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## **The Kingfish's Mineral Legacy: An Analysis of the Legality of State Mineral Leases Granted to W.T. Burton and James A. Noe During the Years 1934–1936 and Their Relevance to Former United States Senator and Louisiana Governor Huey P. Long**

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# **The Kingfish’s Mineral Legacy: An Analysis of the Legality of State Mineral Leases Granted to W.T. Burton and James A. Noe During the Years 1934–1936 and Their Relevance to Former United States Senator and Louisiana Governor, Huey P. Long<sup>1</sup>**

*Ryan M. Seidemann, Ethel S. Graham, Steven B. “Beaux” Jones, William T. Hawkins, Frederic Augonnet\**

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Worth facility; the Historic New Orleans Collection; the New Orleans Notarial Archives; and the clerks of court for the Eighth (Winn), Fourteenth (Calcasieu), Sixteenth (St. Mary), and Nineteenth (East Baton Rouge) Judicial Districts, the Civil District Court for the Parish of Orleans, the First Circuit Court of Appeal, and the United States District Courts for the Eastern and Middle Districts of Louisiana. Finally, this article is dedicated to the memory of Andrew J.S. “Jack” Jumonville. Jack assisted in shaping much of the theoretical underpinnings of this project and provided advice and edits during the original draft writing process. This insight was drawn from Jack’s more than forty years as a mineral attorney in Louisiana—often described by his colleagues as one of the best in the business. Jack’s last project for the State of Louisiana before his death in 2013 was a review of this work and his insights and efforts in his final days were instrumental in ensuring the correctness of the analyses herein. The views and opinions expressed herein are solely those of the authors and do not necessarily represent the position of the Louisiana Department of Justice or the Attorney General.

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## INTRODUCTION

In November of 1934, former Louisiana Governor James A. Noe, along with several associates, formed the Win or Lose Corporation “to acquire, sell, trade and exchange lands and leases for the drilling and

prospecting for oil, gas and other minerals . . . .”<sup>2</sup> In the following years, the Win or Lose Corporation acquired interests in several mineral leases on land owned by the State of Louisiana, some of which are still in operation today. For the past eighty-two years, the former governors and their descendants and assigns profited off of the lessees’ shares of royalties paid from these State mineral leases. However, this profiting has been perceived by some to be the result of an unjust enrichment by a select few politically, connected individuals to the financial detriment of the State of Louisiana.<sup>3</sup>

As a result of these perceptions and a recent resurgence in interest in these leases, the State Mineral and Energy Board requested that the Louisiana Attorney General analyze allegations of wrongdoing surrounding Win or Lose’s involvement in these leases. In 2013, the Louisiana Attorney General’s Office published a report on the issue.<sup>4</sup> This article serves as a modified, updated, and scaled-down version of that report, and is intended to preserve the analysis of these matters in an accessible format for posterity. Included in this article is a review of the historical context of this matter, a review of past litigation of, and investigations into, the Win or Lose matter, and a comprehensive analysis of the legality and validity of what have become known as the Win or Lose leases under the law in force at the time that the leases were granted. This analysis leads to the conclusion that the leases were granted in accordance with the law in force at the time of their issuance and that the State received (and continues to receive) its legally mandated royalty share of minerals produced from these leases and, in some cases, more. No evidence has been identified or discovered to support any theory or claim that the Win or Lose leases were illegally obtained or that they have been unlawfully held. In addition, no evidence has been identified to suggest that the former governors or their heirs and assigns are or have historically received any royalties or other funds from these leases that should have been paid to the State. Finally, this analysis has identified no legal basis for the rescission or cancellation of the Win or Lose leases and has determined that such a rescission or cancellation, were it legally available, would not be in the best interests of the State of Louisiana. In fact, this analysis indicates that

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2. Articles of Incorporation of Win or Lose Corporation 2 (Nov. 21, 1934) (on file with the La. Dep’t of Justice).

3. See, e.g., Lee Zurik, *Lee Zurik Investigation: ‘Dirty Deeds’ Cost Louisiana Hundreds of Millions*, Fox 8 WVUE, Aug. 7, 2013, fox8live.com/story/18067615/lee-zurik-investigation-dirty-deeds-cost-louisiana-hundreds-of-millions [https://perma.cc/T73F-H9VK], aired Aug. 7, 2013 [hereafter Zurik one].

4. See RYAN M. SEIDEMANN, ETHEL S. GRAHAM, WILLIAM T. HAWKINS, STEVEN B. JONES & FREDERIC AUGONNET, LA. ATT’Y GEN., *AN ANALYSIS OF THE LEGALITY AND VIABILITY OF MINERAL LEASES GRANTED TO W.T. BURTON AND JAMES A. NOE DURING THE YEARS 1934–1936* (2013).

such legal action would be unsuccessful and would actually be detrimental to the interests of the State.

### I. WHAT IS WIN OR LOSE CORPORATION?

The Win or Lose Corporation (herein referred to as Win or Lose) was founded on November 20, 1934. According to its Articles of Incorporation, its purpose is to “acquire, sell, or exchange lands and leases for the drilling and prospecting of oil, gas, and other minerals . . . .”<sup>5</sup> The president of the corporation is listed as James A. Noe of Monroe, Louisiana; the vice-president as Seymour Weiss; and the secretary-treasurer as Earle Christenberry.<sup>6</sup> The initial capital stock of the corporation included a ten thousand dollar investment, comprised of one hundred shares.<sup>7</sup> According to later documents, Seymour Weiss and Earle Christenberry only held one share each, with the remaining ninety-eight shares being held by James A. Noe.<sup>8</sup>

The question of the corporation’s alleged impropriety stems from: (1) the relationship between Win or Lose and then-current and former State government officials; and (2) the subsequent transfer of shares to Senator Huey P. Long and Governor Oscar K. Allen, as well as several other select individuals.<sup>9</sup> Specifically, as to the corporation’s officers, James A. Noe, the president of Win or Lose Corporation, was Louisiana’s Governor for three and a half months,<sup>10</sup> following the unexpected death in office of Oscar K. Allen;<sup>11</sup> Seymour Weiss was one of Huey P. Long’s oldest confidants and managed his campaign war chests;<sup>12</sup> and Earle Christenberry was Huey Long’s personal secretary.<sup>13</sup>

The individuals that played a role in the Win or Lose Corporation’s history are legendary in Louisiana. It is their infamous nature that has

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5. Articles of Incorporation of Win or Lose Corporation 2 (Nov. 21, 1034) (on file with the La. Dep’t of Justice).

6. *Id.* at 3.

7. *Id.*

8. Trial Transcript at 92, *United States v. Noe* (E.D. La. 1942) (No. 20,070) (citing testimony of Earle J. Christenberry) (on file with the La. Dep’t of Justice) [hereinafter *United States v. Noe* Trial Transcript]; *see also* T. HARRY WILLIAMS, *HUEY LONG* 825 (Knopf 1970).

9. *See, e.g.*, Zurik one, *supra* note 3.

10. Noe had also served as the Lieutenant Governor of Louisiana and as a State Senator. Alex McManus, *The Political Career of James A. Noe* 11 (M.A. Thesis, Univ. of La. at Monroe 2005) (copy on file with author).

11. *Id.* at 44.

12. RICHARD D. WHITE, *KINGFISH: THE REIGN OF HUEY P. LONG* 80 (Random House 2006).

13. WILLIAM IVY HAIR, *THE KINGFISH AND HIS REALM* 232 (La. State Univ. Press 1991).

colored perceptions of the validity of the mineral leases that ultimately ended up as partially held by those individuals and the corporation over the years. Yet, as noted by historian J. Eric Pardue, the Win or Lose Corporation's involvement in mineral leasing from the State of Louisiana was "of questionable morality but complete legality."<sup>14</sup>

Also apparent in the historical treatment of the Win or Lose Corporation is a tendency for temporal relationships among and between activities to be ignored or otherwise glossed over. Pardue provides an important example of this, commenting that, "the thirty-one shares Noe gave Huey earned \$62[,000] for the governor in the first year of ownership."<sup>15</sup> Although the amounts in this quotation may be correct, the quote implies that Long was governor when the shares and money were received. However, he was not. In fact, the Win or Lose Corporation was not formed until two years after the end of Long's only term as governor.<sup>16</sup> Thus, the implication that Long, as a sitting governor, was given shares of a corporation making money from State leases is simply incorrect.<sup>17</sup> Indeed, as Earle Christenberry later testified in the tax evasion trial of James A. Noe, the Longs gained their title ownership interest in the Win or Lose Corporation by way of a stock issuance to Mrs. Huey P. Long in 1936.<sup>18</sup> Yet, Christenberry also testified that Long had held one of the stock certificates issued to Noe—thirty-one shares—during his lifetime and that the same was part of Long's succession.<sup>19</sup> According to Christenberry, Oscar K. Allen also held a stock certificate issued to Noe—twelve shares—during his lifetime and those stocks were part of Allen's

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14. J. Eric Pardue, *Jimmie, Huey, Sam, and Earl: Longism in James A. Noe's 1940 Gubernatorial Campaign*, in 37 NORTH LOUISIANA HISTORY 102, 105 (2006).

15. *Id.* at 104–05.

16. Huey P. Long served as Governor of Louisiana from 1928–1932. LA. SEC'Y OF STATE, *Governors from 1877-Present*, [sos.la.gov/historicalresources/aboutlouisiana/louisianagovernors1877-present/Pages/default.aspx](https://sos.la.gov/historicalresources/aboutlouisiana/louisianagovernors1877-present/Pages/default.aspx) [https://perma.cc/S76S-3EWQ].

17. It should be noted, however, that O.K. Allen was a sitting governor when he received shares in Win or Lose, and James A. Noe was a sitting Louisiana State Senator and lieutenant governor when he received shares of Win or Lose.

18. United States v. Noe Trial Transcript, *supra* note 8, at 104–05 (citing testimony of Earle J. Christenberry). This is not to suggest that Huey Long did not have a substantial role in the formation of the company just prior to his death. He did. According to the testimony of Alfred D. Danziger, Huey Long was present at the signing of the Win or Lose charter in 1934 and, though he was not an owner of the company, he certainly provided advice to James A. Noe regarding the original development of State Lease 309. For the former, see *id.* at 86–87 (citing testimony of Alfred D. Danziger). For the latter, see *id.* at 49–54 (citing testimony of Leonard M. Levy).

19. *Id.* at 105–06 (citing testimony of Earle J. Christenberry). This reality is corroborated by the information in Huey P. Long's succession. See Succession of Huey P. Long (Orl. Parish, 1938) (No. 215-671) (on file with the La. Dep't of Justice).

succession.<sup>20</sup> In fact, although the original incorporators are shown as James A. Noe, Seymour Weiss, and Earle J. Christenberry, IRS Intelligence Agent Frank W. Lohn succinctly summarized the ownership of the Win or Lose Corporation in his testimony in the matter of *U.S. v. Noe*:<sup>21</sup>

Mr. Noe said that when the company was first organized, he owned [ninety-eight] shares, Mr. Weiss, one share and Mr. Christenberry, one share, that immediately afterwards the stock was split up so that Senator Long owned [thirty-one] shares, he [Noe] owned [thirty-one] shares, Mr. Weiss [twenty-four] shares, Governor Allen [twelve] shares, and Mrs. Alice Lee Grosjean, one share, and Mr. Christenberry, one share.<sup>22</sup>

Lohn's recitation of the division of Win or Lose Corporation shares was later supported by Earle J. Christenberry's testimony in the same trial.<sup>23</sup>

Further, when academic sources such as Jeansonne comment that, "[p]rofits that should have gone to the state went to Long and his cronies,"<sup>24</sup> it is not surprising that the public and press often develop misconceptions regarding whether the State received what it was due under the Win or Lose leases.<sup>25</sup> The "profits" to which Jeansonne refers are monies realized by the Win or Lose Corporation for the royalties, assignments, or subleases of State mineral leases. The issuance of such assignments and subleases by lessees were not, as is examined below,

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20. *United States v. Noe* Trial Transcript, *supra* note 8, at 106–07 (citing testimony of Earle J. Christenberry). This reality is corroborated by Oscar K. Allen's succession. *See* Succession of Oscar Kelly Allen (La. 8th J.D.C. 1936) (No. 777) (listing certificate for twelve shares of the Win or Lose Corporation transferred to O.K. Allen under the personal property section of the succession inventory).

21. As set forth more fully below, the matter of *United States v. Noe* was a tax evasion trial brought against James Noe, Seymour Weiss, and the Win or Lose Corporation by the federal government.

22. *United States v. Noe* Trial Transcript, *supra* note 8, at 248 (citing testimony of Frank W. Lohn).

23. *See id.* at 92 (citing testimony of Earle J. Christenberry).

24. GLEN JEANSONNE, *MESSIAH TO THE MASSES: HUEY P. LONG AND THE GREAT DEPRESSION* 160 (Harper Collins 1993).

25. A classic example of such misconceptions was published in THE ADVOCATE:

[Huey] Long held shares in the Win or Lose Corp., which leased mineral rights on state-owned property. The leases did not cost Win or Lose anything because they were turned over to the company by the governor. Editorial, *Huey: The [O]ther' Long*, THE ADVOCATE, Aug. 26, 2013, at 12C. As is seen herein, Huey Long did own shares of Win or Lose; Win or Lose also held rights in State mineral leases. However, none of the leases, as is developed herein were given at no cost to the company by any governor.



unlawful activities, and the financial benefits of those activities were not supposed to be escheated to the State. The assumption in Jeansonne's statement is that, had the State retained the Win or Lose leased areas and, in turn, successfully leased those areas on its own, then the State would have received a higher original lease amount. Thus, this statement assumes at least two events, neither of which occurred, in order to support a belief that profits were misappropriated to the Long political machine.<sup>26</sup> Further, because the assigning or subleasing lessee would retain any profits realized from assignments of subleases, the State would not have realized any of those funds in any event. Thus, an inflammatory statement that the State was swindled out of large sums of money is based on two assumptions and an incorrect understanding of the law—a troubling reality for an academic publication.

#### A. Huey P. Long

Huey P. Long served as the fortieth Governor of Louisiana from 1928 to 1932. Subsequently, he was elected to the United States Senate and served in that capacity until his assassination in 1935.<sup>27</sup> Long went from relative obscurity in Winn Parish to notoriety as the self-titled "Kingfish" of Louisiana. Numerous biographies and innumerable articles detail the

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26. The assumed events are that the State would have otherwise attempted to and successfully would have leased these same areas to someone other than the Win or Lose interests and that such leases would have garnered more from the State than the Win or Lose leases.

27. WHITE, *supra* note 12, at ix.

life and political career of Huey Long,<sup>28</sup> making a comprehensive review here redundant. His political career began with his election to the Louisiana Railroad Commission in 1918 on a populist platform from which he would never fully step away.<sup>29</sup> Later, Long ran for governor in 1924 but lost.<sup>30</sup> Undeterred, he ran again in 1928 and won.<sup>31</sup> Once in office, Long quickly consolidated his political power by means of nepotism, legal maneuvering, and outright bullying.<sup>32</sup> Historians continue to debate Long's motivations, but the means by which he accomplished his goals is less debatable. In this regard, Long's Louisiana is widely analogized in the historical literature to a dictatorship in which intimidation and suppression was often used to ensure that Long's plans were effectuated. A common theme in historical circles is that, under Long's political control, Louisiana no longer resembled a democracy; instead, all matters of the State were vested in one individual and were dependent upon his whims and moods.<sup>33</sup>

Long's control of Louisiana was near absolute,<sup>34</sup> and the men who were the founders of the Win or Lose venture made up his closest circle.<sup>35</sup>

28. See, e.g., LOUISIANA POLITICS: FESTIVAL IN A LABYRINTH (James Bolner ed., 1982); Henry C. Dethloff, *The Longs: Revolution or Populist Retrenchment?*, in 19 LOUISIANA HISTORY 401–12 (1978); LA. STATE MUSEUM, HUEY PIERCE LONG: THE MARTYR OF THE AGE (James Joseph Alcée Fortier ed., 1937); HUEY LONG (Hugh Davis Graham ed., 1970); Edward F. Haas, *Huey Pierce Long and Historical Speculation*, in 27 THE HISTORY TEACHER 125 (1994); HAIR, *supra* note 13; THOMAS O. HARRIS, THE KINGFISH: HUEY P. LONG, DICTATOR (Pelican Publ'g Co. 1938); ELMER L. IREY & WILLIAM J. SLOCUM, THE TAX DODGERS: THE INSIDE STORY OF THE T-MEN'S WAR WITH AMERICA'S POLITICAL AND UNDERWORLD HOODLUMS (1948); Glen Jeansonne, *Huey P. Long: A Political Contradiction*, in 31 LOUISIANA HISTORY 373 (1990); Glen Jeansonne, *Huey P. Long, Gerald L. K. Smith and Leander H. Perez as Charismatic Leaders*, in 35 LOUISIANA HISTORY 5 (1994); HUEY AT 100: CENTENNIAL ESSAYS ON HUEY P. LONG (Glen Jeansonne ed., 1995); HARNETT T. KANE, HUEY LONG'S LOUISIANA HAYRIDE: THE AMERICAN REHEARSAL FOR DICTATORSHIP 1928–1940 (Pelican Publ'g Co. 1971); REINHARD H. LUTHIN, AMERICAN DEMAGOGUES: TWENTIETH CENTURY (1954); ROBERT MANN, LEGACY TO POWER: SENATOR RUSSELL LONG OF LOUISIANA (Paragon House 1992); ALLAN P. SINDLER, HUEY LONG'S LOUISIANA: STATE POLITICS, 1920–1952 (Johns Hopkins Press 1956); WEBSTER SMITH, THE KINGFISH: A BIOGRAPHY OF HUEY LONG (1933); Courtney Vaughn, *The Legacy of Huey Long*, in 20 LOUISIANA HISTORY 93 (1979); WILLIAMS, *supra* note 8; T. Harry Williams, *The Gentleman from Louisiana: Demagogue or Democrat*, in 26 JOURNAL OF SOUTHERN HISTORY 3–21 (1960); WHITE, *supra* note 12.

29. HAIR, *supra* note 13, at 86–88. The Louisiana Railroad Commission is now known as the Louisiana Public Service Commission.

30. WHITE, *supra* note 12, at 18.

31. *Id.* at 35–36.

32. *Id.* at 39, 45.

33. See, e.g., *id.* at 125.

34. For details, see HAIR, *supra* note 13, at 276–97.

35. Namely, James Noe, Seymour Weiss, and Earle Christenberry.

Long was neither a founder nor an original shareholder of Win or Lose Corporation, but he clearly knew the details of the company's formation, methods, and purposes.<sup>36</sup> In fact, despite the interest that Long held in the company, his name does not show up on the Win or Lose paperwork until after his death in 1935.<sup>37</sup>

### *B. Oscar K. Allen*

At the time during which the Win or Lose Corporation was founded, the State of Louisiana was under a "Long dictatorship."<sup>38</sup> Although by 1934, Huey P. Long was a United States Senator, where he continued to exercise substantial power in Baton Rouge.<sup>39</sup> It is now widely accepted that Long had largely installed Oscar K. Allen as the then-current governor knowing that he could control Allen and thereby maintain control over Louisiana. Thus, Long would hold both a position as a Senator, and influence over the gubernatorial office.<sup>40</sup>

Oscar K. Allen served as Governor of Louisiana from 1932 to 1936, following Huey Long's term. Allen was a boyhood friend of Long, and Long appointed him as the head of the Highway Commission early in Long's gubernatorial term.<sup>41</sup> Long later handpicked Allen to run for governor after him.<sup>42</sup> As noted by both White and Williams, Allen's only qualification for governor consisted of his obedience to Huey Long.<sup>43</sup> Earl K. Long, commenting on Allen's willingness to do Huey Long's bidding, stated that if "[a] leaf blew in the window of Allen's office and fell on his desk[,] [h]e signed it," thinking that it was something from Huey that needed approval.<sup>44</sup> Later, Allen was elected to the United States Senate after Long's death, but suffered a brain hemorrhage and died in the governor's mansion on January 25, 1936.<sup>45</sup>

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36. See Articles of Incorporation of Win or Lose Corporation 3-5 (Nov. 21, 1934) (on file with the La. Dep't of Justice).

37. See Interview by Michael Gillette with Earle J. Christenberry (Nov. 4, 1970), in *Jack B. McGuire Papers*, within DAVID R. MCGUIRE MEMORIAL COLLECTION. The interview can be located in the Manuscript Collections 271, Series 4, Box 1, Folder 34 in the Louisiana Research Collection of the Howard-Tilton Memorial Library at Tulane University.

38. See HAIR, *supra* note 13, at 279-80.

39. Long's only term as governor ended on January 25, 1932.

40. WHITE, *supra* note 12, at 135.

41. *Id.* at 41, 102.

42. *Id.* at 135-36.

43. See generally WHITE, *supra* note 12; WILLIAMS, *supra* note 8.

44. HAIR, *supra* note 13, at 240.

45. WHITE, *supra* note 12, at 304.

C. James A. Noe

James A. Noe, though raised in Indiana, moved to Monroe, Louisiana, and established himself as a prominent oilman, politician, and one of the primary financial backers of Huey P. Long.<sup>46</sup> Further, Noe was also the primary shareholder in and one of the founders of the Win or Lose Corporation.

Noe was working as a drilling supervisor when he met Long, who was an attorney representing an injured worker at the time.<sup>47</sup> The two instantly connected, bonding over a similar background and upbringing. In 1932, Long persuaded Noe to run for Louisiana State Senator. After he won, Noe was immediately appointed President Pro Tempore of the Senate.<sup>48</sup> Later in 1934, Noe was appointed Lieutenant Governor of Louisiana at Long's request.<sup>49</sup>

When Governor Allen suffered a brain hemorrhage, Noe, then Lieutenant Governor, became governor, albeit only for a fourteen-week lame duck governorship.<sup>50</sup> During his brief tenure as governor, Noe made several shrewd political decisions that would help him later in his career, but otherwise did nothing politically of note. It was during this brief time, however, that Noe granted the several mineral leases to William T. Burton that are the subject of this article. Importantly, despite the fact that Governor Noe actually granted the leases to W.T. Burton, application for those leases was made during Governor Allen's tenure. This made Noe's involvement in the actual leasing largely ministerial.<sup>51</sup>

Although Noe attempted to break back into politics on a few more occasions, the remainder of his life was largely focused on his business interests, which included oil and gas assets—some of which derived from his association with Win or Lose—and media assets. Noe ultimately died in 1976.

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46. McManus, *supra*, note 10.

47. McManus, *supra* note 10, at 10.

48. *Id.* at 11.

49. *Id.* at 12.

50. See *Lame Duck*, BLACK'S LAW DICTIONARY (10th ed. 2014). "Lame duck" is defined as "[a]n official, esp[ecially] an elected one, whose power has waned because his or her term of office will end soon; esp[ecially], an elected official serving out a term after a successor has been elected." This is an appropriate characterization of James Noe's governorship, as he was finishing Oscar Allen's soon-ending term and he had not been elected to the position in his own right.

51. See A.J. Gray, III, Annotation, *An Analysis of the Legality and Viability of Mineral Leases Granted to W.T. Burton and James A. Noe During the Years 1934–1936*, at 14–15 (2015) (on file with the author) [hereinafter Gray Annotation].

*D. William T. Burton*

William Thomas Burton, more commonly referred to as W.T. Burton, was a self-made businessman who started with a grocery store in Sulphur, Louisiana. Later, he became one of the most successful industrialists and philanthropists of Calcasieu Parish.<sup>52</sup> He was chairman of the Calcasieu Marine National Bank and president of William T. Burton Industries of Sulphur—a company focused on oil and mineral investments.<sup>53</sup> For the purposes of this article, Burton was also involved with the Win or Lose Corporation by leasing land from the State for mineral exploration and production, and then assigning<sup>54</sup> substantial interests in those leases to the Win or Lose Corporation.<sup>55</sup> Based upon the documents available at this time, it does not appear, nor has any new evidence been identified to suggest, that Burton was a stockholder in the Win or Lose Corporation.<sup>56</sup>

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52. ERBON W. WISE, BRIMSTONE!: THE HISTORY OF SULPHUR, LOUISIANA, 1878–1980, 107 (Southwest Builder News 1981).

53. KATHIE BORDELON, MCNEESE STATE UNIVERSITY, 18 (Arcadia Publ'g 2001).

54. An “assignment” in this context is defined as, “a transfer of rights in real or personal property or rights under a contract—for example, the transfer of an oil and gas lease from the original lessee to others.” UNIV. OF TEX. AT AUSTIN, PETROLEUM EXTENSION SERV., A DICTIONARY FOR THE OIL AND GAS INDUSTRY 13 (1st ed.) (Susan Toalson ed., 2005). *See also* HOWARD R. WILLIAMS & CHARLES J. MEYERS, MANUAL OF OIL AND GAS TERMS 30 (4th ed.) (Matthew Bender 1976).

