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RECENT DEVELOPMENTS IN JURISPRUDENCE AND LEGISLATION

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I. INTRODUCTION

A good case is hard to find (and vice versa). Today we consider several cases, some good, some hard, some interesting. It might seem strange for civilian lawyers to be so concerned with precedent, when there is technically no such thing as *stare decisis* in Louisiana, unlike in the rest of the United States. As stated by the Louisiana Supreme Court:

> In Louisiana, courts are not bound by the doctrine of *stare decisis*, but there is a recognition in this State of the doctrine of *jurisprudence constante*. Unlike *stare decisis*, this latter doctrine does not contemplate adherence to a principle of law announced and applied on a single occasion in the past.
>
> However, when, by repeated decisions in a long line of cases, a rule of law has been accepted and applied by the courts, these adjudications assume the dignity of *jurisprudence constante*; and the rule of law upon which they are based is entitled to great weight in subsequent decisions.[1]

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[1]*Johnson v. St. Paul Mercury Insurance Company*, 236 So.2d 216, 218 (La. 1970), *citing* MERRYMAN, THE CIVIL LAW TRADITION (1969); *Keller v. Haas*, 209 La. 343 24 So.2d 610 (1946); *Gravier v. Gravier*, 200 La. 775, 8 So.2d 697 (1942); *Miami Corp. v. State*, 186 La. 784, 173 So. 315 (1937); Rubin & Ponder, *The Ostrich and the Arbitrator: The Use of Precedent in Arbitration of Labor-Management Disputes*, 13 LA. L. REV. 208 (1953).

As noted by professor Shael Herman, "The difference between *stare decisis* and *jurisprudence constante* 'is of such importance that it may be said to furnish the fundamental distinction between the English [i.e., common-law] and the Continental [i.e., civil-law] legal method.'"[2]

Although these comments indicate that there is "officially" no policy of *stare decisis* in Louisiana that requires courts to follow precedents, we assume that most Louisiana attorneys, like us, rejoice when they find a case on all fours with their client's situation, with a holding favorable to their client. For all practical purposes, from the point of view of a practicing lawyer, *stare decisis* and *jurisprudence constante* seem to be very similar. Courts follow cases, and it's much better to find a case for you than against you. "Real" lawyers in the trenches know that cases are solid and hard, and important. Therefore, despite the formal lack of *stare decisis*, we nevertheless trudge ahead in this talk into the body of case law that has developed in 1993. We also discuss significant legislation enacted in 1993, although neither the cases nor acts discussed below are a comprehensive or exhaustive review of 1993. Along the way, we also discuss some recent Texas and federal cases and Texas legislation of interest to Louisiana attorneys.[3]

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[2]Shael Herman, *Llewellyn the Civilian: Speculations on the Contribution of Continental Experience to the Uniform Commercial Code*, 56 TUL. L. REV. 1125, 1134 n. 34, *quoting* Goodhard, *Precedent in English and Continental Law*, 50 L.Q. REV. 40, 42 (1934).

[3]For a discussion of the differences in terminology in Louisiana and common-law states such as Texas, see N. Stephan Kinsella, *A Civil Law to Common Law Dictionary*, LA. L. REV. (Vol. 54, No. 5, May 1994—forthcoming).

II. CASES

A. Louisiana Oilfield Indemnity Act[4]

1. Whose Interest is Greater—Texas or Louisiana?; Gas Transportation Pipeline

Thomas v. Amoco Oil Company, 815 F.Supp. 184 (W.D.La. 1993)

In *Thomas*, the federal district court held that Louisiana has a greater interest in enforcing its anti-indemnity statute than does Texas. Woodson Construction Company ("Woodson") employed the plaintiff. Amoco Pipeline Company ("Amoco") hired Woodson to perform services on a land-based Amoco pipeline in Texas. The plaintiff was injured and sued Amoco. Amoco, alleging that Woodson's negligence caused the plaintiff's injuries, brought a third-party complaint against Woodson for indemnification pursuant to the contract between Woodson and Amoco (the "Woodson-Amoco Agreement").

Woodson argued that both the Louisiana Oilfield Indemnity Act[5] (the "Louisiana Act") and the Texas Anti-Indemnity Statute[6] rendered the indemnity agreement void and against public policy. The court then conducted a choice of law inquiry to determine which state's law applied to the Amoco-Woodson agreement.

There was no choice of law provision in the contract. Therefore the court examined Louisiana Civil Code art. 3537, which provides that the governing law is the law of the state "whose policies would be most seriously impaired if its law were not applied to that issue."

The court held that, in this case, "Louisiana has a greater interest in enforcing its anti-indemnity statute than does Texas," and therefore the policies behind Louisiana's law would be "most seriously impaired" if Louisiana law was not applied.

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[4]For a discussion of both the Louisiana and Texas anti-indemnity laws, see Patrick H. Martin & J. Lanier Yeates, *Louisiana and Texas Oil & Gas Law: An Overview of the Differences*, 52 LA. L. REV. 769, 853 (1992), and J. Lanier Yeates, *Indemnification and Anti-Indemnity Statutes as They Relate to Mineral Rights and Contracts*, 33 L.S.U. MIN.L.INST. 109, 116-17 (1986). For a detailed discussion of the Texas Anti-Indemnity Statute and recent cases interpreting it, see N. Stephan Kinsella, *Oilfield Indemnity and "Separate Insurance" Provisions in the Wake of Getty Oil*, TEX. OIL & GAS L. J. (March 1994—forthcoming).

[5]LA. R.S. 9:2780.

[6]TEX. CIV. PRAC. & REM. CODE § 127.001-127.007.

The court based this conclusion on several factors. Woodson was a Louisiana corporation and contractor, and Louisiana's interest in protecting a resident contractor is greater than Texas's interest in protecting a non-resident contractor, and, further, Texas would suffer no impairment of its interests if Louisiana law was applied. The contract was negotiated via mail and telephone conversations between Illinois and Louisiana, and was executed by Woodson in Louisiana. Further, the court stated that Texas was "*merely*" the place of performance of the contract and the location of the accident (despite the fact that the place of performance and location of an accident would seem to be significant factors in any balancing test). Neither party was domiciled in Texas nor should have expected the protection of the Texas indemnity statute in these circumstances. Therefore, because the court found relatively little impairment of Texas's interests would result from applying Louisiana's anti-indemnity act, the court analyzed the validity of the indemnity agreement under Louisiana law.

The court then went on to apply the test set forth in *Transcontinental Gas v. Transportation Insurance Co.*[7] ("*Transco*") to determine whether the Woodson-Amoco agreement came within the scope of the Louisiana Act.

In *Transco*, the Fifth Circuit parsed the Louisiana Act in determining the extent to which the Louisiana Act voids indemnity agreements in the natural gas pipeline context. Determining the applicability of the Louisiana Act is a two-step process. The Louisiana Act will invalidate any indemnity provision contained in or collateral to an agreement which (1) pertains to a well, *and* (2) is related to exploration, development, production or transportation of oil, gas, or water.

The issue of whether an agreement affecting a gas transportation pipeline "pertains to" a well does not lend itself to a bright-line standard; each case requires a fact-intensive analysis. In each situation, there should be a reasonably determinable *point* at which the gas can no longer be identified with a particular well, or is so fundamentally changed in processing, commingling, or preparing it for distribution to its ultimate end user that the gas no longer "pertains to a well."

The court in *Transco* listed ten factors, without limitation, to assist courts in determining this point:

(1) whether the structures or facilities to which the contract applies or with which it is associated, e.g. production platforms, pipelines, junction platforms, etc., are part of an in-field gas gathering system;

(2) what is the geographical location of the facility or system relative to the well or wells;

[7]953 F.2d 985 (5th Cir. 1992).

