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March 30, 2016

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

RE: SR 118 OF 2013

Dear Mr. President:

The Louisiana State Law Institute respectfully submits herewith its report to the legislature relative to regulating unsolicited offers for the transfer and sale of mineral rights.

Sincerely,

A handwritten signature in cursive script that reads "William E. Crawford".

William E. Crawford
Director

WEC/puc
Enclosure

cc: Senator Barrow Peacock

email cc: David R. Poynter Legislative Research Library
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**LOUISIANA STATE LAW INSTITUTE
MINERAL LAW – UNSOLICITED OFFERS COMMITTEE**

**REPORT TO THE LEGISLATURE
IN RESPONSE TO SR 118 OF THE 2013 REGULAR SESSION**

Relative to regulating unsolicited offers for the transfer and sale of mineral rights

Prepared for the
Louisiana Legislature on

March 30, 2016

Baton Rouge, Louisiana

**LOUISIANA STATE LAW INSTITUTE
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To: Senator John A. Alario, Jr.
President of the Senate
P.O. Box 94183
Baton Rouge, Louisiana 70804

**REPORT TO THE LOUISIANA LEGISLATURE
IN RESPONSE TO SR NO. 118 OF THE 2013 REGULAR SESSION**

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I. Introduction

During the 2013 Regular Legislative Session, the Senate adopted Senate Resolution 118, attached, by which it “urge[d] and request[ed] the Louisiana State Law Institute, in consultation with the Louisiana Mineral Law Institute, to study and make recommendations for regulation on unsolicited offers for the transfer, sale, and lease of mineral rights.”¹ In fulfillment of the Senate’s request, the Louisiana State Law Institute appointed the Mineral Law—Unsolicited Offers Committee (“the Committee”) to study the practice of certain mineral companies and other purchasers of making unsolicited offers to mineral owners for the transfer, sale, and/or lease of those mineral rights, and to make recommendations regarding their regulation. The Committee, having concluded its study and deliberation, recommends that the Legislature adopt legislation regulating certain transfers of mineral rights through special legislation.

II. Background—Unsolicited Offers for the Transfer of Mineral Rights

A. The Use of Unsolicited Offers to Purchase Mineral Rights

Anecdotal reports, including the personal experience of several members of the Committee, suggest that some purchasers of mineral rights, commonly known as “royalty buyers,” routinely use unsolicited mail offers to purchase royalty interests from Louisiana mineral owners. These royalty buyers send mail offers to all mineral owners in an area of new or increased mineral development on a mass-mailing basis, having acquired the names and addresses of those owners from “interested parties” lists maintained by the Louisiana Office of Conservation. An unsolicited offer of this type typically consists of a letter notifying the owner of the transferee’s desire to purchase the mineral interest and inviting the owner to contact the

¹ S.R. 118 (La. 2013).

transferee by telephone for further negotiations. In some cases, unsolicited offers also contain unsigned mineral or royalty deeds. A form of payment such as a check or bank draft may also accompany the offer. When an unsolicited offer encloses a draft deed and a form of payment, the owner may be invited to accept the offer either by executing the enclosed deed and returning it to the transferee or simply by accepting the proffered payment.

The use of this business practice by royalty buyers has varied substantially over the course of the last decade or more. Naturally, mineral owners receive more offers of this type during periods of increased oil and gas development in the state. The use of unsolicited mail offers reached a zenith in 2008, a time marked by substantial development in the Haynesville Shale area. Around that time, the Louisiana Attorney General's office received a number of complaints from Louisiana mineral owners about unsolicited offers to purchase or lease mineral rights. In response to these complaints, the Attorney General's office issued a public service announcement urging Louisiana mineral owners to be "extremely cautious" about signing any document accompanied by payment for mineral rights and warning that owners "may be permanently signing away valuable mineral rights without realizing it."² Although consumer complaints dropped off significantly following this announcement,³ Louisiana mineral owners continued to receive unsolicited offers to sell their mineral rights, and the practice persists today.

B. Problems with Unsolicited Offers to Purchase Mineral Rights

As indicated by the Attorney General's public service announcement, the unsolicited offers utilized by royalty buyers are often misleading, and may induce mineral owners to sell their mineral rights for a very low price. Commentators that have considered and addressed this business practice have referred to unsolicited offers as "scams" and "traps for the unwary,"⁴ and not without good reason. As discussed above, some unsolicited offers include draft mineral or royalty deeds and a form of payment. Some owners, upon receiving offers of this type, have cashed or deposited the payments without fully understanding the significance of doing so. These owners were later contacted by the royalty buyers and informed that the act of cashing or depositing the payment amounted to an "acceptance" of the offer and bound the owners to execute the mineral deed. Reports of this practice indicate that some royalty buyers intentionally craft the documents and payments accompanying unsolicited offers to mimic royalty payments or delay rentals. In these cases, unsophisticated owners are misled into believing they are accepting payments under existing leases when they are in fact transferring all of their rights to the minerals to another person.

² See Landowner's Warned About Mineral Scam (April 16, 2008), available at http://www.thetowntalk.com/article/20080816/NEWS01/808160344/Landowners-warned-about-mineral-scam?nlick_check=1 (last visited November 10, 2013). The announcement also warned owners:

The document you are asked to sign may actually be a mineral deed with a general power of attorney. If you sign the document, the power of attorney might be used to amend the document, after you sign it, to reflect that all mineral assets, even those already in production, are turned over for very little money.

³ Jeff Ferrell, *Haynesville Shale: Lease Scam Stopped* (November 14, 2008), available at <http://www.ksla.com/story/9353330/haynesville-shale-lease-scam-stopped> (last visited November 10, 2013).

⁴ See, e.g., Edmund L. Cogburn & Charles H. Mansour, *Dealing with the Unsolicited Mineral Buyout*, 47-Aug. HOUS. LAW. 24, 24 (2009); James Fambrough, *Mail-Order Minerals: Risky Business*, 68 TEX. B. J. 889 (2005).

Unsolicited offers also frequently contain vague or misleading language describing the extent of the interest to be transferred. While the letter containing the offer may insinuate that the transferee wishes to purchase only an interest in a producing well, the enclosed mineral deed may describe all of the owner's mineral rights in a particular parish or parishes. An unwary owner may therefore agree to a convey far more mineral rights than intended. Compounding this problem, some deeds accompanying unsolicited offers contain language authorizing the transferee to make subsequent transactions or modifications to the deed on behalf of the seller. Contract provisions of this type often authorize the transferee to amend the property description set forth in the original deed executed by the transferor.

Finally, these offers may contain any number of other one-sided contractual provisions that serve to prevent an owner who conveys an interest and later wishes to rescind the sale from doing so. Examples include choice of law, choice of forum, arbitration, and indemnity provisions.

Notably, unsolicited offers are problematic not only for mineral owners; they also pose problems for legitimate mineral exploration and production companies. Representatives of these companies report that the business practices of royalty buyers often complicate the relationship between mineral lessees and mineral owners. Questionable enforceability of a transfer made pursuant to an unsolicited offer leads to uncertainty regarding the mineral lessee's obligations to the original owner and the transferee.

