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Louisiana Supreme Court Holds that, Absent Unreasonable or Excessive Use of the Leased Premises by a Mineral Lessee, Louisiana Law Does Not Impose an Implied Obligation to Restore the Surface

Terrebonne Parish School Board v. Castex Energy, Inc., 2004-C-0968 (La. 1/19/05), *reversing*, 2001-2634 (La. App. 1st Cir. 3/19/04), -- So.2d --, 2004 La. App. LEXIS 615; 2004 WL 540521.

In a 4/3 decision, the Louisiana Supreme Court recently held that, in the absence of an express restoration provision in a mineral lease, Louisiana Mineral Code article 122 does not impose an implied duty to restore the surface to its original, pre-lease condition on the mineral lessee absent proof that the lessee has exercised his rights under the lease unreasonably or excessively. In so holding, the Louisiana Supreme Court reversed the Louisiana First Circuit Court of Appeal's decision to affirm a trial court's order requiring oil and gas lessees to implement a restoration plan to restore two canals and a slip dredged on property owned by the Terrebonne Parish School Board.

At the outset, the Louisiana Supreme Court stressed that the case forced the courts to weigh the "monumental" problem of Louisiana coastal erosion against adherence to the law and respect for the rights of contracting parties. In the end, the Court refused to allocate responsibility to perform coastal restoration on the oil and gas lessees, respecting instead the mineral lease's terms.

The School Board and Shell Oil Company originally entered into an oil, gas and mineral lease in 1963, which expressly authorized Shell, as lessee, to dredge canals. The lease contained no provisions relative to restoration. After a series of assignments, the lease terminated, and the School Board filed suit asserting that the canals dredged by the lessees altered the hydrology of the marsh, contributing to coastal erosion.

On appeal, the First Circuit affirmed the trial court's determination that two of the assignees/lessees, Bois D'Arc and Samson, owed a duty under Mineral Code article 122 to restore the surface of the leased land to its pre-lease condition by backfilling the canals. The First Circuit's decision further required Bois D'Arc and Samson to specifically perform the resto-

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ration without regard to cost.[1]

Reviewing the First Circuit's decision, the Louisiana Supreme Court reversed it, finding that the First Circuit erred in holding that article 122 impliedly obligates a mineral lessee to restore the surface to its pre-lease condition absent a showing that the lessee exercised his rights unreasonably or excessively.

The Louisiana Supreme Court first looked to Mineral Code article 122, which provides that "A mineral lessee is not under a fiduciary duty to his lessor, but he is bound to perform the contract in good faith and to develop and operate the property leased as a reasonably prudent operator for the mutual benefit of himself and his lessor." Emphasizing that the terms of article 122 do not impose an express duty to restore, the Louisiana Supreme Court noted that the School Board's primary source for the implied duty to restore arose from statements contained in the Official Comment to the article.

To examine the scope of the implied duty, the Louisiana Supreme Court reviewed jurisprudence related to oil and gas property restoration claims and Louisiana Civil Code articles dealing with lease. First, looking to Louisiana case law, the Louisiana Supreme Court observed that the scope of the implied duty to restore the surface was an issue of first impression for the Court, and, therefore, to examine it, the Court turned to decisions of the courts of appeal. In doing so, the Louisiana Supreme Court agreed with the standard articulated in *Rohner v. Austral Oil Co.*, 104 So.2d 253 (La. App. 3d Cir. 1958), which imposed no responsibility on the lessee for damages attributable to ordinary, customary and necessary activities conducted in drilling a well and, rather, imposed a duty to restore only upon showing of negligence or an unreasonable exercise of rights. Second, the Louisiana Supreme Court looked to Civil Code articles 2719 and 2720 observing that they "do not impose a strict obligation to return leased property in an unchanged condition." Rather, the court added, "both articles allow for deterioration of the leased property because of necessary 'wear and tear.'"

