

Legacy Litigation Update

Lou Buatt and Will Lampton

Overview – the Past Year

- A New High in 2012
 - 49 Legacy Suits Filed in 2012
 - Total number of legacy cases 329
- Political Issue
 - 2012 Legislative Session; and
 - Louisiana Supreme Court Race

Millionaires vs. Billionaires...

The Supreme Court race Dec. 8 has taken on a life of its own — with powerful forces lining up for Hughes or Guidry — seemingly for no logical reason.

The biggest driving force behind most of the TV ad spending is the “legacy lawsuit” issue. Some landowners (who’ve made millions from oil production on their land) want to sue some of the major oil companies (who’ve made billions drilling oil on the same land), claiming those oil companies damaged their land. They want more money for cleanup. The oil companies got the legislature to pass legislation prohibiting so-called “legacy lawsuits.” Now the major oil companies (billionaires) are supporting a moderate Democrat (Guidry) and landowners (millionaires) are supporting the conservative Republican (Hughes).

Here’s the irony: Neither Hughes nor Guidry has ever handled a legacy lawsuit case, and neither has expressed his views on the topic. No one knows for sure if the issue will ever get to the Supreme Court, what the case would look like, or how either candidate would rule.

Here’s what Judge Hughes said about the controversy: “As a judge, my job is not to favor or reward any group but to apply the Constitution and laws to the facts of each case. That’s what I will always try to do in every controversy.”

Here’s some advice: Ignore the big money being spent on TV and think about the issues that actually affect you and your family. If you’re pro-life, pro-gun, and pro-traditional marriage, then

Vote Jeff Hughes
Louisiana Supreme Court

Overview – Continued

- Economic Issue
 - Costs Related to Litigation
 - Judgments/Settlements
 - Attorney Fees
 - Experts and Environmental Consultants
 - Discovery Costs
 - Impact on Louisiana Economy
 - Loss of: 1,200 new wells; \$6.7 billion in drilling expenditures; \$10.5 billion in economic output; 30,000 employment opportunities; and \$1.5 billion in wages. David Dismukes, “The Impact of Legacy Lawsuits on Conventional Oil and Gas Drilling in Louisiana,” LSU Center for Energy Studies (February 28, 2012).

Overview – Two Major Issues

- 2012 Legislative Amendments
 - Act 754 of the 2012 Legislative Session
 - Act 779 of the 2012 Legislative Session
- *State of Louisiana and the Vermilion Parish School Board v. the Louisiana Land and Exploration Company, et al.*, 2012-0884 (La. 1/30/13).

Background

- Life before *Corbello*
 - Property damage awards tied to value of property;
 - Legacy lawsuits were filed, but the number was much smaller:
 - 2 legacy suits filed in 2002
 - 7 legacy suits filed in 2003

Corbello

- *Corbello v. Iowa Production*, 2002-0826 (La. 2/25/03), 850 So.2d 686:
 - Remediation damages not limited by value of property;
 - Landowner not required to use award for actual remediation;
 - Private damages allowed for restoration of groundwater;

Life after *Corbello*

- Legislative Response: Act 1166 of 2003, La. R.S. 30:2015.1
 - Limited oversight by DNR
 - Only applied to groundwater claims
- Flood of Legacy Lawsuits:
 - 40 legacy suits filed in 2004
 - 37 legacy suits filed in 2005
 - 41 legacy lawsuits filed in 2006

Act 312 of 2006 – La. R.S. 30:29

- Timely Notice of Suit;
- State has Right to Intervene;
- Admission of Responsibility;
- Responsible Party to Submit Plan to DNR;
- DNR to Approve Most Feasible Plan ;
- Feasible Plan Subject to Trial-Court Approval;
- Trial Court Oversees Plan – Funds Placed in Registry of Court;
- Landowner and State may Recover Fees/Costs;
- Landowner still has Private Claims

Problems with Act 312

- Some courts refuse to allow defendants to admit liability;
- Courts refuse to refer to DNR until after trial;
- Lack of access to property for testing and early remediation;
- Excessive clean-up plans – courts refuse to allow evidence of nonpermitability;
- Legacy filings initially decreased after Act 312 but began to increase in 2010.

