oil Co., 792 F.2d 558, 562 (5th Cir. 1986). For a discussion of pre-Mineral Code cases awarding and declining to award lease dissolution, see 3 HOWARD R. WILLIAMS & CHARLES J. MEYERS, OIL AND GAS LAW, §656.3, at 701-16 (2007) (discussing Melancon v. The Texas Co., 89 So. 2d 135 (La. 1956); Bollinger v. The Texas Co., 95 So. 2d 132 (La. 1957); Toucet v. Humble Oil & Refining Co., 191 F. Supp. 291 (W.D. La. 1960), and Cuter v. Humble Oil & Refining Co., 192 F. Supp. 757 (E.D. La. 1961)). In most other jurisdictions, “in the absence of an express lease provision to the contrary, [lease] cancellation is not available when the sole injury” to a lessor is nonpayment of royalties.

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a. Cases Declining to Award Double Royalties or Lease Cancellation

While determination of a lessor's entitlement to damages and lease dissolution is a very fact specific inquiry, the jurisprudence reveals that lessees who act in good faith and are responsive to a lessor's written notice are generally not subjected to penalties or lease cancellation. Similarly, royalty disputes premised upon legitimate disagreements or discrepancies in ownership generally do not give rise to penalties or lease dissolution. For example, in *Matthews v. Sun Exploration and Production Co.*, the Second Circuit Court of Appeal determined that a lessee stated reasonable cause for not paying royalties, where the lessee was unaware of counter-letters that conveyed mineral interests to the plaintiff. During the course of corresponding with the lessee about the dispute, the lessor became aware of the lessee's lack of knowledge of the counter-letters, and intentionally did not advise the lessee of them. The Court found that the lessee acted in good faith by investigating the matter and responding to the lessor within 30 days of receipt of the demand, and limited the lessor's recovery to reasonable attorney's fees and interest from the date due.

In *Succession of Miller v. Moss*, the Third Circuit Court of Appeal affirmed a lower court's finding that the plaintiff was not entitled to interest, attorney's fees or penalties. In that case, the original royalty owner died, and his two surviving heirs disputed the validity and effect of an holographic will. One of the heirs sued the lessee for underpaid royalties. Recognizing that a dispute over ownership of the royalties existed, the lessee began making payments to the deceased's estate and eventually filed a concursus proceeding, depositing the disputed funds into the court's registry. The Court determined that the lessee provided

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McLaurin v. Shell Western E. & P., Inc., 778 F.2d 235, 237 (5th Cir. 1985); see also 3 WILLIAMS & MYERS, §656.3, at 702-03 ("We are aware of no cases from other states...[permitting lease cancellation] absent an express forfeiture clause in the lease and we are of the opinion that other states should not follow the Louisiana cases in this regard.").

One statutory exception is where the lessee withholds royalty solely because of a lessor's refusal to sign a division order. In such a case, the law strips a court of discretion, providing that the court "shall award as damages double the amount of royalties due, legal interest on that sum from the date due, and reasonable attorney's fees." LA. REV. STAT. ANN. §31:138.1(D) (2009) (emphasis added).

521 So. 2d 1192, 1197 (La. App. 2d 1988).

Id. at 1196.

Id. at 1196-97.

479 So. 2d 1035, 1039 (La. App. 3d Cir. 1985), writ denied, No. 86-0083 (La. 3/14/86); 484 So.2d 135.

Id. at 1037.

Id.
reasonable cause for not paying royalties timely (and further noted that plaintiff had claimed more than her share of royalties). 152

In Bickham v. Amoco Production Co., the court also determined that the lessee had stated a reasonable cause for not paying royalties timely, and thus declined to award damages or attorney’s fees. 153 At the time of the demand by the lessor, it remained an unsettled question of law as to whether royalty was due on take-or-pay settlement funds. This question was resolved by the Louisiana Supreme Court in Frey v. Amoco Production Co. 154 and shortly thereafter Amoco advised the royalty owners that it would make the royalty payments as soon as it completed the necessary (and complex) calculations. 155

In Fuller v. Franks Petroleum Co., the court determined that the lessee failed to state a reasonable cause for nonpayment within 30 days of receipt of the lessor’s written notice. 156 The lessee did not dispute that the royalties were due; rather, the royalties were placed in line for payment following the same process by which other royalties were paid. 157 Thus, the checks, which were allegedly mailed timely, did not arrive within the 30 day window to respond to the lessor’s written notice. 158 Because payment neither was made nor reasonable cause stated, the Court determined it had the discretion to award damages and attorney’s fees. 159 However, the Court declined to award double-damages and limited its award of attorney’s fees to $1,500. 160

In Bailey v. Franks Petroleum, Inc., the First Circuit Court of Appeal overruled a lower’s court’s finding that a lessee’s failure to pay royalty was grossly negligent, “which was tantamount to willful . . . and without reasonable grounds.” 161 The lessee had entered into a gas purchase contract which obligated the purchaser to pay the royalty. 162 The purchaser failed to pay the royalty. 163 The day after receiving the lessor’s written notice of nonpayment, the lessee responded, advising that it had contacted the purchaser and that a check for all unpaid

152 Id. at 1039.
154 603 So. 2d 166 (La. 1992).
155 Bickham, 1993 WL 302677, at *3 & *4 n.2.
156 501 So. 2d 1024, 1031 (La. App. 2d Cir. 1987).
157 Id.
158 Id.
159 Id.
160 Id.
161 479 So. 2d 563, 566 (La. App. 1st Cir. 1985).
162 Id. at 565.
163 Id.
royalties would be issued the next day.164 The lessee was unaware that 
the payments had not been made.165 The Court noted that a “willful act is 
generally one in which the actor intended the end result,” and that 
“negligence’ is characterized by the absence of intent.”166 Accordingly, 
the Court reduced the lessor’s award to interest on royalties from the date 
due and reasonable attorney’s fees.

In Knighton v. Texaco Producing, Inc.,167 the Court also declined to 
penalize the lessee for not paying royalties timely. In response to a 
demand, the lessee conducted a lengthy investigation and then tardily 
tendered the outstanding royalty plus interest in the total amount of 
$5,461.16.168 It further waived its right to assert any defense of 
prescription.169 The Court concluded that the lessee’s nonpayment was 
negligent, as there was “no evidence that the failure to pay was by 
design.”170

Citing Bailey and Knighton, the Court in The Louisiana Land & 
Exploration Co. v. Unocal Corp. also determined that a lessee’s failure to 
pay royalties was not fraudulent, willful or unreasonable.171 In this case, 
neither the lessee nor the lessor could be certain that royalty payments 
were due on reimbursements for gathering costs received by the lessee 
until the Fifth Circuit, in another case, concluded that such allowances 
are royalty bearing.172 Given the uncertainty and the lack of evidence as 
to the value of legal services rendered, the Court declined to award 
double royalties and attorney’s fees.173