Illuminating what constitutes necessary 'wear and tear' in a particular case, the Louisiana Supreme Court pointed to "the character of the spe-

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[1] In an article in our September 2004 Environmental & Toxic Tort E*zine, we wrote at length about the facts underlying the case and the decisions of the trial court and the First Circuit. *See* Jones Walker's En Environmental & Toxic Tort E*Zine, September 2004, Volume 13. As we anticipated in that article, in agreeing to review the First Circuit decision, the Louisiana Supreme Court has now addressed for the first time the scope of oil and gas lessee's

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cific rights granted in the lease," noting that the School Board's express grant of the right to dredge canals "constituted consent to or approval of the changes necessarily incident to dredging." Then, applying the jurisprudence and Civil Code articles, the Louisiana Supreme 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." Finding that the School Board did not present any evidence of unreasonable or excessive use by Bois D'Arc or Samson, the Louisiana Supreme Court reversed the First Circuit's decision to impose an implied obligation on the assignees to backfill the canals. Viewing the evidence related to the conduct of Bois D'Arc and Samson under the lease, the Louisiana Supreme Court pointed to the evidence presented by them showing that they complied with all relevant Louisiana Commissioner of Conservation regulations and that industry custom did not support backfilling canals.

The Louisiana Supreme Court also rejected the argument advanced by various school boards in their amici briefs that the Mineral Code obligation imposed on a mineral servitude owner to "restore the surface to its original condition at the earliest reasonable time" applied to a mineral lessee as well regardless of whether the lessee's use of the surface was reasonable. *See*, La. R.S. 31:22. The Court, while reserving for another day the scope of a mineral servitude owner's duty to restore, reiterated that the implied duty to restore imposed on a mineral lessee "is subject to his reasonable use of the leased premises."

The Louisiana Supreme Court further rejected the School Board's argument that the language in the assignment of the lease to Bois D'Arc expressly required Bois D'Arc to restore the surface and created a *stipulation pour autrui* in favor of the School Board to enforce the restoration obligation. The language upon which the School Board relied obligated Bois D'Arc to "restore the surface of the leased premises, in compliance with applicable state and federal regulations." The Court found that Bois D'Arc's restoration obligation extended only to compliance with federal and state law and that neither federal nor Louisiana law required Bois D'Arc to backfill the canals.

Justice Knoll dissented, observing that, as set forth in *Caskey v. Kelly Oil Co.*, 99-0931, 99-0932, p. 6 (La. 4/30/99), 737 So.2d 1257, 1261, Louisiana's pre-Mineral Code jurisprudence recognized the mineral's lessee's duty to restore the surface as near as practical on completion of opera-

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tions. Further relying on Civil Code articles 2719 and 2720, Justice Knoll refused to find that dredging operations constituted normal wear and tear and opined that a mineral lessee fails to act as a prudent operator in failing to restore the surface as near as practical upon completion of operations.

Justice Weimer also dissented, assigning separate written reasons (Justice Kimball joined in Justice Weimer's dissent). Justice Weimer noted that, because Article 122 of the Mineral Code is silent as to a mineral lessee's restoration obligation, the Civil Code applied. Viewing Civil Code articles 2719 and 2720, the Justice pointed out that they "establish that the lessor must suffer the consequences of wear and tear as a cost of leasing the property." Justice Weimer, however, disagreed with the majority's conclusion that dredging canals through marshland is ordinary wear and tear. After so disagreeing, Justice Weimer reasoned that the lessee's obligation was to return the property in the "same state" subject to wear and tear. To return the property in the "same state," Justice Weimer observed that the restoration plan proposed by Bois D'Arc and Samson, which would take years to accomplish, would best fulfill the lessees' duty because the School Board's proposed restoration plan would "alter" the property, rather than restoring it to the "same state." Accordingly, while agreeing with the First Circuit that Louisiana law imposed an implied obligation to restore on Bois D'Arc and Samson, Justice Weimer disagreed with the restoration plan chosen by the First Circuit.

Although rejecting the First Circuit's expansive interpretation of the scope of an oil and gas lessee's implied obligation to restore the surface, the Louisiana Supreme Court's *Castex* decision still leaves certain questions unanswered. For example, the Louisiana Supreme Court did not address the First Circuit's decision to impose on the lessees the obligation to perform actual restoration (rather than to pay damages for it). As a result, when proof exists that a mineral lessee acted unreasonably or excessively in exercising his rights under a mineral lease, it is unclear whether the lessee's obligation to restore is an obligation to specifically perform the restoration or, instead, to pay damages sufficient to cover the cost of restoration. Like *Corbello*, the *Castex* decision will likely have far-reaching effects on oil and gas property restoration litigation in Louisiana. Unlike *Corbello*, *Castex* may deter some landowner suits given that the Louisiana Supreme Court has now held that the implied obligation to restore only arises upon proof of the mineral lessee's unreasonable or excessive use of the leased premises.