Marin and Castex

- General rule is that remediation in a legacy lawsuit will be to regulatory standards;
- Even where the responsible party operated excessively or unreasonably;
- Additional remediation only required when provided by an express contractual provision.

2012 Amendments

- Two Acts
 - Act 754 enacts two new articles of the Louisiana Code of Civil Procedure; and
 - Act 779 amends La. R.S. 30:29
- The new laws:
 - went into effect August 1, 2012; and
 - apply to any legacy case that was not set for trial as of May 15, 2012.

2012 Amendments

Act 754

- La. C.C.P. art. 1522 – Environmental Management Orders; and
- La. C.C.P. art. 1563 – Limited Admission of Liability.

Act 779

- Testimony & Discovery/Feasible Plan;
- Preliminary Hearing;
- Notice of Intent/Suspension of Prescription;
- No Ex Parte DNR Communications;
- Feasible Plan – Review and Comment from State Agencies;
- Compliance Orders;
- Admission of Liability – No Indemnification for Punitive Damages.

Notice of Intent Suspension of Prescription

- La. R.S. 30:29(B)(7)
- Suspension of prescription for 1 year;
- Notice must include information regarding the property, the alleged damage, and the identity of owners and the current operator;
- Plaintiff must send notice to DNR and everyone identified the notice;
- Any subsequent judicial demand must include:
 - a map with the location of the alleged damage;
 - the results of any environmental testing.

Preliminary Hearing

- La. R.S. 30:29(B)(6)
- Early Determination – does your defendant belong in the case? Good cause.
- Timing – 60 days from Service of Petition or Amendment
- Shifting Burden of Proof
- Dismissal without Prejudice
- Possible Rejoinder – evidence not reasonably available at the time of the hearing.
- Dismissal with Prejudice at Conclusion of Case

Preliminary Hearing

Questions

- How to meet your burden of proof?
- Is discovery allowed prior to the hearing?
- What evidence is allowed at the hearing?
- How closely should you monitor the case following a dismissal?

Benefits

- Possibility of early dismissal;
- Agreement with plaintiffs in some cases;
- Discovery device – get early evidence of plaintiff's claims;
- Chance to depose/cross-examine plaintiff's witnesses.

Environmental Management Orders

- La. C.C.P. art. 1552 – Facilitate access and testing of property in cases governed by La. R.S. 30:29;
- Can be requested by any party or the DNR – mandatory when requested.
- All orders must include:
 - Access to the property;
 - Guidelines for investigation and testing;
 - Protocols for sampling and testing;
 - Time frames for testing.
- Parties must share all testing data with other parties and the DNR – Failure to do so within 30 days will result in exclusion.

Limited Admission

- La. C.C.P. art. 1563
- A party may make a limited admission of responsibility for regulatory cleanup of all or a portion of the damage at issue;
- The party is not required to admit responsibility for a plaintiff's additional claims;
- The limited admission does not waive the party's other rights or defenses.

Limited Admission

- Mandatory referral to DNR for public hearing/formulation of feasible plan;
- Evidence at Trial
 - Limited Admission
 - Feasible Plan
 - Agency Comments

Limited Admission

- Timing
 - Must file with the trial court;
 - The admitting party should file the limited admission no later than 90 days after completion of environmental testing provided by the EMO;
 - Good cause required for a later filing;
 - Once a party files a limited admission, other parties have 60 days to join or file a separate limited admission.

Limited Admission

- The admitting party must pay for costs of DNR public hearing and formulation of the feasible plan;
- Initial deposit to DNR of \$100,000;
- Due when admitting party submits its plan;
- Plaintiff also entitled to recover costs.

Waiver of Indemnification

Punitive Damages

- La. R.S. 30:29(L) – A party admitting liability waives right to indemnification for punitive damages.
- Contractual Indemnities
- Only applies when a party admits responsibility
- Only applies to claims for punitive damages
- “Such waiver...shall not apply to any other claims or damages.”