Additionally, title attorneys report that the vague property descriptions used in many royalty transfers of this type create title examination problems. These property descriptions, known as "omnibus" descriptions, usually purport to transfer an owner's interest in all property in a particular parish or parishes, or within a subdivision of a particular parish. This method of drafting is frequently used in deeds accompanying unsolicited offers because it permits the drafter to send identical offers *en masse* to multiple potential transferors at a low cost. Once executed, deeds containing omnibus descriptions are binding on the parties to the act, but are not effective against third parties, even when properly filed in the public records.⁵ Mineral exploration and production companies wishing to develop property with an omnibus provision in the chain of title must conduct expensive and time consuming curative title work to ensure the security of their interests.

In sum, the unscrupulous use of unsolicited offers to purchase mineral rights potentially harms not only owners of mineral rights but also the entire enterprise of oil and gas development in this state.

⁵ See *Williams v. Bowie Lumber Co.*, 38 So. 2d 729 (La. 1949); DIAN TOOLEY-KNOBLETT, 24 LOUISIANA CIVIL LAW TREATISE, SALES § 6:10 (2013).

III. Current Law Governing Unsolicited Offers

Unsolicited offers for the transfer of mineral rights are currently subject to no special legislation in Louisiana. Moreover, the general rules of conventional obligations provide limited protection against abuse.

A. Requirements of Form

Mineral interests are defined by the Louisiana Mineral Code as incorporeal immovables.⁶ Louisiana law requires that any transfer of mineral rights, including both the sale of mineral rights and the creation of a mineral lease, must be made by authentic act or act under private signature.⁷ When this requirement is applied to the unsolicited offers described above, a question emerges regarding the circumstances under which an owner could become bound to a transfer of his rights through the mere cashing or depositing of payment, as opposed to written execution of a mineral deed. As discussed below, jurisprudential rules regarding the requirements for a valid “act under private signature” may result in the formation of a valid act of transfer or act to transfer even in the absence of the transferor’s signature.

Louisiana Civil Code article 1837 states that “[a]n act under private signature need not be written by the parties, but it must be signed by them.”⁸ Although the article appears to require signatures by all parties to the act as a prerequisite for validity, comment (b) makes clear that the text is not intended to supersede the jurisprudential rule that an act under private signature is valid even when signed by one party alone.⁹ According to case law, such an act is valid provided that the party who did not sign it “availed himself of the contract.”¹⁰ This rule would appear to suggest that an owner who accepts payment in connection with a transfer of mineral rights is bound to that transfer despite his failure to sign the act of transfer.

The jurisprudential rule negating the Civil Code’s requirement that both parties must sign a written act for the transfer of real estate dates at least to 1825.¹¹ Additionally, although the bulk of the cases applying the jurisprudential exception have involved the transferee’s failure to

⁶ LA. REV. STAT. ANN. § 31:18 (2013). The term “mineral right” includes the mineral servitude, the mineral royalty, and the mineral lease. *See* LA. REV. STAT. ANN. § 31:16 (2013).

⁷ LA. CIV. CODE ANN. art. 1839 (2013).

⁸ LA. CIV. CODE ANN. art. 1837 (2013).

⁹ *Id.* cmt. (b).

¹⁰ *See id.* cmt. b and cases cited therein. The official comments to Article 1837 imply that the jurisprudential exception to the article only applies when the party asserting the contract’s validity has signed the act under dispute. *See id.* However, the case law has not applied this requirement consistently. *See* DIAN TOOLEY-KNOBLETT & DAVID GRUNING, 24 LA. CIV. L. TREATISE, LOUISIANA SALES LAW § 6.13 (2013) (citing *Saunders v. Bolden*, 115 La. 156, 98 So. 867 (La. 1923); *Balch v. Young*, 23 La. Ann. 271, 1871 WL 6870 (La. 1871)).

¹¹ *See Crocker v. Nuley*, 3 Mart. (n.s.) 583, 1825 WL 1399 (La. 1825); *see also* DIAN TOOLEY-KNOBLETT & DAVID GRUNING, 24 LA. CIV. L. TREATISE, LOUISIANA SALES LAW § 6.13 (2013) (referring to the jurisprudential rule as “jurisprudence constante”).

sign,¹² some courts have instead found sales valid despite the signature of the transferor.¹³ Thus, the jurisprudential exception referenced in comment (b) of article 1837 is well established and broad in its scope.

However, courts applying the jurisprudential rule to hold a transferor bound to a transfer have usually done so on the basis of additional evidence of acceptance beyond the mere acceptance of payment. For example, in *Milliman v. Peterman*, the court held a transferor bound to an unsigned act of transfer when the transferor not only accepted payment but also sent a *separate telegram* indicating its acceptance of the contract's terms.¹⁴ Similarly, in *Alley v. New Homes Promotion, Inc.*, a transferor was held to be bound by an act of sale where the transferor's typed name appeared on an offer prepared by the transferee and actually delivered title to several other lots in similar transactions, in addition to accepting a deposit from the transferee.¹⁵ One could argue, therefore, that the mere acceptance of payment by a transferor should not lead to a finding that the transferor "availed himself of the contract" without some additional act evidencing consent to the transaction.

Indeed, at least one court has held that a transferor's failure to sign a written mineral lease was fatal to the contract's formation. In *Bills v. Fruge*,¹⁶ a prospective lessee mailed an unsigned written lease and a bank draft to an owner of Louisiana mineral rights who was at the time incarcerated in Atlanta, Georgia. Typed on the face of the draft was the following: "Bonus Consideration for undivided interest in oil, gas, and mineral lease covering 60.29 acres, more or less, situated in Sections 49 and 59, T6S-R1E, St. Landry Parish, La. Middle Savoy Area." A letter included with the draft and lease instructed the owner to sign the lease, have it notarized, and then return it to the attorney representing several other lessors on the property. The letter also informed the owner that he could deposit the draft. Although the owner signed the draft and presented it for payment to the bank, he did not sign and return the lease contract. The prospective lessee filed the draft, together with the unsigned lease, in the conveyance records of the parish where the property was located. The lessee later filed an action for a declaratory judgment of the lease's validity. The court refused to find the lease binding. The court first held that the owner's act of presenting the draft for payment did not evidence his consent to the lease, reasoning that had the owner intended to consent to a lease, he could have signed and returned the written act at any time. Second, the court determined that the prospective lessee himself did not intend the draft alone to constitute the lease, as evidenced by his repeated references to the unsigned written act (and not the draft) as "the lease."

¹² See, e.g., *Balch v. Young*, 23 La. Ann. 272 (La. 1871); *Lepine v. Marrero*, 116 La. 941, 41 So. 216 (1906); *Saunders v. Bolden*, 115 La. 136, 98 So. 867 (La. 1924); *Succession of Jenkins v. Dykes*, 91 So. 2d 416 (La. App. 2 Cir. 1956); *Pennington v. Colonial Pipeline*, 260 F. Supp. 643 (D.C. La. 1966); see also PETER S. TITLE, LOUISIANA REAL ESTATE TRANSACTIONS § 7:27 (2013) (noting that an act of sale need not be signed by the buyer).