- Alida C. Hainkel

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EPA Proposes Redefinition Of Solid Waste

The EPA announced in early 2005 that it will soon shift the emphasis under RCRA from waste disposal to pollution prevention. This is part of its research conservation challenge. A key part of its goal is to finalize the proposed rule on a redefinition of "solid waste" in 2006. The rule was proposed at 68 Fed. Reg. 61558 (Oct. 28, 2003). Industry favors the rule but environmentalists oppose it as it arguably opens too large a loophole in the RCRA regulatory scheme for "recycling." Recycling can pose many of the same storage, transportation and emission hazards as hazardous waste management does. Actually, EPA is trying to calm the waters sullied by many federal court decisions that have led to confusion over what is discarded material ("solid waste") and what is not.

The current definition of solid waste separates recycled materials in two broad categories based on the type of material (by-products, sludges, etc.) and type of recycling (reclamation, burning, etc.) to determine which materials to classify as solid waste when recycled and which to exclude. For instance, a spent solvent if burned as fuel or used as a dust suppressant on land is a solid waste, but, if it is reusable as is as an ingredient in an industrial process, it is not a solid waste. The former is subject to RCRA's entire "cradle to grave" regulatory scheme. This is an "all or nothing" approach, unlike the favored status EPA gives to certain other material when recycled, *e.g.*, batteries, lamps, used oil, etc.

For instance, hazardous secondary materials, *e.g.*, by-products, which are used or reused directly as an effective substitute for commercial products and those which can be used as ingredients in industrial processes without being reclaimed are more akin to normal industrial production than to waste management and are not currently regulated. Some recycling practices, however, bear greater resemblance to waste management, such as reclamation of some types of hazardous secondary materials. This would be the case, for example, in off-site processing of a spent solvent to restore its solvent properties before it is suitable for reuse as a solvent. Additionally, certain practices, e.g., recycling of certain inherently waste-like materials, use of certain materials in a manner constituting disposal and burning material for energy recovery, are considered discarding of waste. The 2003 regulatory proposal would not affect the latter but would de-regulate the former exemption of spent solvents. The EPA formulated the proposed rule as a result of a number of cases, including Association of Battery Recyclers v. EPA, 208 F. 3d 1047 (D.C. Cir. 2000), which questioned EPA's jurisdiction over by-products and sludges destined for reclamation.

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Reclamation covers materials if they are processed to recover a usable product before they are generated. A simple example would be magnetic separation of ferrous metals from a pollution control sludge. Some reclamation may involve a series of steps though. For example, the mineral processing industry produces smelter by-products that are processed in a series of steps successfully to extract different precious metals. Regenerating is another example that includes pickling acids that are used to remove scale or the other impurities from steel but are reclaimed so they can be reused as pickling agents. The reclamation products include both regenerated pickling acids as well as marketable iron oxide products from the spent acids.

EPA's proposal would exempt materials that are generated and reclaimed in a "continuous process" within the "same industry." Again, the exemption would not apply to recycling materials that are inherently waste-like, that are used in a manner constituting disposal or that are burnt for energy recovery.

EPA has proposed two options to exempt materials generated and reclaimed in a continuous process from the same industry. Under the first option, the hazardous secondary materials would have to be generated and reclaimed within a single industry to qualify for the exclusion. For example, if the motor vehicle manufacturing industry generated a hazardous secondary material and then shipped it for reclamation to a facility in the ship and boat building industry, the exclusion would not apply. The resulting regenerated material would be hazardous waste. Under option one, however, multiple processing steps would be allowed in the regeneration. For instance, a copper sludge requiring three separate reclamation steps to produce a marketable product such as copper or sulfate would be exempt if each of the steps took place in the same industry. If the reclamation steps occurred at different locations, as long as it was in the same industry, the exclusion would not place any geographical limits on the excluded reclamation.