In Hanks v. Wilson,174 the First Circuit Court of Appeal affirmed the 
dismissal of an action against a lessee for underpaid royalties. In Wilson, 
the holder of an unrecorderd assignment of a royalty interest was denied 
recovery because, under the express terms of the mineral lease, the lessee 
was obligated to pay royalty only to a record owner of the lease who had 
furnished the lessee with a certified copy of a recorded instrument or

164 Id.
165 Id.
166 Id. at 567 (citations omitted).
168 Id. at 694.
169 Id.
170 Id.
172 Id. at *4. The Court is referring to Mesa Operating Ltd. P'ship v. U.S. Dept. of the 
Interior, 931 F.2d 318 (5th Cir. 1991), cert. denied, 502 U.S. 1058, 112 S.Ct. 934, 117 
173 Unocal, 1997 WL 756597 at *5.
174 No. 93-0554 (La. App. 1 Cir. 3/11/94); 633 So. 2d 1345, 1351.
judgment evidencing the new ownership rights. The Court observed that the purpose of such clauses is “to protect the lessee against the possibility of losing a lease by reason of failure to pay rentals, royalties or other payments to the person entitled thereto after a change in the ownership of the land or interest therein of any person previously entitled . . . to receive such payment.” It was of no moment that the lessee had actual or constructive knowledge of the mineral interest assignment. The Court noted that other courts had reached the same conclusion.

b. Cases Awarding Double Royalties or Lease Dissolution

Wegman v. Central Transmission, Inc. is the only reported opinion under the Mineral Code in which a mineral lease has been cancelled as a result of nonpayment of mineral royalties. The Court observed that, “[a]lthough [the lease] dissolution is not favored, it should be granted when the conduct of the lessee, either in failing to pay originally or in failing to pay in response to the required notice, is such that the remedy of damages is inadequate to do justice.” Here, the jury found that damages were inadequate to do justice where the lessee concealed the market value of the gas and the amount of production, and consciously misled the lessors about the identity of the gas purchaser. Furthermore, the lessors’ monthly statements misstated the price upon which royalties should have been paid.

In Wegman, the lessor was also awarded unpaid royalties, double the royalties due, interest from the date of judicial demand, attorney’s

175 Id.
176 Id.
177 Id. at 1350.
178 Id. Hanks relied upon Lapeze v. Amoco Prod. Co., 842 F.2d 132, 135 (5th Cir. 1988). In Lapeze, a lease forbade the payment of royalties to the owner of such an unrecorded interest, and thus any payment to such an owner, regardless of the lessee’s actual or constructive knowledge of the ownership interest, would place the lessee in a “catch 22.” Hanks also cited Hibbert v. Mudd, 294 So. 2d 518, 523 (La. 1974), in which the Louisiana Supreme Court concluded that, based upon a nearly identical lease clause, a lessee was protected from having to pay royalties to the new royalty owner until the lessee received certified evidence of ownership. Atlantic Refining Co. v. Shell Oil Co., 46 So. 2d 907, 909 (La. 1950) (cited in Hanks, 633 So. 2d at 1345), also involved similar lease language requiring a lessee to be furnished with recorded evidence of a transfer of ownership. In that case, the lessee relied upon a title opinion by its attorney and examination of an abstract prepared by the Clerk of Court of Caldwell Parish. Id. at 908. However, the lessee had not been furnished with a demand for payment of royalties or certified evidence of a change in ownership, and thus judgment was rendered against the lessee. Id. at 911.

179 499 So. 2d 436 (La. App. 2d Cir. 1986), writ denied, 503 So. 2d 478 (La. 1987).
180 Id. at 453.
181 Id.
182 Id.
fees, and interest on the attorney’s fees from the date of the judgment.\textsuperscript{183} The Court affirmed the district court’s recalculation of the jury’s damage award.\textsuperscript{184} The jury had awarded the royalties due plus an amount equal to that.\textsuperscript{185} The district court doubled the penalty portion of the award, thereby effectively awarding the lessor three times the unpaid royalties.\textsuperscript{186} On appeal, the Court concurred with the district court’s modification of the verdict, stating that “we do not believe the jury would have failed to award the maximum amount of monetary damages when it also found that monetary damages were inadequate to provide a complete remedy.”\textsuperscript{187} Thus, the Second Circuit has held that Mineral Code article 140 allows a lessor to recover royalties \textit{plus} double the royalties due, \textit{i.e.}, treble damages.

In \textit{Hilliard v. Amoco Production Co.}, lessee’s nonpayment of certain royalties was found to be reasonable and not willful.\textsuperscript{188} The delay was the result of delay in completion of a final survey plat, which involved a massive number of land tracts.\textsuperscript{189} However, with respect other royalties due certain lessors, the lessee significantly underpaid the lessors using the complexity of the plat as an excuse.\textsuperscript{190} Because the lessee had all of the information necessary and a capable staff, the Court determined that it was “not within the bounds of [their] discretion to allow the defendant to hide behind the excuse of complexity for such an extended period of time.”\textsuperscript{191} The Court therefore awarded these lessors double royalties, interest from the date royalties were due and attorney’s fees.\textsuperscript{192} As the underlying royalties had already been paid by the lessee prior to the judgment,\textsuperscript{193} the award of double royalties is similar to the award in \textit{Wegman}; both lessees were responsible for the underlying royalties plus an award of damages twice that amount. Thus, the Third Circuit is aligned with the Second Circuit regarding interpretation of the phrase “double the royalties due” in Mineral Code articles 139 and 140.

\textsuperscript{183} \textit{Id.} at 451-53
\textsuperscript{184} \textit{Id.} at 452.
\textsuperscript{185} \textit{Id.} at 450-51.
\textsuperscript{186} \textit{Id.} at 451.
\textsuperscript{187} \textit{Id.} at 452.
\textsuperscript{188} No. 95-1366, 95-1367 (La. App. 3d Cir. 10/9/96); 688 So. 2d 1176, 1179.
\textsuperscript{189} \textit{Id.} at 1179-80.
\textsuperscript{190} \textit{Id.}
\textsuperscript{191} \textit{Id.}
\textsuperscript{192} \textit{Id.}
\textsuperscript{193} In response to the original demand, the lessee paid the lessors only part of the royalties due. \textit{Id.} at 1178. The lessee later paid the balance due on the partial payments. \textit{Id.}
4. Prescription

Claims for nonpayment of mineral royalties, except claims by the State of Louisiana, are subject to the liberative prescription of three years set forth in Louisiana Civil Code article 3494(5). The judicially created doctrine of contra non valentem agree nulla currit praesciptio may prevent prescription from running against the party against whom it is asserted. For example, the doctrine of contra non valentem suspends the running of prescription against a lessor during the 30 day written notice period mandated by article 138 because, as a matter of law, he is prohibited from filing a lawsuit during that period of time. The doctrine also may suspend the running of prescription where a royalty owner did not know of and could not reasonably have known of a cause of action, and where a defendant prevents the plaintiff from availing

194 Louisiana Civil Code article 3494(5), added in 1986, provides as follows:

The following actions are subject to a liberative prescription of three years: . . .

