JONES WALKER

E*ZINES
March 2008 Vol. 10

Energy
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Legacy Lawsuits: Recent Developments Following the Enactment of Act 312

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- Notwithstanding that the State of Louisiana presumably has the ear of its own agencies, in November of 2007, then-outgoing Attorney General Foti authorized the filing by private law firms of a number of legacy lawsuits on behalf of Louisiana against various oil and gas companies. Act 312, La. R.S. 30:29, figures largely in the State's petitions, allegedly as support for Louisiana's initiation of the suits themselves as well as for the Attorney General's engagement of private firms to represent the State in them. And, ironically, while Act 312 calls heavily upon the resources and expertise of the Louisiana Department of Natural Resources ("DNR") to address and remediate environmental property damage resulting from oil and gas exploration and production activity, the State throughout its petitions casts itself as having "limited knowledge" and a lack of "resources or manpower."

- With Act 312 now in place, courts have also started down the path of interpreting it. Primarily, courts have looked to whether a liability decision must come before a damages decision.

- The constitutionality of the Act's retroactive application still hangs in the balance pending a decision from the Louisiana Supreme Court one way or another.

I. The State of Louisiana's Property Restoration Suits Against the Oil & Gas Industry.

The suits filed by the State of Louisiana concern alleged state-owned property in places like the West Lake Verret Field in St. Martin Parish, the Potash Field in Plaquemines Parish, and the Bayou Bleu Field in Iberville Parish. The State's petitions assert claims against oil and gas companies like Shell and Exxon and contain many of the "cookie cutter" allegations with which oil and gas companies are now all too familiar based on the onslaught of suits brought by private landowners following the Louisiana Supreme Court's *Corbello* decision. The pleadings, however, have been adapted to invoke Act 312's legislative history, which, according to the allegations, shows that Act 312 "was intended to ensure remediation of both public and private lands damaged by past exploration and production activity" and "to allow both private landowners and the State of Louisiana to proceed in civil courts" to seek damages for property remediation.

On the issue of the private firms' attorneys fees, the State's petitions again invoke Act 312, asserting that:

> After the enactment of Act 312, the Attorney General appointed several law firms to seek, pursuant to the provisions of Act 312, a judicial resolution of the State's claims for environmental damage to public property impacted by oil and gas operations. Under Act 312, the State of Louisiana is not responsible for the

attorneys fees, expenses, and costs arising out of the prosecution of this civil action. The defendants held responsible for the pollution at issue are liable for the payment of such fees, expenses, and costs. The Attorney General's contract with undersigned counsel specifically provides that all payments for attorneys fees, expenses, and costs for this action are to be made only as allowed by the provisions of Act 312.

Act 312 instructs DNR to approve a remedial plan that uses "the specific relevant and applicable standards and regulations promulgated by" state agencies. The plan approved by DNR is then subject to adoption by the court (which adopts the DNR plan except upon proof by a party by a preponderance of the evidence that another plan is more feasible to adequately protect the environment). Once approved, the Act requires the parties found legally responsible for the environmental damage to fund implementation of the plan and further requires all funding associated with implementation of the plan to be deposited into the registry of the court. The Act, however, expressly does not "preclude a judgment ordering damages for or implementation of additional remediation in excess of the requirements of the plan adopted by the court . . . as may be required in accordance with the terms of an express contractual provision." It further provides: "Any award granted in connection with the judgment for additional remediation is not required to be paid into the registry of the court."

Despite the State's allegations about limiting the payment of the private law firms' attorneys fees only to those fees authorized under Act 312[1], the State's petitions seek damages for remediation beyond restoration of the property to "applicable standards." The State, for example, claims that the defendants "have a contractual obligation under the applicable oil, gas, mineral, and surface leases to restore plaintiff's property to its original condition" and requests an award of compensatory damages, "including payment of the costs to restore lands with identified pollution to its original unpolluted state." And, although Act 312 does not provide for the award of exemplary damages, the State also requests an award of punitive damages under Louisiana Civil Code 2315.3. The damages requested by the State, therefore, go well beyond those identified in Act 312. As a result, the State seeks damages from Louisiana oil and gas exploration and production participants beyond the amount necessary to implement a plan for remediation of the property to state-regulatory standards, which, if awarded, could wind up as State spending money, directly contrary to Act 312's purpose of ensuring property remediation.

