

Journal of Energy Law and Resources

Volume 1 | Issue 1
Fall 2012

Six Years Later: Louisiana Legacy Lawsuits since Act 312

Loulan Pitre Jr.

Recommended Citation

Loulan Pitre Jr., *Six Years Later: Louisiana Legacy Lawsuits since Act 312*, 1 LSU J. of Energy L. & Resources (2012)
Available at: <http://digitalcommons.law.lsu.edu/jelr/vol1/iss1/10>

This Article is brought to you for free and open access by the Law Reviews and Journals at DigitalCommons @ LSU Law Center. It has been accepted for inclusion in Journal of Energy Law and Resources by an authorized administrator of DigitalCommons @ LSU Law Center. For more information, please contact sarah.buras@law.lsu.edu.

Six Years Later: Louisiana Legacy Lawsuits since Act 312

Loulan Pitre, Jr.*

TABLE OF CONTENTS

I.	Introduction.....	94
II.	From Corbello to Act 312.....	95
III.	From Act 312 to 2012.....	96
	A. Issues Addressed by the Louisiana Supreme Court.....	96
	1. Constitutionality— <i>M.J. Farms, Ltd. v. Exxon Mobil Corp.</i>	97
	2. Prescription— <i>Hogg v. Chevron USA, Inc.</i>	98
	3. Prescription and Scope of Remediation— <i>Marin v. Exxon Mobil Corp.</i>	100
	4. Subsequent Purchaser— <i>Eagle Pipe & Supply, Inc. v. Amerada Hess Corp.</i>	104
	B. Other Issues in Act 312 Cases.....	106
	1. One Trial or Two?.....	106
	2. What are the Appropriate Regulatory Standards for Remediation?.....	106
	3. What are the Means by which a Landowner may Obtain Damages in Addition to the Remediation to Regulatory Standards Required by Act 312?.....	107
	4. May a Defendant Admit Responsibility for Remediation without Admitting Liability on the Landowners’ Claims for Additional Damages?.....	107
	5. Does Act 312 Apply in Federal Court?.....	108

Copyright 2012, by LOULAN PITRE, JR.

* Loulan Pitre is a member of the law firm of Gordon, Arata, McCollam, Duplantis, & Eagan, LLC. His practice focuses on environmental, energy, and resources law. A native of Cut Off, Louisiana, Mr. Pitre is a 1986 graduate of Harvard Law School and a former member of the Louisiana House of Representatives. Mr. Pitre has defended several dozen “legacy” lawsuits asserting environmental damage, often involving claims in the hundreds of millions of dollars.

C. The Practical Dynamics of Act 312 Litigation.	109
IV. The 2012 Amendments to Legacy Legislation	111
A. The Proposals.....	111
B. The Legislative Compromise.....	113
1. Key Components of the Provisions Dealing with Limited Admissions and Their Consequences.....	114
2. Novel Procedural Changes.....	116
V. Conclusion	116

I. INTRODUCTION

After the Louisiana Supreme Court's *Corbello v. Iowa Production* decision in 2003, litigation by landowners seeking compensation for alleged environmental damage to their property, commonly known as legacy litigation, increased dramatically, particularly in relation to oil and gas exploration and production sites.¹ In response to *Corbello*, the Louisiana legislature enacted Act No. 312 (hereinafter "Act 312" or "the Act") of the 2006 Regular Session of the Louisiana Legislature, primarily in an effort to ensure that contaminated oil and gas exploration sites were remediated to the extent necessary to protect the public interest.

Part II of this article briefly addresses the historical background of legacy litigation, through and including Act 312. It will draw primarily upon my previous article, "*Legacy Litigation" and Act 312 of 2006*," published in the *Tulane Environmental Law Journal*.² Part III of this article reviews certain major issues arising since the enactment of Act 312 and how courts have dealt with these issues. The issues addressed include the scope of damages, the need to remediate environmental damages, the extent of remediation required, and the proper timing of litigation.³ Finally, Part IV examines the battle to amend legacy litigation law in the 2012 Regular Session of the Louisiana Legislature and analyzes the new laws as enacted.

1. 02-0826 (La. 2/25/03); 850 So. 2d 686.

2. Loulan Pitre, Jr., "*Legacy Litigation" and Act 312 of 2006*," 20 *TUL. ENVTL. L.J.* 347 (2007).

3. For example—whether suits are brought too early or too late, who has the right to sue, and constitutional issues.

II. FROM *CORBELLO* TO ACT 312

Since the oil and gas industry entered Louisiana with the discovery of the Jennings Field in 1901, landowners have occasionally sued for alleged damage to their property.⁴ However, the nature and extent of such litigation changed drastically after the Louisiana Supreme Court's decision in *Corbello v. Iowa Production*.⁵

In *Corbello*, the Louisiana Supreme Court held that in a claim for breach of a *contractual* obligation to restore property, damages need not be "tethered" to the value of the property, thus allowing landowners to assert and receive damages that disregarded, and largely exceeded, the fair market worth of the property.⁶ Further, the court held that a landowner who collected such damages could not legally be required to remediate the offending contamination.⁷ This decision created, or, at a minimum, highlighted, a scenario in which property was worth more polluted than not, and landowners could sue for and collect large amounts of damages yet leave the property in its allegedly polluted state. Predictably, *Corbello* resulted in increased attention to legacy litigation. Three years later, the Louisiana Legislature enacted Act No. 312 of the 2006 Regular Session as a direct response to *Corbello* and the similar lawsuits that followed.⁸

Act 312's provisions have been summarized as follows by the Louisiana Supreme Court:

First, the act requires timely notice of such litigation to the State. Second, the act stays the litigation until thirty days after notice is given. Third, the act permits the State to intervene in the litigation. Fourth, the act provides a role for the Office of Conservation with the Louisiana Department

4. See *Andrepoint v. Acadian Drilling Co.*, 231 So. 2d 347 (La. 1969); see also *Smith v. Schuster*, 66 So. 2d 430 (La. App. 2 Cir. 1953); see also *Rohner v. Austral Oil Exploration Co.*, 104 So. 2d 253 (La. App. 1 Cir. 1958).

5. *Corbello*, 850 So. 2d 686. See generally Pitre, *supra* note 2.

6. *Corbello*, 850 So. 2d at 693.

7. *Id.* at 701.

8. While *Corbello* gets most of the credit for the increased litigation activity, large judgments in other cases alleging contamination doubtlessly contributed to the rise in litigious activity. See, e.g., *Grefer v. Alpha Technical*, 02-1237, p. 32-33 (La. App. 4 Cir. 3/31/05); 901 So. 2d 1117, 1141-42 (affirming a \$56 million award of damages for remediation of property worth at most \$1.5 million); *Dore Energy, Corp. v. Carter-Langham, Inc.*, 04-1373, p. 7 (La. App. 3 Cir. 5/4/05), 901 So. 2d 1238, 1242 (affirming that, under certain circumstances, a lawsuit could go forward while oil, gas, and mineral lease remained in effect).

of Natural Resources (“LDNR”) in the determination of the most feasible plan for evaluation and/or remediation of environmental damage. Fifth, the act provides for the payment of all damages for the evaluation or remediation of environmental damages and further provides that the Court shall oversee actual implementation of the plan adjudicated to be “most feasible.” Sixth, the act allows the landowner and the State to recover attorney and expert fees, as well as costs from the responsible party or parties.⁹

In 2012, six years after the enactment of Act 312, the legislature amended it for the first time. The rest of this article reviews certain major developments under Act 312 since 2006, including the new legislation enacted this year.