(3) whether the structure in question is a pipeline or is closely involved with a pipeline;

(4) If so, whether that line picks up gas from a single well or a single production platform or instead carries commingled gas originating from different wells or production facilities;

(5) whether the pipeline is a main transmission or trunk line;

(6) what is the location of the facility or structure relative to compressors, regulating stations, processing facilities or the like;

(7) what is the purpose or function of the facility or structure in question;

(8) what if any facilities or processes intervene between the wellhead and the structure or facility in question, e.g., "heater treaters," compressor facilities, separators, gauging installations, treatment plants, etc.;

(9) who owns and operates the facility or structure in question, and who owns and operates the well or wells that produce the gas in question; and

(10) any number of other details affecting the functional and geographic nexus between "a well" and the structure or facility that is the object of the agreement under scrutiny.

In *Thomas*, applying the *Transco* factors, the court did not find sufficient factual evidence that the Woodson-Amoco agreement pertains to a gas well; there was no sufficient nexus between "a well" and the natural gas pipeline which was the subject of the Woodson-Amoco agreement. The pipeline connects Amoco's Texas City Refinery up to the Texas Eastern Terminal, which connects other pipelines leading to butane storage caverns. The pipeline in question transports butane to and from the refinery. Therefore, the gas cannot reasonably be identified with a particular well. Thus, the Louisiana Act was not triggered and could not invalidate the indemnity provisions in the Woodson-Amoco agreement.

2. Processing Facility for Many Wells Does Not "Pertain to a Well"

Johnson v. Amoco Production Co., 5 F.3d 949 (5th Cir. 1993)

In *Johnson*, a tort action by an injured worker, an oil company filed a third-party demand for indemnification against the worker's employer, based on the indemnity provisions in a master service contract. The court applied the *Transco*[8] factors to determine the applicability of the Louisiana Act. *Transco* had held that a contract does not "pertain to a well", and hence can contain an indemnity provision, if the gas "can no longer be identified with a particular well" or if the gas becomes so "fundamentally changed [by] processing, commingling, or preparing it for distribution to its ultimate end user" that it can no longer properly be attributed to a particular well.[9]

In this case, the employer received a work order to rebuild and install an engine and compressor at the gas compressor station within a facility that processes oil and gas produced from 31 wells located nearby; the oil and gas is delivered commingled to the facility in a single gathering line. The compressor station is used to send completely processed gas from the facility in a distribution line that runs to a transmission line approximately ten miles away. Long before the gas reaches the compressor station it has been commingled in the gathering line with oil and gas from all other wells in the field, then separated from the oil and other liquid hydrocarbons, and finally run through an inlet scrubber and glycol unit. Under these facts, the court held, it is clear that, at least by the time the gas reaches the compressor station where the employee was working when he was injured, it can no longer be identified with a particular well. Thus, the employer's work on the compressor station cannot "pertain to a well" for purposes of the Louisiana Act.

An offshore oil platform may sometimes be characterized as "a well" for purposes of the Louisiana Act, even though multiple wells flow products into it, where itself is initially the nucleus of an necessary to exploratory and developmental drilling. However, the facility in question cannot be analogized to a platform:

> In contract, the [facility] is unrelated to the operations that discovered, developed, and defined the onshore field through individually drilled and completed wells. The facility is used exclusively to receive the collective products of field production, process them, and, inter alia, prepare the dry, processed gas for transportation; it is totally independent of the drilling for and extracting of petroleum. Each well surrounding this facility contains either its own equipment and structures for either extracting the hydrocarbons from the producing subsurface strata and bringing them to the surface, or receiving them there. As such, each of these wells is property characterized as an individual one for purposes of the [Louisiana Act].[10]

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[8] *See supra* note 7.

[9] *Johnson*, 5 F.3d at 954, *citing Transco*, 953 F.2d at 994.

[10] *Johnson*, 5 F.3d at 954.

3. Processing Facility "Pertains to a Well"

Nerco Oil & Gas, Inc. v. M.R. Friday, Inc., 816 F.Supp. 429 (W.D.La. 1993)

In this case, Nerco, an oilfield production unit operator, contracted with Friday, a contractor, to perform maintenance tasks. In a contract between the two, Friday was obligated to indemnify Nerco for liability and expenses it may face from suits brought by any person including Friday's employees. After an explosion occurred while Friday's employees were working at the station and Nerco made certain payments for ensuing injuries, Nerco brought an action for indemnification against Friday. The court held, however, that the indemnity clause could not be enforced because of the Louisiana Act.

The court applied the tests of *Transco* and other Louisiana cases to determine whether the agreement pertained to a well. Friday was working, under its maintenance contract with Nerco, on a facility that was part of the production process for definite wells in a definite field at the time of the explosion. The products emanating from below the earth through the field wells can be identified, and it is precisely those products that were measured and treated by the equipment upon which Friday was working at the time of the accident.

B. Liberative Prescription of Three Years for Lessor's Suit for Royalties; *Frey*'s Effect on the Lessor-Lessee Relationship

Acadia Holiness Association v. I M C Corp., 616 So.2d 855 (La.App. 3d Cir. 1993)

In *Acadia*, the court held that a plaintiff-lessor suit for royalties is subject to three-year prescription, not the ten-year period accompanying breach of contract actions. The court also held that *Frey v. Amoco Production Co.*[11] did not modify the lessor-lessee relationship.

In this case, the plaintiffs-lessors sued for royalties and cancellation of oil and gas leases. A summary judgment in favor of the defendants was granted. The district court determined that summary judgment was proper because the plaintiffs' claims were subject to a three-year prescriptive period (i.e. statute of limitations), since the claim was one for royalties and not for breach of contract (for which there is a ten-year prescriptive period).

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[11] 603 So.2d 166 (La. 1992).

The court of appeals sustained the lower court and ruled simply that the claim was one for royalties.

The plaintiffs claimed that the characterization of their claim and subjecting it to a three-year prescriptive period ignored equitable principles of a prudent administrator, as set out in the recent Louisiana Supreme Court decision of *Frey v. Amoco Production Co.* As Professor Tom Harrell points out, the plaintiffs here attempted to rely on *Frey* as having somehow modified the nature of an oil and gas lease and the relationship of the lessor and lessee to it. The court of appeals' ruling was correct because *Frey* did not modify the nature of the oil and gas lease. In *Frey* the court noted that, in a non-technical sense, the underlying nature of an oil and gas lease can be characterized as a cooperative venture by which the landowner contributes his land and the lessee his capital and expertise for their mutual benefit. It should be emphasized that, other than extending the principles of contra non valentum to the prescriptive period applicable to royalties, *Frey* established no new law in Louisiana; it simply construed the particular contract of lease before the court.

The underlying nature is useful to explain the objectives of the parties, to interpret the terms of the contract, and to form the basis for certain "implied obligations" (now expressly articulated in the Mineral Code). However, the contract is still technically a contract of lease and the duties of the lessee are defined by the Mineral Code and by the contract of lease itself. It is not technically a "partnership," nor is the lessee in any sense a fiduciary, as the Mineral Code expressly notes.

C. Oral Agreement to Pay Expenses of Drilling on Immovable Property Valid

Tabco Exploration, Inc. v. Tadlock Pipe & Equipment, Inc., 617 So.2d 606 (La.App. 3d. Cir. 1993)

The court in *Tabco* held that, although a partnership agreement must be in writing for the partnership to own immovable property, an oral agreement to pay expenses involved in the conducting of drilling operations on immovable property is valid. Tabco and Tadlock Pipe entered into an oral agreement of partnership, by which the parties agreed to pay expenses incurred by Tadlock Properties, Inc., in the conducting of drilling operations on a certain well. The well was eventually plugged and abandoned as a dry hole.