55. It is important to note that, contrary to some media allegations suggesting that Burton was new to mineral leasing at the time of the Win or Lose Corporation activities that are the subject of this report, mineral activities were merely another part of Burton’s industrial pursuits. His activities in this area long predated the Win or Lose Corporation. *See* Zurik one, *supra* note 3, at 1 (stating, incorrectly, that Burton was “a Lake Charles businessman with little to no experience in drilling oil.”). In fact, Burton first acquired a mineral lease from the State in 1920 (State Lease 42), which was fourteen years before the Win or Lose Corporation was even formed. *See* State Lease 42 (Oct. 20, 1920) (awarding the lease to Burton under authority of Governor John M. Parker) (on file with the La. Dep’t of Justice). When asked this question during the *U.S. v. Noe* trial in 1942, Burton noted that he had been in the oil business “ever since—the Spindle top . . . maybe thirty-five years or better.” *United States v. Noe* Trial Transcript, *supra* note 8, at 186 (citing testimony of William T. Burton). It is also important to note that Burton did not always prevail when he was a bidder on State mineral leases. In fact, one example of such an unsuccessful bid occurred during the Noe administration, where Burton was outbid by Shell on a lease at the same lease sale as State Lease 340. *Shell High Bidder on State Lease*, OIL NEWS OF THE SOUTHWEST (Feb. 20, 1936). *See also* Gray Annotation, *supra* note 51, at 10.

56. *See* Articles of Incorporation of Win or Lose Corporation 3 (Nov. 21, 1934) (on file with the La. Dep’t of Justice). This supposition is corroborated by A.J. Gray, III, an attorney to W.T. Burton. *See* Gray Annotation, *supra* note 51, at 16.

Few of the major political biographies or monographs related to Louisiana even mention Burton. He seems to have kept a low profile, as he never ran for political office nor was he directly involved in Louisiana politics. Although Burton was on the receiving end of two Internal Revenue Service tax evasion trials and an additional trial for jury tampering, the latter of which garnered him a two-year stint in the penitentiary,<sup>57</sup> he is fondly remembered in his home, Calcasieu Parish. Indeed, several buildings at McNeese State University are named in his honor: The Burton Business Center and the Burton Coliseum.<sup>58</sup> Additionally, the William T. Burton and Ethel Lewis Burton Foundation award scholarships to outstanding, graduating high school students in the Lake Charles area.<sup>59</sup> W.T. Burton died in 1974.

#### *E. Earle Christenberry*

Earle Christenberry was Huey Long's private secretary and an influential man behind the scenes of the Huey Long administration and the subsequent Longite administrations.<sup>60</sup> In a letter to J. Edgar Hoover, FBI Special Agent Sackett describes Christenberry as, "a very good student of Politics . . . a level-headed, capable young man."<sup>61</sup> Because Christenberry largely operated in the background of other prominent individuals, little biographical information is available; however, it is known that he was born in New Orleans and grew up in a working class family.<sup>62</sup> Further, his brother, Herbert W. Christenberry, served as a judge in the federal court for the Eastern District of Louisiana from 1949 to 1975.<sup>63</sup> Earle Christenberry faded from public view not long after Long's death. Nonetheless, Earle Christenberry lived until 1980.

#### *F. Seymour Weiss*

Seymour Weiss was a prominent New Orleans businessman, a manager turned owner of the fabled Roosevelt Hotel, and one of Huey

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57. *19-Year-Old Tax Dispute Settled, William T. Burton to Pay U.S. \$635,000*, TIMES-PICAYUNE 1 (Nov. 16, 1954).

58. BORDELON, *supra* note 53, at 19.

59. WISE, *supra* note 52 at 107.

60. Letter from B.E. Sackett, Special Agent, to J. Edgar Hoover, FBI Director (May 22, 1939) (on file with the La. Dep't of Justice).

61. *Id.* at 2.

62. See FEDERAL JUDICIAL CENTER, *History of the Federal Judiciary: Biographies: Herbert W. Christenberry*, [https://www.fjc.gov/history/home.nsf/page/tu\\_bush\\_bio\\_christenberry.html](https://www.fjc.gov/history/home.nsf/page/tu_bush_bio_christenberry.html) [<https://perma.cc/KEG9-6623>] (last accessed Oct. 9, 2016).

63. *Id.*

Long's closest confidants.<sup>64</sup> Weiss was the treasurer for Huey Long's campaign and was active behind the scenes of the Long administration.<sup>65</sup> In 1929, the Louisiana House of Representatives summoned Weiss to give testimony regarding certain expenditures that the anti-Long faction believed had been used by Huey Long for drinking and girls. Weiss, in a spectacular display of loyalty to Long, refused to answer any questions regarding the money.<sup>66</sup> Weiss remained Long's steadfast friend and business partner, sharing in the successes of the Win or Lose venture. Moreover, to illustrate how close the two were, Weiss was one of those at Long's bedside when the latter died. Weiss died in 1969.

## II. HISTORIC CONTROVERSIES

The Win or Lose Corporation and the involvement of its officers or shareholders in various mineral leases from the State of Louisiana have been controversial virtually since the corporation's inception. This section reviews both the legal disputes related to these matters as well as the media's historical treatment of these issues.

### *A. Review of All Known Legal Cases Filed, Their Outcomes, and Their Impact on any Current or Future Action.*

A total of seven lawsuits were identified as having been filed related to one or more of the matters surrounding the Win or Lose Corporation. Only one such case, *Roussel v. Noe*, to be discussed below, actually focused on the issues involved in this article, but the other suits, save one, are contextually relevant.<sup>67</sup>

#### *1. State v. Noe (La. 19th J.D.C. 1936) (No. 11,112)*

In *State v. Noe*, a writ of mandamus was brought seeking an order directing then-Governor James A. Noe to cancel State Lease 335, which was issued by Governor Oscar K. Allen to W.T. Burton on January 23, 1936.<sup>68</sup> This suit was brought by the Land Investment Company, Inc. on March 27, 1936, who alleged that former Governor Allen unlawfully

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64. WHITE, *supra* note 12, at 80.

65. *Id.*

66. *Id.* at 81.

67. The one suit tangentially related to this matter, but of no substantive importance, is the matter of *Daspit v. State* (La. 19th J.D.C. 1954) (No. 23,833) (on file with the La. Dep't of Justice). This was a case regarding payment of certain attorneys from an earlier case related to this matter and is not reviewed here.

68. See *Petition of State ex rel. Land Inv. Co., Inc., State v. Noe* (La. 19th J.D.C. 1936) (No. 11,112) (on file with the La. Dep't of Justice).

ignored its nomination of certain acreage to be advertised for bidding.<sup>69</sup> This same acreage later made up a small portion of a nomination by W.T. Burton. In its Petition, the State acknowledged that Governor Allen advertised Burton's nomination for bidding and that Burton ultimately submitted the winning bid.<sup>70</sup> This nominated area became State Lease 335. Land Investment Company, Inc. alleged injury due to Governor Allen's failure to advertise the acreage for bidding upon its application because, although Burton's nomination included the same area, it was for such a large swath of land that Land Investment Company, Inc. was financially unable to bid.<sup>71</sup> Following the filing of this litigation, minimal activity occurred in the court record—the filing of exceptions and answers. The case eventually settled on May 28, 1936, and a judgment approving the compromise was entered on June 1, 1936.<sup>72</sup> However, no copy of the settlement exists in the court record or in the State lease record.<sup>73</sup>

This case does not have a *res judicata* effect on any theory that the State or a private party might use to challenge this lease today. However, it is important to note that a review of the law in force at the time that State Lease 335 was issued reveals that, had this matter gone to trial on the mandamus issue, it would have failed. The mandamus relief sought in this matter assumes that Governor Allen was legally obligated to advertise any nomination of State property for mineral leasing. If this were the case, as a mandatory and ministerial (*i.e.*, nondiscretionary) act, Allen was required to advertise the acreage nominated by Land Investment Company, Inc., upon its application on July 3, 1935. Following this argument to its end, Allen's failure to advertise Land Investment Company, Inc.'s nomination allowed W.T. Burton to later nominate the same property—albeit as part of a much larger nomination—bid on it, and

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69. *Id.* ¶ 4.

70. *Id.* ¶ 7.

71. *Id.* ¶¶ 8–9.

72. Judgment, ¶ 2, *State v. Noe* (La. 19th J.D.C. 1936) (No. 11,112) (on file with the La. Dep't of Justice).

73. Commenting on the outcome of this litigation, an attorney for W.T. Burton, A.J. Gray, III, stated:

The Minutes of a meeting of Win or Lose Corporation dated May 28, 1936 . . . reflect that the compromise with Land Investment Company, Inc. was for payment to Land Investment Company, Inc. of \$5,000.00 plus a 1/48th overriding royalty under State Lease 335. According to the minutes, the 1/48th overriding royalty was one-half of the 1/24th overriding royalty Burton reserved in his sublease of State Lease 335 to The Texas Company. According to the minutes, Burton and The Texas Company agreed to pay the \$5,000.00, and Burton agreed to convey 1/8th of the 1/24th overriding royalty while Win or Lose Corporation agreed to convey 3/8th of the 1/24th overriding royalty.

Gray Annotation, *supra* note 51, at 20–21.



receive the State lease for the property. However, the law in force at the time of this activity—Acts 1915, No. 30<sup>74</sup>—specifically makes the advertisement for bidding of any nominated property discretionary for the governor.<sup>75</sup> The discretionary authority of an elected official cannot be compelled by way of mandamus.<sup>76</sup> Thus, although Governor Allen failed to exercise his discretion to advertise Land Investment Company, Inc.’s nomination for what became State Lease 335, Governor Noe had no obligation to cancel that lease.

For this reason, while this case is instructive on the question of whether governors in the 1930s had the discretion to or not act on certain nominations, it is not an indictment of the letting of State Lease 335. Based on Governor Allen’s statutory authority at the time, he was authorized to reject nominations and could not be compelled to advertise each nomination for bid.

## 2. *State v. Noe (La. 19th J.D.C. 1936) (No. 11,126)*

This case involved another mandamus proceeding against then-Governor James A. Noe by a losing bidder for State Lease 321. State Lease 321 was granted on January 23, 1936 by then-Governor Oscar K. Allen to W.T. Burton. The problem alleged in this action was that when the original lease was issued, it was not properly advertised.<sup>77</sup> Although the lease was advertised in other parishes, it was not advertised in the official journal of the parish in which the land was situated, Caddo Parish.<sup>78</sup> As a result, the lease, subsequent to its issuance, was properly readvertised. The complaining party in this case, C.M. Brenner, alleged that his bid, submitted pursuant to the advertised lease term—one year—was more advantageous to the State than Burton’s bid for a two-year term.<sup>79</sup> Further,

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74. As amended by Act No. 315, 1926 La. Acts 606-07 and Act No. 9, 1930 La. Acts 27 (passed by the 1928 Extraordinary Legislative Session) (currently LA. REV. STAT. ANN. § 30:126 (2009)).

75. This reality is so because of the “may” language in the following excerpt: [T]he Governor of the State *may* cause the Register of the State Land Office to make an inspection of the land sought to be leased, and . . . the Governor *may* cause to be published in the official journal of the state . . . a description of the land to be leased [by the State] . . . . Act No. 30, § 3, 1915 La. Acts 62 (emphasis added).

76. *Badger v. City of New Orleans*, 21 So. 870, 872 (La. 1897) (“The mandamus issues only to enforce the purely ministerial duty imposed by law.”); *see also* *Cook v. City of Shreveport*, 112 So. 402, 404 (La. 1927); *State ex rel. City of New Orleans v. La. Highway Comm’n*, 156 So. 806, 810 (La. 1934).

77. *See* *Petition of State ex rel. C.M. Brenner*, ¶ 3, *State v. Noe* (La. 19th J.D.C. 1936) (No. 11,126) (on file with the La. Dep’t of Justice).

78. *Id.*

79. *Id.* at ¶¶ 6–9.

Brenner alleged that because the advertisement sought a bid for a one-year term and Burton's bid was for a two-year term, he had submitted the only bid in conformity with the advertisement and therefore, the lease should have been awarded to him.<sup>80</sup>

This matter reached the Louisiana Supreme Court in *State ex rel. Brenner v. Noe*.<sup>81</sup> Nevertheless, the court did not rule on whether an acceptance of a two-year lease is legally permissible when the actual advertisement only called for a one-year lease. Thus, this question remains unresolved as to this lease. Regardless, State Lease 321 is no longer active, hence making any further inquiry into the validity of the lease moot. Further, as the Louisiana Supreme Court has noted:

[a]s the obligations of the lessee have been fully complied with under the terms of the lease, the lease has become an executed contract. The State has accepted the benefits of the lease for several years in receiving the sum of \$500, paid by the lessee as bonus and rentals, and neither law, equity nor good conscience will allow the State to claim the benefits and at the same time escape its obligations under the lease.<sup>82</sup>

In other words, because the State accepted the benefits of this lease during its existence, the State cannot later challenge the same lease for irregularities in the advertisements of the lease. This is an important problem for any current challenges to any Win or Lose leases, as the State has undoubtedly accepted the benefits—such as royalties—from all of the Win or Lose leases. Accordingly, the passage of time and, more importantly, the acceptance of the benefits of the lease, have now effectively barred the State from challenging this lease based on the advertised lease term issue.

### 3. *United States v. Noe (E.D. La. 1942) (No. 20,070)*

*U.S. v. Noe* involved a federal income tax evasion matter brought by the United States against James A. Noe, Seymour Weiss, and the Win or Lose Corporation.<sup>83</sup> The federal government alleged that the named defendants had concealed certain income information in order to avoid the imposition of income taxes, and had thus violated and conspired to violate the Internal

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80. *Id.* at ¶ 10.

81. 171 So. 708 (La. 1936).

82. *Reeves v. Leche*, 195 So. 542, 545 (La. 1940). *See also* *State ex rel. Shell Oil Co. v. Register of the State Land Office*, 192 So. 519, 520 (La. 1939).

83. *See* *United States v. Noe (E.D. La. 1942) (No. 20,070)* (on file with the La. Dep't of Justice).

Revenue Code. On October 3, 1940, the court returned an indictment against the defendants, charging them with violations of the Internal Revenue Code.<sup>84</sup> Following the indictment, the United States filed a criminal case against the defendants on October 8, 1940 in the Eastern District of Louisiana.<sup>85</sup> Weiss, alone, pled guilty. The imposition of his sentence was suspended and Weiss was placed on probation for a period of five years. On the other hand, both, Noe and the Win or Lose Corporation pled not guilty.

During the trial, Noe was questioned regarding certain deposits and payments made to the Win or Lose Corporation. To most of these questions, Noe responded that he had no recollection of specific transactions.<sup>86</sup> He did provide that one payment to former Governor Allen was a gift rather than the payment of dividends.<sup>87</sup> He also stated that former Governor Long was never issued any shares of stock in Win or Lose Corporation.<sup>88</sup> Notably, both statements have proven to be incorrect, as was revealed by the testimony of various individuals in the 1942 trial.<sup>89</sup>

Nonetheless, on April 11, 1942, a jury returned not guilty verdicts against Noe and Win or Lose on all four counts of attempted tax evasion.<sup>90</sup> Although this case is related to the Win or Lose Corporation, it provides no real legal insight into the matter being reviewed here, except to confirm certain facts. Further, it has no legal bearing on any claims that the State or a taxpaying plaintiff may have today in challenging any Win or Lose activities.

#### 4. *State v. Burton (La. 14th J.D.C. 1944) (No. 22,664)*

*State v. Burton*, filed on October 5, 1943 against W.T. Burton in Calcasieu Parish, challenged the validity of State Lease 318 and certain

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84. See Indictment, *United States v. Noe* (E.D. La. 1942) (No. 20,070), (Oct. 3, 1940) (on file with the La. Dep't of Justice).

85. See *id.*

86. *United States v. Noe* Trial Transcript, *supra* note 8, at 3–5 (citing sworn statement of James A. Noe given on Nov. 4, 1937).

87. *Id.* at 9.

88. *Id.* at 10–11. This same statement was made by Earle Christenberry some thirty years later in a private interview. See Interview by Michael Gillette with Earle J. Christenberry (Nov. 4, 1970), in *Jack B. McGuire Papers, within DAVID R. MCGUIRE MEMORIAL COLLECTION*. The interview can be located in the Manuscript Collections 271, Series 4, Box 1, Folder 34 in the Louisiana Research Collection of the Howard-Tilton Memorial Library at Tulane University.

89. See, e.g., *United States v. Noe* Trial Transcript, *supra* note 8, at 165 (noting that Governor Allen held stock in Win or Lose Corporation).

90. See Jury Verdict, *United States v. Noe* (E.D. La. 1942) (No. 20,070), (Apr. 11, 1942) (on file with the La. Dep't of Justice).

actions related to that lease subsequent to its issuance.<sup>91</sup> Specifically, the suit, filed by the State Mineral Board in the name of the State of Louisiana (the suit subsequently was amended to add the State Mineral Board as an actual co-plaintiff) alleged that: (1) certain assignments to The Texas Company and the Win or Lose Corporation were invalid for Win or Lose's failure to record and pay consideration for those assignments;<sup>92</sup> (2) those assignments were further invalid because then-Governor Oscar K. Allen, as a stockholder of the Win or Lose Corporation, received a benefit from the assignments;<sup>93</sup> (3) the interests of The Texas Company and the Win or Lose Corporation were reassigned to Burton to avoid the necessity of paying delay rentals;<sup>94</sup> (4) State Lease 318 was invalid because it did not contain a "reasonable development clause" but rather "unusual, unfavorable, inequitable, and unconscionable" terms for the State; thus, Burton's bid should have been rejected;<sup>95</sup> (5) State Lease 318 had, at that time, kept State land out of commerce for eight years—with an indefinite term—and it was illegal, null and void, and violative of the doctrine of ownership;<sup>96</sup> (6) the consideration of less than seven cents per acre and the yearly rental of less than four cents per acre was inadequate, trifling, and constituted the legal equivalent of paying no consideration;<sup>97</sup> (7) State Lease 318 was procured through conspiracy, favoritism, collusion, and fraud;<sup>98</sup> (8) State Lease 318 was invalid because then-Governor Allen granted himself a 1/266th overriding royalty;<sup>99</sup> and (9) State Lease 318 was one of several similar fraudulent transactions by W.T. Burton.<sup>100</sup>

Following six months of exceptions, amendments to the petition, and other legal maneuverings, the court issued its reasons for judgment on April 5, 1944. However, whether the court could determine the merits of the State and the Mineral Board's arguments depended on two preliminary, procedural issues:

1. [Whether] the State of Louisiana in an action in which it may have an interest as a distinct entity apart from other entities or

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91. *State v. Burton* (La. 14th J.D.C. 1944) (No. 22,664) (on file with the La. Dep't of Justice).

92. *See* Petition of State, ¶¶ 6–8, *State v. Burton* (La. 14th J.D.C. 1944) (No. 22,664) (on file with the La. Dep't of Justice).

93. *Id.* ¶¶ 11–13.

94. *Id.* ¶¶ 14–15.

95. *Id.* ¶¶ 17–18.

96. *Id.* ¶ 19.

97. *Id.* ¶ 20.

98. Petition of State, ¶ 20, *State v. Burton* (La. 14th J.D.C. 1944) (No. 22,664) (on file with the La. Dep't of Justice).

99. *Id.* ¶ 25.

100. *Id.* ¶ 27.

corporate agencies it may create and in its own name and sovereign capacity have the legal right or capacity under our law to institute and maintain such action represented therein by and through some person or agency of the State other than the Attorney General as the legal representative of the State.

2. [Whether] the State of Louisiana as plaintiff in this suit have any legal right or authority under our law to institute and maintain this suit in the name of the State Mineral Board, or by any supplemental pleadings implead or make the State Mineral Board a co-plaintiff in the suit, even though it be alleged in such supplemental and amended pleadings that the State Mineral Board through its special counsel consents to being made a party plaintiff with the State of Louisiana.<sup>101</sup>

In deciding these two preliminary issues, the court found in favor of W.T. Burton and against both the State and the Louisiana Mineral Board. It held that:

Since, therefore, this Court has already concluded that the State of Louisiana as the plaintiff in the main or original suit is without right or cause of action to institute this suit brought by and represented therein by an individual or agency other than the Attorney General and must be dismissed, it naturally follows that this intervention, if it may be called such, must be dismissed, without prejudice, however, to the right of the State Mineral Board to assert its rights in a separate action.<sup>102</sup>

Moreover, the court found that the State of Louisiana did not have the authority to institute the suit by an individual or agency other than the Attorney General and that the later joinder of the State Mineral Board as an additional party plaintiff did not correct that error.<sup>103</sup>

The record reflects that the State parties filed an appeal after losing. However, the appeal was jointly dismissed by the parties, stating that, “the State Mineral Board has formally recognized the validity of [Lease 318] and all of the differences existing between [the parties] concerning said lease have been compromised and adjusted and the subject matter of said litigation has, consequently, become moot.”<sup>104</sup>

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101. Reasons for Judgment at 8–9, *State v. Burton* (La. 14th J.D.C. 1944) (No. 22,664) (on file with the La. Dep’t of Justice).

102. *Id.* at 18–19.

103. *Id.* at 17–18.

104. Joint Motion for Dismissal of Appeal of Plaintiffs-Appellants, ¶ 2, *State v. Burton* (La. 1944) (No. 37,524) (on file with the La. Dep’t of Justice).

Ultimately, there was no ruling on the merits by a court as to the validity of State Lease 318, the assignments of that lease to Win or Lose Corporation, or any of the other substantive matters of interest to the current review. Also, because this case was dismissed on procedural grounds only, it does not have a *res judicata* binding effect on the State or a taxpayer plaintiff as to the possible litigation of these matters today.<sup>105</sup> However, because the State Mineral Board and/or State “recognized the validity of Lease 318,”<sup>106</sup> it is reasonably likely that this apparent ratification undermines the ability of the State to bring a challenge to this lease today for leasing inconsistencies.<sup>107</sup> In addition, the State’s acceptance of the benefits of this lease subsequent to this settlement would now, under *State ex rel. Shell Oil Co., Inc. v. Register of State Land Office*,<sup>108</sup> undermine the State’s ability to challenge the lease or the settlement.

5. *State v. Grace (La. 19th J.D.C. 1945) (No. 21,076)*

In *State v. Grace*, filed on February 4, 1944, the State and the State Mineral Board brought an action against the Register of State Lands, Lucille May Grace, Independent Oil & Gas Corporation, Morris S. Rhoads, John A. Farrell, and D.J. Simmons seeking a declaration that State Lease 309 was invalid.<sup>109</sup> State Lease 309 was granted to James A. Noe on October 23, 1934, which was during the gubernatorial term of Oscar K. Allen (and prior to Allen’s death).<sup>110</sup> The basis of the original claim was that, because no cash bonus was paid to the State for State Lease 309, the real consideration for the lease was the lessee’s obligation to drill fifty wells within the primary term.<sup>111</sup> According to the Petition, after the completion of only four wells, on August 21, 1935, the Register of the State Land Office cancelled and changed the terms of the lease to require

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105. *See, e.g., Perrin v. Hartford Acc. & Indem. Co.*, 248 So.2d 58, 60 (La. App. 1 Cir. 1971) (noting that a dismissal of a suit on procedural grounds alone cannot be said to have a *res judicata* effect on the merits of the matter if brought in a later suit).

106. Interestingly, A.J. Gray, III, has commented that the settlement of this suit during the pendency of the appeal that was ultimately dismissed also resulted in a “ratification of State Lease 340.” Gray Annotation, *supra* note 51, at 29. However, Mr. Gray did not provide any supporting documents for this assertion.

107. It should be noted that this lease no longer exists. The final release on State Lease 318 occurred in 1975.

108. 192 So. 519 (La. 1939).

109. *State v. Grace (La. 19th J.D.C. 1945) (No. 21,076)* (on file with the La. Dep’t of Justice).

110. *See* Petition of State, ¶¶ 5–6, *State v. Grace (La. 19th J.D.C. 1945) (No. 21,076)* (on file with the La. Dep’t of Justice).

