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December 15, 2015

Representative Charles "Chuck" Kleckley
Speaker of the House of Representatives
P.O. Box 94062
Baton Rouge, Louisiana 70804-9062

Senator John A. Alario, Jr.
President of the Senate
P.O. Box 94183
Baton Rouge, Louisiana 70804

RE: HCR 63 of the 2014 Regular Session

Dear Mr. Speaker and Mr. President:

The Louisiana State Law Institute respectfully submits herewith its interim report to the legislature in response to 2014 House Concurrent Resolution No. 63, relative to the law of lesion beyond moiety.

Sincerely,

William E. Crawford
Director

WEC/puc
Enclosure

cc: Representative Edward "Ted" James

email cc: David R. Poynter Legislative Research Library
drplibrary@legis.la.us
Secretary of State, Mr. Tom Schedler
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LOUISIANA STATE LAW INSTITUTE

INTERIM REPORT TO THE LEGISLATURE IN RESPONSE TO H.C.R. No. 63 OF THE 2014 REGULAR LEGISLATIVE SESSION

Relative to the law of lesion beyond moiety

Prepared for the Louisiana Legislature on

December 15, 2015

Baton Rouge, LA

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J. Randall Trahan, Reporter

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ENROLLED

Regular Session, 2014

HOUSE CONCURRENT RESOLUTION NO. 63

BY REPRESENTATIVE JAMES

A CONCURRENT RESOLUTION

To authorize and direct the Louisiana State Law Institute to study and make recommendations to the Louisiana Legislature regarding the law of lesion beyond moiety, including but not limited to the restrictions and applicable time limitations for bringing such an action.

WHEREAS, Chapter 12 of Title VII in Book III of the Louisiana Civil Code, comprised of Civil Code Articles 2589 through 2600, provides the legal regime governing lesion beyond moiety; and

WHEREAS, the general principle that underlies lesion is that a party who sells an immovable for less than one-half of its fair market value can rescind the sale because he receives less than an equivalent commitment in exchange for his own promise to perform; and

WHEREAS, Louisiana's contemporary doctrine of lesion is very limited in scope in that it applies only in favor of a seller, only with respect to immovable property, and only upon a determination of a "fair market value" for the immovable; and

WHEREAS, a lesionary price on the face of the public records creates issues regarding the merchantability of title and the ability to issue title insurance, as well as can impede the ability of property to be efficiently put into commerce; and

WHEREAS, Louisiana's law on lesion has persisted with few amendments to the doctrine over the course of its long history in this state, notwithstanding various alterations in other civil law jurisdictions and the omission of the concept entirely in other states; and

WHEREAS, the legislature should be fully informed as to the continued viability of lesion beyond moiety, including an understanding of its effects, consequences, impact upon the efficient use of property, and the ability to provide an appropriate level of fairness and economic balance between contracting parties.

THEREFORE, BE IT RESOLVED that the Legislature of Louisiana does hereby authorize and direct the Louisiana State Law Institute to study the legal issues surrounding lesion beyond moiety and to report and recommend any need for the revision of current law.

BE IT FURTHER RESOLVED that the Louisiana State Law Institute shall report its findings and recommendations to the Legislature of Louisiana on or before January 1, 2016.

BE IT FURTHER RESOLVED that a copy of this Resolution be transmitted to the director of the Louisiana State Law Institute.

SPEAKER OF THE HOUSE OF REPRESENTATIVES

PRESIDENT OF THE SENATE

December 15, 2015

To: Representative Charles "Chuck" Kleckley
Speaker of the House
P.O. Box 94062
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INTERIM REPORT TO THE LEGISLATURE IN RESPONSE TO HCR No. 63 OF THE 2014 REGULAR SESSION

House Concurrent Resolution No. 63 of the 2014 Regular Session [attached] asks the Louisiana State Law Institute (the Institute) to study and make recommendations regarding the law of lesion beyond moiety. For this purpose, the Institute appointed a special committee, named, appropriately enough, the Lesion Beyond Moiety Committee (the Committee).