The second option would be the same as the first except that hazardous secondary materials that are generated and reclaimed in a continuous process within the same industry would not be eligible for exclusion if the reclamation takes place in a facility that also recycles regulated hazardous wastes generated from different industries. For instance, if a paint manufacturer who reclaims spent solvents were to accept paint solvents from another paint manufacturer as well as spent solvents from a generator in a different industry (*e.g.*, automobile repair shop), none of the spent solvents

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managed by the paint manufacturer would be eligible for the exclusion. If the solvents from the automobile repair shop were excluded under a different regulatory provision (*e.g.*, because their reuse was not reclamation), the solvents generated and reclaimed within the paint manufacturing industry would then be eligible for the exclusion.

Option one would likely encourage more beneficial recycling because the exclusion would cover a somewhat broader set of recycling practices. Option two would give greater certainty to the regulated community as to when exclusion would apply.

EPA also rejected an option to exclude from regulation reclamation of secondary materials if they were sold to the general public (provided that the product was considered typical for the generating industry or reused in the product or ingredient within the generating industry even if the reclaimed material was not a typical product of the generating industry). For example, if a paint manufacturer received spent solvent from another paint manufacturer that it reclaimed, the reclaimed solvent could not be sold to the general public under the proposed exclusion. This is because solvent is not a typical product of the paint manufacturing industry. If the reclaimed solvent were reused within the paint manufacturing the exclusion could be maintained. The paint manufacturer could either reuse the solvent as an ingredient for making paint or sell it to other parties within the paint manufacturing industry. EPA indicated, however, that there would be a problem of what is considered a "typical product" for the industry in question.

EPA is proposing to use the *North American Industry Classification System* to define "same generating industry". The NAICS groups industry as follows:

11	agriculture, forestry, fishing and hunting
21	mining
22	utilities
23	construction
31 to 33	manufacturing
42	wholesale trade
43-45	retail trade
48-49	transportation and warehousing
51	information
52	finance and insurance
53	real estate and rental and leasing
54	professional, scientific and technical services

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55 management of companies and enterprises
56 administrative and support in waste management and remediation services
61 educational services
62 health care and social assistance
71 arts, entertainment, and recreation
72 accommodation and food services
81 other services (except public administration); and
92 public administration.

The classification is then subdivided into sub-sectors that have three digit codes and industry groups that have four digit codes. The EPA will use the four digit NAICS codes, with limited exceptions.

The government uses NAICS in lieu of older standard industrial classification (SIC) codes. The codes are used for certain other regulatory purposes, such as Right to Know toxic inventory reporting, storm water discharges associated with industrial activity, OSHA regulation, etc. The problem is that many companies do not normally think of themselves under the NAICS system, and they will have to define themselves in the appropriate categories to take advantage of any future EPA exclusion from hazardous waste regulation promulgated using NAICS. This is not a challenge unique to this particular regulatory program, however.

EPA acknowledges that its proposal may have certain disadvantages for on-site recycling, such as where a single facility has two more operations each identified under a separate NAICS code. For instance, if a large manufacturer involved in integrated steel production has a separate specialized company that operates a dedicated reclamation facility on the same site, the reclamation process would not be classified as part of the steel making industry. It would be a separate distinct economic unit. The exclusion would probably not apply to that scenario. EPA has asked for comments on that.

Additionally, by "continuous process" EPA means to cover only materials that are handled exclusively by facilities or entities that are within the generating industry if they are not speculatively accumulated. This definition would not allow a generator to send materials to a broker or the middleman before it is received by reclamation facility. Although these middlemen may be able to facilitate beneficiary use, the EPA does not believe such arrangements are consistent with the idea of recycling in a continuous process. EPA also believes that continuous processing requires

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some limitation on the timing of the activities in question. For that, EPA uses a speculative accumulation rule. Thus, if a person who wishes to use the exclusion cannot show that the material is potentially recyclable and that there is a feasible means of it being recycled, the exclusion would not apply.

Additionally, if a person accumulating material during a 12 month calendar year period cannot show that at least 75% of the material is being recycled by transfer to a different site for recycling, then the material would not be excluded under the proposed rule. EPA acknowledges the Association of Battery Recycling case did allow temporary storage of secondary materials prior to reclamation as a necessary phase in the overall reclamation process, but the court did not suggest a time period. EPA feels the speculative accumulation rule would suffice for this excluded temporary storage. EPA also considered but rejected at this time a 90-180 day allowable period for accumulation of recyclable materials as a maximum limited for "continuous process." EPA further acknowledged there may be problems in measuring the storage period for recyclable materials.