Tabco contended that it owed nothing to Tadlock Properties because the agreement creating the obligation was oral, and was therefore invalid because it involved immovable (i.e. real) property. However, the court said that "While ownership of an immovable by a partnership requires that the partnership agreement be in writing, ownership and transfer of ownership are not presently at issue."[12] The court characterized the question as whether a partner owes his share of expenses pursuant to an oral agreement between the partnership and a corporation. The judgment against Tabco was for expenses it owed by virtue of its partnership agreement; the partnership agreed to pay expenses incurred by Tadlock Properties in conducting drilling operations on a certain well.

1. Louisiana Partnership Law—Ownership of Immovables

Although not addressed in detail in *Tabco*, the following discussion considers the related issue of ownership of immovables by partnerships.

Under Louisiana law, the partnership agreement needs to be in writing and recorded if the partnership is to own immovable (i.e. "real") property. La. Civil Code art. 2806 provides:

> An immovable acquired in the name of a partnership is owned by the partnership if, at the time of acquisition, the contract of partnership was in writing. If the contract of partnership was not in writing at the time of acquisition, the immovable is owned by the partners.
>
> As to third parties, the individual partners shall be deemed to own immovable property acquired in the name of the partnership until the contract of partnership is filed for registry with the secretary of state as provided by law.

La. R.S. 9:3401 *et seq.* contain provisions concerning central registry for contracts of partnership. Note that section 9:3406 requires that a multiple original of the contract of partnership and a copy of the certificate of registry, shall be filed for registry with the recorder of mortgages of the parish in which the partnership maintains its principal place of business. However, failure to so file these documents with the recorder of mortgages shall *not* affect the title of immovable property as being in the partnership.

Section 9:3407 allows a contract of partnership to be delivered, prior to its effective date, to the Secretary of State for filing and registration on any specified date and time on or before the thirtieth day after the day of delivery. Section 9:3408 provides that if the contract of partnership is filed for registry with the Secretary of State within five days of execution, it is deemed filed for registry at the date and time of execution.

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[12] *Tabco*, 617 So.2d at 610.

D. Ownership of Waterbeds; "Public Trust Doctrine"

Dardar v. Lafourche Realty Co., Inc., 985 F.2d 824 (5th Cir. 1993)

In *Dardar*, the court held that when Louisiana waterbeds were alienated at a time when there were no navigable bodies of water on the land, there was no violation of the State's policy of preventing the alienation of beds of navigable streams; thus the lands did not fall within the "public trust doctrine" of the U.S. Supreme Court case *Phillips Petroleum Co. v. Mississippi*.[13]

In this case commercial fishermen sought the right to use a certain system of waterways. The State of Louisiana intervened, asserting a right of public use of the waters, and claiming title to the water bodies and to over 12,000 acres of land under the waters. The court of appeals upheld the lower court's ruling that the lands did not fall within the public trust doctrine of *Phillips*.

(The essence of the Court's opinion in *Phillips* was a recognition that state claims to ownership, and application of a resurrected and reshaped public trust doctrine, could extend beyond lands lying beneath navigable bodies of water to include those lands lying beneath tidally influenced waters, whether navigable or not.[14])

When the lands were alienated by the State, apparently in 1902, there was no violation of the State's policy of preventing the alienation of beds of navigable streams, since there were then no navigable bodies of water on the lands. Therefore, because the State alienated the water beds and there was no policy against it, the transfer of the land to private owners was valid and the State did not still own the beds.

1. Man-made Canals

Although not addressed in *Dardar*, the following discussion considers the related issue of whether the State may claim ownership of lands underlying man-made waterways.

There is some concern that, pursuant to the *Phillips* case, the State may claim ownership of lands underlying man-made, artificial waterways such as a canal. It is unlikely that the State of Louisiana would assert a *Phillips*-based claim of ownership over a privately-constructed, artificial canal that is classified as a private thing in Louisiana.

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[13]484 U.S. 469 (1988).

[14]Newman Trowbridge, Jr., *Waterbottoms after Phillips Petroleum Company v. Mississippi*, 39 L.S.U. MIN. L. INST. __ (1992).

However, even though unlikely, the law is unsettled in Louisiana concerning the extent to which the State of Louisiana could assert ownership rights to lands under a canal or similar waterbody (whether or not navigable) that may be adjacent or tributary to a navigable waterbody flowing into the Gulf of Mexico that is affected by the tide's ebb and flow.

Despite the uncertainty created by the decision in the *Phillips* case, assuming that a canal is properly classified under Louisiana law as a private thing, additional support for the proposition that the State of Louisiana is unlikely to assert ownership rights to the bed of a canal may be found in an Advisory Legal Opinion issued in February of 1992 by the Louisiana State Law Institute at the request of the Louisiana Legislature pursuant to House Concurrent Resolution 145 of 1991 (the "Advisory Opinion"). Furthermore, in the opinion of at least one commentator, any extension of the public trust doctrine underlying the rationale of *Phillips* to artificially constructed canals subject to tidal influence would require a clear contravention of Louisiana law.[15] An argument that the State of Louisiana has maintained a public trust that includes lands and waterbottoms other than the beds and bottoms of natural navigable water bodies, the sea and the seashore would suggest that the decision in *Phillips* overruled existing law of the State of Louisiana, a result that is repudiated by the majority joining in the decision.

In his treatise on Louisiana property, Professor Yiannopoulis argues that privately constructed canals are private things.[16] If a canal is a private thing, despite the rationale of the decision in *Phillips*, the State of Louisiana is not precluded from recognizing private ownership rights in waterbottoms affected by the ebb and flow of the tide. Acknowledgment of the right of the State of Louisiana to recognize private ownership of such waterbottoms may be found in the Advisory Opinion:

> It is submitted, however, that the legislative and jurisprudential history of this State does not reflect a public policy position recognizing public trust limitations upon, or precluding private ownership rights in, waterbottoms affected by the ebb and flow of the tide acquired by Louisiana by right of sovereignty under the *Phillips* decision beyond those policy limitations clearly expressed in our code, constitution and jurisprudence respecting navigable waters (including the sea and its shores). Modification of that body of law and jurisprudence to divest private ownership and recognition of a public trust limitation upon alienation of all *Phillips* tidewater bottoms within Louisiana would indeed be contrary to other

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[15] Newman Trowbridge, Jr., *supra* note 14.

[16] A. Yiannopoulis, PROPERTY § 79 in LOUISIANA CIVIL LAW TREATISE (1991).

policies of this state which favor not only stability in the law and constancy of jurisprudence, but which also favors stability in real estate titles.[17]

E. Forced Heirship

Succession of Lauga, 624 So.2d 1156 (La. 1993)

In *Lauga* the Louisiana Supreme Court overturned recent legislative limits on forced heirship. Article XII, § 5 of the 1974 Louisiana Constitution declares that "No law shall abolish forced heirship." Civil Code art. 1493, as amended in 1989 and 1990, attempted to extinguish forced heirship for persons who upon the death of their decedents are competent and 23 years of age. The Supreme Court declared unconstitutional amended article 1493, as well as the amendatory acts of 1989 and 1990, in their entirety.

The court held article 1493 unconstitutional for violating Art. XII, § 5 of the constitution in three different but interrelated ways.

> First, the law violates and deprives each plaintiff of his individual right as a child to an equal share of a forced portion of his decedent's estate; furthermore, the law professes to abolish the right of forced heirship as an individual constitutional right and relegate it to the status of a statutory entitlement. Second, the law purports to abrogate completely Article XII, § 5's guarantee of the core principle of equality of heirship among children with respect to a forced portion of their decedents' estates. Third, the law purports to render wholly ineffective the legal institution of forced heirship to further the state purposes for which it was elevated to constitutional status. In fact, the law promotes the very evils that the forced heirship guarantee was designed to combat, that is, the unjust disinheritance of children which leads to family disharmony and litigation among siblings and the concentration of family estates in fewer than all the children, to the economic detriment of society and the resulting impoverishment of the disinherited children. In sum, amended Civil Code article 1493 abolishes the legal institution of forced heirship with respect to all of its ends and purposes as effectively as would a simple repeal of all forced heirship laws.[18]

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[17] La. State Law. Inst., *Advisory Legal Opinion Relative to Non-navigable Water Bottoms*, 45-46 (1992).