111. *Id.* ¶ 11.

only thirty wells, instead of fifty.<sup>112</sup> The State alleged that such a change constituted the Register acting beyond her authority to the prejudice of the State.<sup>113</sup>

On July 6, 1944, the State amended its petition, alleging that State Leases 494 and 495, which also covered areas within State Lease 309, were invalid because they were issued pursuant to Acts 1940, No. 47, which had been declared unconstitutional.<sup>114</sup> Following this action, some discovery was undertaken and answers were filed. In April of 1945, both the State Mineral Board and the board of Independent Oil & Gas Co., Inc. passed resolutions authorizing a settlement of this litigation.<sup>115</sup>

On May 2, 1945, the parties executed an agreement to settle and compromise the lawsuit, with the private defendants paying the State the sum of \$10,000, as well as surrendering and releasing the property described in State Lease 309.<sup>116</sup> In exchange, the State agreed to ratify State Lease 309, as amended by the Register on August 21, 1935, and to dismiss its claims.<sup>117</sup> On May 11, 1945, the court entered a judgment dismissing the matter pursuant to the settlement among the parties.<sup>118</sup> Accordingly, pursuant to this settlement and judgment: (1) State Lease 309 was recognized as a valid mineral lease between the State of Louisiana and then Independent Oil & Gas Co., Farrell, Rhoads, and Simmons; (2) the demands against Interstate Natural Gas Company and United Gas Public Service Company were rejected and dismissed; and (3) the State received a judgment in its favor in the amount of \$10,000.<sup>119</sup>

The practical impact of this case is likely significant for the current inquiry: this settlement and judgment most likely creates a situation where the validity and viability of these leases, once called into question by the State and the State Mineral Board, were settled and the judgment entered by the court now has a *res judicata* effect on the State's ability to challenge

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112. *Id.* ¶ 14.

113. *Id.* ¶ 18.

114. Second Amended Petition of State, ¶ 2, *State v. Grace* (La. 19th J.D.C. 1945) (No. 21,076) (on file with the La. Dep't of Justice).

115. The relevant resolutions accompany the suit's settlement documents in the public records of the Louisiana Department of Natural Resources associated with State Leases 494 and 495.

116. Settlement Agreement, ¶ 6(a)-(b), *State v. Grace* (La. 19th J.D.C. 1945) (No. 21,076) (on file with the La. Dep't of Justice).

117. *Id.* ¶ 6(d).

118. Judgment, at 1-2, *State v. Grace* (La. 19th J.D.C. 1945) (No. 21,076) (rendered on May 11, 1945) (on file with the La. Dep't of Justice).

119. *Id.* at 2.

these leases.<sup>120</sup> For this reason, the involvement of James A. Noe, Win or Lose Corporation, or Independent Oil and Gas Company, Inc., as to State Leases 309, 494, and 495 is considered no further. Pursuant to the settlement and judgment, the State ratified the complained-of activities and was compensated for its perceived losses.<sup>121</sup> Effectively, the State has been made whole with regard to these leases, regardless of a finding of wrongdoing by the court.

6. *Roussel v. Noe (La. 16th J.D.C. 1980) (No. 42,338); 274 So.2d 205 (La. App. 1 Cir. 1973)*

On July 27, 1971, Louis J. Roussel, Jr. filed a class action suit in St. Mary Parish against two defendants: former Governor James A. Noe, individually, and the State Mineral Board of the State of Louisiana.<sup>122</sup> Roussel alleged that Noe conspired to utilize his position of trust to obtain mineral interests in State properties, namely State Leases 340 and 341.<sup>123</sup> According to Roussel, the conspiracy was confected through the creation of the Win or Lose Corporation.<sup>124</sup> Although by the time of Roussel's suit in the 1970s, the Win or Lose Corporation—which later changed its name to Independent Oil & Gas Company, Inc.—had been liquidated, Roussel alleged that many of the individual stockholders that gained an interest upon liquidation benefitted from Noe's actions in the awarding of certain State leases and assignments.<sup>125</sup> Roussel sought to have the leases declared

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120. It is not possible to foreclose the ability of the State to raise today matters somewhat related (though not the same) as the issues settled in this case. Such a situation would be dependent upon the similarity of the claims today and the claims in the 1944 litigation. The basic precepts underlying this qualification are the requirements of the exception of *res judicata*. As Maraist and Lemmon have noted, "*res judicata* is applicable to 'all causes of action existing at the time of final judgment arising out of the transaction or occurrence that is the subject matter of the litigation.'" FRANK L. MARAIST, CIVIL PROCEDURE § 6:7, in 1 LOUISIANA CIVIL LAW TREATISE (2d ed.). Thus, under LA. CODE CIV. PROC. art. 927(A)(3), in order for *res judicata* to apply to a matter, the claims must arise out of the same "transaction or occurrence" that was the subject of the original case. It is difficult to conceive of a scenario in which the State would be able to assert claims not originally raised or able to be raised in the original suit, thus making a viable cause of action as to these leases after the 1944 litigation unlikely.

121. A very rough calculation of the inflationary value of this \$10,000.00 figure from 1945 in 2016 dollars is \$134,126.67. *CPI Inflation Calculator*, BUREAU LAB. STAT., data.bls.gov/cgi-bin/cpicalc.pl.

122. See Petition of Louis J. Roussel, ¶ 55, *Roussel v. Noe* (La. 16th J.D.C. 1980) (No. 42,338) (original petition filed on July 27, 1971) (on file with the La. Dep't of Justice). The putative class members were all Louisiana taxpayers.

123. *Id.* ¶¶ 11, 24–25.

124. *Id.* ¶¶ 32, 46.

125. *Id.* ¶¶ 42–43.



null and void, and to require an accounting and reimbursement to the State.<sup>126</sup>

Roussel brought his action based upon his alleged standing as a Louisiana taxpayer.<sup>127</sup> On August 26, 1971, the district court ruled that Roussel, as a taxpayer, had no standing to bring such an action, and that the Attorney General was the only party empowered to bring such a suit.<sup>128</sup> The court further ruled that, because Roussel's suit would necessarily impact the rights of those that had acquired interests in the subject leases by way of assignment, all of the assignees of the challenged leases were necessary parties to the litigation.<sup>129</sup> These rulings led to a dismissal of Roussel's suit by the district court on August 31, 1971.<sup>130</sup>

Following the district court's dismissal of Roussel's suit on exceptions, Roussel appealed to the Louisiana First Circuit Court of Appeal. On review, in *Roussel v. Noe*, the first circuit affirmed the district court's rejection of the class action nature of Roussel's suit.<sup>131</sup> However, the court did find that Roussel was "entitled to proceed as an individual taxpayer."<sup>132</sup> The court further stated that, "the Attorney General may intervene [in Roussel's suit] if he so desires and assert . . . whatever position his judgment dictates is the proper one for the State of Louisiana."<sup>133</sup> This judgment effectively revived Roussel's suit.

The first circuit went on to declare that the State Mineral Board had been improperly joined in the suit against Noe.<sup>134</sup> The reason for this ruling was that the action against the State Mineral Board was a mandamus action seeking the cancellation of the challenged leases. Such a summary proceeding cannot be cumulated with an ordinary proceeding; thus, the two causes of action against Noe could not survive together as one suit. Noting that "[m]andamus does not lie to compel the performance of a discretionary act[.]"<sup>135</sup> the first circuit effectively severed the State Mineral Board as a defendant (and upheld its dismissal in the district court) in the continued prosecution of Roussel's case. It stated that "[t]he State Mineral Board cannot be said to have failed to perform its ministerial duty

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126. *Id.* ¶ 55.

127. *Id.* ¶ 1-2.

128. *See* Reasons for Rulings on Exceptions, at 1-2, *Roussel v. Noe* (La. 16th J.D.C. 1980) (No. 42,338) (filed on Aug. 27, 1971) (on file with the La. Dep't of Justice).

129. *Id.* at 3.

130. *See* Judgment, at 1, *Roussel v. Noe* (La. 16th J.D.C. 1980) (No. 42,338) (signed on Aug. 31, 1971) (on file with the La. Dep't of Justice).

131. 274 So.2d 205 (La. App. 1 Cir. 1973).

132. *Id.* at 209.

133. *Id.*

134. *Id.* at 212-13.

135. *Id.* at 213.

until such time as plaintiff has successfully invalidated Noe's and others' interests in and to the royalties emanating from the subject leases."<sup>136</sup> Yet, Roussel had not proven that any of the challenged leases had been improperly granted. Thus, no mandatory duty on the part of the State Mineral Board to cancel the leases could exist to which a mandamus action could attach. Further, even if such a duty was later found, such an action could not be brought as part of an ordinary proceeding, as mandamus actions employ a separate procedure.<sup>137</sup> Thus, any such demand would have to be brought later in a separate lawsuit.

Finally, the first circuit affirmed the district court's holding that parties holding interests in the leases by way of assignment must be joined as parties to the lawsuit.<sup>138</sup> Thus, in order to continue this action, Roussel was required to add as defendant parties numerous other interest holders in the leases.

On remand, Roussel continued the prosecution of his case. To begin, Roussel amended his petition to join multiple defendants that claimed an interest in State Leases 340 and 341.<sup>139</sup> Among the newly named defendants was the State of Louisiana, represented by the State Mineral Board.<sup>140</sup> Roussel again amended his petition on April 29, 1974, to add additional defendants with interests in the subject leases.<sup>141</sup>

Once again, the State and the State Mineral Board were dismissed from the litigation on exceptions of no right of action.<sup>142</sup> Although The Texas Company was also dismissed under a no cause exception,<sup>143</sup> the remaining defendants were not dismissed, thus allowing the suit to continue.<sup>144</sup>

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136. *Id.*

137. FRANK L. MARAIST, CIVIL PROCEDURE § 5.3, *in* 1 LOUISIANA CIVIL LAW TREATISE (2d ed.).

138. *Roussel v. Noe*, 274 So.2d 205, 211 (La. App. 1 Cir. 1973).

139. Amended Petition of Louis J. Roussel, ¶ 8, *Roussel v. Noe* (La. 16th J.D.C. 1980) (No. 42,338) (filed on Sept. 18, 1973) (on file with the La. Dep't of Justice).

140. *Id.*

141. *See* Supplemental and Amending Petition of Louis J. Roussel, ¶ 8, *Roussel v. Noe* (La. 16th J.D.C. 1980) (No. 42,338) (filed on Apr. 29, 1974) (on file with the La. Dep't of Justice).

142. Reasons for Judgment, at 5–6, *Roussel v. Noe* (La. 16th J.D.C. 1980) (No. 42,338) (rendered on May 11, 1977) (on file with the La. Dep't of Justice).

143. *Id.* at 4.

144. *See* Judgment on Dilatory Exceptions of Vagueness, *Roussel v. Noe* (La. 16th J.D.C. 1980) (No. 42, 338) (rendered on August 2, 1977) (on file with the La. Dep't of Justice); Judgement on Dilatory Exceptions of Lack of Procedural Capacity, *Roussel v. Noe* (La. 16th J.D.C. 1980) (No. 42, 338) (rendered on August 2, 1977) (on file with the La. Dep't of Justice).

The next significant activity came on November 21, 1979, when the remaining defendants filed a Motion for Summary Judgment asserting the following:

A) The state mineral leases involved in this case were issued in accordance with the law in effect at the time and neither fraud nor conspiracy was involved.<sup>145</sup>

B) During the relevant period of time, there was no prohibition against defendants or their respective ancestors in the title acquiring an interest in mineral leases.<sup>146</sup>

C) The release and compromise agreements between the State Mineral Board, The Texas Company, Mr. Burton, and Win or Lose Corporation (Independent Oil and Gas Company, Inc.) in 1943 bar prosecution of this suit by Plaintiff as representative of the State of Louisiana.<sup>147</sup>

D) Prosecution of this suit is barred by the well recognized and judicially accepted principle [of] doctrine of estoppel.<sup>148</sup>

Inexplicably at the time, Roussel did not respond to the remaining defendants' Motion for Summary Judgment. Accordingly, the court issued Reasons for Judgment on May 7, 1980, noting that the plaintiff's failure to respond to the Motion for Summary Judgment required a dismissal of the suit, and a Judgment was entered to that effect on June 16, 1980.<sup>149</sup>

Because of Roussel's failure to respond to the Motion for Summary Judgment filed in 1979, there was no consideration of the merits of his claims. This oddity was definitively answered when Roussel published his memoirs in 1997.<sup>150</sup> In his book, Roussel stated that he did not respond to the Motion for Summary Judgment and that he otherwise let the case against State Leases 340 and 341 lapse because of his friendships with

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145. Memorandum in Support of Joint Motion for Summary Judgment, at 46, *Roussel v. Noe* (La. 16th J.D.C. 1980) (No. 42,338) (filed on Nov. 21, 1979) (on file with the La. Dep't of Justice).

146. *Id.* at 51.

147. *Id.* at 54.

148. *Id.* at 60.

149. Reasons for Judgment, *Roussel v. Noe* (La. 16th J.D.C. 1980) (No. 42, 338) (filed on May 7, 1980) (on file with author); Order and Judgment, *Roussel v. Noe* (La. 16th J.D.C. 1980) (No. 42, 338) (filed June 16, 1980) (on file with author).

150. *See generally* LOUIS J. ROUSSEL, JR., *FRIENDS, ENEMIES & VICTIMS: THE PERSONAL SUCCESS OF A SEVENTH-GRADER, THE AUTOBIOGRAPHY OF LOUIS J. ROUSSEL, JR.* (Sheree Kerner ed., 1997).

Earle Christenberry and Seymour Weiss.<sup>151</sup> Thus, Roussel's personal decision explains why there is no substantive ruling on his allegations.<sup>152</sup>

An interesting effect of the *Roussel* suit was that then-Attorney General William Guste filed a substantive brief summarizing the history of the Win or Lose Corporation investigations by the Office of the Attorney General.<sup>153</sup> This brief assessed the chances of the success of such a suit on the merits, looking at the customs of the time and at the available evidence. In this regard, Guste stated that, "this investigation, to date, has produced no legally admissible evidence of fraud."<sup>154</sup> Further, Guste provided that:

At the time of the execution of mineral leases 340 and 341, by the defendant, then Governor, there was no statute prohibiting him from owning stock in a corporation securing oil or gas rights under a State lease granted to another by him. Nor was there a statute which prohibited the governor or any public official from directly bidding for, and as high bidder, securing State mineral leases.<sup>155</sup>

Thus, when this issue was before the courts in the 1970s—more than thirty years closer in time to the events that are the subject of this article—the Attorney General could find neither a factual nor a legal basis to support Roussel's allegations.

Although the Attorney General participated in this matter, his involvement as an amicus, in addition to the State's peripheral involvement in the case as a party defendant, does not preclude the State from bringing an action on these same questions today. However, the above accounts, which are statements of record from the State's chief legal officer at the time, would likely constitute substantial statements against

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151. *Id.* at 89.

152. This point is important to note, as, in his autobiography, Roussel notes that "[t]he suit, accusing the six of cheating the state out of \$250 million was valid and was sent to a state court for trial." *Id.* With this statement, Roussel implies that the first circuit had substantively ruled on his allegations. It did not. As discussed, the first circuit merely ruled on exceptions and allowed the merits of the case to go forward. There was no substantive decision in this case. The "six" that Roussel referred to in the above quote are: Huey P. Long, Oscar K. Allen, James A. Noe, Earle J. Christenberry, Seymour Weiss, and Alice L. Grosjean. *Id.* at 87.

153. Brief for State of Louisiana as Amici Curiae, *Roussel v. Noe* (La. 16th J.D.C. 1980) (No. 42,338), (Nov. 15, 1973) (on file with the La. Dep't of Justice).

154. Brief for State of Louisiana as Amici Curiae at 8, *Roussel v. Noe* (La. 16th J.D.C. 1980) (No. 42,338), (Nov. 15, 1973) (on file with the La. Dep't of Justice).

155. *Id.* at ¶ XXIX.

interest should an action be brought.<sup>156</sup> Such statements against interest would create a substantial evidentiary difficulty for the State in any present-day litigation. Importantly, as has been noted by Gray, this case represented the first and last time that all living parties to the allegedly corrupt mineral leases were available.<sup>157</sup> Many of these individuals were interviewed or deposed by the parties to the litigation without any “smoking gun” to the allegations that have lingered around these leases for so long being identified.<sup>158</sup> Interestingly, should private parties ultimately find merit in Roussel’s claims and be able to remedy what most parties in the 1970s recognized as a substantial lack of evidence, Roussel’s case certainly stands for the proposition that a private party may maintain such an action.

### 7. Summary of the Win or Lose Cases

Although these cases are useful for providing a historical background to the Win or Lose matter, they resulted in little, if any, substantive examination of the actual allegations that Huey P. Long or his colleagues swindled the State through the Win or Lose Corporation’s actions. The *Roussel* case came the closest to substantively addressing these issues. However, because that case never advanced past the procedural stages, there was no definitive outcome. As can be seen throughout this article, the *U.S. v. Noe* matter, though largely unrelated to the Win or Lose issues (i.e., it was a tax evasion case) sheds, through the trial transcript, considerable light on the history and motives of the individuals involved in the Win or Lose matter. With these two exceptions noted, the previous litigation related to the Win or Lose leases is largely uninformative with respect to the issues currently raised. Further, these cases would likely not

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156. With regard to a statement against interest, we here refer to that evidentiary exception to the hearsay rule which Maraist, *et al.*, has described thusly:

Under the Louisiana rule, the statement at the time it was made must have been ‘so far contrary to the declarant’s pecuniary or proprietary interest, or so far tended to subject him to civil or criminal liability, or to render invalid a claim by him against another, that a reasonable man in his position would not have made the statement unless he believed it to be true.’

FRANK L. MARAIST, EVIDENCE AND PROOF § 10.8, *in* 19 LOUISIANA CIVIL LAW TREATISE (2d ed.).

157. Gray Annotation, *supra* note 51, at 39. By way of reference, Gray lists the following individuals who were interviewed in some form or fashion during the course of the Roussel litigation: W.T. Burton; Carl Campbell (former State Land Office employee); Earle J. Christenberry; Dudley G. Couvillon (former SMB Secretary); William A. Romans (former SMB employee); Alice Lee Grosjean Tharpe; George A. Wilson (former Department of Minerals attorney); C.C. Wood (former Special Assistant to Attorney General Eugene Stanley). *Id.* at 39–45.

158. *Id.* at 39.

control any potential action that the State or a private party may attempt to institute against the current Win or Lose interests. Due to the lack of guidance from these cases, the current analysis herein reviews all of the issues anew.

### *B. Historic Attorney General Reviews of the Win or Lose Leases*

In addition to the various lawsuits involving Win or Lose, the Louisiana Attorney General's Office has also examined, on several occasions, the legality and propriety of the corporation's leases. Many of these reviews were to fulfill the campaign promises made by Attorney General Eugene Stanley, who vowed to investigate alleged wrongdoing associated with the letting of State mineral leases.<sup>159</sup> The news coverage of the time reveals difficult relationships between Attorney General Stanley, the State Mineral Board, and Governor Sam Jones. The tension largely centered on whether sufficient evidence existed to bring any actual litigation against the Win or Lose State leases.<sup>160</sup> A brief review of the results of those examinations is contained herein.<sup>161</sup>

#### *1. The 1936 Gardiner Letter*

On February 27, 1936, Special Assistant to the Attorney General Lessley P. Gardiner issued a letter detailing the results of an inquiry into the validity of State Lease 327, one of the Win or Lose leases.<sup>162</sup> Citing Acts 1915, No. 30 (as amended, Acts 1926, No. 315), Gardiner provided that the Governor was vested with the authority to execute State mineral

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159. *Stanley Declares Issue is Freedom Versus Slavery*, MORNING ADVOCATE, Jan. 14, 1938.

160. *Action on Oil Lease Frauds in Louisiana Urged by Gov. Jones*, SHREVEPORT TIMES, May 9, 1943, at 10; B. L. Krebs, *Jones Asks Action on Oil Leases Let by Long Regime*, TIMES-PICAYUNE, May 9, 1943, at 1; *Mineral Board to Hire Special Counsel if Stanley Doesn't Act*, SHREVEPORT TIMES, May 12, 1943, at 2; *Mineral Board to Quiz Stanley at Meeting Today*, SHREVEPORT TIMES, May 20, 1943, at 6; THE ASSOCIATED PRESS, *State Body Asks Special Counsel: Seeks Aid on Oil Leases; Stanley Sees No Fraud*, TIMES-PICAYUNE, May 21, 1943, at 1.

161. This particular review excludes the Attorney General's participation as an amicus curiae in the *Roussel v. Noe* matter. On September 15, 1973, Attorney General William J. Guste, in his amicus brief, noted that the Attorney General's investigation of this matter produced no legally admissible evidence of fraud. Aside from that mention, there is no substantive analysis of the facts that is worthy of review here and that document is thus excluded from this review.

162. Letter from Lessley P. Gardiner, Special Assistant Att'y Gen., to the McGinley Corporation (Feb. 27, 1936) (on file with the La. Dep't of Justice). The letter appears to have originated as an informal Attorney General's Opinion request from a private party, which was answered formally through this letter.

leases to the highest bidder “under such terms and conditions as to him seem proper.”<sup>163</sup> Gardiner also noted that, as to State Lease 327: all formalities were complied with; the bid from W.T. Burton was the only one received for this lease; and the lease was duly executed in his favor.<sup>164</sup> Gardiner’s assessment of the applicable law is accurate and, at the time, the Governor held plenary authority to grant State mineral leases.<sup>165</sup> A review of the public records related to State Lease 327 also indicates that Gardiner’s statements about the bid process were accurate.

## 2. *The 1941 Gensler Memorandum*

On April 16, 1941, Philip Gensler, a Special Assistant Attorney General, authored a memorandum analyzing State Lease 335.<sup>166</sup> Although this memorandum does not so state, it appears to be a preliminary assessment or a status report of ongoing inquiries. With respect to this lease, Gensler concluded that, should a proper investigation be made, The Texas Company would be shown to have known or condoned allegedly inappropriate actions of various officials involved in the granting of State Lease 335.<sup>167</sup> Therefore, it was not an innocent third party purchaser of its rights in the lease.<sup>168</sup> However, due to a lack of evidence, Gensler stopped short of concluding that actual fraud was involved in the granting of State Lease 335. Gensler also noted that, should a suit to cancel these leases be instituted, the suit would have to be filed against W.T. Burton, Delta Development Company, the Land Investment Company, The Texas Company, and the Win or Lose Oil Corporation—by then, the Independent Oil and Gas Company, Inc.<sup>169</sup> With the foregoing in mind, Gensler noted that further investigation of his preliminary findings should be made.<sup>170</sup> Additionally, if evidence proving fraud could not be obtained, then the continued viability of State Lease 335 should be examined from the perspective of reasonable development of the lease as required by the law.<sup>171</sup>

Gensler essentially deferred the questions of illegality to the Crime Commission and made no legally binding conclusions. Certainly, his

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163. *Id.* at 1.

164. *Id.*

165. See William O. Bonin, *Public Mineral Leasing in Louisiana*, 27 TUL. L. REV. 246, 246–47 (1953).

166. Memorandum from Philip Gensler, Special Assistant Att’y Gen. (Apr. 16, 1941) (describing the result of an investigation of State Lease No. 335) (on file with the La. Dep’t of Justice) [hereinafter Gensler Memorandum].

167. *Id.* at 10–11.

168. *Id.* at 11.

169. *Id.*

170. *Id.*

171. *Id.*

observation that The Texas Company may not have acquired its interest in State Lease 335 is intriguing and would undermine a claim that The Texas Company—later Texaco—held its interests in this lease in good faith.<sup>172</sup> However, Gensler provides no evidence to support this allegation. In fact, he even admits that, absent such evidence, there is no basis for attacking the legality of the lease based upon this analysis.<sup>173</sup>

### 3. The 1941 Perrault Memorandum and Analysis

Shortly after the release of Gensler's memorandum, Second Assistant Attorney General W.C. Perrault issued a memorandum to Attorney General Eugene Stanley on July 15, 1941, detailing many of Gensler's arguments.<sup>174</sup> As an initial matter, Perrault stated that, "[a] number of suspicious circumstances attended the execution of the . . . leases."<sup>175</sup> The State Leases examined by Perrault were State Leases 309, 318, 323, 334, 335, 340, 341, and 344.<sup>176</sup> Perrault provided that the original lessee made large profits by the assignment of some of the leases involved in this inquiry.<sup>177</sup> Nonetheless, such a scenario does not, in and of itself, make the lease transactions illegal.

However, Perrault did identify specific problems with the subject leases. There were some instances where "bids accepted by the State were typewritten and the amount of the bid filled in blank places on the

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172. The absence of evidence to support an allegation of bad faith becomes important, as discussed at length below, when considering what rights Texaco and its subsequent iterations have in such leases today. It should be noted that the Texaco Global Settlement Agreement in 1994 likely undermines pursuing any litigation theory related to Texaco's bad faith as to any of the leases covered by that agreement from 1994 to the present. *See* discussion *infra* Part V.C.