¹³ See *Milliman v. Peterman*, 519 So. 2d 238 (La. App. 5 Cir. 1988); *Alley v. New Homes Promotion, Inc.*, 247 So. 2d 218 (La. App. 4 Cir. 1971).

¹⁴ 519 So. 2d 238 (La. App. 5 Cir. 1988).

¹⁵ 247 So. 2d 218 (La. App. 4 Cir. 1971).

¹⁶ 360 So. 2d 661 (La. App. 1978).

Bills thus nominally stands for the proposition that the mere act of accepting payment for a transfer does not stand in for a signed written act of transfer. Notably, however, the court in *Bills* focused its inquiry on whether the draft itself formed the written contract of lease, and did not address directly the question of whether the owner's conduct could stand in for a signature on the enclosed contract. In fact, in its opinion the court neither referenced the predecessor to article 1837 nor the jurisprudence discussed above. And, while the particular facts of this case may not have supported a finding that the owner consented to a lease of his property, courts may find that consent to transfer mineral rights is supported by the acceptance of payment in other cases. Indeed, it is difficult to identify an act more consistent with assent to a transfer than the transferor's acceptance of payment.

B. Vices of Consent

Many of the controversial aspects of unsolicited offers for the transfer of mineral rights involve some level of purported deception on the part of the transferee or mistake on the part of the transferor regarding the value or extent of the rights transferred. Arguably, therefore, an aggrieved transferor may be able to rescind the contract on the basis of a vice of consent.

Importantly, however, the Louisiana Mineral Code provides explicitly that lesion does not apply to transfers of mineral rights.¹⁷ Thus, although many complaints by owners regarding transfers of their rights to valuable minerals involve an allegation that the owner did not receive sufficient payment in return for the transfer, Louisiana law does not permit an transferor to rescind a sale of mineral rights on the mere basis that the price paid by the transferee was insufficient. Instead, the aggrieved transferor must successfully establish that his consent to the contract was vitiated by error, fraud, or duress.¹⁸

None of the anecdotal reports describing the use of unsolicited offers in this state suggest that owners would have actionable claims of duress. Specifically, there appear to be no allegations that the consent of any owner has been obtained "by duress of such a nature as to cause a reasonable fear of unjust and considerable injury to a party's person, property, or reputation" as required by Louisiana Civil Code article 1959.¹⁹ Thus, the only grounds likely to be actionable in the routine case are error and fraud.

The Louisiana Civil Code provides that "[e]rror vitiates consent only when it concerns a cause without which the obligation would not have been incurred and that cause was known or should have been known to the other party."²⁰ The requirement that the error concern a cause "without which the obligation would not have been incurred" has historically made it very difficult for landowners to successfully allege that transfers of mineral rights were made as a result of an error. Most frequently, the owner's complaint in cases involving error is that the owner did not have sufficient information with which to appropriately measure the market value of the mineral interest transferred. In response to this complaint, Louisiana courts have routinely

¹⁷ LA. REV. STAT. ANN. § 1:17 (2013).

¹⁸ See LA. CIV. CODE ANN. art. 1948 (2013).

¹⁹ LA. CIV. CODE ANN. art. 1959 (2013).

²⁰ LA. CIV. CODE ANN. art. 1949 (2013).

held that this type of error amounts functionally to a claim for lesion applied to a mineral right, which is not actionable under Louisiana law.²¹ Additionally, Louisiana courts frequently refuse to find mineral transfers invalid for error when the complaining party did not carefully read the contract executed.²² More specifically, if the transferor's mistake could have been corrected by a careful reading, then the mistake is considered "inexcusable" and therefore not eligible for relief.²³

Moreover, although anecdotal evidence indicates that some unsolicited offers contain misleading information, and that transferees often fail to disclose important details regarding the value of the property which is the object of the conveyance, owners are unlikely to prevail in claims that mineral transfers should be rescinded on the basis of fraud. The Civil Code defines fraud as "a misrepresentation or a suppression of the truth made with the intention either to obtain an unjust advantage for one party or to cause a loss or inconvenience to the other."²⁴ While the Code makes clear that fraud may result from "silence or inaction" in addition to an affirmative misrepresentation, Louisiana courts have held that when fraud is based on silence or suppression of the truth, the plaintiff must prove the defendant was obligated by a duty to speak or disclose the information.²⁵ Generally, a party seeking to purchase mineral rights is not under a duty to disclose to the seller known information about the property, its value, or future plans for its mineral production.²⁶ Thus, aggrieved sellers are left with little recourse absent proof that a purchaser made specific and affirmative misrepresentations in an unsolicited offer that "substantially influenced" the consent of the seller.²⁷

In short, a survey of Louisiana jurisprudence addressing the law of vices of consent in connection with transfers of mineral rights suggests that an owner is unlikely to prevail on a claim that a transfer resulting from an unsolicited offer was induced by error or fraud.

²¹ See, e.g., *Cascio v. Twin Cities Development, LLC*, 48 So. 3d 341 (La. App. 2 Cir. 2010) (refusing to rescind mineral lease based on error as to the cause because defendant knew, but did not disclose, that the property overlaid the Haynesville Shale; the court concluded that the claim was one of error as to the value of the mineral lease, and therefore was synonymous with a claim of lesion beyond moiety).

²² See, e.g., *Peironnet v. Matador Res. Co.*, 144 So. 3d 791 (La. 6/28/13) (refusing to rescind mineral lease based on error where error was "inexcusable"—lessor is held to duty to read mineral lease which he is executing).

²³ *Id.*

²⁴ LA. CIV. CODE ANN. art. 1953 (2013).

²⁵ See LA. CIV. CODE ANN. art. 1954 (2013); *Bunge Corp. v. GATX Corp.*, 557 So. 2d 1376, 1382 (La. 1990).

²⁶ See, e.g., *Thomas v. Pride Oil & Gas Properties, Inc.*, 663 F. Supp. 2d 238 (W.D. La. 2009) (finding no actionable error or fraud where mineral lessee did not disclose knowledge regarding extent of minerals underlying property); *but see McCarthy v. Evolution Petroleum Corp.*, 111 So. 3d 446 (La. App. 2 Cir. 2013) (suggesting that although a lessee with no prior relationship with a lessor has no duty to make disclosures regarding the value of leasehold mineral rights it offers to purchase, "[i]t is conceivable that the lessee's duty to act as a reasonably prudent operator for the parties' mutual benefit might require disclosure....").

²⁷ LA. CIV. CODE ANN. art. 1955 (2013).

C. Louisiana Unfair Trade Practices Act

The Louisiana Unfair Trade Practices and Consumer Protection Law (also known as the Louisiana Unfair Trade Practices Act or LUTPA) also provides little protection against the unscrupulous use of unsolicited offers for the transfer of mineral rights.