III. FROM ACT 312 TO 2012

Since Act 312’s enactment, cases subject to the Act have been addressed in Louisiana courts at every level. In deciding these cases, the courts have addressed the procedural aspects of Act 312, as well as legal issues not directly related to the Act.

A. Issues Addressed by the Louisiana Supreme Court

Over the last few years, the Louisiana Supreme Court has issued several decisions addressing issues relevant to Act 312 and legacy litigation. Importantly, the Court determined that Act 312 was constitutional in its 2008 *M.J. Farms, Ltd. v. Exxon Mobil Corp.* decision.¹⁰ Other issues addressed by the Court include whether pre-suit notice is required,¹¹ when an action has prescribed,¹² and whether a subsequent landowner can sue for damages to property occurring prior to its acquisition of the property.¹³

9. *M.J. Farms, Ltd. v. Exxon Mobil Corp.*, 07-2371, p. 29 (La. 7/1/08); 998 So. 2d 16, 36 (citations omitted); *see also* Pitre, *supra* note 2, at 350–54 (identifying the six major components of Act 312 and providing a more detailed discussion of the provisions of Act 312).

10. 998 So. 2d at 38.

11. *Broussard v. Hilcorp Energy Co.*, 09-0449 (La. 10/20/09); 24 So. 3d 813.

12. *Hogg v. Chevron USA, Inc.*, 09-2632 (La. 7/6/10); 45 So. 3d 991.

13. *Eagle Pipe & Supply, Inc. v. Amerada Hess Corp.*, 10-2267 (La. 10/25/2011); 79 So. 3d 246.

I. Constitutionality—M.J. Farms, Ltd. v. Exxon Mobil Corp.

In 2006, M.J. Farms, Ltd. filed suit against various oil and gas companies, alleging that the defendants caused environmental damage to its property.¹⁴ Specifically, M.J. Farms alleged that the defendants' oil and gas exploration and production activities contaminated the surface, subsurface, ground waters, and subsurface aquifers.¹⁵ M.J. Farms sought damages under Louisiana Revised Statutes section 31:22, a statute obliging the owner of a mineral servitude "insofar as practicable, to restore the surface to its original condition at the earliest reasonable time."¹⁶

While the suit was pending, Act 312 was passed and one of the defendants filed a motion to enforce the stay provision of the Act.¹⁷ M.J. Farms opposed the stay on two grounds: (1) the Act was inapplicable to its claims because Act 312 only amended Title 30 of Louisiana's Revised Statutes, and not Title 31,¹⁸ and (2) the Act violated the Louisiana State Constitution by depriving the plaintiffs of vested rights in their causes of action.¹⁹ After the Louisiana Attorney General submitted a memorandum urging the constitutionality of Act 312, the district court ruled, without elaboration, that Act 312 was unconstitutional under both the Louisiana and United States Constitutions.

Following various procedural entanglements²⁰ the matter was considered by the Louisiana Supreme Court, which found that Act

14. *M.J. Farms, Ltd. v. Exxon Mobil Corp.*, 07-2371, p. 1-3 (La. 7/1/08); 998 So. 2d 16, 20-21.

15. *Id.*

16. *Id.* at p. 2-3, 998 So. 2d at 21.

17. *Id.*

18. *Id.* at 5, 998 So. 2d at 22.

19. *Id.* at 20, 998 So. 2d at 31.

20. In April 2007, the Louisiana Supreme Court vacated the district court's first judgment, holding that Act 312 was unconstitutional, dismissed the appeal of the ruling, and remanded the case on the basis that the plaintiff had failed to properly raise its constitutional argument in a formal pleading. *M.J. Farms, Ltd. v. Exxon Mobil Corp.*, 07-0450 (La. 4/27/07); 956 So. 2d 573, 573. Following that ruling, the plaintiff filed a Motion to Dismiss and/or to Strike and/or for Declaratory Judgment Declaring Act 312 of 2006 Unconstitutional and Inapplicable to the Instant Act in the state district court. *M.J. Farms, Ltd. v. Exxon Mobil Corp.*, Docket No. 24055 "A", 7th Judicial District Court, Parish of Catahoula, Louisiana. Defendants then removed the case to federal court on the basis that the plaintiff's federal constitutional challenge to Act 312 conferred federal question jurisdiction over the case. *M.J. Farms, Ltd. v. Exxon Mobil Corp.*, 2007 WL 2081008, at *1 (W.D. La. 2007). The United States District Court for the Western District of Louisiana, however, remanded the proceedings back to the state court, where the trial judge again ruled without elaboration that Act 312 was unconstitutional. *Id.* at *2; *M.J. Farms, Ltd.*, Docket No. 24055

312 was constitutional.²¹ The Court rejected M.J. Farms' argument that the retroactive application of the Act violated due process.²² The retroactive application of the Act did not alter the parties' substantive rights or divest M.J. Farms of its causes of action; it only changed the remedy available to plaintiffs.²³ Plaintiffs have no substantive, constitutionally protected right to recover money damages in lieu of a defendant's specific performance of its remediation obligations.²⁴

The Court also noted two important policy concerns that are furthered by the retroactive application of Act 312: (1) the protection of the health, safety, and welfare of the public by ensuring that environmental damage will actually be remediated; and (2) providing real substance to the expertise of the Louisiana Office of Conservation ("LOC") and the LDNR regarding oilfield remediation.²⁵ Act 312 does not impinge upon the jurisdiction of the district court over civil matters in violation of Article V, Section 16 of the Louisiana Constitution.²⁶ The district court's jurisdiction over all civil matters is original, but not exclusive.²⁷ Act 312 instructs the district court to refer the matter to the LOC/LDNR upon a finding that that environmental damage indeed exists and identifying the responsible party, which does not offend Article V, section sixteen.²⁸

2. Prescription—Hogg v. Chevron USA, Inc.

Plaintiffs alleged contamination from underground gasoline storage tanks at a nearby gas station.²⁹ The tanks had been replaced in 1997 after the discovery of leaks.³⁰ In 2001 and 2002, the LDEQ sent letters to plaintiffs informing them of environmental contamination in the vicinity and that there was a possibility that

"A". As before, Judge Johnson did not elaborate on the reasoning behind her ruling. Defendants appealed this second ruling by the district court. Because the judgment found a statute unconstitutional, the appeal was heard by the Louisiana Supreme Court. *See* LA CONST. art. 5, § 5(d).

21. *M.J. Farms, Ltd. V. Exxon Mobil Corp.*, 07-2371, p. 32 (La. 7/1/08); 998 So. 2d 16, 38.

22. *Id.* at 36, 998 So. 2d at 29.

23. *Id.* at 37-38, 998 So. 2d at 31-32.