173. Gensler Memorandum, *supra* note 166, at 11.

174. Memorandum from W.C. Perrault, Second Assistant Att'y Gen., to Eugene Stanley, La. Att'y Gen. (July 15, 1941) (regarding State Mineral Leases Nos. 309, 318, 323, 334, 335, 340, 341, and 344) (on file with the La. Dep't of Justice) [hereinafter Perrault Memorandum].

175. *Id.* at 1.

176. *Id.*

177. *Id.* It is important to note that, although this information is interesting, there is nothing unlawful about a State lessee obtaining a lease and then selling, whether immediately or at some point after the awarding of the lease, rights in the lease to third parties at a profit. *See* LA. REV. STAT. ANN. § 30:128 (stating that any transfer or assignment of state owned mineral rights requires State Mineral and Energy Board approval; noting that the statute contains no restrictions as to profit making on such assignments).



typewritten copy on the day of the acceptance . . . .”<sup>178</sup> In other instances, Perrault states that, “it was questionable if the [State] accepted the best bid . . . .”<sup>179</sup> Perrault also identified other instances “where the best bid was unquestionably not accepted but a lower bid actually accepted . . . .”<sup>180</sup> In addition, Perrault cites instances where an executed lease “carried no cash consideration as required by the advertisement . . . .”<sup>181</sup> and where “only a nominal cash consideration was paid for the lease . . . .”<sup>182</sup> Finally, Perrault states that, “in all of the leases the Win-or-Lose Oil Company, composed principally of officials of the former government, winds up with an interest.”<sup>183</sup>

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178. Perrault Memorandum, *supra* note 174, at 1. For this problem, Perrault references State Leases 318, 334, 335, 340, 341, and 344. *Id.* A reexamination of the bid forms for these leases confirms that the amounts on these bid forms were, indeed, hand written into typed forms. However, unlike Perrault’s conclusion that the, “blank places [were filled in] on the day of the acceptance,” our review of these documents demonstrates that there is no indication as to when these amounts were written into the forms. Thus, we cannot now conclude that this issue identified by Perrault amounts to a problem that would constitute a legal error for the subject leases.

179. *Id.* In this regard, Perrault references State Lease 323. *Id.* A review of the available public records related to this lease does not show any connection to Win or Lose Corporation aside from the fact that the lease was granted by Governor Noe. In addition, this lease is no longer viable. It was released on July 22, 1953. Accordingly, this lease is not considered further.

180. *Id.* Concerning this situation, Perrault references State Lease 335. *Id.* A review of the public records for this lease reflects that only one bid was submitted—that of W.T. Burton. No higher or lower bids for this lease exist.

181. *Id.* An example of this scenario is cited as State Lease 309. *Id.* Perrault is correct that there was no cash bonus paid for State Lease 309. There does not appear to be any explanation for this absence. It is important to note, however, that none of the law related to mineral leasing at the time required such consideration. Act No. 30, § 3, 1915 La. Acts 62, as amended by Act No. 315, 1926 La. Acts 606-07. However, the same law did provide the Governor with plenary authority to accept or reject any bids in his discretion. *Id.* It is thus probable that, as there was no legal requirement for the consideration, and because the Governor had plenary authority to accept or reject bids, he was authorized to waive this requirement if it was not met. This notion is supported by a letter to Governor Allen by Attorney General Porterie in which the Attorney General stresses the plenary authority of the Governor in the granting of mineral leases under the terms and conditions that the Governor, in his discretion, sees fit. Letter from Gaston L. Porterie, La. Att’y Gen., to Oscar K. Allen, La. Governor (Jan. 23, 1936) (on file with the La. Dep’t of Justice). Further, testimony elicited during the *United States v. Noe* trial, discussed *supra*, indicates that the consideration provided for State Lease 309 was the agreement to drill fifty wells rather than paying a cash bonus. *United States v. Noe* Trial Transcript, *supra* note 8, at 62–63 (citing testimony of Leonard M. Levy).

182. Perrault Memorandum, *supra* note 174, at 1. State Lease 323 is cited for this problem. *Id.*

183. *Id.*

Despite the identified problems with these leases, Perrault ultimately concluded that, due to a lack of proof of fraud, the insinuation of fraud from the circumstances was legally insufficient to proceed with judicial action aimed at cancelling these leases.<sup>184</sup> In that regard, Perrault states:

Despite the suspicious circumstances surrounding the execution of these leases, as above pointed out, I am not prepared to say that fraud entered into these transactions. Investigation thus far made has unearthed none, and no further evidence can be secured except from those who may have participated in the fraud, if any fraud existed. I think, therefore, that these leases cannot successfully be attacked for fraud because of lack of proof. Mere suspicion or probability of its existence are insufficient under the law.<sup>185</sup>

This statement appears to be the most significant indictment of the conspiracy theories surrounding the Win or Lose leases existing since its inception in the 1930s. There is no reasonable basis on which to doubt or deny Perrault's assessment of the evidentiary problems for making a case for fraud. Bound by the laws on fraud in place at the time, any new suit to prove what Perrault did not believe could be proven in 1941 likely would be impossible today. As Perrault correctly states, mere insinuation and

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184. *Id.*

185. *Id.* At the end of this statement, Perrault cites to "9 La. Dig., Section 50, Page 95, citing numerous cases." Although the page numbers differ today, the general citation, "9 La. Dig., Section 50," remains the same as it was in 1941. It is from the Louisiana Digest, and it deals with the presumptions and burdens of proof for fraud. Rather than simply citing to this section of the Louisiana Digest, it seems more appropriate to actually cite some of the cases that Perrault would have seen in the Digest in 1941. In *Angichiodo v. Cerami*, 35 F. Supp. 359, 369 (W.D. La. 1940), a Louisiana federal court noted that, "[f]raud is never imputed except on legal and convincing evidence produced by the one alleging it." In addition, the Louisiana Supreme Court, in *Mutual Life Ins. Co. of N.Y. v. Rachal*, 166 So. 129, 130 (La. 1936), noted that, "[f]raud is never presumed, and the burden rests upon the person alleging fraud to prove it." See also *Garnier v. Aetna Ins. Co. of Hartford, Conn.*, 159 So. 705 (La. 1935); *Strauss v. Ins. Co. of N. Am.*, 102 So. 861 (La. 1925); *Hamilton v. Hamilton*, 57 So. 935 (La. 1912); *Breaux v. Broussard*, 40 So. 639 (La. 1906). In addition to these cases, in 1941, there were an additional twelve appellate court cases in the Louisiana Digest in which the various courts espoused the same principle. The purpose of this examination of Perrault's citation is to note that Perrault's conclusion that fraud is difficult to prove and cannot be based upon supposition was soundly based upon the Louisiana jurisprudence at the time. The same basic standard of proof for fraud applies today. See, e.g., *Hall v. Arkansas-Louisiana Gas Co.*, 368 So.2d 984, 993 (La. 1978), *aff'd in part and vacated in part on other grounds*, 452 U.S. 571 (1981) ("It is well settled that one who alleges fraud has the burden of establishing it by legal and convincing evidence since fraud is never presumed, and that to establish fraud exceptionally strong proof must be adduced.").

innuendo that something is amiss with the subject leases does not create a colorable basis upon which to bring a fraud suit. The missing component to bringing such a suit is, as Perrault notes, evidence from those involved in the fraud. In 1941, many of the key individuals noted in Part II of this article were alive and able to interview. Thus, in 1941, with the exceptions of Huey P. Long and Oscar K. Allen, the Louisiana Attorney General's Office could have probed further into the fraud allegations by collecting information from living informants. Today, the necessary individuals to take a mere allegation to a colorable legal claim are deceased—the missing evidence is forever lost. This latter statement is tempered by the existence of some available testimony from the 1942 *U.S. v. Noe* matter and some depositions that were taken in the 1970s for the *Roussel v. Noe* matter. Yet, as was shown in the reviews of these cases above, even questioning by federal prosecutors in the *U.S. v. Noe* trial and by private attorneys in preparation for the *Roussel v. Noe* case elicited no evidence of fraud related to the State's leasing to W.T. Burton or the Win or Lose Corporation.<sup>186</sup>

In defense of the Louisiana Attorney General's Office in 1941, a later letter by Special Assistant Attorney General Philip Gensler suggests that the primary reason for no subsequent investigation of those alive with knowledge of the acquisition of the subject leases appears to have been due to lack of support.<sup>187</sup> In this regard, Gensler stated that, “[d]ue to the limited personnel of our office and lack of appropriation, the Louisiana Attorney General's Office has not been offered the opportunity of making thorough investigation of these leases . . . .”<sup>188</sup> This statement illustrates a recurring theme—that any investigation of this matter takes time and money—that resonates throughout the history of the Win or Lose matter.<sup>189</sup>

Further, Perrault noted that as early as 1941, most of the subject mineral leases were held by third parties, making their cancellation even more difficult.<sup>190</sup> With respect to this problem, Perrault stated:

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186. See generally discussion *supra* part II.A.3.

187. Letter from Philip Gensler, Special Assistant Att'y Gen., to State Mineral Board (Oct. 31, 1941) (on file with the La. Dep't of Justice) [hereinafter Gensler Letter].

188. *Id.* at 2.

189. See, e.g., La. H.R. 88 (2012) (proposing that the Louisiana Attorney General's Office investigate mineral lease contracts with the Win or Lose Corporation, which was ultimately defeated in the House Judiciary Committee on May 17, 2012).

190. Perrault Memorandum, *supra* note 174, at 1.

All of the leases are presently owned by third persons who, presumably at least, dealt on the faith of the public records in acquiring them, and they cannot be set aside to the prejudice of these persons unless it be shown by competent evidence that they had prior knowledge of any fraud practiced upon the State by the original lessees. We have no such proof.<sup>191</sup>

Therefore, the same problem, with an additional seventy-plus years of assignments and other transfers of the subject leases, is a remaining obstacle to any State action today.

#### 4. *The 1937 Wood Memorandum*

On July 6, 1937, C.C. Wood, of the Office of the Attorney General, issued a memorandum analyzing potential problems with State Lease 318.<sup>192</sup> In this memorandum, Wood notes that there is no term identified in State Lease 318.<sup>193</sup> However, he also stated that, while this is an odd omission from the lease, there are other provisions of the lease that trigger payments from the lessor, W.T. Burton, in order to maintain the lease in the event that no production is underway.<sup>194</sup> Interestingly, Wood provided that, “[a]ccording to the information that we have, a conspiracy was confected between Burton and James A. Noe whereby Burton was to secure the lease . . . [and] assign the lease to The Texas Company . . . .”<sup>195</sup> Further, Wood discussed how the private interests in this lease were to be divided among Burton, The Texas Company, and Win or Lose.<sup>196</sup> Although Wood specifically referred to “information that we have,”<sup>197</sup> he did not elaborate on what this information was. Research on this matter has failed to identify any information in support of this conspiracy claim. Wood also alluded to the possibility that the information that he refers to came by word-of-mouth from someone who witnessed Burton’s grand jury testimony.<sup>198</sup> However, there is nothing concrete in Wood’s memorandum on this point and efforts to locate information related to the grand jury have been unsuccessful.

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191. *Id.* at 1.

192. Memorandum from C.C. Wood, Special Assistant Att’y Gen. (July 6, 1937) (describing the results of an investigation of State Lease No. 318) (on file with the La. Dep’t of Justice) [hereinafter Wood Memorandum].

193. *Id.* at 1.

194. *Id.* at 1–2.

195. *Id.* at 3.

196. *Id.*

197. *Id.*

198. Wood Memorandum, *supra* note 192, at 4.

Additionally, Wood identified some of the proof problems inherent in the conspiracy allegation. For instance, he referenced Burton's grand jury testimony. Burton allegedly stated that Governor Allen, although a participant in the lease later through Win or Lose, did not know of the connection that he would later have to the lease that he originally granted to Burton.<sup>199</sup> Wood believed that this lack of a connection to Allen was defeating of a viable conspiracy claim.<sup>200</sup> In this regard, he stated that: "[i]f we could show that Allen was also a member of this conspiracy, we feel certain that this lease could be set aside as having been obtained by fraudulent means, but unless we can show that, the possibility of success along this course is remote."<sup>201</sup> Presumably, the primary reason that such involvement could not be proven was due to Allen's untimely death; any testimony regarding his involvement would likely be subject to hearsay exceptions.

Wood also provided, if it could be proven that The Texas Company had participated in the actual acquisition of State Lease 318 rather than merely being a third party acquirer of an interest from Burton, then the lease may be voidable.<sup>202</sup> However, aside from suggesting that The Texas Company may have been induced not to bid on the lease in order to keep the actual lease price artificially low, Wood offered no other explanation of The Texas Company's involvement in the letting of State Lease 318. Specifically, Wood did not refer to any evidence, nor has any such evidence since been identified to support this theory.<sup>203</sup>

Wood's memorandum also included several other theories for invalidating State Lease 318, including, but not limited to, cancelling the lease for the lessee's failure to timely pay rentals.<sup>204</sup> Although State Lease 318 was the subject of the *State v. Burton* suit,<sup>205</sup> that suit was dismissed upon a settlement to which the State was a party.<sup>206</sup> Thus, even if Wood's theories for cancelling the lease were correct, the 1943 settlement over the lease effectively estops the State from now complaining of the results of that settlement, which included the continued existence of the lease. However, Wood did not know this at the time, as the settlement occurred six years after he authored his memorandum.

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199. *Id.*

200. *Id.*

201. *Id.*

202. *Id.*

203. *Id.*

204. Wood Memorandum, *supra* note 192, at 5-7.

205. (La. 14th J.D.C. 1944) (No. 22, 664) (on file with the La. Dep't of Justice).

206. See Joint Motion for Dismissal, *supra* note 104.

Nonetheless, State Lease 318 no longer exists; it was released in portions, concluding with a final release in 1975.<sup>207</sup> Since the lease was allowed to continue after the settlement of the *State v. Burton* litigation, and the State obtained benefits from its continuance until its release in 1975, there is nothing to cancel. Therefore, it is inadvisable to seek rescission of the rights that flowed from the lease when it was extant, if such is even a possibility.

### 5. The 1941 Gay Memorandum

On October 8, 1941, Edward J. Gay, Jr., with the Louisiana Attorney General's Office, produced a memorandum analyzing the legality and validity of State Lease 340.<sup>208</sup> In this review, Gay noted that the lease, which was granted to W.T. Burton by Governor James A. Noe on February 7, 1936, did not include an overriding royalty.<sup>209</sup> According to Gay, the overriding royalty of up to \$500,000 from a 1/128th share of production was added by way of a rider after the submission of the original bid.<sup>210</sup> However, it is unclear upon what Gay based this conclusion regarding the later addition of a rider—a document that, today, is often made a part of an original lease document. Gay properly noted that Burton's overriding royalty offer to the State was above and beyond the mandatory 12.5% royalty.<sup>211</sup> When it was submitted, it was substantially less than that of other bidders, particularly the bid of Gulf Company, which included an

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207. Affidavit of Lease Cancellation, State Lease 318 (on file with the La. Dep't of Justice).

208. Memorandum from Edward J. Gay, Jr., Office of the Att'y Gen. (Oct. 8, 1941) (describing the results of an investigation of State Lease No. 340) (on file with the La. Dep't of Justice) [hereinafter Gay Memorandum].

209. *Id.* at 5. The term "overriding royalty," which differs from royalties that are typically received by a landowner as the grantor of a mineral lease, is defined as:

[A]n interest carved out of the lessee's working interest. It entitles its owner to a fraction of production free of any production or operating expense, but not free of production or severance tax levied on production. An overriding royalty may be created by a grant or by reservation. Commonly, an override is reserved by the assignor in a farmout agreement or other assignment. An override's duration corresponds to that of the lease from which it was created.

UNIV. OF TEX., *supra* note 54, at 191. See also WILLIAMS & MEYERS, *supra* note 54, at 410. It is important to note, because of the reality that many of the Win or Lose leases are subject to overrides in favor of various right holders, that such an activity was not and is not uncommon in Louisiana (or elsewhere). See John M. McCollam, *A Primer for the Practice of Mineral Law Under the New Louisiana Mineral Code*, 50 TUL. L. REV. 732, 828 (1976).

210. Gay Memorandum, *supra* note 208, at 2, 5.

211. *Id.* at 5.

overriding royalty of \$1,250,000.00.<sup>212</sup> However, none of the other bidders on State Lease 340 offered a bonus or a rental to the State that was as large as that offered by Burton.<sup>213</sup> Because of the differences between the overriding royalty offers and the bonus and rental submitted by the bidders for State Lease 340, Gay did not, and likely could not, make a determination as to whether the lease to Burton constituted the lease that was most advantageous to the State. However, he did note that, “[t]he main point to be considered, therefore, is whether or not the lease was granted to the person submitting the most advantageous bid as required by law.”<sup>214</sup> There is no indication from this memorandum whether the “most advantageous” analysis was ever undertaken. Gay certainly does not make any determination or declaration that the Burton bid or the subsequent lease was invalid, but merely notes the possible irregularities of the late and low overriding royalty. Ultimately, Gay never answers whether this bid was most advantageous to the State considering the higher and timely bonus and rental of Gulf Company.<sup>215</sup>

#### 6. *The 1941 Gensler Letter*

Philip Gensler’s letter is addressed to the State Mineral Board and appears to summarize the findings reported in the previously discussed 1941 Perrault Memorandum to Attorney General Stanley.<sup>216</sup>

For an unstated reason, Gensler’s October 31, 1941 letter to the Board refers to more State leases being reviewed than those covered by the Perrault Memorandum.<sup>217</sup> A review of the public records clearly indicates that W.T. Burton’s involvement in the leasing was not the reason for the review of these additional leases. Although he was the lessee of State Lease 42, he was not the lessee on any of the additional leases that were not considered in the Perrault Memorandum.<sup>218</sup> A letter by Special Assistant Attorney General Edward L. Gladney, Jr., to Major B.A. Hardey, Chairman of the State Mineral Board provides a probable answer to why these additional leases

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212. *Id.*

213. *Id.*

214. *Id.*

215. *Id.*

216. *See* Gensler Letter, *supra* note 187.

217. *Compare id.* at 1, with Perrault Memorandum, *supra* note 174, at 1. The additional leases not covered in the Perrault Memorandum include: State Lease Nos. 42, 50, 164, 194, 199, 301, 331, 347, and 356.

218. In addition to the Burton leases noted, *infra*, W.T. Burton was also the State’s lessee on the following State Leases granted prior to 1941 (the date of the Gensler Letter and the Perrault Memorandum): 321, 322, 326, 327, 330, 332, 336, and 337. None of these leases were assigned to the Win or Lose Corporation or any of its officers.

were reviewed by the Louisiana Attorney General's Office.<sup>219</sup> In the letter, Gladney references "sixteen leases which the Attorney General was requested 'to take action immediately to recover for the State of Louisiana all profits or overriding royalties fraudulently or illegally obtained in connection with any mineral lease covering State owned property . . .'"<sup>220</sup> Apparently, these additional leases were part of a broader request from the State Mineral Board for the Attorney General to review a collection of leases for possible illegalities or underdevelopment.<sup>221</sup> Thus, Gensler's 1941 letter to the State Mineral Board would constitute an interim report on each of these reviews.

However, Gensler stated that thus far, no evidence of fraud had been found.<sup>222</sup> Gensler stated, "[i]n practically all of these instances, the State has received rentals and royalties from said leases."<sup>223</sup> This point cannot be overstated. Pursuant to Acts 1915, No. 30, as amended by Acts 1926, No. 315, the State could not lease its property for oil and gas production for less than a one-eighth royalty reserved to the State.<sup>224</sup> The royalty rates at which the State would be paid for each of the leases noted in the Perrault Memorandum were all one-eighth—precisely consistent with what the law required.<sup>225</sup> In other words, the State received all of the royalties that it was due as provided by law, regardless of whether and to whom the leases were awarded or assigned.

Based upon the preliminary results reported in this letter, Gensler concluded that the Louisiana Attorney General's Office is ". . . not prepared to prove fraud by legally admissible evidence with reference to the above referred to suspicious circumstances."<sup>226</sup> In addition to this assessment, Gensler goes on to note that: "[m]ost of these leases are held by third parties at the present time and, in order to cancel same as of their inception, fraud would have to be shown in the present holders, or that they did not acquire

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219. See Letter from Edward L. Gladney, Jr., Special Assistant Att'y Gen., to Major B.A. Hardey, Chairman, State Mineral Board (Apr. 29, 1943) (on file with the La. Dep't of Justice).

220. *Id.* at 1.

221. The broader inquiry by the Attorney General is discussed in an article in THE TIMES-PICAYUNE newspaper in 1940. In this article, Attorney General Stanley details his intent to investigate numerous pre-State Mineral Board leases for unlawful activity and failure to develop the leases. THE ASSOCIATED PRESS, *Stanley Plans Suits for Hundred Million in State Oil Leases*, TIMES-PICAYUNE, Aug. 15, 1940, at 1.

222. Gensler Letter, *supra* note 187, at 2.

223. *Id.*

224. See Act No. 30, 1915 La. Acts 62, as amended by Act No. 315, 1926 La. Acts 606.

225. See Act No. 315, 1926 La. Acts 606-07.

226. Gensler Letter, *supra* note 187, at 2.



in good faith on the face of the public records.”<sup>227</sup> Particularly, if there had been any fraud in the acquisition of the subject leases from the State, the parties with an interest in the leases as of the date of the letter that relied on the public records, as Louisiana law encourages and permits,<sup>228</sup> would have “clean hands.” Therefore, it could not be stripped of their rights under these leases that were acquired in good faith.

The letter goes on to discuss matters related to whether these leases had been properly developed as of the date of the letter. Gensler admitted that the Louisiana Attorney General’s Office is not equipped to make such assessments and thus, recommended that more information be supplied to the State Mineral Board by the State Geologist, the State Board of Engineers, and the Conservation Department to answer this question.<sup>229</sup>

### 7. *The 1943 Gladney Letter*

On May 18, 1943, Edward L. Gladney, Jr., Special Assistant Attorney General, authored a letter to the State Mineral Board detailing the validity and viability of State Lease 309.<sup>230</sup> Much like the earlier analyses of the Win or Lose leases, Gladney concluded as to State Lease 309 that, “[t]here is no evidence to indicate fraud in connection with this lease and its amendment. Certainly a suit should not be filed based upon nothing more than ‘suspicious circumstances.’”<sup>231</sup>

State Lease 309 was a lease obtained by James A. Noe in his own name.<sup>232</sup> Noe was not the Governor at the time, but rather was a Louisiana State Senator. Although this lease is not a W.T. Burton lease, it eventually became part of the Win or Lose assets.<sup>233</sup>

In addition, Gladney reviewed the applicable law at the time. Regarding whether Noe was a proper lessee and whether Governor Allen, as a shareholder in the Win or Lose Corporation, could authorize such a lease, Gladney found that:

At no time during any of the foregoing transactions [(i.e., the

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227. *Id.*

228. See Warren L. Mengis, *The Public Records Doctrine Revisited*, Presentation at the 37th Annual Louisiana Mineral Law Institute (Mar. 29, 1990).

229. Gensler Letter, *supra* note 187, at 2–3.

230. See generally Letter from Edward L. Gladney, Jr., Special Assistant Att’y Gen., to State Mineral Board (May 18, 1943) (on file with the La. Dep’t of Justice) [hereinafter Gladney Letter].

231. *Id.* at 15.

232. *Id.* at 2–3.

233. Noe assigned his interests in State Lease 309 “to the Win or Lose Corporation on November 20, 1934, in exchange for [ninety-eight] shares of its stock.” *Id.* at 5.

bidding and leasing process)] was there a prohibitory statute that rendered Noe (State Senator from May 9, 1932 to February 26, 1935, and Lieutenant Governor from February 26, 1935 to January 28, 1936, and Governor from January 28, 1936 to May 12, 1936) ineligible to bid on and secure a lease on State mineral lands. Nor was Governor Allen, a shareholder in the Win or Lose Corporation, enjoined by statute from owning stock in a corporation securing oil or gas rights under a State lease granted to another by him.<sup>234</sup>

This analysis led Gladney to the conclusion that there were no illegal or unlawful actions that resulted in the leasing of State Lease 309.<sup>235</sup>

In addition to the initial leasing of State Lease 309, subsequent questions were raised regarding whether sufficient development of the lease had occurred to maintain the 3,300 original acres of the lease.<sup>236</sup> During the issuance of the lease in 1934 and the amendment of the lease related to possible development insufficiencies in 1935, six wells were drilled. Subsequent to the amendment, Gladney notes that an additional 35 wells were drilled on the property by May 11, 1943, for which the State received \$159,137.85 in royalties.<sup>237</sup> Thus, concluding that there had been sufficient development of the lease to maintain it as to the entire acreage.<sup>238</sup>

Gladney also went to great lengths to examine the validity of the amended agreement to and the assignments of State Lease 309.<sup>239</sup> The latter is of particular import to the current inquiry, as it is through assignments that the Win or Lose Corporation acquired its interests in all of the leases noted in this report. Gladney, after reviewing the circumstances surrounding these assignments and the amendment, found

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234. *Id.* at 15.