Under LUTPA, “[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful.”²⁸ Furthermore, the act defines “trade or commerce” as “the advertising, offering for sale, sale, or distribution of any services and any property, corporeal or incorporeal, immovable or movable, and any other commodity or thing of value wherever situated, and includes any commerce directly or indirectly affecting the people of the state.”²⁹ While LUTPA is a broadly articulated statute that seeks to regulate deceptive practices in the marketplace, the statute historically has been applied only to sales of movables and contracts involving the procurement of services. Indeed, there does not exist a single decision in which a court has applied LUTPA directly to a sale of immovable property³⁰

Furthermore, because the act does not explicitly define the terms “unfair” or “deceptive,” Louisiana courts determine what conduct rises to the level of a LUTPA violation on a case-by-case basis.³¹ According to established jurisprudence, a plaintiff must show that “the alleged conduct offends established public policy and is immoral, unethical, oppressive, unscrupulous, or

²⁸ LA. REV. STAT. ANN. § 51.1405.

²⁹ LA. REV. STAT. ANN. § 51.1402(9).

³⁰ However, LUTPA has been applied to numerous transactions *involving* real estate. For example, courts are willing to entertain the application of LUTPA to the mineral lessee/lessor relationship. *See, e.g., Bogues v. Louisiana Energy Consultants, Inc.*, 71 So. 3d 1128 (La. App. 2 Cir. 2011). In *Bogues*, a mineral lessee sued a mineral lessor under LUTPA, alleging that the lessor engaged in a campaign to discredit the lessee in negotiations with third parties on farm-out agreements so that it could seek cancellation of the leases and deal directly with the third parties for development on more favorable terms. The court held that insufficient evidence of fraudulent or otherwise improper conduct existed on the record to support a LUTPA violation. *Id.* at 1134. Not all leases, however, involve the type of “trade or commerce” regulated by the statute. *Compare* *Dixie Electric Membership Corp. v. AT&T Corp.*, 2012 WL 2788888 (M.D. La. 2012) (lease of space on utility poles by electric company was “trade or commerce”) *with* *Webb v. Theriot*, 97-624 (La. App. 3 Cir. 1997), 704 So.2d 1211, 1215 (La. App. 1997) (lease of hunting property/camp was not “trade or commerce”).

Courts have also shown a willingness to apply LUTPA to cases involving *failure* to buy or sell immovable property to a potential buyer if part of an overall scheme to defraud or mislead. *See, e.g., Hardy Energy Servs., Inc. v. John Hardy*, 113 So. 3d 1178 (La. App. 2 Cir. 2013) (LLC brought action against buyer of property after its business partner allowed option to buy to lapse; court held that buyer had “no relationship” with the plaintiffs and owed them no duty); *Willis v. Brooks*, 119 So. 3d 890 (La. App. 4 Cir. 2013) (commercial real estate developer sued land owner for failure to follow through on agreement to sell land to developer; court found that owner’s behavior was within the range of permissible business judgment and thus did not violate LUTPA).

³¹ Keith E. Andrews, Comment, *Louisiana Unfair Trade Practices Act: Broad Language and Generous Remedies Supplemented by a Confusing Body of Case Law*, 41 LOY. L. REV. 759, 762 (1996).

substantially injurious.”³² To that end, the Louisiana Supreme Court has held repeatedly that “the range of prohibited practices under LUTPA is *extremely narrow*[,]” as LUTPA prohibits only “fraud, misrepresentation, and similar conduct, and not mere negligence.”³³ As explained by the Supreme Court in a recent opinion:

LUTPA does not prohibit sound business practices, the exercise of permissible business judgment, or appropriate free enterprise transactions. The statute does not forbid a business to do what everyone knows a business must do: make money. Businesses in Louisiana are still free to pursue profit, even at the expense of competitors, so long as the means used are not egregious. Finally, the statute does not provide an alternate remedy for simple breaches of contract. There is a great deal of daylight between a breach of contract claim and the egregious behavior the statute proscribes.³⁴

Indeed, even conduct that offends public policy or that is unethical is not necessarily a violation under LUTPA unless that conduct is also deceptive or fraudulent in nature.³⁵

Third, for many years some courts have restricted the private cause of action to consumers, business competitors, and potential business competitors.³⁶ This is so despite the fact that the plain language of the act provides a private cause of action to “[a]ny person who suffers an ascertainable loss of money or movable property... as a result of the use or employment by another person of an unfair or deceptive method, act or practice.”³⁷ Under the established jurisprudence, LUTPA therefore would not apply to mail solicitations for the transfer of mineral rights because the owner of mineral rights is in the position of *seller* vis-à-vis a potential purchaser, and not a consumer or business competitor. And, although the Louisiana Supreme Court recently stated in *Cheremie Services, Inc. v. Shell Deepwater Production, Inc.* that the statute, by its plain language, is not limited to consumers or businesses competitors,³⁸ the precedential value of this plurality opinion has been questioned.³⁹ In essence, it is fair to say that

³² *Quality Environmental Processes, Inc. v. I.P. Petroleum Co., Inc.* 2013-1582 (La. 2014), 2014 WL 1800081 (quoting *Cheremie Servs., Inc. v. Shell Deepwater Prod.*, 35 So. 3d 1053, 1059 (La. 2010)).

³³ *Id.* (emphasis added).

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*; see also Alexander M. McIntyre, Jr., et al., *Standing Under the LUTPA—The Circuit Split Widens*, 54 LA. B.J. 362 (2007) (discussing the discrepancy among the Louisiana circuit courts of appeal as to who may bring a private cause of action under LUTPA).

³⁷ LA. REV. STAT. ANN. § 51:1409 (emphasis added). The term “person” is further defined as “a natural person, corporation, trust, partnership, incorporated or unincorporated association, and any other legal entity.” LA. REV. STAT. ANN. § 51:1402(8).

³⁸ *Cheremie*, 35 So. 3d at 1058.

³⁹ Alexander M. McIntyre, Jr. & Brian M. Ballay, *LUTPA Standing: Plus Ça Change, Plus C'est La Meme Chose*, 59 LA. B.J. 254 (2012); but see Zachary I. Rosenberg, *Consensus at Last: The Broadening of LUTPA Standing in Cheremie v. Shell Deepwater Production*, 85 TUL. L. REV. 1121 (2011).

the state of the law with respect to *who* may bring a private cause of action under LUTPA is still somewhat uncertain.⁴⁰

Even if courts were to find that *transferors* of mineral rights are afforded a private cause of action under LUTPA, another potential limitation exists. LUTPA establishes a private cause of action for “[a]ny person who suffers an ascertainable loss of *money or movable property*... as a result of the use or employment by another person of an unfair or deceptive method, act or practice.”⁴¹ Although a person who has been induced to transfer mineral rights at an unfairly low price has arguably been deprived of *money*, one may also characterize the loss as one of *immovable property*, which is not covered by the act.