An action to recover underpayments or overpayments of royalties from the production of minerals, provided that nothing herein applies to any payments . . . derived from state-owned properties.

See also Ellender v. Goldking Prod. Co., No. 99-0069 (La. App. 1 Cir. 6/23/00); 775 So. 2d 11, 14 (noting that, “[i]f plaintiffs’ claims are for royalties, the controlling prescriptive period is three years”), writ denied, No. 2000-2587 (La. 2/16/01); 786 So. 2d 96; La Plaque Corp. v. Chevron U.S.A., Inc., No. 93-1597 (La. App. 4 Cir. 5/26/94); 638 So. 2d 354, 356 (holding that three year liberative prescription under Civil Code article 3494(5) applies to the lessor’s royalty claim), writ denied, 644 So. 2d 395 (La. 1994); Matthews v. Sun Exploration & Production Co., 521 So. 2d 1192 (La. App. 2d Cir. 1988) (noting that, prior to the enactment of Civil Code article 3493(5), the “claim for royalties in arrearage under an oil and gas lease is likened to the payment of rent, and prescribes in three years”) (citations omitted).

195 This doctrine (commonly referred to as contra non valentem) means that “no prescription runs against a person unable to bring an action.” Ayo v. Johns-Manville Sales Corp., 771 F.2d 902, 907 (5th Cir. 1985). It prevents the running of prescription against a party who is unable to act, and applies in four general situations: (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 a 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 his cause of action; (4) “where the cause of action is not known or reasonably knowable by the plaintiff, even though his ignorance is not induced by the defendant.” Corsey v. State, Dep’t of Corr., 375 So. 2d 1319, 1321-22 (La. 1979); Plaquemines Parish Comm’n Council v. Delta Dev. Co., 502 So. 2d 1034, 1054-55 (La. 1987). Contra non valentem is an exceptional jurisprudential remedy in direct contradiction to the articles in the Civil Code, and therefore should be strictly construed. La Plaque Corp., 638 So. 2d at 356. It is well settled that the party against whom prescription is asserted bears the burden of proof to show that the doctrine of contra non valentem applies. E.g., Id. at 358 (citation omitted).


197 La Plaque Corp., 638 So. 2d at 356.
himself of a cause of action. However, in the context of royalty claims, some courts have looked askance at parties' assertions of the doctrine.

The contra non valentem doctrine was rejected, for example, in Ellender v. Goldking Production Co., where there was an “obvious substantial reduction in [the lessors’] royalty checks,” which, by itself, should have been enough to alert them to question and protect their interests. Moreover, the Court noted that a “[s]imple friendly inquiry among family members and neighbors” would have enlightened the lessors about the price paid for gas, which was also a matter of public record maintained by the Louisiana Public Service Commission. Contra non valentem did not protect the Ellender plaintiffs, as a plaintiff is deemed to know what he could by reasonable diligence have learned.

In La Plaque Corp. v. Chevron USA, Inc., the Fourth Circuit Court of Appeal also rejected application of contra non valentem, overruling the lower court’s judgment granting an exception of prescription. In this case, Chevron paid royalty from 1964 to 1989 based upon a fixed price gas contract. The plaintiffs alleged that, from 1972 to 1989, the market price of gas exceeded the contract price and thus royalties were underpaid. The lower court had determined after an evidentiary hearing that the royalty owners did not have knowledge of the facts supporting their royalty claim until they received a letter from Chevron on August 10, 1998. The lower court reasoned that the royalty owners lacked knowledge of the fixed price gas sales contract; that gas could have been delivered to a better market; that gas was sold to an inferior market for a long period of time; and that royalties were calculated by management at less than market price. The lower court added that Chevron never provided the plaintiffs with information on marketing issues, practices or problems, and that the monthly “check stub” did not give any hint of improper marketing practices. The court further found that Chevron had encouraged and nurtured a level of trust, confidence and faith, through “timely [] payments, courteous responses, and a

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199 775 So. 2d at 17.
200 Id.
201 Id.
202 638 So. 2d at 358.
203 Id. at 355.
204 Id.
205 Id. at 355-56.
206 Id. at 356.
feeling of commonality," resulting in a lack of suspicion by the royalty owners. 207

Notwithstanding the discretion afforded a finder of fact, the Fourth Circuit determined that the ruling was "clearly wrong." 208 Upon review of the record, the court observed that plaintiffs received detailed information on their monthly check-stubs that accompanied the royalty payments, including the value on which their royalties were computed and the price paid for gas produced by other pipelines on state leases. 209 Also, Chevron, upon request, would send these check stubs to "plaintiffs' [La Plaque Corp, 638 So. 2d at 356.]

208 [Id. at 358.]
209 [Id. at 357. The "check-stub" defense may be asserted by lessees to argue that a royalty owner knew or reasonably should have known of an underpayment. The defense is premised on the fact the lessor received a detailed monthly statement or check stub that accompanied each royalty check, as required by Mineral Code article 212.31(B), which provides as follows:

A. As used in this Article:

(1) "Check stub" means the financial record attached to a check.
(2) "Division order" means a contract of sale to the purchaser of oil or gas directing the purchaser to make payment for the value of the products taken in the proportions set out in the division order, which division order is prepared by the purchaser on the basis of the ownership shown in the title opinion prepared after examination of the abstracts and which is executed by the operator, the royalty owners, and the other persons having an interest in the production.
(3) "Interest owner" means a person owning a royalty interest or a working interest in an oil or gas well or unit.

B. Whenever payment is made for oil or gas production to an interest owner, whether pursuant to a division order, lease, servitude, or other agreement, all of the following information shall be included on the check stub or on an attachment to the form of payment, unless the information is otherwise provided on a regular basis:

(1) Lease identification number, if any, or reference to appropriate agreement with identification of the well or unit from which production is attributed.
(2) Month and year of sales or purchases included in the payment.
(3) Total barrels of crude oil or MCF of gas purchased.
(4) Owner's final realizable price per barrel or MCF.
(5) Total amount of severance and other production taxes, with the exception of windfall profit tax.
(6) Net value of total sales from the property after taxes are deducted.
(7) Interest owner's interest, expressed as a decimal fraction, in production from (1) above.
(8) Interest owner's share of the total value of sales prior to any tax deductions.
(9) Interest owner's share of the sales value less his share of the production and severance taxes, as applicable.

oil and gas advisors, accountants, lawyers and banks.” Moreover, the Court noted that the Louisiana Public Service Commission keeps, as a matter of public record, information on the market value of gas. The Court further noted that many of the plaintiffs had actual knowledge of the fixed price gas contract, and that it had been maintained as a public record by the Federal Regulatory Energy Commission. Accordingly, plaintiffs’ claims for underpaid royalties from 1972 to 1987 were held to have prescribed.