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[1] Act 312 entitles a party providing evidence with respect to the evaluation or remediation of environmental damage (defined as contamination resulting from activities associated with oilfield sites or exploration and production sites) to recover all costs attributable to producing that portion of the evidence that directly relates to the establishment of environmental damage, including, but not limited to, expert witness fees; environmental evaluation, investigation, and testing; the cost of developing a plan of remediation; and reasonable attorneys fees incurred in the trial court and DNR. It also entitles the Attorney General and DNR to the same recovery if either or both provide evidence or otherwise contribute to the determination of responsibility for evaluation or remediation or approval of a plan of remediation.

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Last month, recently-inaugurated Attorney General Caldwell indicated his intent to dismiss the State lawsuits and to work instead with state agencies using existing regulations to address any environmental problems related to oil and gas operations on State-owned property.

II. Recent Cases Interpreting Act 312.

- *Duplantier v. BP Amoco*, No. 2007-C-0293 (La. App. 4th Cir. May 16, 2007, J. Bagneris, not designated for publication; *writ denied*, 964 So.2d 367 (La. 2007))

The Louisiana Fourth Circuit Court of Appeal recently addressed the management of oil and gas property restoration cases that fall under Act 312. In *Duplantier*, plaintiffs sought writs to review the district court's decision to revise a case management order based on the court's acceptance of defendants' interpretation of Act 312. Defendants had urged an interpretation of the Act that required two trials, one for establishing the existence of environmental damage and liability and another for all other contractual and/or tort claims. Defendants' argument centered on the need, under Act 312, to have a determination of existence of environmental damage and liability, followed by submission of plans for remediation to DNR, and a second trial on all other issues only after resolution of appropriate remediation as required by Act 312. In asking the Fourth Circuit to review the district court's decision, plaintiffs challenged it by arguing that it would result in inefficient, piecemeal litigation and the possibility of conflicting judgments and conflicting rulings on appeal. Rather than two trials, plaintiffs argued that there should be one trial on all claims and issues followed by the submission by the parties of their plans for remediation to DNR.

The Fourth Circuit accepted plaintiffs' "one trial" interpretation. It initially noted that the Louisiana Supreme Court in *Corbello* recognized that the legislature "has not limited a person's private right of action for damages" in cases concerning remediation of property affected by oilfield contamination and further that *Corbello* recognized that "a landowner's recovery for remediation may not be limited to tort damages." The Fourth Circuit also pointed to *Corbello*'s dicta, observing that it suggested that "all claims, both tort and contractual, should be considered at the same time in order to determine the full extent of damages owed to the property owner[2]."

[2] It is not clear which *Corbello* dicta the Fourth Circuit had in mind because *Corbello* concerned only breach of contract claims, and, rather than suggesting that both tort and contract claims should be considered together to determine "the extent of damages owed," the Louisiana Supreme Court recognized the principle that, "'when a party has been damaged by the conduct of another arising out of a contractual relationship, the former may have two remedies, a suit in contract, or an action in tort, and that he may elect to recover damages in either of the two actions." *Corbello v. Iowa Production*, 850 So.2d 686, 708 (La. 2003) (quoting *Federal Ins. Co. v. Ins. Co. of North America*, 262 La. 509, 263 So.2d 871, 872 (1972)). Accordingly, as opposed to authorizing the recovery of the Fourth Circuit's hypothetical "full amount of damages" arising from both tort and contract claims, the *Corbello* court instead reiterated the rule that a party, while having both contract and tort remedies available, ultimately must elect between recovery of damages arising from just one of the available remedies. To this extent, the Fourth Circuit's reliance on *Corbello* seems misplaced.

The Fourth Circuit then turned to plaintiffs' "judicial efficiency" argument, specifying that to accept defendants' interpretation would require two juries, two trials, and at least two appeals, which could result in conflicting rulings. The court also acknowledged plaintiffs' reliance on La. Code Civ. Proc. arts. 1562(A) and 1736, which allow bifurcated trials only upon consent of all parties.