Finally, LUTPA was modeled after the Federal Trade Commission Act, and the two acts share the same goals: to protect consumers and to foster competition.⁴² These goals include not only halting unfair business practices and sanctioning the businesses that commit them, but also preserving and promoting fair competition and curbing business practices that lead to monopolization and unfair restraint of trade within a certain industry.⁴³ Arguably, although the practices of certain royalty purchasers may be deceptive and/or misleading, their conduct does not necessarily lead to the development of a monopoly or the type of unfair trade restraint sought to be regulated by LUTPA. Additionally, owners of mineral rights are not in the position of a *consumer* vis-à-vis the potential offender.

In summary, although the plain language of LUTPA may support a claim involving misleading or deceptive solicitations for transfers of mineral rights, the jurisprudence interpreting the act and the statute’s history suggest that this type of claim may not be contemplated by the statute. And, even though a cogent argument may be made that LUTPA applies to this behavior, its application is far from assured.

IV. The Proposed Legislation

The Committee has determined that unsolicited offers for the purchase of mineral rights are commonly utilized to induce Louisiana mineral owners to sell their valuable mineral rights far below market value. The Committee has also determined that existing law does not provide sufficient protections to owners against the abuses that may be associated with these offers. Thus, the Committee proposes special legislation to regulate these transactions.⁴⁴

A. Scope of the Legislation

The proposed legislation is limited in its scope in a number of important ways. First, it applies only to certain transfers of mineral rights, dubbed “sales of mineral rights by mail

⁴⁰ See Rosenberg, *supra* note 40, at 1122–24; McIntyre & Ballay, *supra* note 40, at 256.

⁴¹ LA. REV. STAT. ANN. § 51:1409 (emphasis added).

⁴² See Andrews, *supra* note 32, at 777.

⁴³ Quality Environmental Processes, 2013-1582, 2014 WL 1800081 at *22.

⁴⁴ See Proposed LA. REV. STAT. ANN. § 9:2991.1–9:2991.11.

solicitation.”⁴⁵ In the Committee’s view, a carefully tailored definition of the contract affected by this legislation is necessary to ensure that sales of mineral rights that result from legitimate negotiations do not fall within its scope. A “sale of mineral rights by mail solicitation” is defined as the creation or transfer of a mineral servitude or mineral royalty, or the granting of an option, right of first refusal, or contract to create or to transfer a mineral servitude or mineral royalty that is made pursuant to an offer that is (1) received through the mail and (2) accompanied by a form of payment, such as a check or draft.⁴⁶ The risk of bargaining equality is most significant under these circumstances. In other circumstances, such as when the transferee makes an offer in person, or when a form of payment does not accompany the offer, the risk of a hasty or misinformed acceptance is less pronounced.

The proposed legislation also excludes the creation of or transfer of mineral leases from the scope of the act.⁴⁷ Nearly all mail solicitations for the transfer of mineral rights are offers to purchase royalties rather than offers to lease mineral rights. Moreover, unlike a sale or other transfer of mineral rights, a mineral lease does not completely divest the owner of an interest in the minerals.⁴⁸ Furthermore, the obligations imposed on mineral lessees by the Mineral Code provide significant protection against exploitation.⁴⁹ Finally, mineral exploration and production companies have in the past strongly opposed efforts to regulate unsolicited offers in part because of concerns that such regulation would interfere with legitimate and productive use of the mail to solicit or finalize mineral leases. The importance of security of title to a mineral lessee who has expended or intends to expend significant amounts of capital in developing the leased premises also justifies the exemption of mineral leases from the ambit of the legislation.

Additionally excluded from the scope of the act are any contracts made subsequent to “prior personal contact” that included a meaningful exchange between the transferor and the transferee.⁵⁰ Contracts that are preceded by negotiations—whether in person, by telephone, or by written or electronic communication—do not involve the same potential for abuse associated with transfers initiated by unsolicited mail communications.

B. Protections for Transferors of Mineral Rights

1. Requirement of Form

The proposed legislation regulates sales of mineral rights by mail solicitation in several ways. First, the proposed legislation requires that when a sale of mineral rights is initiated by mail, the transfer must be made in an authentic act or an act under private signature *signed by the transferor*.⁵¹ The proposed legislation explicitly provides that the acceptance of any form of

⁴⁵ See Proposed LA. REV. STAT. ANN. § 9:2991.2.

⁴⁶ *Id.*

⁴⁷ See Proposed LA. REV. STAT. ANN. § 9:2991.2.

⁴⁸ See, e.g., *Wall v. Leger*, 402 So. 2d 704, 709 (La. App. 1 Cir. 1981).

⁴⁹ LA. REV. STAT. ANN. § 31:122.

⁵⁰ See Proposed LA. REV. STAT. ANN. § 9:2991.3.

⁵¹ See Proposed LA. REV. STAT. ANN. § 9:2991.4.

payment by the transferor or any action whereby the transferor manifests assent to the contract other than by signing the written contract shall not satisfy the requirement of consent. This requirement is designed to supersede the Louisiana jurisprudence holding that the sale of an immovable may be valid even when a written act of sale is not signed by the transferor.⁵²

2. Requirements of Disclosure and Form Notice of Rescission

Second, the proposed legislation requires that every instrument evidencing a sale of mineral rights by mail solicitation contain on the first page, in conspicuous and legible typeface, a disclosure statement informing the transferor that (1) the transaction is a sale or contract requiring the sale of mineral rights, (2) the transferor may rescind the agreement within sixty days of signing, and (3) the transferor may lose important rights if the notice of rescission is not filed in the conveyance records of the parish in which the property is located within ninety days of recordation of the agreement.⁵³ The proposed legislation implements a rule of substantial compliance with the required disclosure to account for de minimis variations, such as typographical errors or slight deviations in wording, which should not invalidate the disclosure. The proposed legislation also provides that when a sale of mineral rights by mail solicitation is an option, right of first refusal, or contract to sell, the preparatory contract must contain the required disclosure.

The required disclosure contains a form notice of rescission.⁵⁴ The transferee should include in the notice the name of the transferor, the name of the transferee, and a description of the property affected by the sale of mineral rights by mail solicitation. The transferor may rescind the sale of mineral rights by mail solicitation either by signing and returning the form notice of rescission or by any other form of written notice that evidences an intent to rescind the sale.

3. Right to Rescind

Third, the proposed legislation provides transferors with a right to rescind all sales of mineral rights by mail solicitation.⁵⁵ The features of the right to rescind vary depending upon whether the instrument evidencing a sale of mineral rights by mail solicitation includes the required disclosures. In a sale that includes the required disclosures, the transferor has the right to rescind the sale for sixty days after the date on which the transferor signs the agreement.⁵⁶ In a sale where the required disclosures were not properly made, the transferor may rescind the sale within a peremptive period of three years from the time of the sale.⁵⁷ Further, the legislation provides that timely rescission of a sale of mineral rights by mail solicitation that is an option,

⁵² See *supra* Section III.A.