The Court in Edmundson v. Amoco Production Co. reached the same result, denying the plaintiffs application of contra non valentem. In Edmundson, the lessee, Amoco, entered into a gas sales contract with a purchaser who became unable to meet its take-or-pay obligations due to financial difficulties. After negotiating a confidential settlement agreement, Amoco then informed the royalty owners of certain terms of the agreement, and allegedly assured plaintiffs that royalty owners would receive their fair share of the settlement proceeds. In 1988, the plaintiffs became aware of a lawsuit filed by over one hundred other royalty owners arising out of alleged underpayment of royalties on the settlement proceeds. In 1989, the plaintiffs filed their own lawsuit.

The Court concluded that Amoco had not intentionally sought to “hinder, impede, or prevent royalty owners from obtaining a copy of the settlement agreement,” and thus Amoco did not prevent the plaintiffs from taking action. The Court noted that Amoco had provided copies of the settlement agreement to other royalty owners, and that over one hundred other royalty owners had in fact pursued other methods of discovery and timely filed lawsuits. The court held that the plaintiffs should reasonably have known of their claims in sufficient time to file suit, and observed that Amoco’s letter to plaintiffs advising them of the

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210 La. Plaque Corp., 638 So. 2d at 357.
211 Id.
212 Id.
213 Id. at 358.
214 924 F.2d at 82-85.
215 Id. at 80-81.
216 Id. at 81.
217 Id.
218 Id.
219 Id. at 83. The Court noted that contra non valentem might be applicable where a lessee acts in bad faith by deceiving a lessor, concealing information or intentionally withholding payment. Id. (citations omitted). This is consistent with Mineral Code article 122, which provides that there is no fiduciary duty owed between a lessor and lessee. Id. (citing La. Rev. Stat. Ann. §31:122).
220 Edmundson, 924 F.2d at 81-82.
settlement contained the style, suit number, and forum of the lawsuit, and that pertinent information could have been obtained from those court records. Finally, the court noted that, rather than relying on the verbal assurance of one Amoco representative, plaintiffs could have contacted Amoco’s legal department as other royalty owners did, and that they could have spoken with other royalty owners. According to the court, “[t]he only thing which prevented [plaintiffs] from acquiring such information was their own neglect and their failure to exercise reasonable diligence.”

In Matthews v. Sun Exploration and Production Co., the Second Circuit Court of Appeal also declined to apply the doctrine of contra non valentem. In Matthews, a lessee incorrectly apportioned a 1/8 royalty. The error was the result of erroneous title information, and the lessee did not benefit from this error. The court contrasted these facts with the scenario where erroneous royalty payments are “caused by faulty technical information (accounting errors, quantity runs and production from the lease, etc.) which is more likely to be in the possession of the lessee, rather than the lessor.” The court concluded that the lessee had done nothing to deceive the plaintiff or withhold information. Moreover, the Court observed that the plaintiff had signed a division order and thus knew or should have known of his royalty interest from that time forward.

In Frey v. Amoco Production Co., plaintiff sued Amoco Production Company for, among other things, miscellaneous royalty underpayments. The United States Court of Appeal for the Fifth Circuit overruled the lower court’s judgment that these claims had prescribed. Applying the doctrine of contra non valentem, the Court concluded that there was nothing on the face of the monthly check stubs that should reasonably have caused plaintiff to know of a cause of action from the date of receipt. “[I]f the stub simply understates the volume of gas produced from a well, its recipient need not call for an audit of the well’s production each month to preserve the right to sue for royalty
underpayment[s]." On the other hand, a plaintiff might reasonably know of a cause of action "from internal inconsistencies on check stubs, rumors," and other information. Here, the plaintiffs had received internally consistent explanations of their royalty receipts and had no reason to be suspicious. Under these circumstances, it is not dispositive that Amoco sent check stubs and invited questions about royalty calculations.

Finally, in The Louisiana Land & Exploration Co. v. Unocal Corp., the Court applied the doctrine of contra non valentem to prevent the running of prescription against a royalty owner. In this case, neither the lessee nor the lessor could be certain that royalty payments were due on reimbursements for gathering costs received by the lessee until an appellate court in Mesa Operating Partnership v. U.S. Dep't of the Interior concluded that such allowances are royalty bearing. The Court also observed that the royalty owner also did not appear to have known of the existence of the gathering charges and that the lessee did not inform the royalty owner of them prior to an audit. For these reasons, the Court applied the doctrine of contra non valentem to claims arising prior to the Mesa decision.

The above jurisprudence provides valuable guidance to lessors and lessees. Prescription will not likely be suspended by the doctrine of contra non valentem where public records, monthly royalty check stubs, or other information should have made a lessor suspicious that royalties may have been underpaid. Where there is any reason for suspicion, lessors have an affirmative duty to pursue diligently information that could lead to the discovery of a cause of action for underpayment of royalties, whether that be through methods as simple as discussing their royalty payments with other royalty owners or more onerous actions such as analyzing public records. Moreover, sophisticated lessors with oil and gas advisors, accountants, lawyers and bankers may have more difficulty meeting their burden of proving that prescription should not run against them. Where there is any basis for suspicion, lessors also cannot rely on a lessee’s silence or even affirmative (but negligent) representations that

232 Id.
233 Id.
234 Id.
235 See id.
239 Id.
240 Id.
royalties have been paid properly. This is consistent with the rule that the lessee does not owe a fiduciary duty to the lessor.\textsuperscript{241} While lessors have a heavy burden of proof, lessees also must be careful. Prescription may be suspended under the \textit{contra non valentem} doctrine if a lessee intentionally prevents a lessor from accessing critical information to which the lessee would not otherwise have access. Prescription may also be suspended where a lessee willfully misrepresents critical information to a lessor in bad faith.

5. Artful Pleading

Whether a claim is one for royalties depends on the allegations of the petition.\textsuperscript{242} However, parties have had little success trying to “plead out of” Mineral Code articles 137 through 141 by characterizing their claims as seeking relief not arising out of nonpayment of royalties. Royalty claims simply do not change their identity as such based upon a parties’ (mis)characterization of them in a petition.\textsuperscript{243}

In \textit{Ellender v. Goldking Production Co.},\textsuperscript{244} landowners sought damages arising out an alleged breach of the implied obligation to prudently market and sell gas produced from a lease. The landowners measured their damages as the difference in the amount of royalty that would have been due had the gas been marketed prudently.\textsuperscript{245} The defendants argued that plaintiffs were essentially seeking payment of royalties, and thus their claims were subject to the three year liberative prescription of Louisiana Civil Code article 3494(5).\textsuperscript{246} The Court agreed with the defendants:

Although plaintiffs maintain their claims are for an alleged breach of contract, i.e., the duty to prudently market, we find their claims to be for the underpayment of royalties. By choice of words and artful phrasing, the plaintiffs attempt to alter the controlling prescriptive period. However, the underpayment of royalties is why plaintiffs seek redress.\textsuperscript{247}

The \textit{Ellender} court ultimately held that “an action for [] breach of the obligation to market is a royalty claim” and determined that that the plaintiffs’ claims had prescribed.\textsuperscript{248}

\textsuperscript{241} LA. REV. STAT. ANN. §31:122 (2009); see also Edmundson, 924 F.2d at 83.