The court addressed defendants' concerns about the confusion of plaintiffs' claims by concluding that specific jury instructions would be adequate to handle any problems with respect to claim confusion. It also rejected defendants' contention that Act 312 requires an expedited decision on the existence of environmental damage on the basis that the statute provides: "If at any time during the proceeding a party admits liability for environmental damage or the finder of fact determines that environmental damage exists . . ." In the absence of an admission of liability, the court pointed out, the finder of fact, a jury, may find that environmental damage exists, which is a determination, the court concluded, that "could only be had after a trial on the merits."

As a result, the Fourth Circuit reversed the district court's decision to revise the case management order, finding instead that Act 312 does not mandate two trials.

- *Brownell Land Co., LLC v. OXY USA, Inc.*, No. 05-225, 2007 WL 3046203 (E.D. La. October 15, 2007, J. Barbier)

The United States District Court for the Eastern District of Louisiana faced the same issue addressed in *Duplantier* and reached the same result in *Brownell*. As a preliminary matter, the court looked to Act 312's retroactive application and found that the "Act is clearly a procedural law," requiring its retroactive application to lawsuits already filed at the time of its enactment.

Based on the lack of a decision from the Louisiana Supreme Court on the proper procedure to follow under Act 312, the Eastern District made its *Erie*-guess to determine how the Louisiana Supreme Court would decide whether Act 312 requires a court to make a preliminary finding of environmental damage and liability as a prerequisite to its consideration of a remediation plan developed by the parties and DNR. Examining Act 312, the court first found that it could be interpreted in two ways, either in accordance with plaintiff's one trial interpretation or with defendant's two trial interpretation. In so finding, the court looked to the Fourth Circuit's *Duplantier* decision, noting that, in it, the court admitted that "the statute is susceptible of two interpretations, and therefore [that] the search into the legislature's intent" was appropriate. The court pointed out that, under *Duplantier*'s reasoning, "a jury will determine liability, and will also determine the appropriate damages award," after which "the DNR will come up with a remediation plan."

Ultimately, the Eastern District adopted the *Duplantier* approach, concluding:

It appears that the purpose of the Act is to ensure that damages actually be used to remediate the land. The Act specifically does not prohibit additional dam-

ages. Therefore, there is nothing wrong with a jury determination of the amount of damages. Thereafter DNR will decide (with the court's approval) how much of those damages are to be used for remediation. The Louisiana Fourth Circuit has held that there is no need for a second jury for damages, and there is no reason for this Court to disagree.

- *Germany v. ConocoPhillips Co.*, 07-1145, 2008 La. App. Lexis 307 (La. App. 3d Cir. 03/05/08, J. Sullivan)

Just this month, in *Germany*, the Louisiana Third Circuit Court of Appeal agreed with the holdings of the Fourth Circuit in *Duplantier* and the Eastern District in *Brownell*, concluding that "the trial in this matter must be tried in its entirety to the fact finder then referred to LDNR."

Duplantier, *Brownell*, and *Germany* overlook that the amount of damages awarded to fund a remediation plan depends on the scope of the particular plan approved by DNR and adopted by the court. In other words, the plan approved by DNR and adopted by the court will in turn establish the amount of funding that must be deposited into the registry of the court to implement the plan. A jury's damage award that comes before the adoption of the plan by the court, therefore, may be inadequate to fund the plan. On the other hand, the jury's award may be in excess of the amount necessary to implement that plan, providing a windfall for the plaintiff that goes beyond what is necessary to remediate the property and that exceeds the amount, if any, that the jury calculated as "additional damages" owed based on a breach of an express contractual restoration clause.

Courts, however, may be able to address – at least somewhat – discrepancies in the amount awarded under certain provisions of Act 312. For example, Act 312 provides courts with continuing jurisdiction over funds deposited into the court registry for remediation and over responsible parties. It also provides that, "If the court finds the amount of the initial deposit insufficient to complete the evaluation or remediation, the court shall, on the motion of any party or on its own motion, order the party or parties admitting responsibility or found legally responsible by the court to deposit additional funds into the registry of the court." For excess funds, Act 312 provides that, "Upon completion of the evaluation or remediation, the court shall order any funds remaining in the registry of the court to be returned to the depositer." If used to address an insufficient jury award, however, a defendant's satisfaction of its judgment would leave it with no certainty that payment of the jury award was the end of the day for its funding requirements. And, depending on the court's decision to grant a plaintiff landowner immediate access to the award paid, a defendant may not be able to recover funds it paid toward remediation that were not necessary or used to implement a remediation plan.