235. *Id.*; *see also id.* at 9, in which Gladney notes that

We are not aware of any charge of fraud in the granting of the lease on October 23, 1934. But on [sic] irregularity has been noted. It is, in our opinion, of no legal consequence. Noe's bid failed to respond to the published notice in that it did not offer to the State a bonus.

With regard to this "irregularity Gladney noted that, because the main aim of the lease was development and the acquisition of royalties by the State, it could not be said that the lack of a bonus was problematic and that, regardless of the lack of adherence to the notice, it was well within Governor Allen's discretion to grant the lease if he believed such a bid was in the best interests of the State. *Id.* at 9–10.

236. *Id.* at 5–9.

237. *Id.* at 9. A very rough calculation of the inflationary value of this \$159,137.85 figure from 1943 in 2016 dollars is \$2,220,828.49. In addition, Gladney notes that the State also received \$73,500.00 during this period in rentals from State Lease 309 (or \$1,025,720.12 in 2016 dollars). *Id.* *CPI Inflation Calculator*, BUREAU LAB. STAT., [data.bls.gov/cgi-bin/cpicalc.pl \[https://perma.cc/5VUN-7XQ7\]](https://perma.cc/5VUN-7XQ7).

238. Gladney Letter, *supra* note 230, at 9.

239. *Id.* at 11–15.

no legal error sufficient to invalidate the lease.<sup>240</sup> Further, Gladney stated that, with regard to a State Mineral Board's resolution seeking that the Attorney General, "recover for the State 'all profits or overriding royalties fraudulently or illegally obtained . . .'"<sup>241</sup>

In analyzing State Lease 309, problems concerning recovery were also expressed. Gladney characterized these problems, by stating:

Unless and until the lease be annulled and [set] aside, we can conceive of no legal theory under which the State would have a right to participate in the profits derived from the sale of the lessee's interest. Even if the contract is invalidated, we can find no precedent in Louisiana jurisprudence which [sic] would permit recovery by the State of profits from the transaction to which it is not a party.<sup>242</sup>

As is evident from the analysis of numerous legal theories, the same lack of privity between the State and the third party assignees and others exist today as it did in 1943. Thus, the same problem of recovery exists.<sup>243</sup>

Also important in the 1943 Gladney Memorandum is a discussion of Gensler's 1941 Memorandum analyzing the validity of State Lease 309.<sup>244</sup> In this discussion, Gladney acknowledges that Gensler originally called for the filing of suit to annul State Lease 309.<sup>245</sup> However, as Gladney correctly noted, Gensler's analysis was preliminary and the latter called for additional research prior to the filing of such a suit.<sup>246</sup> Gladney's 1943 Memorandum is the additional research called for by Gensler two years before.<sup>247</sup> This more comprehensive examination identified no legal basis on which to challenge State Lease 309, leading Gladney to conclude that "on the basis of all evidence before us . . . a suit by the State could not be successfully maintained and should not be instituted."<sup>248</sup>

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240. *Id.*

241. *Id.* at 13.

242. *Id.*

243. The difference between the current report and Gladney's 1943 Memorandum in terms of the statement that "we can conceive of no legal theory . . ." is that, rather than Gladney's conclusory statement regarding a lack of a legal theory, this article, examines the possible applicability of a panoply of potential theories to the facts of this matter.

244. Gladney Letter, *supra* note 230, at 16.

245. *Id.*

246. *Id.*

247. *Id.*

248. *Id.* at 17.

### III. IMPLICATED LEASES

The historic litigation related to the Win or Lose Corporation made few substantive inquiries. Aside from some of the tangential matters addressed in the cases above, the main questions still remain: (1) whether certain State leases issued during the gubernatorial terms of Oscar K. Allen and James A. Noe are lawful and valid leases; (2) if the leases are not lawful and valid, what can be done to cancel the leases today and whether such action by the State is advisable; and (3) regardless if the leases were lawful or valid, whether the State was fairly and properly compensated under the leases. In order to answer these questions, the implicated leases must be identified and the field of inquiry must be narrowed to define the leases to which these questions should apply.

#### *A. State Leases Involved in the Win or Lose Matter*

A comprehensive review of Louisiana's public records has identified which parties held the subject State leases. No leases identified Win or Lose as the original lessee from the State. Further, Win or Lose, Huey P. Long, Oscar K. Allen, Seymour Weiss, and Earle Christenberry were never direct lessees from the State. The only individuals identified in Part II of this article with a direct lessor-lessee relationship with the State were W.T. Burton, James A. Noe, and, much later, Independent Oil & Gas Company.

Further research has revealed that State Leases 309, 318, 334, 335, 340, 341, 343, and 344, were in part, held by or assigned to James A. Noe, Seymour Weiss, Earle Christenberry, or Win or Lose Corporation during the period between the formation of the Win or Lose Corporation and the end of James A. Noe's term as governor. It is well documented that Noe's

gubernatorial successor, Richard W. Leche, was unfriendly to Noe;<sup>249</sup> thus, making it unlikely that the former would have participated in or allowed Noe to skirt the law and illicitly acquire mineral leases from the State. It is doubtful that any undue influence of the Office of the Governor bore on mineral leases in favor of Win or Lose Corporation following Noe's departure. Finally, Act No. 93 of 1936 substantially curtailed the plenary authority of the Governor of Louisiana regarding the issuance of mineral leases on State lands. This Act established the Louisiana State Mineral Board and vested leasing authority under the auspices of that body.<sup>250</sup> Following the enactment of this law, which went into force on June 26, 1936, the Governor could no longer unilaterally issue State mineral leases, whether those issuances were based on the State's best interests or the currying of political favor. Accordingly, with the Long, Allen, and Noe cronyism gone and the State Mineral Board serving as a check on the Governor's leasing power, there is no compelling reason to examine the legality of post-1936 leases.

#### *B Leases That Need No Examination*

There are several leases, though initially appearing to be related to the Win or Lose matter, that do not merit any examination. These include leases that predate the Win or Lose period but were held by someone with a later-acquired interest in the Win or Lose leases or corporation, and also

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249. Governor Leche ascended quickly from relative obscurity. He was Huey P. Long's campaign manager in the Second Congressional District in 1930; he became secretary to Governor O.K. Allen, and by 1934, he was appointed to the Orleans Parish Court of Appeal. SINDLER, *supra* note 28, at 119. After Huey Long's assassination in 1935, the Long political machine almost immediately broke apart. A split occurred in the Long machine, resulting in two major factions, each lead by a triumvirate of men. KANE, *supra* note 28, at 149; SINDLER, *supra* note 28, at 118; WHITE, *supra* note 12, at 268–69. The Reverend G.L.K. Smith, Earle J. Christenberry, and James Noe comprised the faction that held to Huey Long's Share-Our-Wealth economics as well as his anti-New Deal, anti-Roosevelt policies. The second faction, led by Robert Maestri, Seymour Weiss, and Abe Shushan, was the more conservative faction, seeking to preserve the political machine above all else. KANE, *supra* note 28, at 444. It was the latter faction that supported Leche for governor. James A. Noe had the chance to route Leche in his own run for governor, especially after O.K. Allen's death. However, many of Noe's initial supporters (especially G.L.K. Smith and Seymour Weiss) turned their backs on him in favor of Leche's candidacy. Although Noe eventually made peace with these people and even secured a seat as a Louisiana State Senator in the election, there was resentment between himself and the others from 1936 forward. McManus, *supra* note 10, at 27–33.

250. The State Mineral Board is now officially known as the Louisiana State Mineral and Energy Board (SMEB)—a name change that occurred pursuant to Act No. 196, 2009 La. Acts. 1981 (currently LA. REV. STAT. ANN. § 30:121 (2009)).

leases that have lapsed and can no longer be challenged. The only leases that remain active and were issued or assigned during Oscar K. Allen's or James A. Noe's terms as governor are State Leases 309, 334, 335, 340, 341, and 344. These leases are the subject of each of the following legal inquiries. However, the legal conclusions as to these leases apply the same as to the lapsed leases.

#### IV. CURRENT LEGAL THEORIES

There is no real legal or factual basis on which the State can claim a share of the lessees' royalties from the Win or Lose leases. Lessee's royalty shares, by their very nature, are that portion of the monies realized by mineral production that are retained by the lessee in exchange for the risks and expenses involved in mineral exploration and production.<sup>251</sup> Under the Louisiana law in force at the time the subject leases were granted, the interest share of production to lessees was set at a maximum of 87.5%.<sup>252</sup> The State had and continues to have no claim, under general mineral law principles, to the lessee's share of mineral production. Thus, the following legal theories, while presented and analyzed here as they apply to these leases, are only viable if it can be proven: (1) that the State has been underpaid its share by the original lessees; or (2) that the leases were issued illegally or were not issued in the best interests of the State. Because the State received its legally-required share of 12.5% from the Win or Lose leases—no less than the same share was received from other winning bidders at the time—it is difficult, if not impossible, to say that the State did not enter into the subject leases with its best interests in mind.

As to the State's interests in the subject leases, the analysis that follows has little practical application to "undoing" the Win or Lose leases. The reason, as stated throughout this article, is that since the State received its proper share of the minerals produced, any legal theories to invalidate these leases are useless because the State cannot show it suffered any harm or damages. Regardless of whether the legal theories reviewed herein are valid, the State still would have received its mandatory share of 12.5%. As is later discussed more fully, it is doubtful whether it would be in the State's best interests to "undo" any of the Win or Lose leases today. While the following analysis may be used by heirs or descendants of the lessees to argue that certain of their interests vis-à-vis each other were not properly granted, such would constitute private causes of action in which the State cannot become involved.

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251. 28 WILLISTON ON CONTRACTS § 70:181 (4th ed. 2015); *see also* LA. REV. STAT. ANN. § 31:123 (2016).

252. Act No. 315, 1926 La. Acts 606.

### A. Malfeasance in Office

The current version of the law prohibiting malfeasance in office, La. R.S. 14:134,<sup>253</sup> is a manifestation of two former statutes. These statutes, which were the laws in force in the 1930s, are: Acts 1912, No. 254 (general malfeasance in office), and R.S. 1870, § 872 (failure of officer to perform duty).<sup>254</sup>

Acts 1912, No. 254 § 1 is substantially similar to the current law in that it prohibits a civil officer from: “willfully fail[ing], refus[ing], or neglect[ing] to perform any official duty required of him . . . or [from] perform[ing] any such duty in an unlawful manner . . . or permit[ting] any . . . officer, under his authority, to [do the same].”<sup>255</sup> However, the former statute is stricter because it contains the phrase “required of him, personally, by law” rather than “any duty lawfully required of him.” According to the comments to La. R.S. 14:134, the current phrasing includes the neglect or wrongful performance of any properly required duty, which would include administrative and departmental rules.<sup>256</sup>

For a violation of the 1912 law to be found, the following elements must be proven: (1) the actor be a civil officer or an officer under a civil officer’s authority as contemplated by the statute; (2) the actor had an official duty required of him, personally, by law; and (3) the actor either neglected to perform such a duty or performed such a duty in an unlawful manner.<sup>257</sup> The remedy that existed under this law in the 1930s was that the officer “shall be deemed guilty of a misdemeanor in office, and, on conviction thereof, shall be punished by being condemned to pay a fine not to exceed five hundred dollars, or to suffer imprisonment, not exceeding six months, or both, at the discretion of the court.”<sup>258</sup>

Thus, a review of the malfeasance in office laws of the time reveals that such a law would not apply to Oscar K. Allen’s or James A. Noe’s

253. LA. REV. STAT. ANN. § 14:134 (enacted in 1980 in modern form).

254. Although the official comments to LA. REV. STAT. ANN. § 14:134 note LA. REV. STAT. ANN. § 872 (1870) as a source for the current law, a review of that section reveals that that former law is essentially a penal provision that would accompany a mandamus action under the current LA. CODE CIV. PROC. art. 3861, *et seq.*, for the failure of a public official to undertake an action that he or she is required to do under the law. All of the Win or Lose-related activities (*i.e.*, leasing, etc.) would not qualify as mandatory duties. *See, e.g.*, *Allen v. St. Tammany Parish Police Jury*, 690 So.2d 150, 153 (La. App. 1 Cir. 2/14/97) (“Mandamus will not lie in matters in which discretion and evaluation of evidence must be exercised.”). Thus, mandamus (and presumably an action under LA. REV. STAT. ANN. § 872 (1870)) would not lie against any party to the Win or Lose matter.

255. Act No. 254, § 1, 1912 La Acts. 563.

256. *See* LA. REV. STAT. ANN. § 14:134, cmt.

257. *See id.*

258. *Id.*

granting of the Win or Lose leases, as there is no proof that they either neglected to perform such a duty or performed such a duty in an unlawful manner. The penalty for violating this law is against the public officer.<sup>259</sup> If proof existed of this activity, the only remedy for the State would be a conviction of one or more governors who died decades ago—an impossibility. The best the State could hope for if it chose to use this theory to attack the Win or Lose leases is that the acts of the long-deceased governors would be found unlawful and thus nullified. As is noted throughout the article, no evidence of such unlawful action has been found. Thus, proving malfeasance in office is highly unlikely.

### *B. Ethical Violations—Ethics Laws in 1936*

Had they happened today, the mineral leasing actions of Oscar K. Allen and James A. Noe during their terms as governor, from 1934 through 1936, would certainly violate current ethics statutes.<sup>260</sup> The problem with applying modern concepts of governmental ethics to the Win or Lose matter is that such laws did not exist in Louisiana at the time of the occurrence of any of the actions reviewed here. Because there were no prohibitions to this activity in the 1930s, neither can it be said that the governors acted unethically (from a legal, not a moral, perspective), nor that they created absolutely null contracts by knowing that they were likely to reap a benefit from the leases.

### *C. Bid Collusion*

Certain allegations have been made that the letting of the Win or Lose leases in the 1930s constituted unlawful bid collusion.<sup>261</sup> Collusive bidding is defined as the illegal attempt by conspiring bidders to circumvent rules and laws drawn to ensure free and competitive bidding.<sup>262</sup> The general idea behind these allegations is that the letting of the Win or Lose leases in such

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259. *Id.*

260. *See, e.g.*, LA. REV. STAT. ANN. § 42:1112 (prohibiting public servants from “participating in a transaction in which he has a personal substantial economic interest”); LA. REV. STAT. ANN. § 42:1116(C) (prohibiting the participation of a regulatory employee “in the sale of goods or services to a person regulated by his public agency”). It is likely that these modern laws would prohibit the sort of public/private activities that led to the Win or Lose leasing.

261. *See, e.g.*, Lee Zurik, *Lee Zurik Investigation: The Texaco Connection*, Fox 8 WVUE, May 15, 2012, fox8live.com/story/18428728/the-texaco-connection [https://perma.cc/MV5R-5VDK] (noting that a former State employee questioned the collusion of parties with regard to some of the Win or Lose-related leases).

262. *See Collusive Bidding Agreement*, BLACK'S LAW DICTIONARY (10th ed. 2014).



a manner—one that ultimately benefited the Win or Lose Corporation—constituted bid collusion as between Allen and Noe and the lessees/assignees of these leases.

In Louisiana, bid collusion is prohibited under the Louisiana Antitrust Law found at La. R.S. 51:121, *et seq.* Although the Louisiana Antitrust Law, in its current iteration, is a law of recent vintage,<sup>263</sup> we note that contemporaneously with the adoption of the Sherman Antitrust Act, 15 U.S.C. §§ 1, *et seq.* (Sherman Act), the Louisiana Legislature passed Act 86 of 1890, containing a provision similar to that found in the Sherman Act. This act stated that every contract or combination in restraint of trade was declared to be illegal.<sup>264</sup>

In 1892, the Legislature enacted Act 90, thereby adding new sections to Act 86 of 1890.<sup>265</sup> Particularly, Act 90 prohibited the formation of trusts and the entering into agreements by individuals, firms, corporations, or other entities in order to influence trade in any manner as to affect prices.<sup>266</sup> The Act also provided for the revocation of the charters of corporations violating the provisions of this Act and prohibited foreign corporations that violated the Act from doing business in this State.<sup>267</sup> Additionally, Act 90, § 7 made explicit that “any contract or agreement in violation of the provisions of this Act, shall be absolutely void.”<sup>268</sup>

Following the same principle, Act 11 of the Extraordinary Legislative Session of 1915 declared illegal, “every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce in the State of Louisiana.”<sup>269</sup> In addition, Act 11 established the penalty for violators at \$5,000, or imprisonment with or without hard labor, not exceeding three years. In addition, the Act provided general procedure guidelines to prosecute the violators. Therefore, Act 11 of 1915 is particularly relevant to this analysis because it would control any combinations, conspiracies, or monopolies that presumably were in violation of the antitrust law in the 1930s.

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263. It was amended to its present form in 2003.

264. Act No. 86 § 1, 1890 La. Act 1806 reads, in relevant part, as follows:  
[E]very contract, combination in the form of trust, or conspiracy, in restraint of trade or commerce to fix or limit the amount or quantity of any article, commodity or merchandise to be manufactured, mined, produced or sold in this State is hereby declared illegal.

265. Act No. 90, 1892 La. Act 120-22.

266. *See id.*

267. *Id.* at §§ 2–3.

268. *Id.* at § 7.

269. In *State v. McClellan*, 98 So. 748, 749 (La. 1923), the Louisiana Supreme Court held Act 90 of 1892 (and thus Act 86 of 1890) to be superseded by Act 11, thus making Act 11 the only law applicable to the current matter.

Two elements must be established to prove that bid collusion is present under Act 11 of 1915: (1) the existence of a contract, combination, or conspiracy; and (2) the restraint of trade or commerce.<sup>270</sup> Note that the reference to “restraint of trade” includes only contracts, combinations, or conspiracies that are unreasonable restraints of trade.<sup>271</sup> Because proving concerted actions is essential to establishing a violation of Act 11, vague allegations of conspiracy or collusion will be vulnerable to dismissal.<sup>272</sup> Thus, the complaint must describe the nature of the alleged conspiracy and that the actions of the co-conspirators resulted in an unreasonable restraint to commerce. Circumstantial evidence has been determined to be admissible in proving an antitrust violation.<sup>273</sup> If bid collusion had in fact taken place in the Win or Lose matter, then the contract involving such collusion would be null and void.<sup>274</sup> Based on a review of the testimony set forth in *U.S. v. Noe*, there is little question that there was a “combination” of individuals in the Win or Lose matter that plotted to obtain mineral leases from the State.<sup>275</sup> Based on the available evidence, however, it is impossible to maintain that any of the actions of the subjects of this article amounted to a “restraint of trade” under Act 11 of 1915. Speaking to the question of whether certain activity constitutes a restraint of trade, the Louisiana Supreme Court has held that:

The test of the illegality of a combination or an attempt to create a monopoly is not what the combination or attempted monopoly has accomplished, but what may be accomplished; not what has been done, but what may be done once the participants get in power to accomplish their purpose. If the natural tendency or probable effect of the combination or monopoly is the restraint of trade by stifling competition or to discourage enterprise and industry, the combination or monopoly is deemed to be detrimental to the public welfare and falls within the teeth of the law.<sup>276</sup>

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270. See Act No. 11, 1915 La. Acts 23.

271. See *Wolf & Co. v. Orleans Lumber Co.*, 149 So. 322, 324 (La. App. Orl. 1933).

272. See also *J.W. Rombach, Inc. v. Parish of Jefferson*, 670 So.2d 1305 (La. App. 5 Cir. 2/14/96) To this point, no Louisiana cases could be identified from the period of the 1930s. Thus, we rely on more recent cases to support this proposition.

273. *Alvord-Polk, Inc. v. F. Schumacher & Co.*, 37 F.3d 996 (3rd Cir. 1994).

274. See, 1980-81 La. Op. Att’y Gen. 29 (1980) (citing *Coleman v. Bossier City*, 305 So.2d 444 (La. 1974)).

275. See generally *United States v. Noe* Trial Transcript, *supra* note 8.

276. *Tooke & Reynolds v. Bastrop Ice & Storage Co.*, 135 So. 239, 243 (La. 1931); see also *Wolf & Co.*, 149 So. at 325.

Thus, the mere fact that the Win or Lose transactions were a result of collusion or concerted action by the subjects of this report is not enough to constitute a “restraint of trade,” nor is the fact that such actions may be distasteful by modern moral standards sufficient to create a legal violation. The law requires not only collusion, but also the creation of a scheme by which competition is stifled. It simply cannot be said that the Win or Lose leases led to any stifling of the exploration for or production of oil and gas in Louisiana. Indeed, that industry boomed several times after the Win or Lose transactions had been consummated.<sup>277</sup> Therefore, bid collusion, as it has been interpreted and applied by the Louisiana courts at the time of the Win or Lose activity, is not applicable to this matter as there was no restraint of trade involved.

Further, because the available evidence indicates that all of the applicable laws at the time were followed with regard to the letting of these leases, an unreasonable restraint of trade did not occur. Certainly, other parties were shut out of operating mineral activities on the leased property, but such was accomplished pursuant to a legislatively created public bid process. To the extent that the leases herein can be said to restrain trade by their nature (*i.e.*, restricting the area to competitive mineral activities), then such is a legally sanctioned restraint, which cannot be unlawful.<sup>278</sup> With the foregoing said, in the interest of completeness, because bid collusion is one of the few laws that can rely on circumstantial evidence as a basis for upsetting contracts, a further examination of the viability of such an action is here undertaken.<sup>279</sup>

Although not specified in Louisiana antitrust law, it has been determined that the prescriptive period for monopoly and antitrust claims is the same as that for tort actions; therefore, the prescriptive period of

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277. See, e.g., Robert Gramling & William R. Freudenburg, *A Closer Look at “Local Control”: Communities, Commodities, and the Collapse of the Coast*, in 55 RURAL SOCIOLOGY 541, 543–46 (1990) (discussing the 1970s-1980s oil boom in Louisiana and the historic rise in oil-related activities and economies in Louisiana from the 1940s through the 1980s); Boris Morozov, *Budgeting Practices and Experiences in Louisiana: From the Traditional 1990s to the Dramatic 2000s*, in 25 J. PUB. BUDGETING, ACCOUNTING & FIN. MGMT. 243, 244–45 (2013) (noting a post-Katrina/Rita oil boom in Louisiana).

278. In this regard, the Louisiana Supreme Court has noted that Act 11 of 1915 was not intended to restrain lawful activity that acts as a restraint to trade. *State v. Am. Sugar Refining Co.*, 71 So. 137, 144–45 (La. 1916).

279. This examination assumes that the circumstances that a lease was awarded by a governor (Allen or Noe) to a business partner (Burton) who immediately reassigned the lease to a joint venture of the two (Win or Lose) would constitute sufficient circumstantial evidence to support a bid collusion cause of action absent any other mitigating problems to proving those circumstances (of which there are several in this situation that are reviewed in Part V).

such a claim is one year.<sup>280</sup> In *State ex rel. Ieyoub v. Bordens, Inc.*,<sup>281</sup> the State filed a *parens patriae* petition against a milk supplier pursuant to the antimonopoly statute, alleging bid-rigging in connection with school milk contracts.<sup>282</sup> The petition alleged a bid-rigging scheme that affected the ability of the schools to receive fair, competitive bids and to pay competitive prices on milk sold to Louisiana schools.<sup>283</sup> The court determined that the one year prescriptive period of the antitrust law, La. R.S. 51:121, *et seq.*, applied to this case.<sup>284</sup> The one-year tort period runs from the time the plaintiff acquired sufficient knowledge of the offense to realize there was an injury.<sup>285</sup> This “sufficient knowledge of the offense” concept is akin to the theory of *contra non valentum*.<sup>286</sup> Although Louisiana courts have recognized this theory,<sup>287</sup> prescription commences from the point at which the plaintiff became aware of the wrong.<sup>288</sup> In this case, based upon the extremely vocal opposition to the Win or Lose leases

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280. *Lee v. City of Shreveport*, 58 So.3d 601, 605–06 (La. App. 2 Cir. 3/2/11), *writ denied*, 62 So.3d 114 (La. 4/29/11). In *Delta Theaters, Inc. v. Paramount Pictures, Inc.*, 158 F. Supp. 644 (E.D. La. 1958), *appeal dismissed*, 259 F.2d 563 (5th Cir. 1958), the court stated that actions under federal antitrust laws for damages were “tort” actions within purview of former Article 3537 of the 1870 Civil Code, requiring such actions to be brought within one year. *See also State ex rel. Ieyoub v. Bordens, Inc.*, 684 So.2d 1024 (La. App. 4 Cir. 11/27/96), *writ denied*, 690 So.2d 42 (La. 3/14/97). Similarly, the Louisiana Second Circuit has concluded that “[w]hether categorized as a monopoly [sanctioned by the antitrust law] or a general delictual act, both classifications lend themselves to a one-year prescriptive period.” *Lee*, 58 So.3d at 606.