⁵³ See Proposed LA. REV. STAT. ANN. § 9:2991.5.

⁵⁴ See Proposed LA. REV. STAT. ANN. § 9:2991.5.

⁵⁵ See Proposed LA. REV. STAT. ANN. § 9:2991.6.

⁵⁶ See Proposed LA. REV. STAT. ANN. § 9:2991.6(A).

⁵⁷ See Proposed LA. REV. STAT. ANN. § 9:2991.6(B).

right of first refusal, or contract to sell also rescinds any act of transfer that is subsequently executed pursuant to the preparatory contract.⁵⁸

In any case, rescission is accomplished by written notice to the transferee and is effective between the parties when the notice of rescission is transmitted.⁵⁹ If the instrument evidencing a sale of mineral rights by mail solicitation contains the required disclosures, a third person acquiring an interest in mineral rights from the transferee is subject to the effect of a notice of rescission filed within ninety days from the date after the filing of the act of transfer.⁶⁰ In all other cases, rescission may not impair the rights of any third person who acquired an interest in the mineral rights prior to the time the notice of rescission was filed for registry.⁶¹ This rule is designed to state an exception to Louisiana Civil Code article 3339, under which a termination of rights that depends upon the occurrence of a condition is generally effective as to third persons although not evidenced of record.⁶² Moreover, as to third persons, a notice of rescission is without effect unless it contains the name of the transferee and the transferor.⁶³ In addition, the proposed legislation provides that mineral lessees and other parties who either are required to make or are in fact making royalty or other payments should be protected from the effects of rescission until sixty days after being furnished with a certified copy of the notice of rescission.⁶⁴

The proposed legislation also provides for the effects of rescission of sales of mineral rights by mail solicitation between the parties.⁶⁵ Within sixty days after rescission, the transferor must return to the transferee any payment received in connection with the sale.⁶⁶ However, a transferor's failure to return such payment gives rise to a cause of action for return of the payment but does not prevent rescission.⁶⁷ Also within sixty days after rescission, the transferee must remit to the transferor any royalties or other payments derived from mineral rights that were sold.⁶⁸

In a sale where the required disclosures were not properly made, the transferor has additional rights.⁶⁹ First, when the instrument evidencing a sale of mineral rights by mail solicitation does not contain the required disclosure, the transferee against whom the right to rescind is exercised shall be liable to the transferor for attorney fees and court costs. Second, in

⁵⁸ See Proposed LA. REV. STAT. ANN. § 9:2991.6(C).

⁵⁹ See Proposed LA. REV. STAT. ANN. § 9:2991.7.

⁶⁰ See Proposed LA. REV. STAT. ANN. § 9:2991.7.

⁶¹ See Proposed LA. REV. STAT. ANN. § 9:2991.7.

⁶² LA. CIV. CODE ANN. art. 3339.

⁶³ See Proposed LA. REV. STAT. ANN. § 9:2991.7.

⁶⁴ See Proposed LA. REV. STAT. ANN. § 9:2991.7.

⁶⁵ See Proposed LA. REV. STAT. ANN. § 9:2991.9.

⁶⁶ See Proposed LA. REV. STAT. ANN. § 9:2991.9(A).

⁶⁷ See Proposed LA. REV. STAT. ANN. § 9:2991.9(A).

⁶⁸ See Proposed LA. REV. STAT. ANN. § 9:2991.9(B).

⁶⁹ See Proposed LA. REV. STAT. ANN. § 9:2991.9(C).

addition to restoring any royalties or other payments due to the transferor, a court has discretion to award damages in an amount up to double the amount of royalties or other payments received by the transferee, plus interest, based on the nature of the transferee's conduct.

4. Other Protections

The proposed legislation prohibits certain contract terms that would undermine the protective force of the proposed legislation, including forum and venue selection clauses, choice of law provisions, indemnity provisions requiring transferors to indemnify transferees for any loss resulting from a rescission accomplished pursuant to this legislation, provisions naming the transferee as the mandatary of the transferor, and waivers of the right to rescind.⁷⁰ Finally, the proposed legislation makes clear that the remedies that it provides do not limit or supersede any other remedies or grounds for rescission otherwise provided by law.⁷¹

A copy of 2013 SR 118, along with proposed legislation, is attached.

⁷⁰ See Proposed LA. REV. STAT. ANN. § 9:2991.10.

⁷¹ See Proposed LA. REV. STAT. ANN. § 9:2991.11.

SENATE RESOLUTION NO. 118

BY SENATOR PEACOCK

A RESOLUTION

To urge and request the Louisiana State Law Institute, in consultation with the director of the Louisiana Mineral Law Institute, to study and make recommendations for regulation on unsolicited offers for the transfer, sale, and lease of mineral rights.

WHEREAS, the Constitution of Louisiana mandates the rights of property, including mineral interests, are to be protected, and requires the legislature to enact laws to implement such protections; and

WHEREAS, an "unsolicited offer" for the transfer, sale, or lease of mineral rights is an offer made to the owner of mineral rights by mail or electronic communication; and

WHEREAS, such unsolicited offers commonly include a form of payment which, when deposited, acts as a binding transfer, sale, or lease of mineral rights; and

WHEREAS, the currently regulatory structure for the transfer, sale, or lease of mineral rights does not include provisions designed to protect the landowner in transactions that occur from unsolicited offers, which over the years has raised legal questions and led to numerous complaints to the attorney general; and

WHEREAS, it is the duty of the Legislature to set forth procedures to ensure that property owners are being protected and to be fully informed as to the legal aspects of any procedures enacted to provide such protections.

THEREFORE, BE IT RESOLVED that the Senate of the Legislature of Louisiana does hereby urge and request the Louisiana State Law Institute, in consultation with the director of the Louisiana Mineral Law Institute, to study and make recommendations for regulations on unsolicited offers for the transfer, sale, or lease of mineral rights and report its recommendations to the Senate on or before February 1, 2014.

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

PRESIDENT OF THE SENATE

Regular Session, 2016

SENATE BILL NO. _____

BY SENATOR PEACOCK

(On Recommendation of the Louisiana State Law Institute)

MINERALS: Provides for regulations on unsolicited offers for the transfer and sale of mineral rights.

1 AN ACT

2 To enact Part VI of Chapter 2 of Code Title VII of Title 9, to be comprised of R.S. 9:2991.1
3 through 2991.11, relative to the sale of mineral rights by mail solicitation; to create the
4 Sale of Mineral Rights by Mail Solicitation Act; to define sale of mineral rights by mail
5 solicitation; to require sales of mineral rights by mail solicitation to be in proper form; to
6 provide for required disclosures; to provide for rescission of sales of mineral rights by
7 mail solicitation; to provide for the mechanics and effects of rescission; to provide for
8 prohibited terms; and to provide for related matters.