Finally EPA proposes that a one-time notification be given to EPA for facilities that are recycling materials in the same industry and wish to qualify for the new solid waste exclusion under the proposed rule.

EPA also proposes guidance on legitimate as opposed to sham recycling. The four case-specific principles that are to be applied are the following.

1. The secondary materials to be recycled are managed as a valuable commodity;

2. The secondary material provides a useful contribution to the recycling process or to a product with the recycling process, considering the economics of the recycling transaction;

3. The recycling process yields a valuable product or intermediate that is sold to a third-party or used by the recycler or the generator as an effective substitute for commercial chemical product or as a useful ingredient in industrial process; and

4. The product of the recycling process does not contain significant amounts of hazardous constituents that are not found in analogous products, does not contain significant elevated levels of any hazardous constituents that are found in any analogous

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products, and does not exhibit hazardous characteristics that analogous products do not exhibit.

EPA feels the above four criteria are part of its 1989 guidance that asks, "is the secondary material handled in a manner consistent with the raw material/product it replaces?"

The EPA does not plan to finalize its rule until 2006. There are many rulemaking comments for EPA to resolve.

- Stanley A. Millan

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Subsequent Landowner Lacks Standing to Sue under Expired Mineral Lease or in Tort for Restoration Related to Past Oil and Gas Operations

Frank C. Minvielle, LLC v. IMC Global Operations, Inc., Civil Action No. 03-1908, United States District Court for the Western District of Louisiana.

The Federal District Court for the Western District of Louisiana recently affirmed on rehearing its grant of summary judgment in favor of defendant, the successor to a previous oil and gas operator, on the grounds that the plaintiff, a subsequent purchaser of the property, lacked standing to assert oilfield restoration claims either in contract, under the expired mineral lease, or in tort.

Plaintiff, a limited liability company, filed suit on August 27, 2003, alleging that it owned real property in Iberia Parish, Louisiana that had been "contaminated or otherwise damaged by the defendants' oil and gas exploration and production activities." Years earlier, the subject property had been covered by a 1961 Oil, Gas and Mineral Lease between the then owner of the property and The Atlantic Refining Company ("ARCO"). Following a series of subleases and assignments of the ARCO lease, Petro-Lewis Funds, Inc. succeeded to operatorship and conducted operations on the Delcambre #1 Well. The well was ultimately plugged and abandoned in 1977, and the ARCO lease expired of its own terms shortly thereafter. At the death of the original lessor/landowner in 1988, the property passed to her heirs, who eventually sold the property to the plaintiff in 1998. Plaintiff alleged that Petro-Lewis breached the mineral lease and contaminated the property in the course of operating the Delcambre #1 Well and named IMC Global Operations, Inc. ("IMC") defendant as the alleged successor to Petro-Lewis.

Among its preliminary defenses, IMC asserted that, because plaintiff was not a party to the long-expired mineral lease, the plaintiff had no standing to allege claims for breach of contract under the lease. Further, IMC argued that, because the alleged tortious conduct and damages occurred years before plaintiff acquired the property, plaintiff likewise did not have standing to sue in tort for damages. In response, the plaintiff contended that it did have the right to pursue contractual claims as a "third party beneficiary" under the lease and that it had the right to pursue tort

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claims regardless of the timing of the damages.

In first addressing plaintiff's contractual claim, the Court recognized that the plaintiff had no direct privity of contract with IMC, nor did the plaintiff obtain any assignment of personal rights in the act of sale from its predecessors. The Court concluded that the act of sale, which provided that the Sellers ". . . sell, assign, transfer and deliver with all legal warranties and with full substitution and subrogation in and to all the rights and actions of warranty which Sellers have or may have against all preceding owners and vendors . . .," only applied to warranty of title and did not assign personal rights for damages arising from previous leases involving the property.