\textsuperscript{242} \textit{Ellender} 775 So. 2d at 15 (citing \textit{Wilson v. Palmer Petroleum, Inc.}, No. 97-2386 (La. App. 1 Cir. 11/26/97); 706 So. 2d 142, 145, \textit{writ denied}, No. 97-3204 (La. 3/13/98); 712 So. 2d 879).

\textsuperscript{243} \textit{Ellender}, 775 So. 2d at 16.

\textsuperscript{244} \textit{Id.} at 11.

\textsuperscript{245} \textit{Id.} at 14.

\textsuperscript{246} \textit{Id.} at 13-14.

\textsuperscript{247} \textit{Id.} at 15.

\textsuperscript{248} \textit{Ellender}, 775 So. 2d at 16-17.
Other courts have reached similar conclusions when plaintiffs have attempted to recharacterize their royalty claims. For example, in Wilson v. Palmer Petroleum, Inc., class action plaintiffs who had not sent a written notice for payment pursuant to Mineral Code article 137 asserted claims for antitrust violations, breach of implied lease obligations, unfair trade practices, and additional royalties, an action for breach of the obligation to protect against drainage has been determined to be a royalty claim.249 The First Circuit Court of Appeal, however, determined that “all of their claims are for the underpayment of royalties.”250 Suits for an accounting of royalties and damages are likewise construed as royalty claims.251

B. Lessor’s Privilege Under Mineral Code Articles 146 through 148

Mineral Code article 146 establishes a lessor’s privilege for the payment of rent, including royalty, “on all equipment, machinery, and other property of the lessee on or attached to the property leased.”252 The lessor’s privilege “also extends to property of others on or attached to the property leased by their express or implied consent in connection with or contemplation of operations on the lease or land unitized therewith.”253 A mineral lessor has the right to seize the pledged property “before the lessee removes it from the [] premises, or within fifteen days after it has been removed by the lessee without the consent of the lessor, if it continues to be the property of the lessee, and can be identified.”254 A mineral lessor can exercise his privilege “in the same manner as the right of pledge accorded other lessors.”255

249 706 So. 2d at 145.
250 Id.; see also Breaux v. Pan Am. Petroleum Corp., 163 So. 2d 406 (La. App. 3d Cir. 1964), writ denied, 165 So. 2d 481 (La. 1964) (suit for damages arising out of breach of an implied obligation to prevent drainage is a royalty claim subject to liberative prescription of three years); see also Williams v. Humble Oil & Refining Co., 290 F. Supp. 408, 413 (E.D. La 1968) (“Breaux squarely holds that the right of the landowner-lessee against his lessee in the event of a breach of the lessee’s implied obligation to exercise reasonable diligence is a right to recover damages” and that the measure of damages “is the value of the minerals or royalties which the lessor would have received had the lessee complied with his obligation under the lease.”). Cf. Eagle Lake Estates, L.L.C. v. Cabot Oil & Gas Corp., 330 F.Supp.2d 778, 786 (E.D. La. 2004) (noting that claims for damages resulting from drainage, but not seeking royalties, do not fall under Mineral Code articles 137 through 141).
251 Acadia Holiness Ass’n v. IMC Corp., No. 92-639 (La. App. 3d Cir. 4/7/93); 616 So. 2d 855, 857, writ denied, No. 93-1201 (La. 6/25/93); 620 So. 2d 842; Parker v. Ohio Oil Co., 186 So. 604 (La. 1939).
252 LA. REV. STAT. ANN. §31:146 (2009). “The landlord’s lien is not available in other states to the oil and gas lessor.” WILLIAM & MYERS, supra note 21, §656.4, at 724.
There are few published opinions discussing the lessor's privilege under Mineral Code articles 146 through 148, but one case provides a modicum of guidance as to the application of the lessor's privilege. In *Vaught v. Ratliff*, royalty owners filed a lawsuit for unpaid royalties and requested a writ of sequestration, which was issued and attached to a third-party's pick-up truck, mud pump and other tools. The third-party owner intervened in the lawsuit to request dissolution of the writ with respect to his property. The Court noted the inequity of the broad privilege over the third-party's property, including the fact that he was still paying a note on his pick-up truck, but determined that the breadth of the privilege was for the legislature to address. The Court nevertheless fashioned a remedy for the defendant by finding that the defendant's property constituted tools of the trade which were exempt under Civil Code articles 2705 and La. R.S. 13:3881.

The lessor's privilege can provide a lessor with valuable protection, and exert considerable leverage on operators to resolve royalty disputes promptly, as they may be answerable to non-operating working interest owners and other third-parties with interests in the leasehold or property thereon. As a practical matter, however, the interplay between the lessors's privilege and Mineral Code article 137's written notice prerequisite to judicial demand is not well-defined. Query whether a written notice pursuant to Mineral Code article 137 is a prerequisite to filing a lawsuit against a lessee or a third-party to enforce the lessor's privilege, in light of Mineral Code article 137's description of such notice as a prerequisite to a judicial demand for damages or lease dissolution. If such notice is not necessary, a lessor might be able to file a lawsuit for past-due royalties and enforcement of the lessor's

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256 In a pre-Mineral Code decision, *Tyson v. Surf Oil Co.*, the Louisiana Supreme Court recognized that the Civil Code provisions granting a non-mineral lessor a lien for payment of rent applied equally to mineral lessors. 196 So. 336, 267 (La. 1940); *see also Hatch v. Morgan*, 12 So.2d 476, 480 (La. App. 2d Cir. 1942) (“It is now beyond dispute that the royalty under such a contract is in reality rent, and that the payment thereof is secured by lien and privilege upon all property placed on the leased premises in the same manner as if the lease was of a predial estate.”). The *Tyson* court reasoned that, “[h]aving declined to enact laws for the regulation of the oil industry and, particularly, having declined to adopt a Mineral Code, the Legislature had placed the stamp of approval upon the system of interpretation of oil and gas contracts [by applying the Civil Code] which this court has followed for so many years.” 196 So. at 268-69.

257 509 So. 2d 647, 648 (La. App. 3d Cir. 1987).

258 Id. at 650.

259 Id. at 650-51. Another case has determined that the lessor's privilege provided by articles 146 through 148 are avoidable under 11 U.S.C. §545 [permitting a trustee to avoid the fixing of certain statutory liens on property of a debtor, including statutory liens for rent] as the privilege is a statutory lien for rent. *Duck Lake Acquisition Partners LP v. Gulfport Energy Corp. (In re WRT Corp.)*, 169 F.3d 306, 308-09 (5th Cir. 1999).

260 *See supra note 72.*
privilege, while simultaneously providing written notice to the lessee pursuant to Mineral Code article 137. After thirty days have elapsed, if appropriate, the lessor might then be able to amend his lawsuit to add claims for damages and lease dissolution.