Litigating the Public Hearing

- **The Problem prior to the 2012 Amendments**-Plaintiffs introduce to juries excessive cleanup plans that are technically and economically infeasible and in many instances would be unlawful to implement. Juries never hear from DNR or any other state agencies regarding appropriate cleanup options. As a result juries make excessive awards that are not needed or used for cleanups.
- **Importance of the Public Hearing** –La. C.C.P. art. 1563 provides for the insertion of a regulatory and administrative process in a judicial proceeding in part through the requirement for a public hearing for DNR to approve or structure the “Most Feasible Plan”.
 - Admissibility of Plan Approved by DNR
 - Admissibility of Comments of other Agencies;
 - La. R.S. 30:29(B)(5) provides authority to subpoena DNR and other commenting agencies for trial or deposition after submission of final feasible plan.

- **Understanding DNR, DEQ and DAF requirements and approaches to remediation**
 - DNR's 29-B and DEQ's RECAP-When consistent and when inconsistent
 - DNR/DEQ Memorandum of Understanding

- General Requirements of the Cleanup/Evaluation Plans Submitted to DNR:
 - General Requirements (LAC 43:XIX.609)
 - Specific Requirements (LAC 43:XIX.611)
 - Evaluated in accordance with 29-B, except as specifically provided;
 - Site must be fully delineated, vertically and horizontally;
 - Sampling and testing in accordance with 29-B and the latest revision of the DNR Laboratory Procedures for Analysis of Exploration and Production Waste;
 - Plat showing the physical location where samples were taken;
 - Identity of the person or company taking the samples and a copy of the certification of such person or company (if applicable);
 - Documentation showing the method of sampling, the chain of custody and all other such relevant information;
 - Sample analysis shall be in accordance with applicable regulatory requirements and DNR’s “Laboratory Procedures for Analysis of Exploration and Production Waste;

- Specific Requirements (LAC 43:XIX.611) continued
 - Laboratory analysis shall be performed by DEQ LELAP accredited laboratory;
 - Testing results shall contain a report certified by the testing laboratory including a description of the test method, whom conducted such testing, a copy of the laboratory accreditation and all applicable required quality assurance/quality control data;
 - Separate section analyzing the sampling and testing by comparison with applicable 29-B criteria;
 - Chronological work schedule or proposal for chronological work schedule detailing activities necessary for implementation, an estimated cost for each item along with a comprehensive itemized cost basis for each item; and
 - A certification of review and approval by signature from an attorney licensed to practice in Louisiana.

- Specific Requirements (LAC 43:XIX.611) continued
 - Exception to Requirements of 29-B
 - A plan that complies with 29-B, exclusive of §319;
 - A separate plan that includes:
 - » Sufficient proof that there is good cause to grant an exception
 - » Sufficient proof showing that the exception does not endanger USDW's and
 - » Specific citation to the Louisiana rules, regulations or statutes sought to be applied in lieu of 29-B (Example RECAP)

- Comments from Other Agencies:
 - Other agencies have always had and now continue to have the ability to comment on cleanup plans.
 - La. R.S. 30:29(C)(3)(b)(i): if DNR preliminarily approves or structures a plan that applies standards of another agency, then DNR shall submit the plan to DEQ and DAF within 15 days.
 - Within 30 days of submission, all agencies may provide written comments regarding the plan. Failure to provide comments does not affect the validity of the plan.
 - These comments are admissible in the judicial proceeding subject to Rules of Evidence 702-705 and CCP Art. 1425.

- **Strategy to Use Regulatory and Administrative Process to Influence the Judicial Process**
 - Plaintiff Strategy is to present excessive cleanup plans to juries and for juries not to hear from DNR or other State Agencies;
 - DNR positions regarding most feasible cleanup plan will be developed during the public hearing process;
 - Cleanup Plan meeting the requirements of 29-B and consistent with DEQ's RECAP
 - Comprehensive Feasibility Study or Corrective Action Study consistent with federal and state requirements (EPA and DEQ) that compares and contrast several different remedial alternatives, including those likely submitted or to be submitted by plaintiffs.