The Court then addressed plaintiff's third party beneficiary argument by conducting an extensive analysis of Louisiana law regarding *stipulations pour autrui* (stipulations for the benefit of another) in the context of property restoration and damage clauses in leases. The Court noted that the creation of a *stipulation pour autrui* is determined by the specific language of the contract in question. The Court reviewed several cases cited by plaintiff which had found *stipulations pour autrui* to exist in favor of subsequent landowners and concurrent users of the surface, including *Hazelwood Farm, Inc. v. Liberty Oil & Gas Corp.*, 790 So. 2d 93 (La. App. 3 cir. 2001); *Andrepont v. Acadia Drilling Co.,* 231 So. 2d 347 (1969); and *Hargroder v. Columbia Gulf Transmission Co.,* 290 So. 2d 874, 876 (La. 1974). It contrasted the open-ended damage provisions in the contracts in *Hazelwood* and *Andrepont*, which provided that "the lessee shall be responsible for all damages" arising out of its operations, to the damage provision contained in the 1961 lease involved in the case at bar, which read:

> Lessee shall promptly pay to Lessor and Lessor's tenants a reasonable sum for any damage resulting to said premises or the crops or improvements thereon which may be caused by or result from the operations of Lessee hereunder. Within ninety (90) days after the cessation of drilling operations on any well located on the leased premises, Lessee, or its successors and assigns, shall fill and level all slush pits and shall remove the drilling equipment and material used in connection therewith from the drill site and shall restore said drillsite to substantially its prior condition, so far as can reasonably be done, as concerns any material change in the surface of such premises caused by or resulting from operations of Lessee hereunder.

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The Court found that, when taken as a whole, the provision only discussed a right to damages in favor of the "Lessor and Lessor's tenants." Accordingly, the Court concluded that the language of the subject lease did not create a *stipulation pour autrui* in favor of the plaintiff. As further support for its holding, the Court cited *Broussard v. Northcott Exploration Co. Inc*., 481 So. 2d 125 (La. 1986) and *Ashby v. IMC Exploration Co.*, 506 So. 2d. 1193 (La. 1987), both of which concluded, based on analogous lease provisions, that no *stipulation pour autrui* arose in favor of future surface owners in the absence of a clear intention to create such a benefit at the time the lease was negotiated. Considering that plaintiff did not receive an assignment of rights from the previous owner, nor was plaintiff a third party beneficiary under the 1961 lease, the Court found that plaintiff lacked standing to pursue contractual claims based on the mineral lease.

In addressing plaintiff's tort claims, the Court acknowledged long-standing Louisiana jurisprudence holding that the owner of the land at the time of the alleged damages is the person with the real and actual interest to assert a claim for damages to the land. As the Court concluded, the subsequent landowner, therefore, lacks standing to assert tort claims for damage to the property occurring before the landowner's acquisition. Because plaintiff undisputedly sought damages arising from operations occurring prior to its acquisition of the land, the plaintiff lacked standing to pursue alleged tort claims.

Following the above dismissal on summary judgment grounds, the plaintiff moved for reconsideration and/or new trial, alleging that it had standing to bring the alleged contractual and tort claims because actions for restoration of property once burdened by a mineral lease are real rights that attach to the property when the plaintiff acquires it. The plaintiff also attempted to introduce a proposed amendment to the act of cash sale in which it sought to retroactively add language in the conveyance specifically assigning property restoration claims to the plaintiff. The Court analyzed the plaintiff's motion for reconsideration as a Rule 59(e) motion to "alter or amend" the prior judgment.

In reconsidering its prior ruling, the Court pointed out that, while plaintiff may be correct in asserting that the Mineral Code imposes an implied obligation on the lessee to restore the leased premises, this was not dispositive of the present case. The Court stressed that, regardless of whether such an obligation exists [1], the plaintiff must have standing to en-

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[1] The Court rendered its decision before the Louisiana Supreme Court rendered the *Castex* decision. As also reported in this issue, in *Castex*, the Louisiana Supreme Court held that a mineral lessee owes no implied obligation to restore the leased premises absent proof of unreasonable or excessive conduct under the lease by the lessee.

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force it. In reviewing plaintiff's argument regarding the creation of real rights through a mineral lease, the Court explained that the Mineral Code designates the right as a real one to protect the mineral lessee from losing its rights if the land is sold during the existence of the lease. The Mineral Code, however, lacks any indication that the mineral lease creates any real right in favor of the lessor. Factually distinguishing *Hazelwood* as a case where the mineral lease was still in existence when the property was transferred, the Court found that the jurisprudence did not indicate that a subsequent landowner has standing to sue a former mineral lessee based on the status of the mineral lease as a real right. Accordingly, the Court denied plaintiff's motion and reiterated its finding as to the plaintiff's lack of standing.