IV. Mineral Code Remedies for Nonpayment of Royalties Other than a Lessor’s Royalty

Mineral Code articles 137 through 143 expressly apply only to royalty claims of lessors. The original Mineral Code was silent as to procedures and remedies afforded overriding royalty interest owners, mineral royalty owners and others with an interest in production. The Louisiana legislature filled this void in 1982 by enacting Mineral Code articles 212.21 through 212.23. Under these articles, an owner of a royalty interest other than a lessor’s royalty interest (such as the owner of mineral royalty or an overriding royalty interest) is not without a remedy if he has not been paid his royalty. However, written notice by either such royalty owner is a prerequisite to a judicial demand for damages. 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.”

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. If, on the other hand, the obligor does not pay, but instead states reasonable cause for nonpayment, damages are limited to legal interest

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261 Enforcement of the lessor’s privilege against a third-party or the lessee, before the lessee has had an opportunity to investigate the lessor’s claims and make any delinquent payments, could create substantial contractual or other exposure to a lessee. This result appears contrary to the intent of Mineral Code articles 137 through 141.

262 “This article is broad in its terms and appears to cover all types of royalties, including overriding royalties and mineral royalties, other than lessor’s royalty. It should be noted that an overriding royalty payable to a sublessor will probably be viewed as a lessor’s royalty, because the sublease is a new lease.” See McDougal, supra note 15, §5.4, at 273a, 247. “Thus, overriding royalties payable to a sublessor fall within the scope of articles 137 through 142.” Id.

263 Mineral Code article 212.21 provides as follows:

If the owner of a mineral production payment or a royalty owner other than a mineral lessor seeks relief for the failure of a mineral lessee to make timely or proper payment of royalties or the production payment, he must give his obligor written notice of such failure as a prerequisite to a judicial demand for damages.


265 LA. REV. STAT. ANN. §31:212.23(A) (2009).
on the amounts due from the due date.\textsuperscript{266} If the obligor neither pays nor provides a written statement of reasonable cause, a court has discretion to award double damages,\textsuperscript{267} "legal interest on that sum from the date due, and reasonable attorney's fees regardless of the cause of the original failure to pay."\textsuperscript{268}

Many of the procedures and remedies are similar to those set forth in Mineral Code articles 137 through 141. For example, Mineral Code articles 137 and 212.21 both require written notice as a "prerequisite for a demand for damages."\textsuperscript{269} In fact, courts interpreting Mineral Code articles 212.21 through 212.23 look to jurisprudence discussing Mineral Code articles 137 through 141.\textsuperscript{270}

Although the procedures and remedies are similar, there are noteworthy differences among these two statutory frameworks. For example, lease dissolution is only available to lessors. Also, the penalty provisions of these two statutory schemes are phrased differently. While Mineral Code articles 139 and 140 allow lessors potentially to recover "double the amount of royalties due," Mineral Code article 213(C) allows claimants to recover "double the amount due." By excluding the phrase "of royalties" from Mineral Code article 213(C), query whether the Louisiana legislature created some ambiguity as to the ability of royalty interest owners other than lessors to recover double damages based upon not only unpaid royalties but also consequential damages.\textsuperscript{271} However, the different phrasing is likely attributable to the broad scope of Mineral Code article 212.21, which applies to "the owner of a mineral production payment or a royalty owner other than a mineral lessor . . . ."\textsuperscript{272}

There are scant reported cases applying these Mineral Code articles.\textsuperscript{273} However, the Third Circuit Court of Appeal recently analyzed

\textsuperscript{266} LA. REV. STAT. ANN. §31:212.23(B) (2009).

\textsuperscript{267} An award of double damages is not mandatory. \textit{CLK Co. v. CXY Energy, Inc.}, No. 2007-834 (La. App. 3d Cir. 12/19/07); 972 So. 2d 1280, 1290, \textit{writ denied}, No. 2008-0140 (La. 3/14/08); 977 So. 2d 937.

\textsuperscript{268} See supra notes 72 & 263 and accompanying text.

\textsuperscript{269} See, e.g., Columbine II Ltd P'ship v. Energen Res. Corp. 129 Fed. Appx. 119, 123 (5th Cir. 2005) (citing Matthews, 521 So.2d at 1195-97, a case involving Mineral Code articles 137 through 140); see infra notes 277 & 280 see also MCDUGAL, supra note 15, §5.4, 273a-1 ("Presumably, similar types of facts constitute a reasonable cause for nonpayment of these royalties or production payments as would constitute a reasonable cause for nonpayment of a lessor's royalty.").

\textsuperscript{270} See infra note 281 and accompanying text.

\textsuperscript{271} See infra note 281 and accompanying text.

\textsuperscript{272} LA. REV. STAT. ANN. 31:212.21 (2009) (emphasis added).

\textsuperscript{273} In 2007, the Third Circuit observed that "[o]nly one case involving La. R.S. 31:212.21-23 has been reported." \textit{CLK Co., LLC}, 972 So. 2d at 1290-91.
them in *Cimarex Energy Co. v. Mauboules*, a decision currently under review by the Louisiana Supreme Court. In *Cimarex*, a royalty owner, through its attorney, sent an e-mail to the obligor urging it to forego filing a concursus proceeding over disputed royalty payments and "instead distribute the royalty to the rightful owners." The Court found the e-mail satisfied the written notice requirement of Mineral Code article 212:21, and affirmed the trial court's award of damages. The Court distinguished the facts in *Cimarex* from the facts in *CLK Co., L.L.C. v. CXY Energy, Inc.*, in which the court determined that the royalty owner failed to make satisfactory written demand. The Court observed that, in *CLK*, the letters at issue requested an acknowledgement of an assignment of royalty interests, but did not demand payment of royalties. Thus, the notice was inadequate.

*Cimarex* is more noteworthy, however, for its interpretation of the damages and interest available under Mineral Code article 213.23(C). In *Cimarex*, the royalty owner was awarded the actual royalties due plus twice that amount. The Court held that the actual royalties are not damages, "but merely a sum of money that would be owed...in any event." Because the Mineral Code states that a "co-rt may award double the amount due as damages," an "obligor, in addition to owing the unpaid royalties, would pay an additional sum as damages to the obligee." Thus, according to the *Cimarex* court, Mineral Code article 212.23(C) effectively allows a court to award a royalty owner three times the royalties due. The Court also implied that damages may, at the discretion of the fact finder, include other consequential damages, and