281. 684 So.2d 1024 (La. App. 4 Cir. 11/27/96), *writ denied*, 690 So.2d 42 (La. 3/14/97).

282. *Id.* at 1026.

283. *Id.*

284. Citing *Loew's Inc. v. Don George, Inc.*, 110 So.2d 553 (La. 1959); *Delaughter v. Borden Co.*, 364 F.2d 624 (5th Cir. 1966) and *Diliberto v. Cont'l Oil Co.*, 215 F. Supp. 863 (E.D. La. 1963). Borden argued that prescription runs where the State asserts claims in its *parens patriae* capacity and here the one year prescriptive period had run. The Attorney General countered that prescription does not run against the State based on LA. CONST. art. XII, sec. 13, which declares that “prescription shall not run against the state in any civil matter unless otherwise provided in the constitution or expressly by law.” The court reasoned that a *parens patriae* action brought by the State on behalf of its citizens has elements of private and public enforcement. Even in federal cases, the passage of the four-year period under federal law is used to bar actions by the states. *See Texas v. Allan Constr. Co.*, 851 F.2d 1526 (5th Cir. 1988).

285. *Delaughter*, 215 F. Supp. at 864.

286. *Doctrine of Contra Non Valentem*, BLACK'S LAW DICTIONARY (10th ed. 2014).

287. *See, e.g., Hazelwood Farm, Inc. v. Liberty Oil and Gas Corp.*, 844 So. 2d 380 (La. App. 3 Cir. 4/2/03), *writ denied*, 857 So. 2d 476 (La. 10/31/03).

288. *Id.* *See also Doctrine of Contra Non Valentem*, BLACK'S LAW DICTIONARY (10th ed. 2014).

since its inception,<sup>289</sup> it is impossible to say that a *contra non valentum*-type theory would act to meaningfully extend the brief antitrust prescriptive period in this matter.

Since the alleged collusion resulted in the issuance of potentially null and void State leases still in operation, this article must explore whether such an action has set in motion a “continuous tort” on which prescription does not begin until the conduct causing the damages is abated.<sup>290</sup> However, in order for a case to qualify as a continuing tort, the *conduct* causing the damage must be continuous in nature, not the damages.<sup>291</sup> In this situation, the conduct occurred in the 1930s. Thus, the time within which to bring an action for a violation of the antitrust laws, such as bid collusion, has long passed. Thus, even if Act 11 could be used to invalidate the Win or Lose leases if they were found to result from activity prohibited by that Act, the jurisprudence clearly demonstrates that any such action has prescribed. However, it does not appear that the activity of those involved in this inquiry even rises to the level of bid collusion sufficient to trigger the application of Act 11 to this matter.

#### D. Fraud

There is no specific provision in the Louisiana Criminal Code that covers a “crime of fraud,” *per se*. In the absence of an explicit crime of fraud or a criminal definition of fraud, courts look to the relevant civil law at the time. In the current Louisiana Civil Code, fraud is defined 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.”<sup>292</sup> This article did not come into effect until the Louisiana Civil Code was revised in 1984. However, the Revision Comments to Louisiana Civil Code article 1953 state that: “[t]his Article is new. It does not change the law, however. It restates the definition found in C.C. Art. 1847(6) (1870).”<sup>293</sup> Thus, the legal definition in place at the times relevant to this research would have been essentially the same as the definition found in the current Louisiana Civil Code article 1953.

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289. See, e.g., W.R. Lence, *Noe-Allen Oil and Gas Deals Reviewed*, THE SHREVEPORT TIMES, Nov. 22, 1935, at 1–2; *Charge Allen Profited in Land Lease*, MORNING ADVOCATE, Nov. 28, 1935, at 5.

290. S. Cent. Bell Tel. v. Texaco, Inc., 418 So.2d 531, 533 (La. 1982). See also Benton, Benton & Benton v. La. Pub. Facilities Auth., 672 So.2d 720, 723 (La. App. 1 Cir. 4/4/96), writ denied, 679 So.2d 110 (La. 9/13/96).

291. Lee v. City of Shreveport, 58 So.3d 601, 605 (La. App. 2 Cir. 3/2/11), writ denied, 62 So.3d 114 (La. 4/29/11).

292. LA. CIV. CODE ANN. art. 1953.

293. LA. CIV. CODE ANN. art. 1953, cmt. a.

Because there was no “crime of fraud” in the 1930s, it is somewhat irrelevant to discuss the elements of such crime.<sup>294</sup> However, parsing out the civil elements of fraud, a fraudulent party would have to be found to have made a misrepresentation or suppressed the truth in an attempt to gain an unjust advantage for one party or to cause loss or inconvenience to another.<sup>295</sup> As has been noted throughout this article, because there is no indication that the State received anything less than its statutorily-guaranteed royalty share of 12.5% from the Win or Lose leases, “loss or inconvenience” is unlikely to be proven as against the State’s interests. Such an allegation would rest on speculation that the State would have received a more advantageous bid and lease terms had the Burton and Noe bids been rejected. Yet, that is not possible to know.

Whether the Win or Lose leases satisfy the other component of fraud again requires evidence that is not present. Clearly, Burton and Noe obtained an advantage with these leases. The question lies with whether the advantage was unjust. They did not, as is shown herein, break any laws at the time (nor is there evidence of such activity) to obtain this advantage. Thus, it is hard to say that the advantage was unjust. Also necessary to succeed on this theory, it would have to be proven that Burton and Noe made “misrepresentation[s] or . . . sup[p]ress[ed] . . . the truth” to obtain the advantage.<sup>296</sup> Although it is possible to infer such misrepresentations or suppressions, no clear evidence of such activity has been identified.

With respect to these requirements, the lack of proof is a virtual bar to utilizing a fraud theory in either a criminal or a civil sense as against any of the Win or Lose leases. It is possible that fraudulent receipt of the subject mineral leases could invalidate them under a theory that such activity was contrary to the morals of the 1930s (*contra bonos mores*) or due to the fact that fraud is a vice of consent.<sup>297</sup> However, this is a problematic prospect as morality and values have adapted over time, making morality judgment calls on what was and was not acceptable in the 1930s largely speculative. In many ways, the idea that laws exist to designate a distinction between morality and immorality complicates matters with regard to the Win or Lose situation.<sup>298</sup> In this regard, the question remains whether the laws have already set the bounds of morality. If so, then by virtue of the Legislature not barring such activity, the actions of those related to the Win or Lose matter may have been deemed moral

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294. It is important to note in this regard that several of the other legal theories reviewed herein were likely surrogates for an actual crime of “fraud” in the 1930s.

295. See LA. CIV. CODE ANN. art. 1953.

296. See LA. CIV. CODE ANN. art. 1953.

297. See LA. CIV. CODE ANN. art. 1948.

298. JACQUES P. THIROUX & KEITH W. KRASEMANN, *ETHICS: THEORY AND PRACTICE* 8–10 (Glencoe 1977).

at the time (although distasteful by modern standards). Alecia Long, addressing the changing of social mores over time, provided that, “it was simply assumed that in order to get deals done a certain amount of graft would be taken off the top of any particular deal.”<sup>299</sup> Indeed, a recent publication has discussed the differing moral standards of the 1920s and 1930s from other American periods, making any morality determination with regard to the Win or Lose matter tenuous and complex at best.<sup>300</sup> Thus, the prospect of getting at objective measures of morality, at least using existing methodologies, is impossible.<sup>301</sup> Thus, it is difficult to conceive the question regarding the morality of individuals being put before a court. In fact, this reality harkens to the admonition of the Louisiana Supreme Court in *McGuigin v. Ochiglevich* that courts should not dabble in divining the morality of certain activities.<sup>302</sup> In addition to the inherent difficulties in divining moral judgments from more than seven decades ago, the data on public opinion from that period (which is a presumptively reasonable surrogate for morality if the correct questions are asked) has internal problems and has scarcely been analyzed to date.<sup>303</sup> Thus, making analyses of the Win or Lose activities by comparison to other data is practically impossible at this time. However, under either theory, proof of Win or Lose receiving interests in the leases by fraud is necessary and such proof has not been identified sufficient to support a legal cause of action.

*E. Were there Violations of the Bid Process in the 1930s with the Win or Lose Leases?*

As noted throughout this article, it is not sufficient that the Win or Lose leases were let in a manner that does not comport with the public leasing of minerals today. Rather, in order for these leases to be considered ill-gotten gains by the former governors and their associates, the leasing must have violated the law in force at the time. This subpart addresses the question of what was the law of public mineral leasing at the time of the Win or Lose leases.

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299. Zurik one, *supra* note 3.

300. See generally Melissa E. Weinbrenner, *Movies, Model Ts, and Morality: The Impact of Technology on Standards of Behavior in the Early Twentieth Century*, in 44 J. OF POPULAR CULTURE, 647 (2011).

301. Gabriel Abend, *Two Main Problems in the Sociology of Morality*, 37 THEORY AND SOC’Y 87 (2008).

302. 18 La. Ann. 92 (La. 1866).

303. See Adam J. Berinsky, *American Public Opinion in the 1930s and 1940s: The Analysis of Quota-Controlled Sample Survey Data*, in 70 PUBLIC OPINION Q. 499 (2006).

### 1. *What Were the Steps and Were They Followed?*

John Madden has characterized the pre-1936 law related to mineral leasing from the State as: “confusing, left much to conjecture, and appeared to vest too much authority in the Governor.”<sup>304</sup> Nonetheless, it is this pre-1936 mineral lease law that governs the leases acquired by the Win or Lose Corporation that are the subject of this article.

A series of legislative acts embodied the statutory standards governing the issuance of oil and gas leases in 1934 through 1936. Before the passage of Acts 1928, No. 9 (Extraordinary Session), the Governor of Louisiana was unilaterally authorized to lease State lands for oil and gas development and enjoyed virtually complete discretion in providing for the terms and conditions of the leases.<sup>305</sup> With a few minor exceptions, the controlling law for mineral leasing at the time of the letting of the Win or Lose leases was governed by Acts 1915, No. 30 (Act 30). In pertinent part, that law stated that, upon receiving an application for a mineral lease on State land:

[T]he Governor may cause to be published in the official journal of the State and in the official journal of the parish wherein such land is located and advertisement to be published for a period of not less than fifteen days, setting forth therein a description of the land to be leased by the State, the time when bids therefor will be received, a short summary of the terms and conditions of the lease or leases to be executed, and, in his discretion, the royalty to be demanded should he deem it to the interests of the State to call for bids on the basis of a royalty fixed by him . . . .<sup>306</sup>

This law was amended by Acts 1926, No. 315 (Act 315), but the amendment resulted in only minor changes. This latter law stated that, after the fifteen days noted in Act 30, the Governor was vested with full authority to:

[E]xecute any lease or leases so granted, to the highest bidders therefor, under such terms and conditions as to him seem proper; provided that the minimum royalties to be stipulated in such leases

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304. JOHN L. MADDEN, *FEDERAL AND STATE LANDS IN LOUISIANA* 415 (1973).

305. See Act No. 30, 1915 La. Acts 62–63; Act No. 315, 1926 La. Acts 606–07, and Act No. 9, 1930 La. Acts 27 (passed by the 1928 Extraordinary Legislative Session). See also Letter from Gaston L. Porterie, Attorney General, to Oscar K. Allen, Governor (Jan. 23, 1936) (on file with the La. Dep’t of Justice) (opining on the broad discretion of the Governor to grant mineral leases prior to the creation of the State Mineral Board). See also William O. Bonin, *Public Mineral Leasing in Louisiana*, 27 TUL. L. REV. 246, 246–47 (1953).

306. See Act No. 30, § 3, 1915 La. Acts 63.



to be paid by the State shall be one-eighth of all the oil and gas produced and saved from the property leased . . . .<sup>307</sup>

In 1928, the Register of State Lands acquired the authority to adjust, settle, and determine, by agreement with the lessee and with the approval of the Governor, all matters arising from the interpretation of oil and gas leases granted by the State of Louisiana.<sup>308</sup> The 1928 Act was limited in scope and did not otherwise change any of the standards prescribed in the 1915 and 1926 acts, since it only amended section 1 of Act 30.<sup>309</sup> Thus, there were few standards imposed on the unilateral authority of Governors Allen and Noe when they executed the subject mineral leases from 1934 through 1936. These standards, or the lack thereof, remained in force until the Legislature changed the law in 1936 and created the Louisiana State Mineral Board.<sup>310</sup> Nonetheless, this legislative activity occurred subsequent to the issuance of the subject leases.

Based upon the law in force at the time, the Governor, under Act 30, had discretion to advertise mineral leases.<sup>311</sup> Thus, because such advertisements were not mandatory, it is irrelevant whether the Win or Lose leases were advertised. Further, Act 315 set the minimum royalty for State leases at 12.5%, but none of these Acts, including Act 30, required the payment of a bonus or rental for mineral leases on State property.<sup>312</sup> Accordingly, the 12.5% royalty interest reserved to the State in the Win or Lose leases was consistent with the law in force at the time. Finally, Act 9 of the 1928 Extraordinary Session conferred on the State Land Office only the authority to modify mineral leases when questions of interpretation arose. This Act did not curtail the Governor's plenary authority to grant leases on terms that he deemed proper, in his discretion. Due to the lack of standards for the issuance of mineral leases that existed at the time that the Win or Lose leases occurred, there is no indication that these leases were issued in contravention of the appropriate legal requirements at the time.

Another matter to consider in tandem with the granting of the leases is whether the assignments of these leases to third parties—the manner in which the Win or Lose Corporation obtained its interests in the subject leases—were accomplished in a manner consistent with the law. Prior to the creation of the State Mineral Board, there was no legislation in Louisiana

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307. Act No. 315, § 4, 1926 La. Acts 607.

308. See Act No. 9, 1930 La. Acts 27 (passed by the 1928 Extraordinary Legislative Session).

309. *Id.*; see also Act No. 30, 1915 La. Acts 63; Act No. 315, 1926 La. Acts 606–07.

310. See Act No. 93, 1936 La. Acts. 276–80.

311. Act No. 30, § 3, 1915 La. Acts 63. The authority is discretionary based upon the presence of the term “may” in Section 3 of that Act.

312. Act No. 315, 1926 La. Acts 606–07.

that controlled or restricted the assignment of State mineral leases.<sup>313</sup> Accordingly, in the absence of any law controlling or restricting such transfers or assignments, it cannot be said that those assignments were prohibited. Further, there are no obligations imposed upon the Governor or any instrumentality of the State to adhere to any such nonexistent rules. It is probable that the Governor or other State signatory to such assignments was bound by a general fiduciary duty to the State in undertaking such assignments. However, as is set forth throughout the article, because the State has always received at least its minimum legal royalty share from the subject leases, it is impossible to now conclude, that any assignments of these leases constituted a derogation of any fiduciary duty to the State. Further, in the absence of law to the contrary, as long as such assignments or transfers did not adversely impact the State's 12.5% royalty share, the activities were agreements among private parties. There was no requirement that the State approve said assignments nor even be notified of the assignments. The lack of notice to the State and the essentially private nature of those agreements are likely the reasons for the absence of some assignments in the State's records (*e.g.*, the assignment of the Win or Lose interest in State Lease 195)—they simply were not sent to the State because there was no requirement to do so.

## 2. *Were These Leases the Most Advantageous Leases to the State?*

The question of whether a particular mineral lease is most advantageous to the State is one that delves into the discretion of those with authority to grant the leases. Today, the State Mineral and Energy Board (SMEB) exercises such discretion.<sup>314</sup> The SMEB benefits from a staff of well-trained scientists, engineers, geographers, and accountants

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313. A review of the relevant law in force at the time of the Win or Lose leases is indicative of this reality. *See* Act No. 30, § 3, 1915 La. Acts 62-63; Act No. 315, 1926 La. Acts 606-07; and Act No. 9, 1930 La. Acts 27 (passed by the 1928 Extraordinary Legislative Session), none of which contain any language related to mineral lease assignments. Indeed, Madden echoes this lack of a requirement prior to 1936. MADDEN, *supra* note 304, at 423. Further, Madden also notes of the 1936 law that,

[I]t is recognized that a contention could be made, whether supportable or not in law, that a transfer or assignment, in whole or in part, of a lease, duly executed by the parties, is a firm contract, fait accompli in itself, and that the legislature was without right within the sphere of its powers to make such contract subject to State Mineral Board approval.

*Id.* Thus, although the requirement for the Mineral Board to approve assignments has been embodied in law since 1936, the enforceability and utility of such actions is questionable.

314. LA. REV. STAT. ANN. § 30:127.

who are able to evaluate the bids and advise the Board regarding the advantages of particular bids to the State.

During the examined time period, 1934–1936, the Governor held the sole and complete discretion as to whether a particular lease should be granted—a reality that carried with it the authority to decide if a particular bid and resulting lease was the most advantageous to the State. Without being able to interview any of the governors that were involved in the leasing from this period, it is impossible to know what factors entered into their analyses of the bids related to the Win or Lose Corporation.<sup>315</sup> Some seventy-plus years from the discretionary decisions that led to the granting of the subject leases, the only means to examine the reasonableness (which presumably should provide some insight into the advantageousness) of these leases is to look to the numbers themselves. In furtherance of this goal, data on all leases let by the State for a ten-year period surrounding the subject leases (i.e., five years prior to 1934 and five years after 1936, or 1929 through 1941)<sup>316</sup> were collected and statistically examined in order to obtain a better understanding of the relationship of these leases to others at the time.

During the period examined, 1929 through 1941, the State let 267 mineral leases.<sup>317</sup> These leases span the terms of seven governors—Huey P. Long, Alvin O. King, Oscar K. Allen, James A. Noe, Richard W. Leche, Earl K. Long, and Sam H. Jones. These leases also span the creation of the State Mineral Board in 1936. The data analyzed for this inquiry include the size (acreage) of the leases and the per-acre bid price in order to determine whether the subject leases were inconsistent with other leases at the time.

Generally, per-acre prices for mineral leases from the State during the examined twelve-year period were often quite low (with a statistically-corrected median per acre price of \$2.54).<sup>318</sup> Further, the size of state

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315. An interesting historical side note to this reality comes from the hearsay testimony of Earle J. Christenberry in the *U.S. v. Noe* trial, in which he commented that both Long and Noe, at least with respect to State Lease No. 309, were convinced that the royalties expected to be generated for the State by that lease would constitute an important economic boon for the State. Thus, although the requirement for the Mineral Board to approve assignments has been embodied in law since 1936, the enforceability and utility of such actions is questionable. See generally *United States v. Noe* Trial Transcript, *supra* note 8 (citing testimony of Earle J. Christenberry).

316. The period of time captured for this review actually amounts to twelve years, because five years prior to the formation of the Win or Lose Corporation (1934) were examined and five years after the end of Governor Noe's term in office (1936) were examined, thus providing twelve-years' worth of data.

317. These leases are sequentially numbered between State Lease No. 219 and State Lease No. 509.

318. See Seidemann, et al., *supra* note 4.

mineral leases during the examined twelve-year period were often also quite low.<sup>319</sup> This reality is borne out by the median size for this twelve-year period being 500 acres.<sup>320</sup>

In the size examination, three leases—State Leases 318, 335, and 340—were all found to be significantly larger than the other leases issued by the State during the subject time period.<sup>321</sup> It is unclear whether the governors issuing these leases abused their discretion by issuing leases that were so large as to not be in the best interests of the State. Certainly, these three leases are significantly larger than all of the others, but there were no size restrictions on State leases at the time.

The first-time size restrictions were imposed on the public officials responsible for issuing leases was in Acts 1936, No. 93 (Act 93).<sup>322</sup> The Act added sixteen sections to the original Acts 1915, No. 30 and repealed all of the previous conflicting provisions.<sup>323</sup> Section 7 of Act 93 prohibited the issuance of leases greater than 10,000 acres.<sup>324</sup> Had the per-acre price for the leases been significantly lower than others at the time and the lease size been significantly higher, it would be much easier to conclude that such lease terms were unreasonable. However, that is not the case here. The governors had the discretion to grant such large leases and it cannot be said that the State did not get a reasonable price for these large areas. Thus, even for State Leases 318, 335, and 340, it cannot be concluded that the best interests of the State were not served by the granting of unusually large leases.

On the whole, the statistical analyses undertaken as part of this project lead to a conclusion that the Win or Lose leases were not unreasonable based on the other leases that the State granted at the time. There is uncertainty regarding the meaning of the larger sizes of State Leases 318, 335, and 340; however, no direct line can be drawn between these large sizes and an inference that an abuse of discretion occurred such that the leases were invalid. Clearly, as to the price per acre that the State received, there was nothing out of the ordinary when the Win or Lose leases are compared to all of the leases from the subject time period. With the questionable nature of the meaning of lease size results and the suggestion from the per-acre price results that the Win or Lose leases were reasonable at the time, it is unlikely that the governors that issued these leases did so on unreasonable terms or abused their discretion in so issuing the leases. In the case of the subject leases, the provisions of Act 30 governed the issuance of oil and gas leases

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319. *Id.*

320. *Id.* at 84.

321. *Id.* at 87.

322. *See* Act No. 93, 1936 La. Acts. 276-80.

323. *Id.* at § 21.

324. *Id.* at § 7.

on State owned land. Because Governors Allen and Noe granted the leases prior to the acreage restrictions of Act 93, there were no acreage limitations when the subject leases were issued. Thus, the larger-sized leases, such as State Leases 318, 335, and 340, were lawful.

#### *F. Public Bribery and Corrupt Influencing*

Some allegations suggested that W.T. Burton acquired the subject leases by way of bribing or unlawfully influencing O.K. Allen and James A. Noe. The alleged bribing suggests that Burton enticed Allen and Noe to issue the leases to him (Burton) by agreeing to assign a portion of the royalties to the Win or Lose Corporation.<sup>325</sup> Such activity may have occurred, but there is no extant proof that this was the case. Nonetheless, this article reviews the applicable bribery and corrupt influencing laws and discusses what would be necessary to prove such allegations.

A general bribery statute was passed in Louisiana in 1878, followed by a similar statute enacted in 1890. In order to constitute public bribery, the bribe given or received must be to influence one of the parties named in Acts 1890, No. 78.<sup>326</sup> A mutual agreement as to the purpose of the bribe is not necessary, so long as the defendant alone has that purpose. In *State v. Dudoussat*, the Louisiana Supreme Court held that public bribery according to the 1890 statute is made up of two separate offenses—that of receiving, and that of giving, the bribe to influence one of the parties named in the statute.<sup>327</sup> Finally, the act committed in pursuance of the bribe does not have to be a legal act or an act within the official power and duty of the official bribed; the act only needs to be related to the bribed official's position, employment, or duty.<sup>328</sup>

Acts 1890, No. 78 embodied the statutory authority relating to bribery of public officials. The law provided that:

[A]ny person who shall directly or indirectly offer or give any sum or sums of money, bribe, present, reward, promise or any other thing to any officer, State, parochial or municipal, or to any member or officer of the General Assembly with intent to induce or influence such officer, or member of the General Assembly to appoint any person to office, to vote or exercise any power in him

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325. Lee Zurik, *Lee Zurik Investigation: Who's Still Making Money from 'Dirty Deeds'?*, Fox 8 WVUE, May 8, 2012, fox8live.com/story/18169793/lee-zurik-investigation [https://perma.cc/8KU6-RF8F] [hereafter Zurik two].

326. See J.N.H., *Criminal Law—Bribery of a Public Officer*, 5 LA. L. REV. 327, 327 (1943). These named parties are: “any officer, State, parochial or municipal, or to any member or officer to the General Assembly . . . .” Act No. 78, 1890 La. Acts 62.

327. 17 So. 685, 687 (La. 1895).