This defense victory at the summary judgment stage of potentially costly litigation highlights the need to review carefully the contracts underlying the dispute at the earliest possible opportunity and to take advantage of motion practice when the contractual language at issue is favorable. Here, the trial court, despite being presented with a number of tangential theories and causes of action, upheld the fundamental principle that it is still the contract in Louisiana that constitutes the law between the parties thereto. This ruling also rejects the inherently inequitable result that would arise if the law recognized a property purchaser's right to pursue claims for damage to the property that occurred long before the purchaser acquired the property given that the law presumes that, when acquiring property, the purchaser will learn its condition and will account for it at the time of purchase. Here, the trial court properly rejected the notion that an acquiring landowner should be allowed to realize a windfall, i.e., restored property, through the purchase of a lawsuit.

- *Jeffrey Baudier*

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Owner Of New Orleans Office Tower Settles Louisiana DEA Actions Over Alleged Asbestos Removal Violations

In the Matter of Bahar Development Inc., Bahar Towers Limited Partnership, and MBA Services LLC, Agency Interest No. 38717, 66139.

The Louisiana Department of Environmental Quality ("DEQ") recently announced an agreement with the owner of a New Orleans office tower to settle a series of alleged violations of state environmental laws governing the removal of asbestos materials. Bahar Development Inc., Bahar Towers Limited Partnership and MBA Services LLC agreed to the settlement to avoid agency action regarding alleged violations of the Louisiana Environmental Quality Act and the Air Quality Regulations Act.

This case arises from a series of violation notices issued to Bahar stemming from renovation work at the Plaza Tower Office Building in the New Orleans Central Business District. Beginning in May of 1996, and continuing through April of 1998, the DEQ conducted inspections of the Plaza Tower and noted numerous violations of state air quality regulations resulting from renovation activities at the building. DEQ issued a total of seven penalty assessments and violation notices were sent to the parties involved, the last dated February of 2003.

The alleged violations included:

- Failure to notify DEQ of their intent to demolish or renovate;
- Failure to properly remove regulated asbestos-containing material from the facility before any activity began that would break up, dislodge or disturb the material;
- Failure to adequately wet asbestos-containing material prior to and during stripping operations to prevent release of dust particles to the outside air;
- Failure to wet asbestos-containing material and to ensure that it remained wet until properly contained for disposal;
- Failure to seal asbestos-containing materials in proper containers;

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- Failure to have properly-trained personnel and supervision during the removal process;
- Failure to immediately dispose of removed material; and,
- Improper removal methods and failure to adequately clean the facility following removal activities.

Under the terms of the agreement, Bahar denied any violation of state environmental laws but agreed to pay a total of eighty thousand dollars ($80,000.00) in penalties; DEQ, in turn, agreed to terminate its enforcement activities. In addition, DEQ maintained the right to use the inspection reports, violation notices and the settlement as evidence of compliance history in the event of any future enforcement or permitting action. Finally, Bahar is barred from objecting to their use as evidence of compliance history in any future enforcement actions.

- Robert D. Rivers

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Louisiana Department of Environmental Quality Maintains Authority Over LPDES Program

On December 30, 2004, the U.S. Environmental Protection Agency (“EPA”) announced that the Louisiana Department of Environmental Quality (“DEQ”) would continue to have authority over the state's wastewater permitting and enforcement program ("Louisiana Pollutant Discharge Elimination System (LPDES) program").

This endorsement by the EPA resulted from petitions filed by several environmental groups in 2001 that asked the EPA to remove DEQ's authority over the LPDES program. Petitioners included the Louisiana Environmental Action Network, Louisiana Audubon Council and the Gulf Restoration Network.

The EPA officially denied the petitions after the DEQ implemented measures that DEQ and EPA agreed to in a Memorandum of Agreement. Specifically, DEQ implemented seven performance measures that address the backlog of permits, public access to files, penalty collection, accountability in the beneficial environmental project program, timely enforcement actions, completeness of the state's program documents and enforcement against municipal or state agencies.

The National Pollutant Discharge Elimination System program is the nation's method for permitting facilities to discharge treated wastewater to waterways. Permits set discharge limits, reporting parameters and penalties for non-compliance, among other requirements for industry.

- Tara Richard

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Remember that these legal principles may change and vary widely in their application to specific factual circumstances. You should consult with counsel about your individual circumstances. For further information regarding this E*Zine or this practice group, please contact:

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