[18] *Lauga*, 624 So.2d at 1158.

F. Illegitimate Children; Equal Protection

Talley v. Succession of Stuckey, 614 So.2d 55 (La. 1993)

Civil Code art. 1705 provides:

> A testament is revoked by the subsequent birth of a legitimate child to the testator or by the subsequent adoption or legitimation of a child by the testator, unless the testator has made testamentary provision to the contrary or has made testamentary provision for such child.

The mother of an illegitimate child, who argued that the testament of the child's father was revoked by the subsequent birth of the child, challenged the constitutionality of the article on equal protection grounds contending that the article discriminated against illegitimates insofar as it did not provide for the revocation of a testament by the subsequent birth of an illegitimate child unless the illegitimate child was legitimated by the testator.

Classifications based on illegitimacy, although not "suspect" or subject to "strict scrutiny" under equal protection analysis, are unconstitutional unless they are substantially related to permissible state interests. The court held that this classification in article 1705 did not meet this test, and was therefore unconstitutional, because of the word "legitimate" in its text. The word "legitimate" was severed from the statute, and the remainder of the article held constitutional, thus the will was revoked by the subsequent birth of the illegitimate (but later filiated) child.

G. Four-Wheelers and Well Casings

Cockerham v. Atlantic Richfield Co., 615 So.2d 547 (La.App. 3d Cir. 1993)

In *Cockerham*, injuries were sustained by Cockerham when the Yamaha four-wheeler on which she was a passenger struck an abandoned oil well casing that protruded approximately 12 inches above the ground, and that was approximately ten inches wide. Cockerham sued ARCO, the successor to the lessor, for failure to cut the casing at two feet below plow depth, as required by Statewide Order 29-B of the Louisiana Department of Conservation. The court held that ARCO, as the successor to the owner of the oil well in 1943, was the "owner" for purposes of the Order and, given that premise, that ARCO was obligated to cut the casing at least two feet below plow depth some 45 years after the lease was released. The trial court applied the duty/risk analysis and concluded that ARCO breached a legal duty to protect the public from the type of injuries suffered by Cockerham, and then assessed ARCO and the driver with each 45% of the fault and Cockerham with 10% of the fault for her injuries. The court of appeals affirmed.

H. Deficiency Judgment for *In Globo* Sale by Executory Process of Separately Mortgaged Properties

First Federal Savings & Loan Association of New Iberia v. Moss, 616 So.2d 648 (La. 1993)

In *Moss*, the Louisiana Supreme Court held that a mortgagee's in globo sale of separately mortgaged properties constituted a substantive defect in the executory proceedings and, thus, the mortgagee was not entitled to obtain a deficiency judgment. A creditor seeking to obtain a deficiency judgment has the burden of establishing compliance with two criteria: (1) insufficiency of the sale proceeds to satisfy the underlying debt; and (2) sale of the seized property after appraisal in accordance with the codal and statutory requirements for executory proceedings. This proof is necessary to establish that the creditor has not been barred from obtaining a deficiency judgment by operation of Code of Civil Procedure art. 2771 and La. R.S. 13:4106(A). In this case the question was whether an *in globo* sale of separately mortgaged properties in an executory proceeding is unauthorized. As the court stated,

> Given the general rule favoring separate sales, the general codal scheme contemplating foreclosure on a single mortgage and the lack of any statutory or codal authority for an *in globo* sale of separately mortgaged properties in an executory proceeding, we hold that such an *in globo* sale is unauthorized.[19]

Citizens Savings and Loan Association v. Kinchen, 622 So.2d 662 (La. 1993)

On a related issue, the Louisiana Supreme Court in *Kinchen* held that, (1) to obtain a deficiency judgment against a mortgagor, the mortgagee was required to prove that the mortgagor was served with notice to appoint an appraiser prior to the judicial sale; and (2) to recover a deficiency judgment against a mortgagor, the mortgagee was not required to make the mortgagor a party to executory proceedings or to have him served with notice of demand or notice of seizure.

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[19]*Moss*, 616 So.2d at 654, *disagreeing in part* with *First Bank of Natchitoches & Trust Co. v. Chenault*, 576 So.2d 1123 (La.App. 3d Cir. 1991).

I. Proper Party Plaintiff to Recover under OCSLA

St. Mary Parish v. Parker, 615 So.2d 327 (La. 1993)

In this case, the Supreme Court held:

> If La. Const. art. VII, § 4(E) affords a remedy to a coastal parish to recover from the state one-tenth of the state's share of the royalties from oil and gas produced on federally owned lands from pools underlying both state and federal lands, then the governing body of the parish is the proper plaintiff to assert the parish's real and actual interest in the claim. Thus, St. Mary Parish has a right of action.[20]

J. Use of Pipeline Servitudes to Interrupt Prescription

Ashland Oil Company v. Palo Alto, Inc., 615 So.2d 971 (La.App. 1st Cir. 1993)

The question here was whether pipeline owners used the pipeline within the meaning of the pipeline servitude, so as to interrupt the servitude agreement's 12-month prescription period. The agreement restricted the use of the pipeline to the transportation of carbon dioxide. The pipeline was shut down for several years for economic reasons. Until the plant was reopened years later, Ashland ran carbon dioxide through the line every 11 ½ months to interrupt the 12-month prescription period provided by the agreement, and the carbon dioxide was simply vented at the plant. Because a servitude must be used as contemplated in the grant of the servitude in order to interrupt prescription, the court held that Ashland's actions were not consistent with the object of the grant of the servitude and constituted "a mere gesture by the . . . owners to preserve a servitude." Therefore, the court held that the servitude had prescribed by non-use.

K. Division Order

JFD, Inc. v. Chappuis, 615 So.2d 492 (La.App. 3d Cir. 1993)

In *JFD*, a concursus proceeding was instituted by the broker of payment of royalties to resolve a dispute among lessors as to the proper distribution of royalties, following a notice by a co-lessor to her lessee that she would no longer be bound by a division order that had been in place for 12 years. The court commented that the

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[20] *Parker*, 615 So.2d at 327.

essential purpose of a division order is to protect the lessee and purchaser from liability for improper payment of royalties, and also noted that a division order is a contract between the lessee and the individual lessors, which creates no legal relationship between co-signing lessors. The court also noted that the division order contained no fixed term. Therefore, the court held that the division order was a temporary arrangement subject to unilateral modification by any of the royalty owners upon the giving of notice.

L. Termination of Natural Gas Purchase Contract for Buyer's Failure to Take or Pay; Buyer's Right to Cure Deficiency

La-Nevada Transit Co. v. Marathon Oil Co., 985 F.2d 797 (5th Cir. 1993)

In *La-Nevada*, Seller's contract for the sale of gas to Buyer gave Seller the right to terminate the contract if Buyer either failed to take or pay for a minimum quantity of gas during any month. After Buyer failed to take the minimum quantities on and off for several months, Seller gave notice that it was exercising its option to terminate the contract, and pointed to a certain month's deficiency as the basis for its right to exercise the option. Buyer then attempted to "cure" the deficiency for that month, even though it had been deficient in other months as well.

The court held that, as the contract was silent, Seller had a "reasonable time" after any deficiency within which to exercise its rights, and the earlier deficiencies were still viable causes for termination since a reasonable time had not yet elapsed. Additionally, the court held that, since the notice was not of a breach or default, but merely the exercise of an option, it was not necessary for the seller to identify which month or months had given rise to it. The exercise of the contractual right to terminate was not conditioned upon having to explain either why Seller could or wanted to exercise the right.

