



## BUSINESS BRIEF

### The Rogue Co-Owner: Cutting and Selling Timber from a Co-owned Tract

Picture this: former wife sues her ex-husband for cutting and selling timber from a co-owned 120-acre timberland tract. The timberland tract was purchased during the couple's marriage and was community property. As part of a divorce settlement, the ex-couple remained co-owners of the timberland. Thereafter, the ex-husband had the timber cut and sold – and checks for the timber sold were made payable to the then girlfriend (now wife) of the ex-husband. When the former wife found out, she sued the ex-husband, seeking treble damages (among other things), under Louisiana's so-called "timber piracy" statute.

As a co-owner, is the ex-husband liable to his former wife under Louisiana's "timber piracy" statute? This was the issue presented to the Louisiana Supreme Court in the case, *Sullivan v. Wallace*, 2010-0388 (La. 11/30/10), 51 So.3d 702. The Court concluded that he was not, because the "timber piracy" statute did not apply to suits between co-owners.

In response, the Louisiana legislature, in the recently concluded 2011 Regular Session, amended Louisiana's "timber piracy" or "timber theft" statute (LSA-R.S. 3:4278.1). Those associated with forestry recognize the statute as forbidding unauthorized timber removal, and assessing civil penalties (treble damages) for a violation of the law. The amendment to the "timber piracy" statute, sponsored by Representative Dorothy Sue Hill of Dry Creek, was signed by Governor Jindal as Act 226 on June 27, 2011, and becomes effective August 15, 2011.

Louisiana has had a "timber piracy" statute since 1974. Prior to the recent amendment, the "timber piracy" statute made it unlawful for any person to cut or remove timber from the land of another without the consent of the property's owner or legal possessor. It provided for civil damages of three times the fair market value of the trees cut or removed (treble damages) for willful or intentional timber theft, plus reasonable attorney fees. Even the "good faith" removal of timber could subject the violator to treble damages, if the violator should have been aware that his actions were without the consent of the owner or legal possessor. A "good faith" violator failing to pay the required damages within 30 days of notification by the owner or legal possessor could also then be assessed reasonable attorney fees.

So what does the recent amendment do to the "timber piracy" statute and why was the law revised? At the heart of the matter is who is included in the phrase "any person."



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The amended law basically retains the present law but adds protection for co-owners or co-heirs for the unauthorized removal of timber from co-owned land. That is, a co-owner of timber must obtain the consent from other co-owners prior to the cutting or removal of timber from co-owned land. Failure to do so subjects the offending co-owner to the statute's provisions regarding treble damages and attorney fees. This is accomplished by the addition of subparagraph A(2) to the statute, which states in pertinent part: "It shall be unlawful for any co-owner or co-heir to cut, fell, destroy, remove, or to divert for sale or use, any trees, or to authorize or direct his agents or employees to cut, fell, destroy, remove, or to divert for sale or use, any trees, growing or lying on co-owned land, without the consent of, or in accordance with the direction of, the other co-owners or co-heirs, or in accordance with specific terms of a legal contract or agreement."

For a concept that seems simple enough on the surface, our Louisiana appellate courts have struggled with co-ownership rights under the "timber piracy" statute. The Louisiana Second Circuit Court of Appeal (based in Monroe) considered the issue in *Alexander v. Dunn*, 44,272 (La. App. 2d Cir. 6/3/09), 15 So.3d 302, where a defendant owned one-half of the community timberlands property and his deceased wife's five children owned the other half. When the defendant sold the timber, the co-owning children sued. On appeal, the Second Circuit Court held that the "timber trespass" statute does not apply to co-owners of immovable property. Thus, disputes among co-owners in that appellate circuit were to be handled by the Louisiana Civil Code articles on co-ownership, which do not allow for treble damages. Meanwhile, in the Louisiana Third Circuit Court of Appeal (based in Lake Charles), the appellate court reached a different conclusion in the case, *Prewitt v. Rodrigues*, 04-1195 (La. App. 3d Cir. 2/2/05), 893 So.2d 927. In *Prewitt*, the Third Circuit Court affirmed an award of treble damages and attorney's fees against a brother who had willfully sold timber co-owned with his sister with no intention of providing her with her share. The Third Circuit reasoned that, while the "timber trespass" statute may have been inartfully drafted, its purpose was to impose penalties on those who flagrantly disregard the rights of timber owners, whether strangers or co-owners.

Thus, to resolve the split in the appellate courts, the Louisiana Supreme Court addressed the issue of co-owners in the case, *Sullivan v. Wallace*, 2010-0388 (La. 11/30/10), 51 So.3d 702, wherein Bruce Sullivan contracted with a third party in the mid-1990s to cut and remove timber from a 120-acre tract of land in Claiborne Parish, co-owned with his former wife, Janice Sullivan. Payments were made to Mr. Sullivan's girlfriend at the time, Priscilla Wallace. Upon gaining knowledge of the timber harvest, Janice Sullivan filed suit seeking treble damages and attorney fees under the "timber theft" statute. The Louisiana Supreme Court, finding the statute "facially ambiguous with regard to co-owners" of timberland, concluded that the "timber trespass" statute was inapplicable in suits involving co-owners of immovable property.

The Louisiana Supreme Court also noted that if LSA-R.S. 3:4278.1 applied to co-owners, then one co-owner who holds more than 80% of the ownership interest and permits the timber to be cut in accordance with LSA-R.S. 3:4278.2 (the "80% Rule" for a valid sale of timber owned in indivision with co-owners) would become liable to the other co-owners for treble damages under the "timber theft" statute. The Court reasoned that such an inconsistency could not have been what the Louisiana Legislature intended.

To be sure, the Louisiana Legislature responded swiftly and decisively to address both issues during this most recent legislative session. Not only was the "timber piracy" statute amended to specifically include co-owners and co-heirs among the persons protected by its provisions, but language was also included in the amendment stating that the "provisions of this Paragraph shall not apply to the sale of an undivided timber interest pursuant to R.S. 3:4278.2." Thus, a co-owner owning 80% or more of the timber may still sell the timber and a minority co-owner is only entitled to his share of the fair market value

of the timber removed under R.S. 3:4278.2. Accordingly, minority co-owners cannot pursue an action against the 80% or more majority co-owner(s) under the “timber piracy” statute. Likewise, timber buyers obtaining consent from at least 80% of the timber co-owners are equally protected from the penalties contained in the “timber piracy” statute. The recent amendment to the “timber piracy” statute clarifies the rights of co-owners against “rogue” co-owners. Considering the path taken by the courts and the legislature, one should be mindful of proper estate planning for timberlands.

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