24. *See id.*

25. *Id.* at 39 (Johnson, J., concurring).

26. *M.J. Farms*, 998 So. 2d at 36-37.

27. *Id.*

28. *Id.* at 37.

29. *Hogg v. Chevron USA, Inc.*, 09-2632 (La. 7/6/10); 45 So. 3d 991, 995.

30. *Id.*

gasoline had migrated or would migrate in the future onto plaintiffs' property.³¹ The letters also revealed the presence of chemicals associated with gasoline in the area, and an attached map established that tests were conducted on the plaintiffs' property.³² The LDEQ recommended that the landowners limit the amount of time they spent in the noted areas and disclosed that it was in the process of finalizing a contract for the remediation.³³

In 2007, plaintiffs filed suit against the neighboring landowner, the gas station operator, and Chevron seeking damages for diminution of value of the property.³⁴ Defendants filed motions for summary judgment claiming that plaintiffs' claims had prescribed one year after plaintiffs acquired, or should have acquired, knowledge of the contamination and damage to their property from the letters in 2001 and 2002.³⁵ The Louisiana Supreme Court accepted review of the district court's denial of these motions.³⁶

The applicable prescriptive period for tortious conduct causing damage to immovable property is one year, which runs from the day the property owner had actual or constructive knowledge of the damage.³⁷ Constructive knowledge is notice that is enough to excite attention and put the injured party on guard, and whether it exists depends on the reasonableness of the injured party's action or inaction in light of the surrounding circumstances.³⁸

Plaintiffs argued that it was reasonable for them to wait for further notice from the LDEQ rather than to file suit in 2002 because the letters did not provide definitive evidence of contamination, did not state whether the contamination exceeded acceptable limits, and indicated that the investigation was ongoing.³⁹ The Louisiana Supreme Court rejected this argument. The Court found that the letters clearly indicated the presence of damage in the form of undesirable levels of contaminants on the property and noted the disclosure that a remediation contract was being finalized, which was a clear indication that matters had advanced beyond mere investigation.⁴⁰ While the letters did not specifically inform plaintiffs that the soil and groundwater on their property was contaminated, it was "beyond peradventure" that they

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.* at 995.

35. *Hogg*, 45 So. 3d at 995–96.

36. *Id.* at 996.

37. *Id.* at 997.

38. *Id.* at 997–98.

39. *Id.* at 1000.

40. *Id.* at 1001.

provided sufficient information to excite attention and put plaintiffs on notice that they had a reasonable basis to pursue a claim.⁴¹ Waiting more than five years to file suit was unreasonable, and the plaintiffs' claims had prescribed.⁴²

This decision sends a message to landowners that they have a burden to investigate possible claims when they receive information that their property might be contaminated. Landowners who ignore signs of contamination and then claim that they waited to file suit until they knew the extent of the damage or had definitive evidence of damage will face a challenge in successfully defeating an exception of prescription.

3. Prescription and Scope of Remediation—Marin v. Exxon Mobil Corp.

Marin v. Exxon Mobil Corp. involved two pieces of property—the “Marin Property” and the “Breux Property”—in St. Mary Parish upon which Exxon or its predecessors (collectively, “Exxon”) conducted oil and gas exploration, production, and transportation activities.⁴³ Both the Marin and the Breux properties had also been used for sugarcane cultivation.⁴⁴ Pursuant to leases on the properties dating back to the 1930s, Exxon installed and operated oil and gas facilities on the properties, and, as was industry custom at the time, Exxon used unlined pits to dispose of the byproducts of its oil and gas operations.⁴⁵ The water produced in the pits was discharged into a nearby waterway.⁴⁶

By the 1980s, plaintiffs were concerned about sugarcane growth in the areas around the pits.⁴⁷ Between 1988 and 1990, they made numerous demands upon Exxon to clean up the property so they could continue to grow sugarcane.⁴⁸ Around that time, in 1986, the LDNR amended Statewide Order 29-B⁴⁹ to require the registration and closure of existing unlined oil pits and the remediation of various contaminants to certain standards.⁵⁰

41. *Hogg*, 45 So. 3d at 1001.

42. *Id.*

43. *Marin v. Exxon Mobil Corp.*, 09-2368 (La. 10/19/10); 48 So. 3d 234, 239.

44. *Id.*

45. *Id.* at 240.

46. *Id.*

47. *Id.*

48. *Id.* at 240.

49. LA. ADMIN. CODE tit. 43, §§ 101-641 (1987).

50. *Marin v. Exxon Mobil Corp.*, 09-2368 (La. 10/19/10); 48 So. 3d 234, 240.

Between 1987 and 1991, Exxon closed all of the remaining pits on plaintiffs' properties and "represented that it was remediating the pit areas to Statewide Order 29-B standards."⁵¹

After the *Corbello* decision, plaintiffs hired an environmental expert to test the properties, and the expert reported that there was significant contamination present.⁵² In November 2003, plaintiffs filed suit against Exxon asserting claims sounding in tort and contract "for remediation of the soil and groundwater and other damages arising out of Exxon's activities."⁵³ The trial court found that Exxon's deposit of chemicals on plaintiffs' properties constituted negligent operations by Exxon, resulting in breach of contract and negligence.⁵⁴ The trial court rejected Exxon's arguments that the plaintiffs' claims had prescribed and found that *contra non valentem* suspended the running of prescription until the expert reports were received in 2003.⁵⁵ The Court of Appeal affirmed.⁵⁶ The Louisiana Supreme Court granted the writ applications of both Exxon and plaintiffs to address several assignments of error.⁵⁷

a. Prescription

Contra non valentem,⁵⁸ which applies only in exceptional circumstances, suspends the running of prescription where the cause of action is neither known nor reasonably knowable by the plaintiff, even though plaintiff's ignorance is not induced by the defendant.⁵⁹ Knowledge sufficient to start the running of prescription is information, which, if pursued, will lead to the true condition of things, considering the reasonableness of the

51. *Id.*

52. *Id.* at 240–41.

53. *Id.* at 241.

54. *Id.* at 242.

55. *Id.*

56. *Marin*, 48 So. 3d at 243.

57. *Id.* at 244.

58. As a defense to prescription, plaintiffs often assert the theory of *contra non valentem agere nulla currit praescriptio*, which literally means "no prescription runs against a person unable to bring an action." *Edmundson v. Amoco Prod. Co.*, 924 F.2d 79, 82 (5th Cir. 1991). *Contra non valentem* operates as an exceptional remedy to the general rule of prescription and must be strictly construed. *Ellender v. Goldking Prod. Co.*, 99-0069, p. 8 (La. App. 1 Cir. 6/23/00); 775 So. 2d 11, 17. The doctrine focuses on factors outside of the plaintiff's control that prevent the plaintiff from bringing an action. *Edmundson*, 924 F.2d at 82.

59. *Marin*, 48 So. 3d at 245. *Contra non valentem* also suspends the running of prescription in other situations, which are not relevant for the purposes of this Article and are not discussed here.

plaintiff's action in light of his education, intelligence, and the nature of the defendant's conduct.