M. MMS "Dear Payor" Letter for Royalties Owed on Take-or-Pay Settlements

Independent Petroleum Association of America v. Babbitt, Civil No. 93-0112-E (N.D. W.Va.)[21]

On May 3, 1993, the Minerals Management Service ("MMS") issued a "Dear Payor" letter to federal lessees informing them of its interpretation of existing royalty valuation regulations with respect to their alleged obligation to pay royalties on funds received under various types of gas contract settlements pertaining to federal and Indian tribal leases and setting forth MMS' criteria for determining the royalty-bearing nature of these contract settlement payments. Letter dated May 3, 1993 from James W. Shaw, Associate Director for Royalty Management, MMS, addressed to "Dear Payor," MMS Reply No. MMS-VSD-OG, Mail Stop 3922 (the "5/3/93 Dear Payor Letter").

The 5/3/93 Dear Payor Letter was followed, on June 18, 1993, by an order executed by Bob Armstrong, Assistant Secretary-Land and Minerals Management, DOI (the "6/18/93 Order"), ordering all federal lessees to complete and return, within forty-five days of receipt of the 6/18/93 Order, the form of report set forth therein relating to the disclosure of information concerning gas contract settlements entered into by each federal lessee, or any predecessor in interest, pertaining to a federal or Indian tribal oil and gas lease since January 1, 1980. The 6/18/93 Order also required the submission of an affidavit by a knowledgeable and responsible officer of the lessee certifying either that the lessee was not a party to any such contract settlement since January 1, 1980, or that the information given in the special report was correct.

Finally, the order instructed the federal lessees to retain all records relating to any such contract settlements until the release of such records is specifically authorized in writing by MMS, subject to the obligation to make such records available for inspection by any duly authorized officer of MMS. Because this communication was couched as an order signed by an Assistant Secretary of DOI, DOI took the position that the 6/18/93 Order was not subject to appeal to the Interior Board of Land Appeals and is the final action of DOI.

On August 13, 1993, the Independent Petroleum Association of America ("IPAA") and twenty-two other associations representing natural gas producers and others filed suit against DOI in the United Sates District Court for the Northern District of West Virginia, seeking a declaratory judgment that MMS is not entitled to collect royalty payments on the amount of gas contract settlements between producers and pipelines entered into

[21]The discussion of this case is adapted from Michael P. Pearson, *Emerging Federal Royalty Issues*, STATE BAR OF TEXAS 11TH ANNUAL ADVANCED OIL, GAS & MINERAL LAW COURSE, F-1 (1993), with permission of Mr. Pearson, a partner at Jackson & Walker, L.L.P. in Houston, and head of its energy section.

during the 1980's.[22] In this lawsuit, to provide the parties adequate time to brief and argue certain procedural motions, MMS agreed to extend the date for compliance with the 6/18/93 Order first until October 15, 1993, and subsequently until November 15, 1993.[23] As of the date of this writing (March 10, 1994), the court has extended the deadline for compliance with the 6/18/93 Order to April 1, 1994, at the earliest.[24]

With respect to the 6/18/93 Order, the plaintiffs argue that, by demanding information and reports for periods back to January 1, 1980, DOI has arbitrarily and capriciously imposed unwarranted costs on owners of the federal and Indian leases in question by compelling them to review production periods for which DOI's demands for additional royalties would be barred by the statute of limitations, by accord and satisfaction, by laches and estoppel, and by the regulatory principle of finality with respect to closed audit periods.[25] Because of its unreasonableness, the plaintiffs argue, the 6/18/93 Order requiring this information also exceeds DOI's authority under Section 107(a)(1) of FOGRMA,[26] on which such order is based.[27] The plaintiffs thus seek a declaratory judgment that part of DOI's claims are barred by the statute of limitations, by accord and satisfaction, by laches and estoppel, and by DOI's closure of audit periods with respect to the plaintiffs' members, and that the 6/18/93 Order is arbitrary, capricious, an abuse of the Secretary's discretion, and not in accordance with law.[28]

As of the date of this writing (March 10, 1994), the plaintiffs' requests for declaratory judgments and injunctions are still pending.

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[22]*Independent Petroleum Association of America v. Babbitt*, Civil No. 93-0112-E (N.D. W.Va.).

[23]Order dated September 22, 1993, *Independent Petroleum Association of America v. Babbitt*, Civil Action No. 93-112-E (N.D. W.Va.).

[24]MMS recording available by calling 303/231-3185.

[25]Complaint for Declaratory and Injunctive Relief at 19-20, *Independent Petroleum Association of America v. Babbitt*, Civil Action No. 93-112-E (N.D. W.Va.) ("Complaint").

[26]30 U.S.C. § 1717(a)(1) (1986).

[27]Complaint, at 20.

[28]*Id.*

N. Indemnity for Plug and Abandon Obligations

Chevron U.S.A., Inc. v. Traillour Oil Company, 987 F.2d 1138 (5th Cir. 1993)

In *Chevron*, when Chevron had decided to sell a lease with numerous wells, it required letters of credit and an indemnity from its assignee to protect itself against future obligations to plug and abandon. These rights were subleased to other parties by the assignee. Later, when Chevron's request for a replacement letter of credit was not honored, it sought a declaratory judgment requiring each of the defendants to provide it with a letter of credit to secure the plug and abandon obligations. It also sought an indemnity from each of the defendants for any plug and abandon obligations that Chevron might be required to discharge.

The court held that the successors-in-interest to an assignee or sublessor of a lease are obligated to plug and abandon the wells, but that the obligation is personal and does not run to the original lessor. The court also held that "investors" (actually transferees of undivided interests in a sublease of the lease) were not obligated to indemnify the original lessee, under their contracts, for such obligations.

As stated in the editorial note to this case in the Louisiana Mineral Law Service (presumably by Professor Harrell), "The Court's determination that the obligations of the lease can only be enforced by an assignor against an assignee but not against an assignee of an assignee is more doubtful. . . . [It seems] that the last person who assumes the obligation should be liable to all of those preceding him."[29]

O. Cancellation of Mineral Lease; Factors for Reasonable Development of Leased Property; Putting in Default before Instituting Suit

Noel v. Amoco Production Company, 826 F.Supp. 1000 (W.D.La. 1993)

In *Noel*, the court held that,

> In determining whether the lessee has reasonably developed the leased property, a court should consider the lessee's entire operation, including its past operations and the measures that it has taken for future development. Relevant factors for the court to consider include:
>
> > (1) geological data; (2) number and location of the wells drilled both on leased lands and adjoining property; (3) productive

[29] *Louisiana Mineral Law Service*, Vol. 13, No. 4, Page 7 (1993).

capacity of wells; (4) costs of drilling operations compare[d] with profits; (5) time interval between completion of the last well and the demand for additional operations; and (6) acreage involved in the disputed lease.[30]

Vetter, one of the cases cited by the court in *Noel* for the factors above, itself cited a comment in the *Tulane Law Review* for these factors.[31] The court notes that the adoption of these factors by the *Vetter* court was criticized by Professor Harrell,[32] which, of course, has come to be known as the "Harrell Gripe."[33]

Although there was no Louisiana case[34] addressing the next issue, under the *ratio decidendi* of Louisiana jurisprudence, the court also held that, for all practical purposes, the lessor's institution of a suit for total cancellation of the mineral lease prevents the lessee from maintaining and repairing the producing wells on the lease. Under such circumstances, the lessor is estopped from complaining about cessation of production in paying quantities that results from the lessee's failure to maintain and repair the wells during the pendency of the lessor's suit for cancellation.[35]

Hunt v. Stacy, __ So.2d __, 1994 WL 51731 (La.App. 2d Cir.)

In *Hunt*, the plaintiffs sought cancellation mineral leases, alleging that the defendants failed to explore and develop the leased property. The court held that Mineral Code art. 135 provides special exceptions to the general rule that a putting in default is not a prerequisite to filing suit.