9 Be it enacted by the Legislature of Louisiana:

10 Section 1. Part VI of Chapter 2 of Code Title VII of Title 9, to be comprised of R.S.
11 9:2991.1 through 2991.11, is hereby enacted to read as follows:

12 PART VI. SALE OF MINERAL RIGHTS BY MAIL SOLICITATION

13 §2991.1. Title

14 This Part shall be known and may be cited as the "Sale of Mineral Rights by Mail
15 Solicitation Act."

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Comment

This Part, which is new, is designed to regulate certain transfers of mineral rights that place landowners and other persons with rights to minerals at risk of exploitation. As defined in R.S. 9:2991.2, a sale of mineral rights by mail solicitation is the creation or transfer of a mineral servitude or mineral royalty, or contract preparatory to such a transfer, that is initiated by an offer transmitted through the mail by the transferee and accompanied by a form of payment, such as a check or draft. An offer of this type may induce an owner to sell mineral rights without understanding the consequences of the transaction or at a price far below market value. Because the doctrine of lesion does not apply to transfers of mineral rights, owners have relatively little protection under existing law. This Part therefore permits a transferor of mineral rights in a sale of mineral rights by mail solicitation to rescind the transfer within sixty days after signing the instrument evidencing the agreement. This Part also requires that any instrument evidencing a sale of mineral rights contracted in this manner contain a disclosure statement describing this right of rescission. When the required disclosure is not included in the instrument, the transferor has the right to rescind the contract for three years after the date of signing the instrument. In such a case, the transferee is liable for attorney fees and court costs and may also be liable for additional damages at the discretion of the court.

§2991.2. Sale of mineral rights by mail solicitation defined

For purposes of this Part, a sale of mineral rights by mail solicitation is the creation or transfer of a mineral servitude or mineral royalty, or the granting of an option, right of first refusal, or contract to create or to transfer a mineral servitude or mineral royalty, that is contracted pursuant to an offer that is received by the transferor through the mail or by common carrier and is accompanied by any form of payment. As used in this Part, the term "mineral rights" does not include a mineral lease.

Comments

(a) This Section narrowly defines the term "sale of mineral rights by mail solicitation" so as to affect only those transactions that are likely to place a landowner or other person with rights to minerals at risk of selling without understanding the consequences of the transaction or for a price far below market value. The risk of bargaining inequality is most significant when a transfer of mineral rights is initiated by an offer that is transmitted through the mail by the transferee and accompanied by a form of payment, such as a check or draft. In other circumstances, such as when the transferee makes an offer in person, or when a form of payment does not accompany a written offer,

1 the risk of a hasty or misinformed acceptance is less pronounced.

2
3 (b) This Section specifically excludes a contract creating or transferring a mineral
4 lease from the term “sale of mineral rights by mail solicitation.” Unlike a sale or other
5 transfer of mineral rights, a mineral lease does not completely divest the owner of an
6 interest in the minerals. *See, e.g.,* Wall v. Leger, 402 So. 2d 704, 709 (La. App. 1st Cir.
7 1981)(“The grantor of a mineral servitude ceases to be the owner of the mineral rights;
8 the lessor of a mineral lease continues to be the owner of the mineral rights.”).
9 Moreover, the obligations imposed on mineral lessees by the Mineral Code provide
10 significant protection against exploitation. *See* La. Rev. Stat. Ann. § 31:122. The
11 importance of security of title to a mineral lessee who has expended or intends to expend
12 significant amounts of capital in developing the leased premises also justifies the
13 exemption of mineral leases from the ambit of this legislation.

14 §2991.3. Exclusion of contracts initiated through personal contact

15 This Part does not apply to a sale of mineral rights by mail solicitation contracted
16 subsequent to a prior personal contact that included a meaningful exchange between the
17 transferor and the transferee.

18 Comment

19 This Part does not apply to a transfer of mineral rights that is contracted following
20 prior personal contact that included a meaningful exchange between the transferor and
21 the transferee, even if the transfer otherwise meets the definition of a “sale of mineral
22 rights by mail solicitation” set forth in R.S. 9:2991.2. Contracts that are preceded by
23 negotiations—whether in person, by telephone, or by written or electronic
24 communication—do not involve the same potential for abuse associated with transfers
25 initiated by unsolicited mail communications. The term “prior personal contact” does not
26 require in-person negotiations or even significant negotiations between the parties or their
27 representatives. However, it does require that a meaningful exchange take place between
28 the transferor and transferee. Therefore, mass-mailings, automated telephone calls, and
29 other communications that do not involve a meaningful exchange are not excluded under
30 this Section.

31 §2991.4. Form

32 A sale of mineral rights by mail solicitation shall be made by authentic act or by
33 act under private signature signed by the transferor. The acceptance of any form of

1 payment by the transferor or any action whereby the transferor otherwise manifests assent
2 to the sale shall not satisfy the requirement of the transferor's signature.

3 Comment

4 According to Louisiana jurisprudence, an act under private signature may be valid
5 even when signed by one party alone, provided that the party who did not sign the act
6 otherwise exhibited some outward manifestation of acceptance beyond oral assent. *See,*
7 *e.g., Milliman v. Peterman, 519 So. 2d 238 (La. App. 5 Cir. 1988); see also La. Civ.*
8 *Code art. 1837 cmt. (b) (1984) and the citations contained therein.* In contrast, this
9 Section requires that in a sale of mineral rights by mail solicitation the transferor must
10 sign the instrument evidencing the agreement. The transferor's acceptance of any form
11 of payment or performance of any action otherwise manifesting assent to the contract
12 shall not suffice to satisfy the signature requirement.

13 §2991.5. Required disclosure: form notice of rescission

14 An instrument evidencing a sale of mineral rights by mail solicitation shall
15 contain on the first page, under the caption "The Seller's Right to Cancel", the following
16 disclosure, or one substantially similar, in conspicuous and legible type that is not smaller
17 than fourteen-point font and is in contrast by typography, layout, or color with any other
18 printing on the instrument, with all relevant information provided by the transferee:

19 "THIS IS A [SALE] [CONTRACT REQUIRING THE SALE] OF YOUR
20 VALUABLE MINERAL RIGHTS. If you sign and return this agreement, you
21 may cancel it by mailing a notice to the buyer. You may use any written statement
22 that indicates your intention to cancel, or you may sign and return the notice
23 provided below.

24 Your notice must be mailed, no later than 60 days after you signed the agreement,
25 to the following: [insert name and mailing address of the transferee]. Within 60
26 days after mailing your notice, you must return any payment you have received

1 from the buyer, and the buyer must return your mineral rights and any royalties
2 and other payments received since the sale. You may lose important rights if you
3 do not file your notice in the conveyance records of the parish where the property
4 is located within 90 days after this agreement is filed in the conveyance records.

5 NOTICE OF CANCELLATION

6 I, [insert name of transferor], wish to cancel the sale or contract requiring the sale
7 of my mineral rights to [insert name of transferee]. The affected mineral rights
8 are all mineral rights that I transferred to the transferee in the following lands:
9 [insert legal description of land.]