The court outlined plaintiffs' knowledge and found that *contra non valentem* did not suspend the running of prescription on plaintiffs' claims. By the late 1980s, plaintiffs knew that sugarcane would not grow in areas surrounding the pits and that Exxon had been dumping in the pits for years.⁶⁰ They had made multiple requests that contamination be removed from the area.⁶¹ Between 1987 and 1991, they knew that Exxon was closing the pits and that sludge remained in the pit bottoms.⁶² Post-1991, plaintiffs knew that healthy sugarcane crop was still not growing in the area.⁶³ The Court also noted that no new damage became apparent after 1991.⁶⁴

The Court acknowledged that a "layperson could not have discovered the contamination on the property without the assistance of an expert." The Court then looked to the *Hogg* constructive knowledge analysis to determine whether the failure to grow sugarcane should have alerted the plaintiffs of potential contamination and prompted them to seek out an expert.⁶⁵ While the information in the letters in *Hogg* was far more detailed than the information plaintiffs here had, the sugarcane damage was an "outward sign of 'actual and appreciable damage' that was sufficient to excite attention and put the plaintiffs on guard."⁶⁶ Plaintiffs knew that healthy sugarcane should have grown within four years of the 1991 planting.⁶⁷ As a result, the Louisiana Supreme Court found that plaintiffs had sufficient knowledge at least by 1995.⁶⁸ The fact that an expert may be needed to determine the extent of damage in an oilfield contamination case does not prolong the prescriptive period until an expert is actually hired.⁶⁹ It was unreasonable for plaintiffs to wait until 2003 to hire an expert and file suit, and by that time, their claims had prescribed.⁷⁰ This decision takes plaintiffs' burden to investigate potential claims for property damage even further than the Court in

60. *Id.* at 248.

61. *Id.*

62. *Id.* at 247.

63. *Id.* at 248.

64. *Id.*

65. *Marin*, 48 So. 3d at 249.

66. *Id.* at 249-50.

67. *Id.* at 251.

68. *Id.*

69. *Id.*

70. *Id.*

Hogg by indicating that there is a duty to investigate triggered by even more abstract knowledge of contamination.

b. Scope of Remediation

Plaintiffs argued that Exxon should be liable for restoring the property to its original pre-lease condition based on (1) the lease provisions; and (2) the rule delineated in *Terrebonne Parish School Board v. Castex Energy, Inc.*⁷¹ arguing that *Castex* recognized an implied duty of restoration to the property's original condition. The Louisiana Supreme Court rejected both of these arguments. The original 1941 lease contained no restoration provisions.⁷² In 1994, the parties executed a novation of the 1941 lease that required the lessee to "restore the leased premises as near as reasonably practicable to its present condition."⁷³ Because the 1994 novation of the lease extinguished the 1941 lease, the Court found that the term "present condition" in the novation could not relate back to the 1941 lease.⁷⁴ Accordingly, the Court rejected plaintiffs' argument that the lease provisions required restoration to the original 1941 condition.

The Louisiana Supreme Court then addressed plaintiffs' argument based on the rule in *Castex*. In *Castex*, the Court held that "in the absence of an express lease provision, Mineral Code article 122 does not impose an implied duty to restore the surface to its original, pre-lease condition absent proof that the lessee has exercised his rights under the lease unreasonably or excessively."⁷⁵ Plaintiffs argued that this rule applied because Exxon exercised its rights under the lease unreasonably and excessively.⁷⁶ The Court distinguished *Castex* because *Castex* addressed whether restoration was necessary at all, whereas here the issue is the extent of restoration.⁷⁷ The obligation to correct the damage due to unreasonable or excessive operations does not necessarily mean that the lessee has a duty to restore the land to its pre-lease condition.⁷⁸ Here, the Court acknowledged that Exxon operated unreasonably or excessively, but found that its additional restoration duty was the duty to correct the consequences of

71. *Terrebonne Parish School Board v. Castex Energy, Inc.*, 04-0968 (La. 1/19/05); 893 So. 2d 789.

72. *Marin*, 48 So. 3d at 257.

73. *Id.* at 258.

74. *Id.* at 258–59.

75. *Id.* at 257.

76. *Id.* at 259.

77. *Id.*

78. *Marin*, 48 So. 3d at 260.

unreasonable or excessive use, not to restore the property to its original condition.⁷⁹

4. *Subsequent Purchaser*—Eagle Pipe & Supply, Inc. v. Amerada Hess Corp.

In *Eagle Pipe*, the Louisiana Supreme Court examined what is commonly known as the “subsequent purchaser doctrine.”⁸⁰ The subsequent purchaser doctrine provides that “an owner of property has no right or actual interest in recovering from a third party for damage which was inflicted on the property before his purchase, in the absence of an assignment or subrogation of the rights belonging to the owner of the property when the damage was inflicted.”⁸¹

Plaintiff, Eagle Pipe, purchased property in Lafayette Parish in 1988.⁸² From 1981 until 1988, the previous owners leased the property to Union Pipe, a company that operated the property as a pipe yard where it bought, stored, and sold used oilfield tubing.⁸³ After Eagle Pipe purchased the property, the Louisiana Department of Environmental Quality (“LDEQ”), following-up on an alleged field interview, found that the property was contaminated with Technologically Enhanced Naturally Occurring Radioactive Materials (“TENORM”).⁸⁴ The LDEQ cited Eagle Pipe for violating TENORM exposure regulations and ordered that the property be remediated.⁸⁵

Eagle Pipe then filed suit against several groups of defendants which it alleged caused the contamination, including the previous owners and various companies that sold or transported the TENORM contaminated pipe to the property.⁸⁶ The defendants urged the exception of no right of action, arguing that Eagle Pipe had no right to assert a claim for damage to the property which occurred before Eagle Pipe was its owner.⁸⁷ The trial court granted the exception.⁸⁸ On appeal, the Fourth Circuit Court of Appeal

79. *Id.*

80. *Eagle Pipe & Supply, Inc. v. Amerada Hess Corp.*, 10-2267 (La. 10/25/11); 79 So. 3d 246. While this decision relates to the contamination of a pipe-cleaning yard, its analysis extends to cases subject to Act 312 involving oil and gas exploration and production sites.

81. *Id.* at 256–57.

82. *Id.* at 253.

83. *Id.*

84. *Id.* at 254.

85. *Id.*

86. *Eagle Pipe*, 79 So. 3d at 254.

87. *Id.*

88. *Id.*

originally affirmed the trial court's decision; however, on rehearing the Fourth Circuit vacated its previous judgment and reversed the trial court's ruling.⁸⁹ The Louisiana Supreme Court granted writs to determine the bounds of the subsequent purchaser rule.