Mineral Code art. 135 provides:

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[30]*Noel*, 826 F.Supp. at 1011 (footnotes omitted), *citing Middleton v. California*, 237 La. 1015, 112 So.2d 704, 707 (1959), *Vetter v. Morrow*, 361 So.2d 898, 900 (La.App. 2d Cir. 1978).

[31]Comment, *Implied Covenants in Louisiana Mineral Leases as Affected by Conservation Legislation*, 27 TUL. L. REV. 353, 3577-58 (1953).

[32]*Noel*, 826 F.Supp. at 1011, n. 30; Thomas A. Harrell, *A Mineral Lessee's Obligation to Explore Unproductive Portions of the Leased Premises in Louisiana*, 52 LA. L. REV. 387, 390-91 n. 5 (1991).

[33]Not to be confused with the "Harrell Rule," which states "that a lease arrangement is in the nature of a cooperative venture in which the lessor contributes the land and the lessee the capital and experience necessary to develop the minerals of the mutual benefit of both parties." *Klein v. Jones*, 980 F.2d 521, 531 (8th Cir. 1992).

[34]*See supra* notes 1-3 and accompanying text.

[35]*Noel*, 826 F.Supp. at 1014-15.

> The provisions of the Louisiana Civil Code concerning putting in default are applicable to mineral leases subject to the following modifications.

The appellants argued that, when the legislature revised the civil code in 1984, it abolished the distinction between active and passive breach and therefore abolished the requirement for putting into default prior to the filing of a lawsuit. The court held that the legislature intended to retain the distinction between passive and active breaches and the jurisprudence regarding those classifications, at least as to contracts involving oil, gas, and other minerals. Thus, passive breaches still exist, and a breach of the duty to develop is a passive breach because the duty is an implied obligation. Therefore, a formal placing in default is required before judicial intervention may be sought.

P. Gas Purchase Agreement Characterized as "Output Contract" (Texas Case)

Tennessee Gas Pipeline Company v. *The Lenape Resources Corporation*, __ S.W.2d __, 1993 WL 319865 (Tex.App.—San Antonio, n.w.h.)

In *Lenape*, the San Antonio court of appeals upheld a natural gas contract that requires a pipeline company to pay three times the market rate for gas produced. However, the court characterized the contract as an "output contract" rather than a "supply contract," and remanded the case to the trial court to determine exactly how much production should be covered under the long-term contract.

In this case the Buyer entered into a Gas Purchase and Sales Agreement ("GPA") with the Seller in 1979. The GPA obligated the Buyer to take or pay for gas produced from committed reserves, with the quantity to be determined by the Seller's delivery capacity. Under Texas jurisprudence, an output contract is one that measures the quantity to be sold by reference to the seller's good-faith output. The quantity provision of the GPA met this test, according to the court, and states, in pertinent part, as follows:

> 3. Quantity:
>
> (a) Seller agrees to sell and deliver to Buyer, and Buyer agrees to purchase and receive, or pay for if available and not taken, Seller's pro rata part of the following quantities of gas produced from the committed reserves . . . . A quantity of gas well gas equal to eighty-five percent (85%) of seller's delivery capacity.
>
> The Seller's delivery capacity was defined as:
>
> Seller's pro rata part of the average amount of gas well gas per day which can be efficiently withdrawn from the wells on the lease(s) . . . the

> production from which is covered by this Agreement and which is available for delivery.

The court held that this measure of quantity established that the GPA was an output contract, because the quantity of gas covered by the GPA was not specifically stated but was determined in accordance with the Seller's production or delivery capacity. However, the court held, according to section 2.306 of the Texas UCC, any increase in the rate of production by the Seller must be in *good faith* and *reasonably proportionate to prior output,* and these requirements cannot be waived by contract.

III. LEGISLATION

Below are discussed various acts of the 1993 regular session of the Louisiana legislature.

A. "Owner" of Mineral Rights Includes Operators and Producers

Act 113 amends La. R.S. 30:3(8) to include operators and producers in the definition of an owner of mineral rights, and provide as follows:

> "Owner" means the person, including operators and producers acting on behalf of the person, who has or had the right to drill into and to produce from a pool and to appropriate the production either for himself or for others.

B. Leases of Mineral Rights Owned by the State

Act 114 amends La. R.S. 30:128 to provide that failure to obtain approval of the state mineral board of any transfer or assignment of a state lease within 60 days of the confection of the transfer or assignment will subject the transferor or assignor to a civil penalty of $100 per day until the transfer or assignment is received in the Office of Mineral Resources.

C. Repeal of Louisiana Noncoal Surface Mining Law

Act 245 repeals the Louisiana Noncoal Surface Mining Law, formerly codified at La. R.S. 30:961–979.

D. Penalties for Errors on forms for Payment of Royalties to the State

Act. 267 amends La. R.S. 30:136(B) to provide for penalties for errors in reporting on forms required by the Department of Natural Resources or the Office of Mineral Resources concerning royalty and to provide a penalty of 10 percent of the total sum due, not to exceed $1,000, for failure to pay or for underpayment of royalties due to the state.

E. Louisiana Oilfield Site Restoration Law

Act 404 amends La. R.S. 30:73(4) and enacts R.S. 30:80–97, relative to cleanup and restoration of oilfield sites, to enact the Louisiana Oilfield Site Restoration Law. The law defines an "orphaned oilfield site" as:

> an oilfield site which has no continued useful purpose for the exploration, production, or development of oil or gas and which has been declared to be an orphaned oilfield site by the assistant secretary under R.S. 30:91.

A "Responsible party" is defined as:

> the operator of record according to the office of conservation records, who last operated the property on which the oilfield site is located at the time the site is about to be abandoned, ceases operation, or becomes an unusable oilfield site, and that operator's partners and working interest owners in that oilfield site. A working interest owner is the owner of a mineral right who is under an obligation to share in the cost of drilling or producing a well on the oilfield site.

The act also establishes an oilfield site restoration commission and fund, provides for the creation of oilfield site trust accounts and fees, defines "waste site", provides for the identification and declaration of orphaned oilfield sites, and provides for oilfield site restoration, provides for the recovery of site restoration costs, and provides for penalties.

F. Sales Revision *Projet*

Act 841 enacts the Sales Revision Project of the Louisiana State Law Institute. The act redesignates Civil Code arts. 2601 to 2641 as La. R.S. 9:3151 to 9:3191, and amends arts. 2438 to 2659. This revision is to be effective on January 1, 1995.

In Louisiana, of course, unlike common-law jurisdictions, both immovables (i.e., real property) and movables (i.e., personalty) are conveyed by the same method. "Land is not 'conveyed' by deed but is sold. Sales of movables and immovables are based on the same principles. One sells land by the same contract and in the same way—in terms of theory—as one sells an automobile."[36]

The revision covers the following subjects:

1. Of the Nature and Form of the Contract of Sale
2. Of Persons Capable of Buying and Selling
3. Of Things Which May be Sold
4. How the Contract of Sale is to be Perfected
5. Of the Prices of the Contract of Sale
6. At Whose Risk the Thing Is, After the Sale is Completed
7. Of the Obligations of the Seller
8. Eviction
9. Redhibition
10. Of the Obligations of the Buyer
11. Of the Sale with a Right of Redemption
12. Rescission for Lesion Beyond Moiety
13. Sales of Movables
14. Agreements Preparatory to the Sale
15. Assignment of Rights
16. Of the Giving in Payment

Although the old sales provisions were not totally eliminated by the projet, the revision is a major overhaul, a structural and functional renovation that leaves the foundations of the prior articles intact. Many provisions were adopted from Article 2 of the UCC.