10 _____
11 Transferor's Signature

Date

12 Comments

13 (a) The disclosure statement required by this Section is intended primarily to
14 notify the transferor in a sale of mineral rights by mail solicitation that the transaction is a
15 sale rather than another type of contract, such as a mineral lease. The required disclosure
16 is intended also to inform the transferor of the right to rescind the sale within sixty days
17 after the date on which the transferor signed the agreement. To comply with this Section,
18 the instrument evidencing a sale of mineral rights by mail solicitation must contain the
19 disclosure statement provided by this Section or one substantially similar. De minimis
20 variations from the required disclosure, such as typographical errors or slight deviations
21 in wording, should not invalidate the disclosure, provided that the substance of the
22 required disclosure is made. When a sale of mineral rights by mail solicitation is an
23 option, right of first refusal, or contract to sell, the preparatory contract must contain the
24 required disclosure.

25
26 (b) This Section requires that the transferee include in the disclosure statement a
27 form notice of rescission that may be signed and returned by the transferor and also filed
28 in the conveyance records of the parish in which the property is located. The transferee
29 must include in the notice of rescission the names of the transferor and the transferee and
30 a legal property description of the land that is subject to the affected mineral rights.

31 §2991.6. Right to rescind; time for rescission

1 mineral rights from the transferee is subject to the effect of a notice of rescission filed
2 within ninety days after the date of the filing of the instrument. In all other cases,
3 rescission may not impair the rights of any third person who acquired an interest in the
4 mineral rights prior to the time that the notice of rescission was filed for registry.

5 C. A notice of rescission is without effect as to third persons unless it contains
6 the name of the transferee and the transferor.

7 Comments

8 (a) Between the parties, rescission takes place of right immediately upon
9 transmission of the notice of rescission. Rescission does not have to be judicially
10 demanded or declared, nor is rescission delayed until the transferor has restored the price
11 paid to him. *See* R.S. 9:2991.9.

12
13 (b) Under this Section, when the instrument evidencing a sale of mineral rights
14 by mail solicitation contains the required disclosure, a third person acquiring an interest
15 in the mineral rights from the transferee does so subject to the right of the original
16 transferor to rescind the agreement, provided that the notice of rescission is filed within
17 ninety days after the date of the filing of the instrument. For all other cases, this Section
18 states an exception to Louisiana Civil Code Article 3339, under which a termination of
19 rights that depends upon the occurrence of a condition is generally effective as to third
20 persons although not evidenced of record. Thus, when the instrument evidencing a sale
21 of mineral rights by mail solicitation contains the required disclosure but a notice of
22 rescission is not filed within ninety days after the date of the filing of the instrument, or
23 when the instrument evidencing a sale of mineral rights by mail solicitation does not
24 contain the required disclosure, third persons who acquire an interest in the mineral rights
25 prior to the recordation of the notice of rescission are protected from the effects of
26 rescission.

27
28 (c) This Section does not address the situation in which the transferee sells or
29 grants a right in the mineral rights to another person who, under the law of corporate veil-
30 piercing and other similar theories, is a mere alter ego of the original transferee. *See, e.g.,*
31 *Warriner v. Russo*, 308 So. 2d 499, 501 n.2 (La. App. 4th Cir. 1975).

32 § 2991.8. Rescission: parties obligated to make payments

1 Rescission shall not be effective against a party obligated to make or in fact
2 making royalty or other payments until sixty days after that party is furnished with a
3 certified copy of the notice of rescission.

4 Comment

5 This Section protects mineral lessees and other parties who are either obligated to
6 make or are in fact making royalty or other payments to an owner. The mere recordation
7 of a notice of rescission, in the absence of actual notice, to the party making such
8 payments, does not obligate that party to begin making payments to a transferor who has
9 rescinded a sale of mineral rights by mail solicitation.

10 §2991.9. Effects of rescission

11 A. A transferor who exercises the right to rescind under this Part shall return to
12 the transferee within sixty days after rescission any payments made by the transferee. A
13 transferor’s failure to return such payments gives rise to a cause of action for return of the
14 payments but does not prevent rescission.

15 B. A transferee against whom the right to rescind is exercised under this Part
16 shall pay to the transferor within sixty days after rescission any royalties and other
17 payments received by the transferee plus interest on those royalties and other payments
18 from the date received by the transferee.

19 C. When an instrument evidencing a sale of mineral rights by mail solicitation
20 does not contain the disclosure required by this Part, a transferee against whom the right
21 to rescind is exercised shall be liable for attorney fees and court costs. In such a case, in
22 addition to restoring any royalties or other payments due to the transferor, a court may
23 further award as damages an amount up to twice the sum of royalties and other payments
24 received by the transferee.

1 Comments

2 (a) When the transferor exercises the right to rescind, the parties must be restored
3 to the situation that existed before the contract was made. *See* La. Civ. Code art. 2033.
4

5 (b) Failure to include the required disclosure in the instrument evidencing a sale
6 of mineral rights by mail solicitation subjects the transferee to liability for attorney fees
7 and court costs. In addition to restoring any royalties or other payments due to the
8 transferor plus interest on that sum, the court has discretion, based on the nature of the
9 transferee's conduct, to award damages in an amount up to double the amount of
10 royalties or other payments received by the transferee. For example, if the amount of
11 royalties due to the transferor is \$1,000, the court may award up to an additional \$2,000
12 as damages.

13 §2991.10. Prohibited terms

14 The following provisions, if included in or accompanying an instrument
15 evidencing a sale of mineral rights by mail solicitation, are absolutely null:

16 (1) A provision requiring the agreement to be governed or interpreted by the laws
17 of another jurisdiction or requiring a suit to be brought in a forum or jurisdiction outside
18 of this state.

19 (2) A provision stipulating any venue to the extent inconsistent with the
20 applicable provisions of the Code of Civil Procedure.

21 (3) A provision requiring the transferor to indemnify the transferee for any loss
22 related to the transferor's right to rescind.

23 (4) A provision authorizing the transferee to act as a mandatary of the transferor.

24 (5) A provision that excludes, limits, waives, or otherwise modifies the
25 obligations of the transferee described in this Part.

26 §2991.11. Reservation

1 Nothing in this Part shall be construed to limit any other remedies or grounds for
2 rescission provided by law.

DIGEST

The digest printed below was prepared by the Louisiana State Law Institute. It constitutes no part of the legislative instrument. The keyword, one-liner, abstract, and digest do not constitute part of the law or proof or indicia of legislative intent. [R.S. 1:13(B) and 24:177(E)]

Sen. _____ SB _____

Abstract: Provides for regulations on unsolicited offers for the transfer and sale of mineral rights.

Present law does not regulate unsolicited offers for the transfer and sale of mineral rights.

Proposed law (R.S. 9:2991.1 through 2991.11) creates the Sale of Mineral Rights by Mail Solicitation Act, defines sale of mineral rights by mail solicitation, and provides for proper form, required disclosures, rescission, the mechanics and effects of rescission, and prohibited terms.

(Adds R.S. 9:2991.1 through 2991.11)