328. See, e.g., *State v. Addison*, 64 So. 497, 498–99 (La. 1914).

vested, or to perform any duty in him required with partiality or favor, the person giving or offering to give, directly or indirectly, and the officer or member of the General Assembly so receiving or agreeing to receive any money, bribe, present, reward, promise, contract, obligation or security, with the intent or for the purpose or consideration aforesaid, shall be guilty of bribery, and on conviction thereof shall be imprisoned at hard labor for not less than one nor more than five years, and fined not less than fifty nor more than five thousand dollars.<sup>329</sup>

Since 1936, corrupt influencing has been considered a separate crime from bribery. Acts 1920, No. 162 amended part of the original corrupt influencing Acts 1878, No. 59, entitled, “An Act for the prevention and punishment of bribery and corrupt practices in all legislative, judicial, or ministerial offices.”<sup>330</sup> The law of corrupt influencing at the time of the subject lease issuances in 1934 through 1936 included the following provision:

That any person who obtains or seeks to obtain money or other thing of value from another person upon a pretense, claim or representation that he can or will improperly influence in any manner, by any means direct or indirect, the official action of any judge . . . or other officer of this State, ministerial or judicial . . . shall be guilty of a felony . . .<sup>331</sup>

In order to establish a bribery claim, the State must prove that something of value was given to a State officer in order to influence that officer to exercise some vested power.<sup>332</sup> In regard to Win or Lose, the vested power would be the granting of a State lease. Presumably, the “something of value” would be the promise by W.T. Burton to assign a portion of the granted leases to an entity in which the grantor held an interest. Although such assignments did occur and such a motive can be inferred, there is no proof of such a motive. Indeed, the available information from Noe’s tax evasion trial seems to indicate just the opposite: that Burton was sought out by Long, Allen, and Noe as someone with experience in oil and gas operations and as someone with the capital to finance the exploration and production of the Win or Lose leases.<sup>333</sup> Yet, such a scenario substantially undercuts an allegation that

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329. Act No. 78, 1890 La. Acts 62.

330. Act No. 162, 1920 La. Acts 252 (amending Act No. 59, 1878 La. Acts 97).

331. Act No. 162, 1920 La. Acts 252.

332. *See id.*

333. *See generally* United States v. Noe Trial Transcript, *supra* note 8 (citing testimony of William T. Burton).

Burton bribed public officials to obtain a benefit. Further, no evidence to the contrary exists.

The applicability of the crime of corrupt influencing also does not apply to the Win or Lose situation. As noted above, corrupt influencing laws in the 1930s were intended to criminalize someone obtaining something of value for a promise to unlawfully influence a public official. There is no indication in the Win or Lose scenario that anyone accepted anything of value on a promise to unlawfully influence the awarding of State leases. In addition, the Win or Lose Corporation, through its later iteration, Independent Oil & Gas Company, was liquidated in 1951 and no longer exists as a potential defendant.<sup>334</sup> Thus, this law is irrelevant to the current analysis.

### G. Conspiracy

Among the many allegations circulating involving the Win or Lose matter, conspiracy is an oft-repeated refrain. The current criminal law covering conspiracy is codified at La. R.S. 14:26. That law, which was amended to its current form in 1950, 1977, and 2013, was preceded by one provision that was in force during the Win or Lose period in question: Acts 1934 (3d E.S.), No. 2. This 1934 law criminalized the conspiracy of defrauding the State of taxes and revenues.<sup>335</sup> A conspiracy, refers to the collusion of more than one individual to accomplish unlawful activity.<sup>336</sup> Unlike attempt, conspiracy is a stand-alone, actionable crime.<sup>337</sup> As is evident from numerous sources cited herein and otherwise consulted in this research, there is no doubt that more than one person colluded in the Win or Lose activities. Indeed, at one time or another, as many as ten natural or juridical persons may have been involved in the actions that the Win or Lose Corporation undertook with regard to mineral leasing from

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334. Some concept of extending any potentially available criminal penalties against the corporation (or an individual) to the heirs of that corporation's interests is likely prohibited by the United States Constitution as an *in personem* forfeiture, which has been identified as a type of bill of attainder. U.S. CONST. art. I, sec. 9, cl. 3. See also Bruce A. Baird & Carolyn P. Vinson, *RICO Pretrial Restraints and Due Process: The Lessons of Princeton/Newport*, 65 NOTRE DAME L. REV. 1009, 1010 n.3 (1990).

335. Act No. 2, 1934 La. Acts 15 (passed by the Third Extraordinary Legislative Session).

336. LA. REV. STAT. ANN. § 14:26.

337. *Id.* See also *State v. Bagneris*, 110 So.2d 123 (La. 1959); *State v. Gunter*, 23 So.2d 305 (La. 1945).

the State.<sup>338</sup> Thus, one element of conspiracy is undoubtedly satisfied as to the Win or Lose State leases.

An allegation of criminal conspiracy for the acquisition of the Win or Lose leases requires the consideration of whether a criminal act was accomplished by the above-noted collusion.<sup>339</sup> Because there is no proof that the State was actually defrauded of revenues by the actions of the Win or Lose-related individuals, and because no positive law has been identified from the period of inquiry, it cannot be said that the actions of the individuals associated with Win or Lose constituted criminal acts. In addition, even if such an act is considered a criminal violation today, retroactive application of substantive criminal law is impermissible.<sup>340</sup> Therefore, this law is inapplicable to the instant scenario.

#### *H. Lease Nullification for Immoral Object*

The most viable remaining theory would be that of nullifying the Win or Lose leases on the basis that the agreement to grant such a lease had an immoral object. In *Rosenblath v. Sanders*, the Louisiana Supreme Court made clear that, under article 1892 of the Louisiana Civil Code of 1870, a contract that has an immoral object is void.<sup>341</sup> As previously noted, the current governmental ethics laws were not in place during the relevant time periods. However, the lack of a positive law prohibiting certain action does not necessarily prevent a finding that the actions of Governors Allen

338. See generally *United States v. Noe* Trial Transcript, *supra* note 8. The ten referenced parties are: Huey P. Long, Oscar K. Allen, James A. Noe, Seymour Weiss, Earle J. Christenberry, Alice Lee Grosjean, William T. Burton, M. S. Rhodes, J. E. Farrell, and the Win or Lose Corporation.

339. See *State v. D'Ingianni*, 47 So.2d 731 (La. 1950).

340. A discussion of this principle was set forth by the Fifth Circuit Court of Appeals in *Janecka v. Cockrell*:

The Ex Post Facto Clause provides that “[n]o state shall . . . pass any . . . ex post facto law.” U.S. Const. art. I, § 10, cl. 1. Although the text of the Ex Post Facto Clause makes clear that it only limits the powers of legislatures, the Supreme Court has acknowledged a similar limitation on the power of the judiciary to render decisions that retroactively criminalize previously legal conduct. *Marks v. United States*, 430 U.S. 188, 191, 97 S.Ct. 990, 51 L.Ed.2d 260 (1977) (holding retroactive application of Supreme Court case violated defendants’ due process rights because it punished conduct that had been considered innocent under previous case law); *Bowie v. City of Columbia*, 378 U.S. 347, 353, 84 S.Ct. 1697, 12 L.Ed.2d 894 (1964) (holding that “an unforeseeable judicial enlargement of a criminal statute, applied retroactively, operates precisely like an ex post facto law” and is prohibited by the Due Process Clause).

301 F.3d 316, 322 n.9 (5th Cir. 2002).

341. 150 La. 882, 883-84 (La. 1922). The laws discussed in this case were the laws in force in 1936.



and Noe and W.T. Burton were nevertheless immoral, thus resulting in the invalidation of these contracts.

In order to establish immorality, it must first be proven that at least a portion of the object of the granting of the leases was to obtain an improper financial benefit or that some law was violated. Obviously, the mere act of entering into a mineral lease agreement is not inherently immoral, but the analysis for this situation is more nuanced than a simple inquiry into whether mineral leasing is, *per se*, immoral. The Louisiana Supreme Court explained this concept of nullity through immorality in the 1866 case of *McGuigin v. Ochiglevich*, stating:

It is not pretended that there is anything inherently immoral or essentially criminal in the art of making sails, or in the act of selling canvas. The trade of sail-making is in itself an eminently useful and honorable one; it is indispensable to commerce, to science, to civilization. A contract to supply canvas and sails involves no patent turpitude, like a contract to rob, to murder, to commit arson, to abet treason, which would be on its face iniquitous, and for the enforcement of which the law grants no action. It is obvious, therefore, that a distinction is to be made between contracts immoral *sui generis* and those the object of which is to supply, or do something which, innocent in itself, is intended by one or both parties to subserve a purpose reprobated by law or by good morals.<sup>342</sup>

With regard to the Win or Lose leases, it is incontrovertible that mineral leasing by the State, in itself, is, as the *McGuigin* court noted “eminently useful.”<sup>343</sup> In order to determine whether the Win or Lose leases fail the contract morality test, an inquiry into the motivations of the lessor (the State, through Governors Allen and Noe, and others) and the lessee (W.T. Burton and James A. Noe) would have to be undertaken. Had this been done during these individuals’ lifetimes, a similar argument could be made. Such an argument would roughly be that if Governors Allen or Noe granted a mineral lease to W.T. Burton with the constructive knowledge that the agreement would likely result in a financial benefit solely to themselves, the original contract granting the lease might be void for having an immoral object. Yet, these motives, cannot be supplied or verified. In the absence of such evidence, and with the reality that the State was compensated at the regular royalty rate for the time, these legal theories are not usable as to the current matter.

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342. 18 La. Ann. 92, 92 (La. 1866).

343. *Id.*

*Coco v. Oden* also deals with a situation that involves a public official entering into an immoral contract based on its position.<sup>344</sup> Here, the Louisiana Supreme Court was faced with a situation in which the Sheriff of Allen Parish accepted a free railroad pass.<sup>345</sup> The court found that “[t]he contract set up by the defendant is *contra bonos mores*, it is immoral, and it is against the public policy of the state.”<sup>346</sup> In so finding, the court held that the Sheriff “forfeited his office by the acceptance and use of such pass.”<sup>347</sup> As one of the potential consequences of entering into an immoral contract as a result of one’s official position under the law of the 1930s, *Coco* provides a useless potential result for the State—O.K. Allen and James A. Noe left public office more than eight decades ago. Thus, their forfeit of office would be meaningless.

Situations that would render a contract unlawful because it is against sound morals, public policy, public rights, or public interests include: contracts made with an alien enemy; contracts in general restraint of trade or marriage; contracts for the perpetration, concealment, or compounding of some crime; considerations impeding the course of public justice, as dropping a criminal prosecution for a felony, or a public misdemeanor, or suppressing evidence.<sup>348</sup> Under the law of the 1930s, these examples of violations of public morals likely did not exist or are provable in the current matter.

Regarding whether an act *contra bonos mores* is sufficient today to support an annulment of a contract—here, a State mineral lease—the answer is likely in the negative. In *McGuigin v. Ochiglevich*, the court categorically rejected the idea that mere “intention” would be sufficient to prove that something was *contra bonos mores*:

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344. 79 So. 287 (La. 1918).

345. *Id.*

346. *Id.* at 288.

347. *Id.*

348. *Ozanne v. Haber*, 30 La. Ann. 1384 (1878).

The immoral character of the contract does not result from a simple inspection of its terms, but is remotely deduced by a process of reasoning and casuistry involving questions of motive and intention on the part of the vendor, and of knowledge on the part of the vendee . . . . The whole inquiry, then, in cases of this kind, would turn upon questions of intention, and the investigation assumes a moral and metaphysical character. Attorneys at law become casuists. The Court is converted into a Synod of Theologians. The authority of Locke and Malebranche supersedes the authority of Pothier and Domat, and the judgment of the Court would present a solution of metaphysical problems, not a juridical sentence. It is obvious to what absurd consequences we are led by the doctrine of “intention” as taught by the lower Court. Civil magistrates should be content to limit their labors to the investigation and enforcement of civil contracts, and not complicate and confuse their duties by entering the labyrinth of subtleties in quest of hidden “intentions.”<sup>349</sup>

Thus, the law presumes that the true intention of parties is clear and explicit on the face of their contracts, and that people, in their business transactions, do not intend to violate the law or to make contracts for the enforcement of which the law refuses a remedy. Hence, as the Louisiana Supreme Court has noted, “when one party charges that the contract is infected with an illegal intent, the burden of proof is imposed upon him to establish this allegation.”<sup>350</sup>

This is a particularly problematic scenario for the Win or Lose matter, as evidence of any actual intent is now impossible to acquire. The leases bear no evidence of impropriety on their faces. As indicated, the leases are consistent with the law and with similar leases of the time. Thus, there appears to be no cause of action by the State to invalidate the Win or Lose leases on the grounds that the leases were a result of immoral actions. Even if the courts were willing to ignore the warnings of the Louisiana Supreme Court in *McGuigin* to avoid looking to the metaphysical question of intent to divine immorality, answering the question situation would be impossible since all of the parties involved in the original transactions are long-dead. In addition, the *McGuigin* court clearly articulates that, absent clear evidence of wrongdoing, a court will not sit in judgment as to the

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349. *McGuigin v. Ochiglevich*, 18 La. Ann. 92, 93 (La. 1866).

350. *Stewart Bros. v. Beeson*, 148 So. 703, 705 (La. 1933).

morality of specific acts—such is not a judicial function.<sup>351</sup> However, another basis for annulment is that the contracts were illicit. As has been noted at length in the above analyses, no evidence of illegality exists with regard to these leases.

### *I. The Perez Cases*

The series of cases related to Leander Perez and his efforts to obtain and maintain mineral leases from various levee districts in Plaquemines Parish are reviewed here based upon suggestions by media reports that such cases may provide a legal mechanism for the State to invalidate the Win or Lose leases.<sup>352</sup> However, the factual distinctions between those cases and the Win or Lose situation are so great as to render any holdings in the Perez cases useless in any effort to rescind the Win or Lose leases.

Leander Perez, like Huey Long, is an almost mythical, larger-than-life figure.<sup>353</sup> The former judge and District Attorney for Plaquemines and St. Bernard Parishes is best known today for his bigotry and staunch opposition to integration of the New Orleans area schools in the 1950s and

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351. See, e.g., *City of Shreveport v. Sw. Gas & Elec. Co.*, 74 So. 559 (La. 1917) (noting that it is not a judicial function to pass judgment on the morality of certain legislation). Indeed, in *State v. Smith*, 766 So.2d 501, 509–10 (La. 7/6/00), the Louisiana Supreme Court implies that morality judgments are left to the Legislature and that the courts should examine acts only in light of those moral judgments made through the enactment of laws. See also *Allen v. Carruth*, 32 La. Ann. 444, 446 (La. 1880), in which the Louisiana Supreme Court notes that its role is in interpreting morality only through the enforcement of the existing law. In this regard, the court noted:

With the motives of public policy we have nothing to do, in the absence of all restraint on the power of the owner in the terms of the law. If, however, we were at liberty through our views of public policy to go beyond the terms of the statute, we would hold that public morality would best be subserved by enforcing the performance of obligations legally entered into; that the interest of society and of individuals would best be guarded by discountenancing all attempts to procure credit by the renunciation of rights of property, and, after reaping the benefits of the credit, seek to frustrate payment by an attempted exercise of the rights renounced.

*Id.* In the end, although the bulk of the jurisprudence suggests that courts should not be in the business of making moral judgment calls, it may be that in extreme cases, such does occur. However, it seems unlikely that courts, based upon the jurisprudence noted herein, would become involved in nuanced questions of moral issues.

352. See, e.g., *Zurik two*, *supra* note 325.

353. JAMES CONAWAY, JUDGE: THE LIFE AND TIMES OF LEANDER PEREZ 5 (1973).

1960s.<sup>354</sup> However, long before such events, Perez was known as the boss of Plaquemines Parish, controlling the parish with an iron fist.<sup>355</sup>

Within this historical framework, Perez, as the District Attorney of Plaquemines and St. Bernard Parishes, and the ex-officio attorney for the Buras and Grand Prairie Levee Districts, assisted those districts (from 1936 and 1938) in leasing mineral rights on district property to Delta Development, Inc.<sup>356</sup> Delta Development was a corporate entity that was solely held by the Perez family.<sup>357</sup> When challenged on the issuance of these leases by the levee districts in the 1940s, Perez fought back, using political clout to obscure the true nature of Delta Development and to intimidate those who would challenge him.<sup>358</sup> Perez went so far as to obtain grand jury indictments of several levee district members, as well as the then-Attorney General, Eugene Stanley, in an effort to fend off inquiries into his issuance of the Delta Development leases.<sup>359</sup> For a time, Perez succeeded in maintaining the leases by continuing as counsel for the levee districts, the parishes, and for Delta Development.<sup>360</sup>

Following Perez's death, Plaquemines Parish (the successor-in-interest to the Buras and Grand Prairie Levee Districts) challenged the validity of the Delta Development leases.<sup>361</sup> The Louisiana Fourth Circuit Court of Appeal dismissed the case against the Perez heirs and assigns, holding that prescription had run and consequently that the parties could not maintain their action.<sup>362</sup> The Louisiana Supreme Court overturned the fourth circuit, noting that Perez's lies to the people and the courts in the 1930s and 1940s, in addition to his use of police power to intimidate his opponents, constituted a bar to prescription in this matter. Thus, the case was allowed to proceed.<sup>363</sup>

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354. See generally GLEN JEANSONNE, LEANDER PEREZ: BOSS OF THE DELTA (La. State Univ. Press 1977); ADAM FAIRCLOUGH, RACE & DEMOCRACY: THE CIVIL RIGHTS STRUGGLE IN LOUISIANA, 1915-1972 (Univ. of Ga. Press 1999).

355. CONAWAY, *supra* note 353, at 5.

356. Plaquemines Parish Comm'n Council v. Delta Dev., Inc., 486 So.2d 129, 131-32 (La. App. 4 Cir. 1986) [hereinafter *Plaquemines Parish Comm'n Council*]. See also Plaquemines Parish Comm'n Council v. Delta Dev., Inc., 502 So.2d 1034, 1041-42 (La. 1987) [hereinafter *Delta Dev., Inc.*].

357. *Delta Dev., Inc.*, 502 So.2d at 1042-43.

358. *Id.* at 1046-53.

359. *Id.* at 1051-52.

360. *Id.* at 1046-53.

361. See generally *Plaquemines Parish Comm'n Council*, 486 So.2d at 131 and *Delta Dev., Inc.*, 502 So.2d 1034 (La. 1987).

362. *Plaquemines Parish Comm'n Council v. Delta Dev., Inc.*, 486 So.2d 129, 143 (La. App. 4 Cir. 1986).

363. *Plaquemines Parish Comm'n Council v. Delta Dev., Inc.*, 502 So.2d 1034, 1061-63 (La. 1987).

Although fascinating cases from a historical perspective, the fourth circuit and supreme court *Perez* cases from the 1980s hold no useful mechanisms for the State to use in a challenge to the Win or Lose leases. The primary reason for this lack of utility is that these cases are about liberative prescription, a legal theory for the extension of actions that is generally inapplicable to the State under La. Const. Art. XII, Sec. 13.<sup>364</sup>

When the Delta Development matter returned to the fourth circuit in 1997, all but one of the *Perez* descendants had settled their disputes with Plaquemines Parish.<sup>365</sup> In this case, the court discussed some substantive issues of relevance to the Win or Lose matter. However, much of this case related to the original prescription issues—matters already determined inapplicable by the Louisiana Supreme Court and, once again, dismissed by the fourth circuit.<sup>366</sup>

The fourth circuit addressed the issue of whether Leander *Perez* derogated his fiduciary duty to the levee districts by serving as both the levee districts' attorney and Delta Development's attorney. The court found that such a breach did occur and that the breach caused the leases to be invalid.<sup>367</sup> This result is not relevant to the Win or Lose matter. The *Perez* court rested its decision—that Leander *Perez* breached his fiduciary duty to the levee districts—on his position as the attorney for both the levee districts and for Delta Development.<sup>368</sup> Such a relationship did not exist in the Win or Lose matter; thus, the holding in this case is inapplicable. The fiduciary responsibilities of the governors in the Win or Lose matter were set forth by the statutorily required minimum royalties and lease terms for mineral leases. Further, these responsibilities were also created legislatively by requiring adherence of such leasing to a public bid process. As was noted previously, there has been no derogation of these duties discovered in the Win or Lose matter.

Lastly, in the 1997 *Perez* case, the court examined whether the remaining *Perez* descendant, who was not found to be complicit in any of Leander *Perez*'s wrongdoings, was required to: "surrender the overriding royalty interests, and the monies he has derived from them, because those overriding royalty interests originally were acquired by his grandfather's breaches of fiduciary duty."<sup>369</sup> The court refused to impute the guilt of the ancestor to the descendant. In this regard, the court stated that, "simply

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364. See *Plaquemines Parish Comm'n Council*, 486 So.2d at 143; *Delta Dev., Inc.*, 502 So.2d at 1061–63.

365. *Plaquemines Parish Comm'n Council v. Delta Dev., Inc.*, 688 So.2d 169, 172 (La. App. 4 Cir. 1997).

366. *Id.* at 172–74.

367. *Id.* at 174.

368. *Id.*

369. *Id.* at 175.

receiving the benefit of a fraud, without more, [does not] make[] one liable for the fraud.”<sup>370</sup> However, the court did provide that the Perez descendant would be liable to Plaquemines Parish under a theory of unjust enrichment, even though he was not criminally culpable for fraud.<sup>371</sup> This finding by the 1997 *Perez* court also is not significant to the Win or Lose matter. The conclusion that the one Perez heir was liable to Plaquemines Parish based upon his unjust enrichment was premised on the finding that the mineral leases were acquired from the levee districts in a fraudulent manner.<sup>372</sup> The absence of proof of fraud in the acquisition of the Win or Lose leases from the State undermines the application of an unjust enrichment theory in the current matter. Indeed, because the State was not impoverished by the acquisition of mineral leases by the Win or Lose Corporation, there is no unjust enrichment. This conclusion is consistent with Judge Plotkin’s concurrence in the 1997 *Perez* matter.<sup>373</sup>

## V. MITIGATING FACTORS

Each of the above-discussed theories is fraught with legal and logistical problems. This section briefly examines the most obvious of those problems, which largely, if not completely, defeat any attempt to invalidate or revoke the subject leases.

### A. Evidentiary Problems

The primary obstacle to the State proving any case for wrongdoing with regard to the Win or Lose leases is the lack of evidence. If such wrongdoing occurred, its perpetrators did well in avoiding a paper trail that could represent a smoking gun from an evidentiary perspective. Thus, should the State bring an action for the revocation of the Win or Lose leases, it will be faced with the reality that it has no actual, explicit proof of wrongdoing.

Because the allegation of fraud is the primary charge levied against the actors in the Win or Lose matter, this article will briefly review the proof problems inherent in a successful prosecution of that theory.<sup>374</sup> As was mentioned in the review of Perrault’s 1941 Memorandum,<sup>375</sup> fraud is

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370. *Id.*

371. *Plaquemines Parish Comm’n Council v. Delta Dev., Inc.*, 688 So.2d 169, 175 (La. App. 4 Cir. 1997).

372. *Id.* at 176.

373. *Id.* at 176–77.

374. The proof problems for the other theories reviewed herein are set forth in their respective sections of this article.

375. *See generally* textual discussion *supra* part II.B.3.

not presumed and the burden of proving it is high. In *Hall v. Arkansas-Louisiana Gas Co.*,<sup>376</sup> the Louisiana Supreme Court stated that, “[i]t is well settled that one who alleges fraud has the burden of establishing it by legal and convincing evidence since fraud is never presumed, and that to establish fraud exceptionally strong proof must be adduced.”<sup>377</sup> In other words, although circumstantial evidence may be used to prove fraud, the mere insinuation and innuendo upon which the current claims of fraud and wrongdoing are based are not sufficient.

Review of the paper trail in this matter revealed that it contains insufficient evidence of fraud or any other wrongdoing.<sup>378</sup> Indeed, commenting on the possibility of fraud, years after his analysis of the matter for the State, C.C. Wood stated “. . . as far as I could see, we didn’t have any evidence of fraud, at all.”<sup>379</sup> There exist no inconsistencies in the extant lease (*i.e.*, State Lease 340, 341, and 344) documents to support a fraud allegation. With no paper trail to demonstrate wrongdoing, live testimony is the only other option. Thus, in order to prove fraud, the State needs live testimony of the actors involved in the alleged fraudulent activity. The existing testimony from *U.S. v. Noe* does not evidence any fraud. All potential witnesses are now long dead and thus cannot be interviewed. The lack of evidence of fraud or of any other wrongdoing in this matter defeats any nonfrivolous challenge to the Win or Lose leases.

### *B. Good Faith of Third Parties*

The Perrault Memorandum of July 15, 1941 reviewed the requirements to invalidate certain State leases vitiated with several irregularities: the large profits made by the original lessee resulting from his assignment of the lease; the typewritten bids accepted by the State; and the amount of the bid filled in blank places;<sup>380</sup> the executed lease carrying no cash consideration as called for by the advertisement; and instances where a corporation in which public officials owned an interest finally received by assignment interests in the leases. Perrault’s analysis concluded that, despite the suspicious circumstances surrounding the execution of these leases, such circumstances did not equate to a proof of

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376. 368 So.2d 984, 993 (La. 1978), *aff’d in part and vacated in part on other grounds*, 452 U.S. 571 (1981).