For example, prior Civil Code art. 1943 provided: "An acceptance not in accordance with the terms of the offer is deemed to be a counteroffer." This is known as the mirror-image rule, which results in the dreaded last-shot principle and so-called "battle of the forms." The UCC attempted to eliminate the last shot principle with UCC section 2-207, although some vestiges of the last shot principle still survive. Civil Code art. 1943 has been replaced (effective January 1, 1995) by new articles 2601 and 2602,

[36]Martin & Yeates, *Louisiana and Texas Oil & Gas Law: An Overview of the Differences*, 52 LA. L. REV. 769, 787-88 (1992). For further differences between civilian and common-law terminology, see N. Stephan Kinsella, *A Civil Law to Common Law Dictionary*, *supra* note 3.

which are similar to UCC 2-207, with some improvements that wipe out even more fully any remaining vestiges of the last-shot principle.[37]

G. Limitation of Liability for Owners of Mineral Interests

Act 889 amends La. R.S. 9:2800.4. This section provides for limitation of liability of owners of farm or forest land, and, now, owners of oil, gas, or mineral properties. The definition of "owner" has been changed to include owners of any oil, gas, or mineral property, which is defined to mean any land leased for the development and production of oil, gas, or minerals. The statute provides that such an owner "shall not be liable to any person who unlawfully enters upon his oil, gas, or mineral property, for damages for any injury, death, or loss which occurs while on the oil, gas, or mineral property of the owner, unless such damage, injury , or death was caused by the intentional act or gross negligence of the owner."

H. Texas Legislation

1. Forum Non Conveniens

Texas' popularity as a forum for lawsuits filed by foreigners—both Americans and non-Americans—will diminish as a result of recent legislation concerning the doctrine of *forum non conveniens*. Acts 1993 of the 73rd Texas legislature, ch. 4, § 1, enacts § 71.051 of the Texas Civil Practices & Remedies Code, in which the equitable doctrine of forum non conveniens has been enacted into law with respect to personal injury and wrongful death causes of action filed on or after September 1, 1993. The doctrine gives judges wide latitude to dismiss a case filed by a claimant who is not a resident of the United States, if a more appropriate or convenient forum exists outside Texas.

With respect to a claimant who is a legal resident of the United States, the party seeking to stay or dismiss the action under the doctrine of forum non conveniens must prove by a preponderance of the evidence that (1) a forum outside Texas is a more appropriate forum that: (a) offers a remedy for the causes of action brought by a party to which the section applies; (b) can exercise jurisdiction over all parties and claims properly joined in the action by the claimant; (c) would provide a fair, reasonable, and convenient place of trial; (2) maintenance of the action in Texas courts would work a substantial injustice to the moving party, and the balance of the private interests of all the parties and

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[37] *See* N. Stephan Kinsella, *Smashing the Broken Mirror: The Battle of the Forms, UCC 2-207, and Louisiana's Improvements*, 53 LA. L. REV. 1555 (1993).

the public interest of Texas predominates in favor of the action being brought in the other forum; and (3) the stay or dismissal would not, in reasonable probability, result in unreasonable duplication or proliferation or litigation.

Additionally, with respect to the claim of a legal resident of the U.S., all properly joined defendants must file a written stipulation that each defendant will: (1) submit to the personal jurisdiction of the other forum's courts; and (2) waive any defense based on the statute of limitation applicable in the other forum with respect to all causes of action brought by a party to which the section applies.

A court may not stay or dismiss an action with respect to a claimant who is a legal resident of the U.S. if: (1) a properly joined claimant is a legal resident of Texas; (2) a party opposing the motion alleges and makes a prima facie showing that an act or omission that was a proximate or producing cause of the injury or death occurred in Texas; (3) the action is brought under the Federal Employers' Liability Act, the Safety Appliance Act or the Boiler Inspection Act; (4) it is alleged that the personal injury or death was caused by a means of air transportation designed, manufactured, sold, maintained, inspected, or repaired in Texas, or occurred while traveling by air during a trip beginning or ending in Texas; or (5) it is alleged that harm was caused by exposure to asbestos fibers.

A request for stay or dismissal under Section 71.051 must be filed within the time permitted for filing a motion to transfer venue. The moving party must then obtain a hearing on the motion at a reasonable time, at least 30 days before trial. All parties must have 21 days notice of the hearing and "ample opportunity" before the hearing to discover information relevant to the motion. Any of these time limits may be extended by the court at the request of any party for good cause.

Section 71.051 applies generally to actions for personal injury or wrongful death. However, it does not apply if the personal injury or death resulted from a violation of Texas or federal laws. The section expressly states that it will govern Texas courts in determining issues under the doctrine of forum non conveniens in the actions to which it applies, notwithstanding Civil Practice and Remedies Code Section 71.031(a) or any other law.

2. Choice of Law

By Acts 1993, 73rd Leg., ch. 570, § 13, Texas recently enacted § 35.51 to the Business and Commerce Code, entitled "Rights of Parties to Choose Law Applicable to Certain Transactions." Under this new provision, where contracting parties choose the law of a jurisdiction other than Texas to govern their contract, the choice of law will be upheld by Texas only if the contract has, first, a substantial relationship to the chosen state. If this test is met, the choice will be upheld unless (1) another state (such as Texas) has the most significant relationship to the parties and the transaction; (2) the other state has a materially greater interest than the chosen state has in the enforceability of the contractual provisions at issue; and (3) enforcement of the contractual provision at issue would violate a fundamental policy of the other state. Texas also has a "boldface" statute, which in some circumstances requires that a choice of the law of another state be set out in boldface type.[38]

[38]TEX. BUS. & COM. CODE §§ 35.53(B); 1.201(10).

SCHEDULE

41ST MINERAL LAW INSTITUTE
March 24 and 25, 1994
L.S.U. Law Center

Thursday, March 24, 1994

PROGRAM MODERATOR:
James P. McGowen
President
American Association of Professional Landmen *Plano, TX*

8:00 - 8:30 Registration

8:45 - 12:15 MORNING SESSION

ALLOCATION OF CONTRACT AND TORT LIABILITY FOR P&A, SITE RESTORATION AND RELATED ISSUES
J. Jay Caraway
Blanchard, Walker, O'Quin & Roberts
Shreveport, LA

SELECTED ISSUES CURRENTLY FACING OPERATORS
F. Henri Lapeyre, Jr
Lapeyre, Terrell & Randazzo
New Orleans, LA

CURRENT ISSUES IN FEDERAL ROYALTY MANAGEMENT
Everard A. Marseglia, Jr.
Butler & Binion *Houston, Texas*

12:15 - 1:30 Lunch

1:30 - 5:00 AFTERNOON SESSION

RECENT DEVELOPMENTS IN JURISPRUDENCE AND LEGISLATION
Robert O. Thomas
N. Stephan Kinsella
Jackson & Walker *Houston, Texas*

NEGOTIATING OIL AND GAS TRANSACTIONS IN THE INTERNATIONAL ARENA

A. **Pitfalls in Doing Business in a Foreign Country**
Alan Frederick *Plano, Texas*
General Counsel
Atlantic Richfield Indonesia, Inc.

Kerry W. Eckstein *Plano, Texas*
Senior Counsel
Arco International Oil & Gas Co., Inc.

B. **The Anatomy of an International Exploration Contract**
Harry W. Sullivan, Jr. *Plano, Texas*
Atlantic Richfield Company

C. **Lease Maintenance After the Primary Term**
Jonathan A. Hunter, Shareholder
Liskow & Lewis *New Orleans, LA*

7:15 - 8:15 Reception Sponsored by Liskow & Lewis

Friday, March 25, 1994

7:15 - 8:15 **Breakfast - Faculty Club**
Hosted by J. Lanier Yeates

PROGRAM MODERATOR:
Ernest L. Edwards, Chairman
Louisiana Mineral Law
Institute Advisory Council
Lemle & Kelleher
New Orleans, LA

8:30 - Noon MORNING SESSION

CURRENT TECHNOLOGY IN THE OIL PATCH AND HOW IT CAN BE PROTECTED

A. **Current Technology In Exploration and Production**
Daniel J. Tearpock
President, Subsurface Consultants & Associates, Inc.
Lafayette, LA

B. **Secrets in the Oil Patch: A Primer on the Use, Protection, Preservation of Oil and Gas Trade Secrets and Proprietary Data**
M.W. (Mel) Cockrell, Jr.
Cockrell & Weed
Dallas, Texas

NORM - SCIENCE, REGULATIONS, LITIGATION
David L. Martindale *Houston, TX*
Chevron U.S.A. Corp.