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274 No. 2008-452 (La. App. 3d Cir. 3/11/09); 6 So. 3d 399, 408-09, writs granted, No. 2009-1194 (La. 9/25/09); 18 So.3d 97.
275 *Id.* at 409.
276 *Id.*
277 972 So. 2d at 1280. In *CLK*, the Court looked for guidance to jurisprudence under the written notice provision applicable to mineral lessors set forth in Mineral Code article 137. *Id.* at 1291.
278 *Cimarex*, 6 So.3d 399 at 409 n.6.
279 *Id.* at 407.
280 *Id.*. The Court observed that the Second Circuit Court of Appeal reached a similar conclusion in *Wegman*, 499 So. 2d at 436. *Cimarex*, 6 So. 3d at 407. *Wegman*, however, interpreted the double damages provision applicable to mineral lease royalties in Mineral Code article 140. *Wegman*, 499 So. 2d at 451; see *supra* note 183 and accompanying text. Thus, both the Second and Third Circuits have analyzed Mineral Code articles 212.21 through 212.23 by looking to jurisprudence under Mineral Code articles 137 through 140. See *supra* note 270.
281 *Cimarex*, 6 So. 3d at 410. The royalty owner in *Cimarex* appealed the trial court's failure to award consequential damages incurred due to missed sales of royalty interests. "Given the discretion given to the finder of fact in awarding damages and, further, the amount of [double] damages already awarded...," the Court declined to overrule this aspect of the trial court's judgment.
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. 282

Cimerax also observed that non-lessee mineral royalty owners have a direct cause of action against lessees and sublessees for non-payment of royalties. 283 “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. 284

In an unpublished decision, Columbine II Limited Partnership v. Energen Resources Corp., 285 the United States Court of Appeals for the Fifth Circuit held that the lower court had abused its discretion in awarding double damages and attorney’s fees to an overriding royalty interest owner. In Columbine, a sublessor sued a sublessee after learning that a portion of a fee paid to the well operator had been deducted from royalty payments. The lower court noted that the lease provided the royalty interest was free of transportation and other costs. The lower court also found that the royalty interest was to be paid in-kind; thus, the royalty interest was not intended to be based upon the value of gas once it reached the mouth of the wellhead, as this would have permitted [the sublessee] to deduct post-production costs. Accordingly, the district court awarded the sublessor $111,258 for unpaid royalties, $222,516 as “double damages,” and $99,775.26 in attorney’s fees. 286

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282 Id. at 407. The Court noted that Mineral Code article 212.23(C) provides for legal interest “from the date due,” and thus “the interest on the statutory damages could have potentially begun to accrue from the date of written demand” by the royalty owner as opposed to the date of judicial demand. Id. at 408. Because this determination was not appealed, however, the Court did not adjudicate the issue. Id. Query whether interest should accrue from the month in which each royalty payment was due, the date of written notice, the date of judicial demand, or the date of the judgment. In Wegman, 499 So. 2d at 452-54, the lessors were awarded unpaid royalties plus double the unpaid royalties. The Court added the unpaid royalties and double royalties together, and then awarded interest on that amount from the date of judicial demand. Id.

283 Id. at 409.

284 Id. at 410. The Court noted that a mineral royalty owner need not be a party to the lease giving rise to the mineral royalty payments in order to bring suit in his own name, as Louisiana Code of Civil Procedure article 3664 provides that “the owner of a mineral right may assert, protect and defend his right in the same manner as the ownership or possession of other immovable property, and without the concurrence, joinder, or consent of the owner of the land or mineral rights.” Id. at 410.


286 The district court’s interpretation of the “double damages” provision of Mineral Code article 213.23(C) is the same as the Cimarex court’s interpretation. Cimarex, however, is the only appellate court that has opined on the issue, as the Fifth Circuit did not consider it.
Overruling the lower court's imposition of double damages, the Fifth Circuit noted that "such awards are not viewed entirely favorably unless the conduct necessitating the award was clearly egregious."287 Here, the sublessee's conduct was not "so beyond the pale as to require the district court to impose double damages" or attorney's fees.288 In support of this conclusion, the Court noted first that the sublessee's predecessor "engaged in the same behavior, so it was not unreasonable for [the sublessee] to believe that it was similarly permitted to deduct the fees in question."289 The court also observed that Louisiana courts had not interpreted similar lease clauses, which contain an inherent ambiguity.290

V. Remedies for Overpayment of Royalties

Many Louisiana decisions address claims for the underpayment of royalties, but few address overpayments, and the Mineral Code is silent on remedies for overpayment. Accordingly, the Civil Code must be consulted for a remedy.291 Although the Civil Code specifies a three-year prescriptive period for "underpayments or overpayments of royalties from the production of minerals . . . ,"292 it contains no specific provision directly addressing the recovery of overpayments. However, the obligation to return an overpayment of royalties falls squarely within the category of the "payment of a thing not due," governed by Civil Code articles 2299, et seq.293 These provisions require a person who has received a payment not owed to him to restore it to the person from whom he received it.294

287 129 Fed. Appx. at 123.
288 Id.
289 Id.
290 Id.
291 To this end, Mineral Code article 2 provides:

The provisions of this Code are supplementary to those Louisiana Civil Codes and are applicable specifically to the subject matter of mineral law. In the event of conflict between the provisions of this Code and those of the Civil Code or other laws the provisions of this Code shall prevail. If this Code does not expressly or impliedly provide for a particular situation, the Civil Code or other laws are applicable.

292 LA. CIV. CODE art. 3494(5) (2009) (emphasis added). This prescriptive period does not apply to "any payments, rent, or royalties derived from state-owned properties." Id.
293 Overpayments may also be sought in a revendicatory action, pursuant to Louisiana Civil Code article 526, et seq. Article 526 mandates that "[t]he owner of a thing is entitled to recover it from anyone who possesses or detains it without right and to obtain judgment recognizing his ownership and ordering delivery of the thing to him." However, in a revendicatory action, the party seeking recovery of a corporeal movable (like money) must overcome the presumption that the possessor is the owner. LA. CIV. CODE art. 530 (2009).
294 LA. CIV. CODE art. 2299 (2009). "A thing is not owed when it is paid or delivered.
Matthews v. Sun Exploration and Production Co.\textsuperscript{295} illustrates the application of these articles to royalty overpayments. In Matthews, a lessor had been overpaid by defendant a total sum of $5,983.79. Finding that the lessor had no reason to doubt the accuracy of the payment, the trial court held that it would be unfair to require the lessor to repay the funds.\textsuperscript{296} The appellate court reversed, holding that the lessee’s actions amounted to reasonable error; that the lessor had information to put her on notice of the error; and that the lessor was not free from fault. The court held:

We believe the defendant’s error in overpaying [the lessor] amounted to an ordinary or ‘honest’ mistake as contemplated by [Civil Code articles 2301 and 2302]. Consequently, [the lessee’s] error in making the overpayment does not bar its recovery of these funds.\textsuperscript{297}

In King v. Strohe,\textsuperscript{298} the Third Circuit applied Civil Code articles 2299, \textit{et seq.} where royalties were mistakenly paid to one party for mineral interests owned by another party. The payee alleged that the payor’s waiver of its warranty of title precluded recovery. The court rejected that defense:

We note that under a breach of warranty claim, the Strohe Group [payee] could be liable for all rents, royalties, and bonuses paid under the lease, not merely the portion of the royalties that were rightfully due Ms. King [the party actually due the royalties paid]. We therefore distinguish between recovering all royalties, rents and bonuses paid under the lease, and merely recovering those funds that were due Ms. King and were mistakenly paid to the Strohe Group. Although DeNovo [payor] waived its claim under the implied warranty provisions of the Mineral Code, it did not waive its rights to recovery under Civil Code Articles 2301, \textit{et seq.} We see no reason why the Strohe Group should gain a windfall at the expense of DeNovo.\textsuperscript{299}
The recovery of royalty overpayments often arise in the context of set-off and compensation, when the payor withholds royalties to recover prior overpayments. In *Arkla, Inc. v. Maddox & May Brothers Casing Service, Inc.*, the court relied on the doctrine of compensation to authorize an operator’s suspension of a working interest owner’s production proceeds to recover severance taxes paid by the operator on the working interest owner’s behalf. The court affirmed the trial court’s finding that “the taxes were due when the oil was severed from the earth and that [the operator] was obligated to hold and pay the taxes due. Accordingly, a corresponding offset was simultaneously created against [the working interest owner] in favor of [the operator].” To determine that compensation was appropriate under Louisiana Civil Code article 1893, the court observed that two co-existing, reciprocal obligations existed. The operator was obligated to pay the working interest owner for the oil it purchased and the working interest owner became indebted to the operator when the operator satisfied assessments for additional severance taxes from its own funds. The court held that the operator’s debt to the working interest owner and the working interest owner’s debt to the operator offset one another by operation of law at the moment the two obligations existed contemporaneously.

In *Exxon Corp. v. Goodrich*, the court allowed an operator to recover overpayments under the doctrine of compensation where the non-operating owners were underproduced under the parties’ gas balancing agreement. The joint operating agreement allowed Exxon, as operator, to charge the joint account for royalties paid on behalf of defendants as non-operators. The non-operating owners argued that

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300 See, e.g., *Texaco, Inc. v. La. Land & Exploration Co.*, 113 B.R. 924, 936 (M.D. La. 1990) (in litigation brought by State of Louisiana to recover royalties, the doctrine of sovereign immunity did not bar Texaco’s counter-claims seeking a set off for overpayment of royalties).

301 671 So. 2d 1220 (La. App. 2d Cir. 1996).

302 Id. at 1222.

303 Louisiana Civil Code article 1893 states:

Compensation takes place by operation of law when two persons owed to each other sums of money or quantities of fundable things identical in kind, and these sums or quantities are liquidated and presently due.

In such a case, compensation extinguishes both obligations to the extent of the lessor amount.

Delays of grace do not prevent compensation.

304 *Arkla*, 671 So. 2d at 1223.

305 Id.

306 Id. at 1224.

307 720 So. 2d 17 (La. App. 3d Cir. 1988).

308 Id. at 17
"they should not have to reimburse [the operator] for royalties [the operator] paid on their behalf in months where they had no gas sales."\(^\text{309}\)

Finding that the operating agreement required both non-operators and operator to bear their proportionate part of royalty due on any production from the lease, and that the non-operators were obligated to pay royalties on a monthly basis whether they actually sold their production in a particular month or not, the court rejected the non-operators' defense.

A logical question ensuing from any discussion of the recovery of overpayments is whether the payor is entitled to interest on the overpaid amounts. Article 2303, read in conjunction with Civil Code article 551,\(^\text{310}\) suggests that the overpaid royalty owner would only owe interest on overpayments if he received them in "bad faith," knowing that he was not the rightful owner. Article 2303 specifically states, "A person who in bad faith received a payment or a thing not owed to him is bound to restore it with its fruits and products." Article 551 defines civil fruits to include interest.\(^\text{311}\) The absence of an article on "good faith" implies that one who receives royalties without knowledge that an overpayment has occurred is required only to return the overpayment, and is not required to pay interest.

VI. Conclusion

The oil and gas industry in Louisiana sprung to life over a century ago.\(^\text{312}\) Royalty disputes followed shortly thereafter,\(^\text{313}\) as did efforts to legislate the industry.\(^\text{314}\) However, until the adoption of the Mineral Code, the law relative to mineral rights lacked coherence.\(^\text{315}\) With respect to royalty disputes, the law developed into a "patchwork quilt of jurisprudence" that created uncertainty regarding the mineral rights at

\(^\text{309}\) \textit{Id.} at 21.

\(^\text{310}\) \textsc{La. Civ. Code} art. 551 declares:

Fruits are things that are produced by or derived from another thing without diminution of its substance.

There are two kinds of fruits; natural fruits and civil fruits.

Natural fruits are products of the earth or of animals.

Civil fruits are revenues derived from a thing by operation of law or by reason of a juridical act, such as rentals, interest, and certain corporate distributions.

\(^\text{311}\) \textit{Id.}

\(^\text{312}\) \textit{See} http://www.loga.la/LOGA-history.html (noting that, in 1901, "[t]he Heywood well six miles from Jennings was brought in, producing the first oil discovered in the state in commercial quantities and marking what is recognized as the birth of the industry in the state....").

\(^\text{313}\) \textit{See, e.g.,} Martel \textit{v. Jennings-Heywood Oil Syndicate}, 38 So. 253 (La. 1905).

\(^\text{314}\) \textit{Nunez v. Wainoco Oil & Gas Co.}, 488 So.2d 955, 960 (La. 1986) (noting that, as early as 1906, Louisiana "recognized the need for legislative control of the industry").

issue. The Mineral Code sought to codify and supplant this extensive body of jurisprudence. In large part, it has been successful. Royalty and working interest owners now have three distinct sets of codal articles—Mineral Code articles 137 through 143, 146 through 148, and 212.21 through 212.23—that provide a stable framework for resolving royalty disputes involving the underpayment of royalties. These articles provide a measure of predictability for all interested parties, remedies for royalty owners to obtain unpaid royalties, disincentives for untimely royalty payments in the form of penalties, attorney’s fees, interest and lease dissolution, and procedural protections to ensure that any remedies imposed are not unduly harsh.

However, if the goal of the Mineral Code is to codify this area of law and supplant jurisprudence, there is room for improvement created by some perceived ambiguities by the courts. For example, the Louisiana legislature could clarify the following issues:

(1) whether class-wide notice is permitted, and, if so, under what circumstances;

(2) whether the penalty provisions of Mineral Code articles 139, 140 and 212.23(C) are intended to allow recovery of the disputed royalties plus double the disputed royalties (treble royalties) or double the disputed royalties;

(3) whether written notice is required under Mineral Code articles 137 and 212.21 prior to filing a judicial demand for royalties or enforcement of a lessor’s privilege against a lessee, but not “damages” or lease dissolution

(4) whether lease or other contract provisions trump Mineral Code articles 137 through 143 and 212.21 through 212.23; and

(5) when, under Mineral Code articles 139, 140, and 212.23, interest begins to accrue and on what sums.

In addition to the foregoing clarifications, the legislature could codify the law applicable to overpayment of royalties. Although the Mineral Code is supplementary to the Civil Code, parties involved in mineral interests may find it advantageous to have an industry-specific set of rules that address the procedure and remedies available where an overpayment has occurred.

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