Within its plea to both the Fourth Circuit Court of Appeal and the Louisiana Supreme Court, Eagle Pipe attempted to carve out an exception to the subsequent purchaser rule in an attempt to circumvent its application when the prior damage to property was not overt or apparent at the time of the sale.⁹⁰ Eagle Pipe argued that the contamination on its property was not apparent at the time of its purchase, and, therefore, the subsequent purchaser rule should not apply to preclude it from seeking damages against the entities alleged to have caused the contamination.⁹¹

The Louisiana Supreme Court rejected this argument and held that the subsequent purchaser rule applies regardless of whether the damage was apparent at the time of the sale.⁹² Significantly, when there is apparent damage to the property, the law does not allow a subsequent purchaser to profit by permitting it to negotiate a lower purchase price based on the condition of the property *and* have a separate right to seek damages from the tortfeasor who is responsible for the property's poor condition.⁹³ And when the damage is not apparent, the law only provides the subsequent purchaser "with the right to seek rescission of the sale, or a reduction in the purchase price," but not the right to also sue for damages against the tortfeasor.⁹⁴ In either instance, "the personal nature of the right of the landowner at that time does not change, and remains with the landowner unless the right is explicitly assigned or subrogated to another."⁹⁵

Under the subsequent purchaser rule as articulated in *Eagle Pipe*, absent an explicit assignment or subrogation of the previous owner's rights, landowners may not recover in tort for property damages incurred before they acquired the land, even when the damages are not apparent. While this Louisiana Supreme Court decision certainly has not eliminated all legacy lawsuits based upon historic contamination to property, in many instances it significantly limits the scope of such lawsuits and the claims of current landowners.

89. *Id.* at 254–55.

90. *Id.* at 257.

91. *Id.* at 257.

92. *Eagle Pipe*, 79 So. 3d at 275.

93. *Id.* at 276.

94. *Id.*

95. *Id.*

B. Other Issues in Act 312 Cases

Several other significant issues arising in Act 312 cases have been addressed by other courts, including the Louisiana courts of appeal and federal district courts, while many of the major issues have been fought in the district courts with varying results. Some of these issues and court decisions are discussed below.

1. One Trial or Two?

There has been some question about whether Act 312 allows for a preliminary hearing to first determine whether environmental damage exists and identify a responsible party, or whether this should be determined at a full-blown trial (usually by a jury) along with the landowners' private claims. Though courts have recognized that the Act is ambiguous on this point, courts have generally sided with plaintiffs, arguing that there should be one trial to determine all issues.⁹⁶ While this result avoids piecemeal litigation and the potential for inconsistent judgments, it also delays both the formulation of a remediation plan and the remediation itself.

2. What are the Appropriate Regulatory Standards for Remediation?

For the past quarter-century, the Office of Conservation has followed the standards under its Statewide Order No. 29-B.⁹⁷ These standards involve various limits for various substances (chlorides, heavy metals, etc.) in different environments (uplands, wetlands, etc.).⁹⁸ LDEQ, on the other hand, created its Risk Evaluation/Corrective Action Program ("RECAP") document, which uses risk-based standards similar to those formulated by the

96. See, e.g., *Brownell Land Co. v. Oxy USA Inc.*, 538 F. Supp. 2d 954, 958 (E.D. La. 2007) (noting that the statute can be read two ways and adopting the interpretation set forth in *Duplantier Family Partnership v. BP Amoco* that a single trial, rather than separate trials, is proper. 07-0293 (La. App. 4 Cir. 2007), 955 So. 2d 763); *Duplantier Family P'ship v. BP Amoco*, 07-0293 (La. App. 4 Cir. 2007), 955 So. 2d 763 (unpublished opinion) (noting that bifurcated trials require the consent of all parties under the Louisiana Code of Civil Procedure and finding that Act 312 does not mandate two trials and that having one trial promotes judicial efficiency).

97. LA. ADMIN. CODE tit. 43, §§ 101–641 (1987).

98. See *id.*

Environmental Protection Agency (“EPA”).⁹⁹ In 2010, the Office of Conservation proposed its own risk-based documents, the Site Evaluation and Remediation Procedures Manual (“SERP Manual”), and came very close to adopting it before deciding not to do so (or at least ceasing all effort), leaving the matter somewhat unsettled.¹⁰⁰

3. What are the Means by which a Landowner may Obtain Damages in Addition to the Remediation to Regulatory Standards Required by Act 312?

Plaintiff attorneys have promoted a number of theories to support damages over the amount required to remediate the property to regulatory standards. Damages have been sought for storage of hazardous materials, trespass, and stigma resulting in diminution of property value.¹⁰¹ Plaintiffs have also asserted entitlement to damages for the cost of remediation beyond any required regulatory remediation.¹⁰² The likelihood of success based on these theories has not been resolved, but their potential for success creates settlement value.

4. May a Defendant Admit Responsibility for Remediation without Admitting Liability on the Landowners’ Claims for Additional Damages?

On its face, Act 312 seems to allow defendants to admit responsibility for remediation without admitting liability for additional damages.¹⁰³ But because plaintiffs have generally

99. LA. ADMIN. CODE tit. 33, §§ 1301–1309 (2012); *Risk Evaluation/Corrective Action Program (RECAP)*, LA. DEP’T OF ENVTL. QUALITY (2003), available at <http://www.deq.louisiana.gov/portal/DIVISIONS/UndergroundStorageTankandRemediationDivision/RemediationServices/RECAP/RECAPDocument2003.aspx>.

100. La. Office of Conservation, Notice of Intent, 2010 La. Reg. Text 211335.

101. See *Marin v. Exxon Mobil Corp.*, 09-2368 (La. 10/19/10); 48 So. 3d 234; see also *Hogg v. Chevron USA, Inc.*, 09-2632 (La. 7/6/10); 45 So. 3d 991; see also *Crump v. Sabine River Authority*, 98-2326, p. 13 (La. 6/29/99); 737 So. 2d 720, 731.

102. See *State v. La. Land & Exploration Co.*, 10-1341 (La. App. 3 Cir. 2/1/12); 85 So. 3d 158, cert granted 12-0884 (La. 6/15/12); 92 So. 3d 340 (addressing whether Act 312 limits the recoverable remediation damage to the cost of the feasible plan identified by the LDEQ).

103. See, e.g., *Brownell Land Co. v. Oxy USA Inc.*, 538 F. Supp. 2d 954, 958 (E.D. La. 2007) (noting that the statute can be read to allow the issue of damages to be tried separately from the issue of liability for remediation).

convinced judges to rule that admission of responsibility for environmental damage requires admission of civil liability for private damage claims, defendants have been reluctant to admit responsibility.¹⁰⁴ As a result, remediating the property before trial has been unlikely as a practical matter. This is a victory for the plaintiff lawyers and can ultimately delay remediation for years.

5. Does Act 312 Apply in Federal Court?

Cases that would be subject to Act 312 have been before federal courts on several occasions.¹⁰⁵ Plaintiffs have argued that the *Burford* abstention doctrine¹⁰⁶ warrants the federal court's abstention based on Louisiana's Act 312.¹⁰⁷ Some federal courts have rejected these arguments and refused to abstain under *Burford*.¹⁰⁸ While federal courts have exercised jurisdiction over cases that would be subject to Act 312, there is still some question about whether Act 312 should apply in federal court. It is a long recognized principle that federal courts sitting in diversity apply state substantive law and federal procedural law.¹⁰⁹ But this has not stopped at least one federal court from interpreting and applying Act 312—a law recognized both by that court and by Louisiana courts as a procedural law.¹¹⁰

104. See, e.g., *Tensas Poppadoc, Inc. v. Chevron*, 07-927 (La. App. 3 Cir. 5/21/08); 984 So. 2d 223, 229; *Germany v. Conoco Phillips Co.*, 07-1145 (La. App. 3 Cir. 3/5/08); 980 So. 2d 101, 103-04; see also *Savoie v. Richard*, Docket No. 10-18078, 38th Judicial District Court, Cameron Parish, Louisiana.