377. *Id.*

378. See Perrault Memorandum, *supra*, note 174.

379. Deposition of C.C. Wood, *Roussel v. Noe* (La. 16th J.D.C. 1980) (No. 42,338) at 12 (on file with the La. Dep’t of Justice).

380. It is unclear to the authors of this article why this fact would give someone pause regarding the validity of the leases, but it is cited by Perrault as a concern and we thus repeat it here in the interest of completeness.



the existence of fraud. In order to cancel the leases as of their inception, fraud would have to be shown. Thus, there must be proof that: (1) fraud occurred on the part of the present lease holders; or (2) the present lease holders did not acquire in good faith on the face of the public records.

Thus, in order to examine whether the current holders of the Win or Lose leases may be forced to give up those leases based on a lack of good faith, this article looks to the current law on nullity. Louisiana Civil Code article 2035, provides that: “Nullity of a contract does not impair the rights acquired through an onerous contract by a third party in good faith. If the contract involves immovable property, the principles of recordation apply to a third person acquiring an interest in the property whether by onerous or gratuitous title.”

According to the 1984 revision comments, “[t]his Article is new, but it does not change the law.”<sup>381</sup> The comments further note that article 2035, “merely articulates the doctrines of *bona fide* purchase and the sanctity of the public records.”<sup>382</sup> The article also “reflect[s] the public policy in favor of security of transactions by protecting the person who acquires rights through a valid onerous contract from the effects of the nullity of any related contract between different persons.”<sup>383</sup> In fact, this principle has been part of the Louisiana jurisprudence since the 1800s. In *Blanchard v. Castille*, the Louisiana Supreme Court noted that, “a *bona fide* purchaser, without notice, is not affected by fraud in his vendor, who has a legal title to the property sold.”<sup>384</sup>

In *State v. Hackley, Hume & Joyce*, the State sought to invalidate patents on certain lands because they were obtained through the use of fraudulent representations.<sup>385</sup> The State’s prayer was that the patents, then owned by subsequent holders, be decreed to have been illegally obtained. Further, the State prayed that the patents, together with the titles of the defendants, be ordered erased from the records, and that the State be recognized as the owner of the lands and have a judgment rendered against the defendants ordering them to vacate the disputed property. On rehearing, the court concluded:

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381. LA. CIV. CODE ANN. art. 2035, cmt. a.

382. *Id.* See Mengis, *supra* note 228 (discussing the importance and sanctity of public records in such situations).

383. LA. CIV. CODE ANN. art. 2035, cmt. b.

384. 19 La. 362, 364 (La. 1841).

385. 50 So. 772 (La. 1909).

Even though the patent itself should be invalid, by reason of the alleged fraud of the patentees, the several titles which constitute the chain of title by which the defendants are alleged to hold may be good, and each of them be an insurmountable barrier to the pretensions of the state. This is so because, where fraud has been committed by the patentee, the government cannot recover the land from a third person who has acquired it for valuable consideration and without notice of the fraud. Therefore, for showing a cause of action against the defendants, it was necessary that the petition should have shown that the acquisition of the property under each and every one of these several titles was without valuable consideration, or else with notice of the alleged fraud; in other words, connected these subsequent holders of the title with the fraud by proper allegations, and the petition has not made this showing.

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To say that the defendants are holders in bad faith is not to allege a fact, but merely a conclusion of law. It is merely to say that their title is invalid, and that they know it. A 'holder in bad faith' is defined by the Civil Code to be he 'who possesses as master, but who assumes this quality when he well knows that he has no title to the thing or that his title is vicious or defective.' Civ. Code, art. 3452.<sup>386</sup>

Notably, bad faith is never presumed;<sup>387</sup> thus, good faith is presumed.<sup>388</sup> To overcome this presumption, it is necessary to prove that the purchaser acted in bad faith because he had knowledge of the fraudulent circumstances involving the original transaction:

If there is doubt as to the validity of the title from whom he acquires, or if the person so acquiring title has knowledge of such facts as would render the title invalid, he cannot claim the benefit of a possessor in good faith.<sup>389</sup>

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386. *Id.* at 775 (internal citations omitted).

387. *See* *Breaux v. Broussard*, 40 So. 639, 640 (La. 1906).

388. LA. CIV. CODE ANN. art. 3481.

389. *Franks v. Scott*, 191 So. 175, 177 (La. App. 1 Cir. 1939) (citing *Knight v. Berwick Lumber Co.*, 57 So. 900 (La. 1912); *Fradella v. Pumilia*, 147 So. 496 (La. 1933), *rev'd on other grounds*; *Rauschkolb v. DiMatteo*, 181 So. 555 (La. 1938)).

The requirement that all of the current right holders in the Win or Lose leases be shown to have been in bad faith at the time that they acquired their rights is, in some cases, impossible (due to the death of the acquirers); and in others, highly unlikely (most of the parties to these leases today relied in good faith on the public records that suggested or demonstrated that these leases were valid).

With regard to the “good faith acquirers” mitigating factor, the past actions of the State Mineral Board, the Louisiana Attorney General’s Office, and private litigants are of great importance. Over time, the State Mineral Board, whether by resolution or by settlement of litigation, has ratified the validity of the Win or Lose leases. Whether these ratifications were sufficient to undo any wrongdoing that occurred in the acquisition of the leases is immaterial to this inquiry. What is material is the effect that those actions had on the public records and the perceptions of those who acquired interests and invested in the Win or Lose leases subsequent to the ratifications. The effect of the State Mineral Board ratifications cannot be understated: they put all subsequent acquirers of interests in these leases on notice that the State has committed itself to the validity of the leases. Thus, despite any existing rumors of wrongdoing in the granting of these leases, the public records demonstrate, that these leases were and are valid, and such an assertion, can be relied upon in good faith. Consequently, as a result of these public pronouncements, the current acquirers of interests in these leases are in good faith and their interests cannot be assailed by revoking the leases due to the presumption of good faith discussed above.<sup>390</sup>

If these resolutions were not enough to assuage any concerns of prospective acquirers of interests in the Win or Lose leases, the several pronouncements of the Louisiana Attorney General Office certainly also contribute to the good faith of the current lease interest holders. As is reviewed at length in Part II(B), past Attorneys General for the State of Louisiana have examined the Win or Lose leases for irregularities. Some of these examinations revealed inconsistencies; yet, each of these examinations resulted in determinations that the inconsistencies were either unverifiable or that invalidating the Win or Lose leases was pointless. These decisions, which effectively became public examples of prosecutorial discretionary decisions not to take action for lack of evidence

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390. *See, e.g.*, *Keller v. Summers*, 187 So. 69, 71 (La. 1939) (“good faith is always presumed, until the contrary is shown” in commercial transactions); *Caldwell Lands, Inc. v. Cedyco Corp.*, 980 So.2d 827, 829 (La. App. 3 Cir. 4/2/08) (“Good faith is presumed” in acquisitive prescription scenarios (citing LA. CIV. CODE ANN. art. 3481)); *Cahn Bros. & Redmond, Inc. v. Terrebonne*, 289 So.2d 171, 173 (La. App. 1 Cir. 1973) (good faith is presumed in financial transactions).

of wrongdoing, further bolster the good faith of today's right holders in these leases.

Although none of the governmental or private litigation regarding the Win or Lose leases reached a final judgment by a court, the mere existence of the suits and their lack of finality further suggest that these leases could be relied upon as valid. Probably the most important of these cases is the litigation against Texaco.<sup>391</sup> These acts, along with the lack of complete prosecution of the other cases involving the Win or Lose leases, certainly stands as a reliable basis for acquiring good faith rights in the Win or Lose leases by any and all subsequent lease interest holders.

Therefore, even if the State were able to revoke the Win or Lose mineral leases, it could not invalidate the equitable rights in or effects of those leases to the good faith third parties who now hold rights in those leases. The State has continuously received what it contracted for: a 12.5% (or more) royalty share on any production from the Win or Lose leases. Thus, revocation of the leases would not result in the release of any acreage to potential renomination for bid nor in a return of any royalties acquired by the lessees, their assigns, or their heirs.

### *C. The Texaco Litigation and its Implications for the Entire Win or Lose Matter*

In the matter of *Texaco Inc., et al. v. Louisiana Land and Exploration Co., et al.*,<sup>392</sup> the State sued Texaco, Inc. within Texaco's then-pending bankruptcy suit, alleging that the latter had violated a 1981 settlement agreement between the two parties over natural gas pricing disputes. The State further alleged that Texaco had intentionally underpaid for gas from other State leases not included in the 1981 settlement.<sup>393</sup> More broadly, the State alleged that Texaco had been underpaying royalties on gas produced from forty-four State leases for approximately forty years.<sup>394</sup> Among the leases involved in this lawsuit were several leases in which Texaco acquired an interest from W.T. Burton and/or shares of interests from the

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391. See generally discussion *infra* part V.C.

392. 136 B.R. 658 (M.D. La. 1992).

393. The 1981 litigation was entitled, *State of Louisiana, ex rel. William J. Guste, Jr., et al. v. Texaco, Inc., et al.*, Docket No. 60,407, Sixteenth Judicial District Court, St. Mary Parish.

394. Statement of the Case filed by State of Louisiana, Department of Natural Resources and State Mineral Board, *State v. Texaco*, Docket No. 88-998-A (M.D. La., filed Jan. 8, 1989), at 4-5.

successors of the Win or Lose Corporation.<sup>395</sup> Notably, that this case was not instituted to attack the actions of or to investigate matters related to W.T. Burton or Win or Lose, but rather to remedy the royalty underpayment allegations of the State as against Texaco.<sup>396</sup> This does not mean, that the issues related to W.T. Burton and Win or Lose did not come up during the course of this wide-ranging and complex litigation; they were simply not the focus of this case or of the 1981 *Texaco* litigation.<sup>397</sup>

The *Texaco* litigation, which was instituted in the United States District Court for the Middle District of Louisiana, was associated, but not consolidated, with Texaco's then-pending bankruptcy proceedings in the United States Bankruptcy Court in the Southern District of New York.<sup>398</sup> After several years of litigious maneuvering in both the New York and Louisiana federal courts, the State, Texaco, and several other parties entered into mediation, which concluded in 1994 and resulted in the confection of the Texaco Global Settlement Agreement (GSA).<sup>399</sup>

The GSA, in addition to settling the State's gas royalty payment dispute with Texaco over the leases subject to the suit for a payment to the State of \$250 million, also constituted ratification by the State of the leases

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395. A bankruptcy filing by Texaco listed State Leases 334, 335, 340, and 341 as State leases in which Texaco had an interest. Exhibit A to Motion of Texaco Inc. for Order Approving Assumption of Oil and Gas Agreements with State of Louisiana, or Alternatively, Determining that Certain Oil and Gas Agreements are Not Executory Contracts or Unexpired Leases for Purposes of Bankruptcy Code Section 365, In re: Texaco Inc, et al., Docket Nos. 87-B-20142, 87-B-20143, 87-B-20144 (S.D.N.Y., filed Sept. 15, 1987).

396. See generally Amended and Restated Objection, Amended and Restated Proof of Claim and Complaint of the State of Louisiana, Texaco Inc., et al. v. Louisiana Land and Exploration Co., et al., Docket No. 88-998-A (M.D. La., filed July, 21, 1989).

397. The media reports have referred to this case as an example of Attorney Generals Guste and Ieyoub's examination of the Win or Lose allegations that are the subject of this report and their decisions not to pursue them. As is clearly evident from the filings in this case, the alleged wrongdoings of W.T. Burton and the Win or Lose Corporation were not the subject of either this case or of the case that resulted in the 1981 *Texaco* settlement.

398. In re: Texaco Inc, et al., Docket Nos. 87-B-20142, 87-B-20143, 87-B-20144 (S.D.N.Y.). Louisiana filed its suit prior to Texaco's bankruptcy filing. See Statement of the Case, *supra* note 394, at 5. Texaco did not file its bankruptcy primarily to avoid liability from Louisiana's claims. Rather, the bankruptcy was instituted because Texaco was unable to cover the obligations imposed upon it by the adverse ruling against it in *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1 (1987). Statement of the Case, *supra* note 394, at 14-15. With that said, Louisiana's counsel on the *Texaco* litigation directly alleged that the bankruptcy was also filed in order to avoid certain liabilities under Texaco's leases, including those owed to Louisiana for the underpayment of gas royalties. *Id.* at 15.

399. See *Texaco Global Settlement Agreement (1994)* (on file with the La. Dep't of Justice) [hereinafter GSA].

subject to the suit.<sup>400</sup> The effect of this ratification constitutes an acceptance of the leases and of their terms by the State in 1994. Such an acceptance creates a strong presumption of estoppel for the State to now challenge the substance and terms of those leases.<sup>401</sup> Importantly, that the State did not unilaterally ratify these past leases without any consideration. In reality, the ratification was a necessary requirement for the State to gain the benefits of the underpaid royalties—the \$250 million payment. In order to benefit from the leases, the State had to recognize and acknowledge the validity of the leases under which the benefits were to be obtained. Hence, the ratification of the leases was included as a condition of the GSA.

Moreover, it would be a mischaracterization to imply that the State simply ratified the former W.T. Burton and Win or Lose leases (among others) without any reason or recompense. The reason and recompense was a quarter of a billion dollars;<sup>402</sup> an agreement for Texaco to spend an additional \$152.25 million for further development of the mineral reserves covered by their leases;<sup>403</sup> an agreement for Texaco to release 33,000 acres from the Lighthouse Point, Mound Point, and Caillou Island Fields;<sup>404</sup> and tightening Texaco's commitment to adhere to the gas pricing requirements of the 1981 Compromise Agreement.<sup>405</sup>

In addition to the confection of the GSA, the *Texaco* litigation also resulted in the creation of the Lease Protection Agreement.<sup>406</sup> The Lease Protection Agreement constituted a settlement of certain State claims in the *Texaco* litigation against the overriding royalty interest owners for State Leases 335, 340, and 341. In the settlement, the State reserved the ability to, under certain circumstances, obtain higher royalty rates from these interest holders than had originally been bargained-for when these leases were let. Through this agreement, the State acquired a 20% royalty rate for any reassigned portions of these three State leases,<sup>407</sup> an increase in the State's royalty of 7.5% over the original royalty rate for these leases.

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400. The cash payment is detailed in the GSA at ¶ 3, and the ratification is detailed in the GSA at ¶ 9.

401. *See, e.g.,* *Frazier v. Harper*, 600 So.2d 59, 62 (La. 1992) (noting the effects of ratification of contracts).

402. GSA at ¶ 3.

403. *Id.* at ¶ 4.

404. *Id.* at ¶ 5. The releases from the Lighthouse Point and Mound Point Fields amounted to releases of acreage from State Lease 340. In addition to these areas, the State also required Texaco to release portions of the Rabbit Island, West Cote Blanche Bay, Horseshoe Bayou, and Bayou Sale Fields.

405. *Id.* at ¶ 7. There were additional concessions by Texaco in the GSA that are too detailed for a meaningful summarization in this document. The reader is referred to the actual language of the GSA for this information.

406. Lease Protection Agreement (1994) (on file with the La. Dep't of Justice).

407. *See id.* at 11.

In exchange for this higher royalty rate, the State, through the State Mineral Board, ratified: “State Leases 334, 335, 340, and 341 and all Subleases thereof, and all sales and assignments of these leases by William T. Burton and his successors in title which have been approved by the State Mineral Board . . . .”<sup>408</sup>

Thus, once again, the State Mineral Board ratified W.T. Burton and Win or Lose leases and assignments. This ratification effectively makes these leases, at least as to those individuals in W.T. Burton’s chain of title, invulnerable by the State today. Further, considering the effects of undermining or undoing the leases that are discussed below, such a dissolution may cause more harm than good to the State’s fisc.

## VI. DISCUSSION AND RECOMMENDATIONS

This section examines how the State was injured by the issuance of the Win or Lose leases. It then analyzes the likelihood of success of the possible mechanisms for invalidating the Win or Lose leases

### A. *What Did The State Lose?*

Prior to embarking on an analysis of the possible legal theories to undermine or cancel the Win or Lose leases and their chances for success, it is crucial to understand what the State has lost through these leases. In other words, the question remains how the State fisc (and, presumably by extension, the people) has been injured by the letting of the Win or Lose.

The very simple answer to this is: nothing. As can be seen in the clear language of the leases, the State received from these leases a one-eighth (12.5%) royalty share. This royalty share is consistent with historic leases at the time. In addition, the consistency of this amount with that of leases at the time—a 12.5% royalty for the State—was the State-mandated royalty minimum.<sup>409</sup> Thus, not only were the royalty amounts for these leases consistent with historic standards, they were also consistent with the legally required royalty at the time.<sup>410</sup> Thus, under the law and custom of

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408. *Id.*

409. Act No. 315, 1926 La. Acts 606-07.

410. A significant fact, as found by Daryl Purpera, is that the average royalty rate for the time period of 1920-1939 was 13.0%—an insubstantial difference from the 12.5% of the subject leases. DARYL G. PURPERA, Louisiana Legislative Auditor, STATE MINERAL AND ENERGY BOARD MINERAL LEASE ROYALTY RATES INFORMATIONAL REPORT, 2 (2013). This reality suggests that even though 12.5% was the legal minimum at the time, the subject leases were not let at the bare minimum based upon some side agreement among the relevant parties, but rather they were let at the minimum just like most other leases of their time, regardless of the lessor.

the time, the State received no less than what it was due under the law for these leases. In short, there was no injury to the State fisc in the letting of the subject leases and therefore fraud did not, *ipso facto*, occur in these cases.

Further, under the aforementioned Lease Protection Agreement, entered into by the State and several other parties to State Lease 340 in 1994, the State's royalty share for portions of certain Win or Lose leases has substantially increased.<sup>411</sup> As noted above, the original royalty percentage received by the State for the Win or Lose leases was 12.5%. Under the Lease Protection Agreement, any acreage that is reassigned subsequent to the execution of that Agreement is subject to a 60% increase in favor of the State (*i.e.*, adding 7.5% to the existing 12.5% royalty, for a total of a 20% royalty share). With regard to State Lease 340, not all of that lease's remaining acreage has been reassigned under the Lease Protection Agreement since 1994, but the majority of it has. Because of this Agreement, of the 75,640 unreleased acres still held by State Lease 340, 41,320 of those acres (or 54.63%) are paying out royalties to the State at 20%, while 34,320 of those acres (or 45.37%) are still paying out at the original 12.5%. This important reality means that it is very difficult to say that the State fisc is being injured by the continued existence of State Lease 340. Further, because the State received its statutory royalty due (12.5%) prior to the execution of the Lease Protection Agreement, it is similarly difficult to say that the State fisc was injured by State Lease 340 between 1936 and 1994.

This finding and conclusion leads necessarily to the question or what is left to sue for with regard to the Win or Lose leases. The answer to this question is not one that has the support of any identifiable legal theory. The only thing that the State could sue for as to the subject leases is for the hypothetical idea that, had the State not leased to Noe or Burton, it would have enjoyed a better royalty rate offered by some other bidder. In other words, during the gubernatorial terms of Oscar K. Allen and James A. Noe, today the State would have to show that it would have received a more advantageous bid than what it received for the Win or Lose leases in order to even begin to call into question the propriety of the letting of these leases. This task is impossible. Additionally, such a conclusion is not supported by the facts from the time. As the Louisiana Legislative Auditor has recently found, the average royalty rate at the time was 13%.<sup>412</sup> Thus, the 12.5% that the State received was unlikely to have been outbid or beaten by another bidder during Allen's or Noe's terms as governor.

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411. Lease Protection Agreement, *supra* note 406.

412. Purpera, *supra* note 410, at 2.



Based upon these realities, this article concludes that, considering the evidence, the State of Louisiana was not swindled and was not cheated by the Win or Lose transactions. The State received what was legally required and customarily due at the time. There is no doubt that the lessees and their assigns and heirs have profited from the Win or Lose leases. There is also no question that other lessees have similarly profited in the 103 years that the State has been leasing its lands for mineral exploration and production. This profiting is part of the trade-off of mineral development. The landowner, private or public, reserves (where allowed by law) a share of the proceeds realized from the minerals derived from its land and the lessee, as the party bearing the burden of developing the minerals, retains the remainder of the proceeds. Whether and how these proceeds are divided among lessees, assignees, overriding interest holders, and others is strictly a private matter of no concern to the State. Therefore, considering the leases at issue, as long as the State receives its share of the royalties as required by law and contract (*i.e.*, its State leases), the State has not been injured with respect to the Win or Lose leases.

### *B. Likelihood for Success*

Most of the legal theories in this article that propose mechanisms for the invalidation of Win or Lose leases are untested and, admittedly, are confected on weak legal bases. Very simply, there is no legal theory to undo the actions of W.T. Burton, Oscar K. Allen, and James A. Noe, nor is it clear that it is in the State's best interests to do so. Much of the reason for the weaknesses of these theories is the much-belabored lack of evidence in this matter necessary to support, much less to prove, a cause of action. In addition to the lack of a clearly applicable legal theory in this situation, there is no smoking gun in this matter. The question of whether the triumvirate of Huey Long, Oscar Allen, and James Noe colluded with William Burton to obtain vast mineral leases on State property is a compelling question that can and has led to massive amounts of speculation. However, the speculation and insinuation of conspiracy theories does not equate to evidence sufficient to prove a case in a court of law. No documentary evidence has been identified that can serve as a basis for invalidating the Win or Lose leases.

Whether there is enough information available to create a claim to invalidate the subject leases is unclear. Virtually anything can serve as the basis for a lawsuit, whether it is well founded or not. However, as this article has set forth above, insinuation and innuendo do not rise to the level of proof sufficient to support the legal theories available for the invalidation of the Win or Lose leases. Evidence would have to be real and clear. Such evidence has not been identified in such a manner that, as of

today, we can say that the State has a cause of action against the lessees, assignees, and overriding interest holders in the Win or Lose leases.

Indeed, the available evidence suggests that the Win or Lose leases were granted in compliance with the law in force at the time rather than through a nefarious scheme to defraud the State. This reality leads to a necessary consideration of one of the apparent motivations for seeking to invalidate the Win or Lose leases in the allegations and stories that led to the creation of this article: the idea that it is somehow unfair that the descendants of Long, Allen, and Noe are profiting today off of actions taken by their ancestors four generations ago. This reality can understandably cause frustration, envy, and consternation for modern Louisianans who happen not to be descendants of these individuals. However, the simple concept that this reality is unfair is not a legal basis for invalidating otherwise lawful leases. As the Louisiana Supreme Court has noted, “[e]quitable considerations and estoppel cannot be permitted to prevail when in conflict with the positive written law.”<sup>413</sup> In other words, the perception that the State was cheated by way of the Win or Lose leases, in the absence of any evidence to support such claims, cannot overcome the reality that the subject leases were issued in compliance with the then-existing law. The State, under Louisiana Supreme Court precedent, cannot simply invalidate otherwise valid leases merely because the citizens are now unhappy that the Longs, Allens, and Noes continue to profit from these leases.

This does not mean that, should the State opt to bring an action to invalidate the active Win or Lose leases, that it might not be successful. However, based on the reality that the State has not lost any royalties on these leases and based on the lack of evidence and the weakness of the available legal theories, any such suit will be, legally, virtually impossible and practically unwise.

## VII. CONCLUSION

Based on the analysis, it is not recommended that a suit be filed on this matter. The costs are simply too high for a speculative and doubtful return. Such a suit does not appear to be in the best interests of the State. In the exercise of its fiduciary duty, the State must not only consider the potential sins of the past, but also the effects of any prospective actions taken with regard to the Win or Lose leases. There is little doubt that a legal swipe at the heirs of the Win or Lose fortune would seem to cure a perceived (but not proven) moral injustice. However, as is noted above, the costs of such

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413. *Palermo Land Co., Inc. v. Planning Comm'n of Calcasieu Parish*, 561 So.2d 482, 488–89 (La. 1990).

an action could be significant and may result in substantial negative financial impacts to the State. Further, many of the mineral rights that originally began as part of the Win or Lose matter are now in the hands of third parties with no involvement in the original acquisitions of these interests. The disturbance of these parties' rights would likely be rebuffed by the courts or would constitute contractual interferences for which the State could be financially liable.<sup>414</sup>

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414. The former possibility is based upon the discussion of the rights of good faith third parties. The latter possibility refers to the general tort theories related to the interference with a contract or a business relationship. *See, e.g.*, 9 to 5 Fashions, Inc. v. Spurney, 538 So.2d 228 (La. 1989); Tech. Control Sys., Inc. v. Green, 809 So.2d 1204 (La. App. 3 Cir. 2/27/02), *writ denied*, 817 So.2d 100 (La. 5/31/02); Bogues v. La. Energy Consultants, Inc., 71 So.3d 1128 (La. App. 2 Cir. 8/10/11).