

# PUBLICATION

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## Louisiana Risk Fee Statute Amended

November 12, 2012

**On June 6, 2012, the governor of Louisiana signed Act 743 amending two sections of the Conservation Code, including Louisiana Revised Statute Section 30:10, commonly referred to as the Louisiana Risk Fee Statute. Among other things, Act 743 adds several provisions addressing the obligation of a drilling owner to pay royalties (and overriding royalties) owed by non-participating interest owners to others.**

The Louisiana Risk Fee Statute seeks to allocate the risk of drilling certain wells as between "drilling" owners and "non-drilling" owners. Under the Risk Fee Statute, when a non-drilling owner has been sent a risk-fee notice by a drilling owner and has elected not to participate in the risk and expense of drilling, the drilling owner may recoup the costs to be borne by the non-drilling owner from the non-drilling owner's share of unit production, plus a risk fee of 200 percent of such tracts' allocated share of the cost of drilling, testing, and completing the well.

The Risk Fee Statute, in its current form and as reenacted, provides that notwithstanding the risk-fee provision, "the royalty owner and overriding royalty owner shall receive that portion of production due to them under the terms of the contract creating the royalty." Both state and federal Louisiana courts have previously interpreted this provision to mean that the nonparticipating owner, as the contracting party, is responsible for paying the royalties (and overriding royalties) owed to its royalty interests, even though the nonparticipating owner is not receiving any part of production revenues. Act 743 effectively overrules that jurisprudence, at least in part.

The new statute provides that *during the recovery period*—the period of time during which the *drilling owner* withholds from production the actual reasonable expenditures incurred in drilling, testing, completing, equipping, and operating the well—the drilling owner must pay the royalty to the nonparticipating owner, and the risk fee is not assessed against those amounts. The drilling owner's obligation is determined, as a basic matter, by the terms of the contract or agreement *between the nonparticipating owner and the royalty interest(s)* as "reflected of record at the time of the well proposal." The drilling owner's royalty payment obligation ceases once it recovers the actual well costs and risk charge.

In addition to requiring the drilling owner to foot the royalty bill during the recovery period, the reenacted and amended Risk Fee Statute affords certain judicial remedies to an aggrieved royalty interest(s) for nonpayment. Most significantly, the new statute recognizes a cause of action for damages on behalf of a nonparticipating owner against a non-paying drilling owner. Subject to certain notice requirements and a time period for corrective measures to be taken by the drilling owner, a drilling owner who fails to make payment of the royalties or state a reasonable cause for its failure may be liable to the nonparticipating owner for double the amount of royalties due, interest on that sum from the date due, and a reasonable attorney fee "regardless of the cause for the original failure to pay royalties."

Given that the legislature did not provide a specific effective date for Act 743, by law, the default effective date was August 1, 2012. It is unclear whether the Act will apply retroactively. However, the Act does not expressly provide for retroactive application and because the changes are substantive and may affect vested rights, Act 743 *should* apply only to wells drilled after August 1, 2012.