105. See *Sweet Lake Land & Oil Co. v. Exxon Mobil Corp.*, No. 09-01100, 2011 WL 3878329 (W.D. La. Sept. 1, 2011); *C.S. Gaidry, Inc. v. Union Oil Co. of Cal.*, No. 09-2762, 2009 WL 2765814 (E.D. La. Aug. 27, 2009); *Brownell Land Co.*, 538 F. Supp. 2d at 958.

106. The *Burford* abstention doctrine provides that federal courts should not interfere with proceedings or orders of state administrative agencies when (1) there are "difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar;" or (2) the "exercise of federal review of the question in a case and in similar cases would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern." *C.S. Gaidry, Inc.*, 2009 WL 2765814 at *7 (quoting *New Orleans Pub. Serv., Inc. v. Council of the City of New Orleans*, 491 U.S. 350, 361 (1989)).

107. *C.S. Gaidry, Inc.*, 2009 WL 2765814 at *4; *Brownell Land Co.*, 538 F. Supp. 2d at 958.

108. *C.S. Gaidry, Inc.*, 2009 WL 2765814 at *4; *Brownell Land Co.*, 538 F. Supp. 2d at 959.

109. *Gasparini v. Ctr. For Humanities, Inc.*, 518 U.S. 415, 427 (1996) (citing *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 77 (1939)).

110. See *Brownell Land Co.*, 538 F. Supp. 2d at 957-58 (noting that "[t]he Act is clearly a procedural law" and then determining whether the Act requires a separate determination of liability and damages); *M.J. Farms, Ltd. v. Exxon*

In *Brownell Land Co. v. Oxy U.S.A., Inc.*, the defendant filed a motion in limine essentially seeking to have the issues of liability and damages tried separately.¹¹¹ In ruling on the defendant's motion, the Court stated that Act 312 was "clearly a procedural law," and then went on to analyze Act 312 and even cited to a Louisiana case that relied on the Louisiana Code of Civil Procedure in deciding the same issue.¹¹² Admittedly, determining the proper law to apply in diversity cases is often difficult and requires consideration of complex issues.¹¹³ But there is at least a valid argument that Act 312 is a procedural law that should not be applied in federal diversity cases.

C. The Practical Dynamics of Act 312 Litigation.

In practice, many of the issues discussed above do not get resolved by the courts, because these legacy cases tend to settle before trial. Generally, plaintiffs' experts will assert that the appropriate remediation will cost hundreds of millions of dollars. Defense experts usually have a less sensational assessment of the need for and extent of remediation. The competing expert assessments drive the vast majority of cases to settlement, with the landowners typically accepting some money (often a large amount, but a modest percentage of their experts' damage estimate) in exchange for the agreement to stop urging a remediation plan costing hundreds of millions of dollars and to allow the defendants to remediate the property according to the regulatory standards acceptable to the Office of Conservation.

During the 2011 Regular Session of the Louisiana Legislature, the oil and gas industry supported S.B. 146 by Senator Adley and the duplicate H.B. 563 by Representative Cortez. The original bills were short "placeholder" bills intended to be amended as they went through the legislative process. Extensive amendments were circulated shortly before a House Natural Resources Committee hearing on HB 563, and, subsequently, the bill was involuntarily deferred in committee, effectively killing the legislation for the

Mobil Corp., 07-2371 (La. 7/1/08), 998 So. 2d 16 ("We find it clear Act 312 attaches a procedure 'for judicial resolution of claims for environmental damage'") (quoting LA. REV. STAT. ANN. § 30:29 (West 2008)).

111. *Brownell Land Co.*, 538 F. Supp. 2d at 955, 958.

112. *Id.* at 957-58.

113. See *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 130 S. Ct. 1431 (2010); *Gasperini*, 518 U.S. at 427 (referring to the *Erie* analysis as a "challenging endeavor").

session.¹¹⁴ Consequently, the Legislature requested that the Louisiana Department of Natural Resources study the matter and report its findings.¹¹⁵

That report was published on February 1, 2012.¹¹⁶ The report, prepared by J. Blake Canfield, Senior Attorney in the Louisiana Office of Conservation, thoroughly recounted the history of Act 312 and set the stage for a legislative battle in 2012.¹¹⁷ The report stated, among other things, that of the 271 legacy lawsuits subject to Act 312, 60 did not provide a specific site description, and only 61 were supported by testing data submitted to the LDNR (as required by the law).¹¹⁸ Only two of those had been identified by the Office of Conservation to have long-term risk.¹¹⁹ As of the publication of the report, only one case had gone through a complete hearing process at the Office of Conservation, and no plans had been adopted or implemented by any court pursuant to Act 312.¹²⁰

In addition, 64 cases settled. Twenty-nine of these settlements were made without the Office of Conservation receiving environmental data.¹²¹ Of the remaining 35 cases, 32 had environmental data showing no need to remediate to achieve regulatory standards.¹²² Only three of the 64 settled cases required remediation.¹²³ The subject properties in those three cases were remediated.¹²⁴

114. History of H.B. 563, Reg. Sess. (La. 2011), available at <http://www.legis.state.la.us> (follow “Session Info” hyperlink; then follow “2011 Regular Legislative Session.”; then search for “HB 563”; then click on “History” hyperlink) (last visited Oct. 1, 2012).

115. H.C.R. 167, Reg. Sess. (La. 2011).

116. J. Blake Canfield, Senior Attorney, La. Office of Conservation, *Report to the House Committee on Natural Resources and Environment and Senate Committee on Natural Resources as Requested in House Concurrent Resolution 167, 2011 Legislative Session*, February 1, 2012, available at <http://www.scribd.com/doc/82935877/DNR-Report-to-House-and-Senate-NR> (transmitted under cover of letter dated February 1, 2012 by Scott A. Angelle, Secretary, La. Dept. of Natural Resources).

117. *Id.*

118. *Id.* at 17–18.

119. *Id.* at 19.

120. *Id.* at 20–21.

121. Canfield, *supra* note 116, at 21–22.

122. *Id.*

123. *Id.*

124. *Id.*

IV. THE 2012 AMENDMENTS TO LEGACY LEGISLATION

The Office of Conservation's report provided the backdrop for the exhausting and controversial process of re-assessing Act 312 during the 2012 regular legislative session.¹²⁵

A. The Proposals

At least twenty-three bills relating to legacy litigation, some of which were duplicates, were filed in the 2012 Regular Session.¹²⁶ Generally, these bills fell into three groups.