WHAT'S AHEAD FOR NATURAL GAS
Forrest E. Hoglund *Houston, Texas*
Chairman and C.E.O. Enron Oil & Gas

1:00 - 5:00 AFTERNOON SESSION

F.E.R.C. ORDER 636 COMES OF AGE -- IMPLICATIONS FOR NATURAL GAS MARKETING
Commissioner James J. Hoecker
Federal Energy Regulatory Commission
Washington, D.C.

THE GHOST OF FREY V. MILLER - REMAINING ISSUES IN THE MARKETING CONTROVERSIES
Thomas A. Harrell *Baton Rouge, LA*
Professor of Law
LSU Law Center

RECENT DEVELOPMENTS IN ETHICS
Warren L. Mengis
Professor of Law
LSU Law Center
Baton Rouge, LA

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THE 41ST MINERAL LAW INSTITUTE

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LSU Law Center

FACULTY BIOGRAPHIES

MR. J. JAY CARAWAY earned his B.S. degree from Louisiana Tech University in 1975, graduating *summa cum laude*, his MBA in 1976 and his J.D. from Louisiana State University Law School in 1980. While in law school he was a member of the Order of the Coif and Phi Delta Phi. Mr. Caraway was admitted to practice in 1980. He is presently with the firm of Blanchard, Walker, O'Quin & Roberts in Shreveport. His principal area of practice is oil and gas law. He is a member of the Shreveport, Louisiana State and American Bar Associations.

MR. M. W. (MEL) COCKRELL, JR. is a partner in the Dallas law firm of Cockrell & Weed which specializes in oil and gas and energy matters and related litigation. He formerly was head of the Energy Section of Baker & McKenzie, an international law firm with approximately 50 offices. Mr. Cockrell taught Oil and Gas, Energy Law and Business Entities at Texas Tech School of Law as a Visiting Professor of Law. Following the teaching at Texas Tech, he served with Lear Petroleum Exploration Company in Dallas as Vice President and General Counsel. Mr. Cockrell is a 1967 graduate of Texas A & M and 1970 *cum laude* graduate of the University of Houston where he was managing editor of *The Law Review*. He was Clerk for The Honorable Warren L. Jones, U.S. Court of Appeals for the Fifth Circuit, and is Board Certified in Oil, Gas and Mineral Law by the Texas Board of Legal Specialization. Cockrell is the author of numerous articles in the energy area and as adjunct faculty of SMU Law School.

MR. KERRY W. ECKSTEIN is Senior Attorney of ARCO International Oil and Gas Company in Plano, Texas. He holds a B.A. degree from Texas Tech University and a J.D. degree from the University of Tulsa College of Law. He is responsible for providing legal services for ARCO's operations in the Middle East, Asia Pacific area and in the Former Soviet Union. He previously was counsel for Transcontinental Energy Corporation of Shreveport. Prior to joining ARCO, he was with Rosewood Resources of Dallas where he was responsible for the company's international operations and was also the Manager of a division which directed the company's acquisition and divestment activities. He has extensive experience in international oil and gas matters.

MR. ERNEST L. EDWARDS is the Managing Partner of Lemle & Kelleher in New Orleans, Louisiana, with a diverse energy, environmental, antitrust and business litigation practice. He has represented producers, marketers, pipelines, and industrial end users in Louisiana, Texas, California, Oklahoma, Arkansas, Pennsylvania, West Virginia and Washington, D.C. for 25 years. Mr. Edwards received his B.A. Degree (1966) and his J.D. Degree (1968) from Tulane University. In 1970 he received his LL.M. from University of Manchester, Manchester, England. While in law school he was a member of the Order of Coif, Assistant Editor-in-Chief, *Tulane*

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PROFESSOR THOMAS A. HARRELL joined the LSU Law Center faculty in 1973. He is presently Campanile Professor of Law as well as Director of the Mineral Law Institute. He has taught courses on security devices, corporations, mineral rights, property, contracts, oil and gas taxation, corporate taxation, law office practice and security in movables - article 9 of the U.C.C. In 1991 he served as Director for the LSU Law School Summer Session in Aix-en-Provence, France. Before beginning his teaching career he practiced law in Shreveport, Louisiana and then was Executive Vice President of the Cenard Oil & Gas Company in Dallas, Texas in charge of legal, financial, administrative, land, engineering and geological departments with executive authority for operation of the company and its subsidiaries. Professor Harrell received his Juris Doctor degree from the Louisiana State University Law Center in 1951. He has written extensively in the field of oil and gas law. He is a member of the Louisiana and Texas Bar Associations; American Bar Association; Louisiana Law Institute; Order of the Coif and The Association Henri Capitant.

COMMISSIONER JAMES J. HOECKER has been an energy law practitioner for 15 years. When he joined the Federal Energy Regulatory Commission in May 1993, he became the first former staff person to become Commissioner. During several years in the private sector, Jim was associated with two major law firms and performed extensive regulatory and transactional work for clients in the natural gas and electric utility industries. A native of Wisconsin and a resident of Virginia, Jim received his law degree from the University of Wisconsin (1978). He also holds a Ph.D. from the University of Kentucky (1975). Jim has published and spoken extensively on energy, environmental, and administrative law issues. During his tenure at the Commission, Jim has developed a special interest in the impacts of Order No. 636 on natural gas markets and the "second generation" issues that will flow from the restructuring of the natural gas pipeline business, including matters related to gathering and state-regulated distribution. He is currently focusing on the potential for a competitive electric bulk power market and, along with his colleagues, is seeking to implement the Energy Policy Act in a responsive and responsible manner.

MR. FORREST E. HOGLUND is chairman, president and chief executive officer of Enron Oil & Gas Company, a public company whose largest shareholder (80%) is Enron Corp. Prior to his appointment with Enron Oil & Gas in September 1987, Mr. Hoglund was president and CEO of Texas Oil & Gas Corporation (TXO), one of the fastest growing independent companies at that time. From 1986 to 1987, after TXO merged with USX, he remained as president while also serving as a director of USX. Earlier in his career, Mr. Hoglund worked for Exxon Corporation from 1956 to 1977 in various capacities, including vice president of Esso Middle East and as corporate vice president of natural gas and gas liquids. He received a B.S. degree in mechanical engineering from the University of Kansas. He is on the Executive Committee of the Mid-Continent Producers and Royalty Owners Association (TIPRO), the Society of Petroleum Engineers (SPE), and a member of the Board of Visitors of the M.D. Anderson Cancer Foundation, serves on the Central Houston Board, and is Chairman of the Board of Trustees of the Houston Museum of Natural Science.

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MR. JAMES P. MCGOWEN, CPL is serving as President of the American Association of Professional Landmen (AAPL). In addition, he is President and Chairman of McGowen Resources, Based in Dallas, Texas. Mr. McGowen's previous leadership achievements within AAPL include his recent year of service as 1st Vice-President and previously as 2nd Vice-President, Chairman of the Advertising Committee, Landman's Scholarship Trust Fund, AAPL Compensation Committee and Assistant Chairman of the AAPL Forms Committee. He is currently a member of the Dallas Association of Petroleum Landmen, the Independent Petroleum Association of America (IPAA) and the Dallas Petroleum Club. He was listed in Who's Who in the South and Southwest and in 5,000 Personalities of the World in 1988-89. His professional experience includes executive management positions with Petro-Hunt Corporation, Placid Oil Company and Hunt Energy Corporation. Mr. McGowen began his energy career with Halliburton Services and Koch Industries.

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