The Committee, having first conducted research into the law of lesion in Louisiana and in other civil law and mixed jurisdictions, has met with a view to determining deficiencies in current law and devising possible remedies for those deficiencies. The Institute Council was updated in October on the Committee's progress:

> The Committee's tentative conclusion is that Louisiana's law of lesion does not suffer from any glaring theoretical or practical deficiencies. In particular, the Committee is persuaded that the law does not, as some have suggested, create any significant "title issues". For this reason, the Committee is in agreement that the law should not be altogether repealed. Nevertheless, the Committee did identify a number of problems with the law, problems that can and perhaps should be corrected. These problems include that many of the limitations on the scope of the law seem to be arbitrary, for example, that the law applies only to sales of corporeal immovables and then provides a remedy only for sellers. Given the raison d'etre of the law – to protect persons against the risk of loss arising from a bad bargain entered into improvidently or under significant economic pressure --, it can be argued that the law should, at the very least, protect buyers as well as sellers and, further, should be extended to all sales and, perhaps, even to other contracts as well, such as leases. In many other civil law and mixed jurisdictions, the law of lesion is not subject to "scope" restrictions of these kinds. Another problem with the law is the seeming arbitrariness of the standard that must be met

if a remedy is to be available, which, at present, is that the sale price fall below one half of fair market value. This standard establishes an "all or nothing" approach that, one suspects, leaves many cases of genuine economic hardship without remedy and yet, at the same time, allows remedies in cases in which such hardship is lacking. In other civil law jurisdictions, notably Germany, Switzerland, and Italy, this approach has been replaced with one that is more flexible, specifically, one that requires a case-by-case consideration of not only the degree of injury suffered by the complaining party but also the degree to which the other party may have attempted to "take advantage" or "put one over" on the complaining party.

The Committee also discussed the relationship between the law of lesion – which is of civil law origin – and its common law counterpart – the law of "unconscionability". By means of that doctrine, common law jurisdictions attempt to get at much the same problems as do civil law jurisdictions by means of the doctrine of lesion, namely, to prevent "overreaching" in the striking of bargains. The Committee noted, with interest, that the doctrine of unconscionability is neither subject to any of the arbitrary limitations that have been placed on Louisiana's law of lesion (in other words, that doctrine applies, in principle to more contracts than simply sales) nor is tied to any arbitrary scale of value (such as fifty percent).

Based on these considerations, the Committee is convinced that additional research is required, in particular, research into the law of lesion in other civil law and mixed jurisdictions and the law of unconscionability in the rest of the United States. This research, the Committee hopes, will point up possible solutions to the problems from which Louisiana's law of lesion now suffers.

One additional matter that the Committee addressed and which the Committee related to the Council falls under the heading not of "deficiencies" in the law, but rather "uncertainties". Chief among these uncertainties is the applicability of lesion to the sale of corporeal immovable property that has no significant value other than in its potential for mineral development. The uncertainty arises thanks to Mineral Code Article 17, which provides that "[a] sale of a mineral right is not subject to rescission for lesion beyond moiety." By its terms this article seems to apply only to sales that are structured as sales of mineral rights per se. But in *Hornsby v. Slade,* 854 So. 2d 441 (La. App. 1st Cir. 2003), the dissenting judge suggested that the article should be applied, as well, to a sale that has been structured as a sale of land, provided that the principal value of the land lies in the landowner's right to develop the minerals within it. Other judges seem to have rejected this interpretation of the article. In any event, this uncertainty in the law needs to be cleared up. Additional research and thought will be required as to how best to do that.

While the Committee has made progress in formulating revisions to the law of lesion beyond moiety, the work is still ongoing. A final report will be submitted to the Legislature once the Committee has received full approval of its project from the Council of the Law Institute.

Respectfully submitted,

Professor J. Randall Trahan, Reporter
Lesion Beyond Moiety Committee
Louisiana State Law Institute