125. *Id.*

126. These bills included: S.B. 731, Reg. Sess. (La. 2012) (Sen. Allain) (provides relative to remediation of oilfield sites and exploration and production sites), *substitute adopted*, S.B. 760, Reg. Sess. (La. 2012) (Sen. Allain) (provides relative to qualified admission of responsibility for remediation of oilfield sites and exploration and production sites); S.B. 555, Reg. Sess. (La. 2012) (Sen. Adley) (provides for the remediation of oilfield sites and exploration and production sites); S.B. 528, Reg. Sess. (La. 2012) (Sen. Long) (provides for remediation of oilfield sites and exploration and production sites); S.B. 443, Reg. Sess. (La. 2012) (Sen. Morrell) (provides relative to limited admission of liability in lawsuits for environmental damages); S.B. 240, Reg. Sess. (La. 2012) (Sen. Murray) (provides relative to certain mineral lease indemnification agreements); H.B. 1180, Reg. Sess. (La. 2012) (Rep. Harrison) (provides for remediation of oilfield sites and exploration and production sites); H.B. 1037, Reg. Sess. (La. 2012) (Rep. Montoucet) (provides for the Louisiana Land Owners Protection Act); H.B. 920, Reg. Sess. (La. 2012) (Rep. Johnson) (provide exemplary damages for environmental damages); H.B. 897, Reg. Sess. (La. 2012) (Rep. Harrison) (provides with respect to remediation of oil fields); H.B. 863, Reg. Sess. (La. 2012) (Rep. Montoucet) (provides for lessee's obligation to restore the leased premises); H.B. 862, Reg. Sess. (La. 2012) (Rep. Lambert) (provides with respect to civil actions for environmental damages); H.B. 853, Reg. Sess. (La. 2012) (Montoucet) (provides for the Louisiana Land Owners Protection Act); H.B. 678, Reg. Sess. (La. 2012) (Jim Morris) (provides for the restoration of certain oilfields); H.B. 642, Reg. Sess. (La. 2012) (Rep. Montoucet) (provides for the remediation of certain oilfield sites); H.B. 618, Reg. Sess. (La. 2012) (Rep. Abramson) (provides relative to the admission of liability for environmental damage); H.B. 649, Reg. Sess. (La. 2012) (Jim Morris) (provides for the remediation of certain oilfield sites); H.B. 482, Reg. Sess. (La. 2012) (Rep. Montoucet) (provides for discovery in cases involving certain environmental damage from oilfield operations); H.B. 463, Reg. Sess. (La. 2012) (Rep. Abramson) (provides relative to pleading and discovery in certain civil actions); H.B. 460, Reg. Sess. (La. 2012) (Rep. Abramson) (provides civil procedures for the remediation of oilfield sites); H.B. 458, Reg. Sess. (La. 2012) (Rep. Abramson) (provides for notice of breach of a mineral lease); H.B. 454, Reg. Sess. (La. 2012) (Rep. Abramson) (provides relative to bifurcation of trials); H.B. 388, Reg. Sess. (La. 2012) (Rep. Johnson) (provides indemnification for environmental damages to an oilfield site); H.B. 235, Reg. Sess. (La. 2012) (Rep. Harrison) (provides relative to mineral lease indemnification agreements).

First, the bills by Senator Morrell and Representative Abramson were supported by the Louisiana Oil and Gas Association (“LOGA”). After considering several issues that it would like addressed, LOGA concentrated on one narrow, but important change—allowing a defendant to admit responsibility for the purpose of conducting a cleanup (and thus clear the way to move forward with remediation) without admitting liability on the landowner’s claims for additional damages.¹²⁷ The language of Act 312 seems to permit this, but plaintiffs have generally convinced judges to rule the other way.¹²⁸ This makes it difficult to get the property remediated before trial, allowing the remediation to be delayed for years. The practical difficulty of defendants to remediate without admitting liability puts plaintiffs in a favorable posture before the jury. Under such a regime, plaintiffs could argue before the jury that the property has not been cleaned up—a point that was considered by many to be quite effective.

Other bills by Representatives Montoucet, Johnson, and Lambert were supported by an alliance of some of the main law firms representing the landowner-plaintiffs in legacy lawsuits. Predictably, these bills promoted positions that strongly favored the landowners’ actions against parties conducting oil and gas exploration and production activities on their properties. Some bills proposed voiding existing contracts by retroactively prohibiting certain indemnity agreements in purchase and sale agreements, and others would reverse rulings of the Louisiana Supreme Court by allowing a current landowner to sue for damages occurring before that landowner owned the property.¹²⁹

Finally, a third group of bills introduced by Senator Alain, Senator Long, and Representative Harrison was promoted by Jimmy Faircloth, former executive counsel to Governor Bobby Jindal and now attorney to Roy O. Martin Lumber Company, a large landowner. While Mr. Faircloth initially characterized his bill as a “compromise,” his proposal contained several elements that were not supported by LOGA.¹³⁰ While Mr. Faircloth accepted

127. Testimony by Gifford Briggs and Loulan Pitre, Jr. at Hearing of the House Committee on Civil Law and Procedure, April 17, 2012.

128. *See supra* Part II(B).

129. *See, e.g.*, H.B. 388, Reg. Sess. (La. 2012) (prohibiting indemnification for environmental damage to an oilfield site); H.B. 862, Reg. Sess. (La. 2012) (provides with respect to environmental damages).

130. S.B. 731, Reg. Sess. (La. 2012) (provides relative to remediation of oilfield sites and exploration and production sites); S.B. 528, Reg. Sess. (La. 2012) (provides for remediation of oilfield sites and exploration and production sites); H.B. 1180, Reg. Sess. (La. 2012) (provides for remediation of oilfield sites and exploration and production sites).

that a defendant should be able to admit responsibility for a cleanup without admitting liability on the landowners' claims for additional damages, he proposed that the admission and remediation plan adopted as a consequence not be admissible in evidence at trial unless the State has formally intervened in the litigation. Given that the State has thus far intervened in only 19 of 271 cases, as a practical matter this would keep the jury from knowing the remediation plan recommended by the Office of Conservation and would facilitate the landowners' arguments for excessive remediation plans.

B. The Legislative Compromise

The outcome of the legislation remained uncertain until May 16, 2012, when a compromise package was announced¹³¹ and was ultimately enacted into law, becoming effective on August 1, 2012.¹³² The compromise package enacts articles 1552 and 1563 of the Louisiana Code of Civil Procedure and amends and reenacts portions of Louisiana Revised Statutes section 30:29.¹³³ The package does not apply to cases in which an order setting the case for trial was entered on or before May 15, 2012 (even if that trial is later continued), and it specifically provides that the LDNR does not maintain primary jurisdiction.¹³⁴

The key provisions proposed by the oil and gas industry are contained within the package. Most of the compromise package addresses admissions of responsibility for environmental damage and their consequences.¹³⁵ However, the package also creates two other very novel procedures: the option for a preliminary hearing that could result in parties obtaining a preliminary (but perhaps tenuous) dismissal without prejudice, and a one-year suspension of

131. Capitol News Bureau, *Legislative Briefs for May 17, 2012*, THE ADVOCATE (Baton Rouge), May 17, 2012, available at <http://theadvocate.com/home/2849235-125/legislative-briefs>.