In reaching their "one trial" conclusion, the courts in *Duplantier*, *Brownell*, and *Germany* also relied extensively on the Act 312's carve out of a landowner's right to an additional damage award arising under an express contractual provision (like the *Corbello* award resulting from the surface lease clause that provided: "Lessee further agrees

that upon termination of this lease it will reasonably restore the premises as nearly as possible to their present condition"). Some leases, particularly older mineral leases, do not contain a clause or any language that imposes a restoration obligation on the mineral lessee. See, *e.g., Dore Energy Corp. v. Carter-Langham, Inc.*, 901 So.2d 1238 (La. App. 3d Cir. 2005) (discussing a 1927 mineral lease without any language regarding a duty to restore the property). Under those circumstances, a landowner would have no basis to assert its entitlement to "additional damages" for breach of contract beyond the funding necessary to implement restoration of the property to applicable standards under a DNR-approved and court-adopted remediation plan. Under the "one trial" approach, a jury's damage award would again run the risk of being excessive if it is an amount beyond the amount required for implementation of the remediation plan.

Although *Duplantier*, *Brownell*, and *Germany* appear to contemplate that the issue of how to split up the funds awarded (between those required to be used for property remediation and those earmarked as an "additional" award for breach of contract damages) will be sorted out at some point after the court holds its "one trial," the cases fail to answer the fundamental question of whether all funds awarded by a jury must be paid into the registry of the court, at least as an initial matter. While Act 312 specifies that "all damages or payments in any civil action, including interest thereon, awarded for the evaluation and remediation of environmental damages shall be paid exclusively into the registry of the court in an interest-bearing account with the interest accruing to the account for clean up," it further provides that any award for additional remediation in excess of the requirements of the plan adopted by the court "is not required to be paid into the registry of the court." In *Brownell*, the court concluded that, after the jury determines a "global" damage award, "DNR will decide (with the court's approval) how much of those damages are to be used for remediation." *Brownell*'s stated methodology simply cannot be squared with the language of Act 312 and, in particular, is simply inconsistent with the Act's requirements about which part of a damage award must go into the registry of the court and which part is payable directly to the plaintiff. In short, the key problem with the "one trial" interpretation is that it runs contrary to Act 312's framework under which the remediation plan adopted controls the amount of damages for which a responsible party is liable and under which all funds paid for remediation purposes are safeguarded by the Act's requirement that they be deposited into the registry of the court and by its requirement that the court "ensure that any such funds are actually expended in a manner consistent with the adopted plan."

III. The Unresolved Question of the Constitutionality of Act 312's Retroactive Application.

Constitutional challenges have been raised with respect to Act 312's retroactive application to cases already filed at the time of its enactment (with the exception, as set forth in the Act, of cases set for trial on or before March 27, 2006). The issue went before the Louisiana Supreme Court in *M.J. Farms, Ltd. v. Exxon Mobil Corp.*, 956 So.2d 573 (La. April 27, 2007). The court, however, did not reach the merits of the constitutionality of Act 312 and held instead that "the issue of constitutionality was not properly raised in this case" based on "the long-standing jurisprudential rule of law" that "a stat-

ute must first be questioned in the trial court, not the appellate courts, and the unconstitutionality of a statute must be specially pleaded and the grounds for the claim particularized." Because plaintiffs did not raise the issue of constitutionality in a pleading – meaning a petition, an exception, written motion, or answer – the court concluded that plaintiffs had not properly challenged the Act's constitutionality.

Plaintiffs sought to cure the procedural defect by filing a Motion for Declaratory Judgment in the district court in which they contended that Act 312's retroactive application is unconstitutional on the basis that it divests or diminishes their accrued case of action. Plaintiffs further asserted that Act 312 impermissibly divests state courts of subject matter jurisdiction on the grounds that it confers a role on state regulatory agencies in the evaluation of plans for remediation of property. In response, defendants asserted that Act 312 is procedural only and that it does not change the substantive rights of the parties. On August 13, 2007, the district court agreed with plaintiffs and ruled that Act 312 violates both the Louisiana and United States Constitutions. Defendants filed petitions for appeal to the Louisiana Supreme Court, which held oral argument on February 26, 2008 (No. 2007-CA-2371). We await a decision.

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 these issues, contact:

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