No Ex Parte

Communication with DNR

- La. R.S. 30:29(C)(2)(b);
- No party to a legacy lawsuit may have ex parte communication with DNR regarding the formulation of the feasible plan;
- Applies from the date the responsible party submits its plan to DNR until DNR files its feasible plan with the trial court;
- DNR must certify its compliance with this provision;
- The Do's and Don'ts Considering Prohibitions on Ex Parte Communications

Feasible Plan – Testimony and Discovery

- La. R.S. 30:29(B)(5)
- Parties may subpoena anyone involved with formulation of feasible plan
- Deposition or Trial
- Discovery allowed regarding DNR's formulation and approval of the feasible plan, but only after DNR submits the plan to the trial court.

Compliance Orders

- La. R.S. 30:29(C)(3)(b)(ii)
- DNR must file feasible plan with trial court;
- Confirms DNR's authority to issue compliance orders;
- Compliance order can be issued to the current operator or any responsible party.

VPSB

- Issued January 30, 2013;
- 6 – 1 Decision (Justice Victory Dissented);
- Plaintiffs may be entitled to remediation damages, in excess of feasible plan/regulatory standards, even where there is no express contractual provision for the excess damages.

VPSB

- Defendant admitted responsibility;
- The contract at issue did not contain an express remediation provision;
- Defendant moved for summary judgment that remediation damages would be limited to the feasible plan.
- Trial court granted the summary judgment;
- Court of Appeal and Supreme Court reversed trial court.

VPSB – Majority

- Even in the absence of an express contractual provision, plaintiffs may seek remediation damages in excess of the feasible plan and may keep the excess award.
- How did the Court reach this conclusion?
 - Implied obligation to restore above regulatory standards exists under Louisiana law; and
 - Act 312 does not affect this implied obligation.

VPSB Majority

- Implied obligation to restore above regulatory standard:
 - Civil Code Lease Articles. Art. 2683(3) – lessee has the obligation to return thing in original condition minus normal wear and tear.
 - Mineral Code. La. R.S. 31:122 – mineral lessee required to operate the property as a prudent operator.
 - *Castex* and *Broussard* – lessee can be required to restore property to pre-lease condition where lessee operated unreasonably or excessively.

VPSB Majority

- Act 312 does not alter the implied obligations:
 - Act 312 was a “solely procedural statute” that did not affect landowners’ substantive rights.
 - Act 312 is not a cap on remediation damages. It merely requires that the portion of the remediation damages necessary to fund the most feasible plan will be paid into the registry of the court, not to the landowner.
 - A landowner has the ability to collect additional remediation damages, even in the absence of an express contractual provision.

VPSB Majority

- Regarding Act 312: “this procedural statute does nothing to the substantive rights of the landowner, whether arising out of (1) the implied obligations of the mineral lease under the Civil Code or (2) the implied obligation arising out of La. R.S. 31:122 if the landowner can show a mineral lessee acted unreasonably or excessively under the lease.” (p. 23)
- Unreasonableness or excessiveness must be determined on a case by case basis.
- Therefore, summary judgment was not appropriate.

Problems with VPSB

- La. R.S. 30:29(H) allows private claims. But it only allows claims for excess remediation when provided by an express contractual clause.
- La. R.S. 30:29(D)(1) requires that all remediation damages be paid exclusively into the registry of the court. Only exception is La. R.S. 30:29(H).
- The Court states that La. R.S. 30:29 does not create substantive rights. But the Court appears to be creating new substantive rights to excess remediation damages – implied obligation to restore to pre-lease condition.
- The majority opinion is inconsistent with *Marin* and *Castex*.

Impact of VPSB

- Defendants applied for rehearing;
- Does the opinion remove the cork from the bottle for remediation awards?
- 2012 amendments did not apply in VPSB.
How will the court interpret the amendments?
- Will the majority's opinion affect defendants' willingness to admit responsibility?