132. The compromise consisted of Act No. 754 (House Bill 618) and Act No. 779 (Senate Bill 555). H.B. 618, Reg. Sess. (La. 2012) (provides for a preference for services by companies domiciled in Louisiana relative to a public bid process); S.B. 555, Reg. Sess. (La. 2012) (provides for remediation of oilfield sites and exploration and production sites).

133. 2012 La. Sess. Law Serv. Act 754 (H.B. 618) (West) (enacting LA. CODE OF CIV. PROC. arts. 1552, 1563); 2012 La. Sess. Law Serv. Act 779 (S.B. 555) (West) (enacting portions of LA. REV. STAT. ANN. § 30:29).

134. 2012 La. Sess. Law Serv. Act 754 (H.B. 618) (West) (enacting LA. CODE OF CIV. PROC. arts. 1552, 1563).

135. *Id.*

prescription established when plaintiffs file a “notice of intent to investigate.”¹³⁶

1. Key Components of the Provisions Dealing with Limited Admissions and Their Consequences

a. Limited Admissions of Responsibility

A party admitting liability under Louisiana Revised Statutes section 30:29 may make a “limited admission,” i.e., limit the admission to responsibility for a remediation to applicable regulatory standards.¹³⁷ In other words, the admitting party need not waive defenses to private claims for additional damages. After a limited admission, the court shall make a timely referral to the Office of Conservation to conduct a public hearing to approve or structure a remediation to regulatory standards.¹³⁸

b. Admissibility of Plan and Proceedings

The limited admission, the plan approved by the Office of Conservation, and written agency comments shall be admissible evidence at trial.¹³⁹ Parties may subpoena agency personnel involved in formulation of the remediation plan after the remediation plan is submitted to the court, subject to payment of subpoena response costs.¹⁴⁰

c. Environmental Management Orders

The court must enter an environmental management order to facilitate investigation and environmental testing upon request of any party or the Officer of Conservation in any case subject to Louisiana Revised Statutes section 30:29. The order shall address

136. 2012 La. Sess. Law Serv. Act 779 (S.B. 555) (West) (enacting portions OF LA. REV. STAT. ANN. § 30:29).

137. 2012 La. Sess. Law Serv. Act 754 (H.B. 618) (West) (enacting LA. CODE CIV. PROC. art. 1563(A)(1)–(2) (West) (Titled “Limited admissions of liability in environmental damage lawsuits; effect”).

138. 2012 La. Sess. Law Serv. Act 779 (S.B. 555) (West) (amending LA. REV. STAT. ANN. § 30:29(C)(1) (West)).

139. 2012 La. Sess. Law Serv. Act 754 (H.B. 618) (West) (enacting LA. CODE CIV. PROC. art. 1563(A)(3) (West)).

140. 2012 La. Sess. Law Serv. Act 779 (S.B. 555) (West) (enacting LA. REV. STAT. ANN. § 30:29(B)(5) (West)).

access, sampling and testing protocols, and provide specific time frames for testing and sampling.¹⁴¹

d. Deadline for Limited Admissions

If one party makes a limited admission, the other parties must file any limited admissions within 60 days. However, all limited admissions must be made within 90 days of the completion of environmental testing in accordance with the environmental management order set by the court.¹⁴²

e. Procedure for Formulation of the Remediation Plan

The formulation of remediation plans after an admission of responsibility is limited to one time per case.¹⁴³ *Ex parte* communication with agency personnel is prohibited while a remediation plan is being formulated.¹⁴⁴ Comment by the Department of Agricultural and Forestry, the Department of Environmental Quality, and the Department of Natural Resources will be allowed if the Office of Conservation preliminarily approves a remediation plan that applies the regulatory standards of that agency or provides an exception from the Office of Conservation's standards.¹⁴⁵ The Office of Conservation and the court are empowered to facilitate implementation of a plan once adopted, including the ability to require the cooperation of the current operator.¹⁴⁶

f. Responsibility for Certain Costs

A party admitting responsibility shall be required to deposit funds to cover the Office of Conservation's costs with an initial deposit of \$100,000. The party admitting responsibility shall also reimburse the plaintiffs' costs as provided by Louisiana Revised

141. 2012 La. Sess. Law Serv. Act 754 (H.B. 618) (West) (enacting LA. CODE CIV. PROC. art. 1552 (West)).

142. 2012 La. Sess. Law Serv. Act 754 (H.B. 618) (West) (enacting LA. CODE CIV. PROC. art. 1563(A)(4)–(5) (West)).

143. 2012 La. Sess. Law Serv. Act 779 (S.B. 555) (West) (amending LA. REV. STAT. ANN. § 30:29(C)(2) (West)).

144. *Id.*

145. *Id.* (amending LA. REV. STAT. ANN. § 30:29(C)(3) (West 2007)).

146. *Id.*

Statutes section 30:29(E)(1) in an amount determined by the court.¹⁴⁷

g. Waiver of Punitive Damages

A party admitting responsibility for environmental damage waives any right to claim indemnity for punitive damages.¹⁴⁸

2. Novel Procedural Changes

a. Preliminary Hearing and Dismissal Without Prejudice

Defendants may request a preliminary hearing, at which affidavits and written evidence will be allowed, to determine whether good cause exists for maintaining the defendant as a party in the litigation. Successful defendants will be dismissed without prejudice, subject to being brought back in upon discovery of evidence not reasonably available at the time of the preliminary dismissal. A defendant obtaining a preliminary dismissal will be entitled to a dismissal with prejudice following a final non-appealable judgment in the case.¹⁴⁹

b. Notice of Intent to Investigate and Suspension of Prescription

Plaintiffs may suspend prescription for up to one year by filing a notice of intent to investigate, which must identify the property, the alleged environmental damage, all known owners of the property, and the current operator. Subsequent lawsuits must include all environmental testing results.¹⁵⁰

V. CONCLUSION

Act 312 of 2006 created Louisiana Revised Statutes section 30:29 in the hope of bringing more rationality and consistency to legacy litigation alleging environmental damage arising from oil and gas exploration and production operations. In practice, Act 312 created new legal issues for parties and their lawyers to litigate, and little remediation of contaminated properties has actually been

147. 2012 La. Sess. Law Serv. Act 754 (H.B. 618) (West) (enacting LA. CODE OF CIV. PROC. art. 1563(A)(6) (West)).

148. 2012 La. Sess. Law Serv. Act 779 (S.B. 555) (West) (enacting LA. REV. STAT. ANN. § 30:29(L)).

149. *Id.* (enacting LA. REV. STAT. ANN. § 29(B)(6) (West)).

150. *Id.* (enacting LA. REV. STAT. ANN. § 29(B)(7) (West)).

achieved. In 2012, the Louisiana legislature re-visited the issue and enacted the first amendments to Louisiana Revised Statutes section 30:29 and new related provisions of the Louisiana Code of Civil Procedure. The expressed goal of these amendments is to facilitate expedited remediation of actual contamination as may be necessary to protect the public safety. Doubtlessly, lawyers for both landowners and industry will once again argue over how these new provisions will be interpreted and applied. Only time will tell the result.