

**Recent Legislative Changes in the
Law Relating to Drillers and
Landowners**
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**“Legacy Lawsuits” – The History of Act
312**

“ Corbello v. Iowa Production Co.

- . Landowner received \$76 Million from Shell Oil Company for brine contamination of a farm in Southwest Louisiana
- . Property was valued at approx. \$100,000
- . The vast majority of the recovery was awarded to clean up contaminated water.
- . The damage award and court opinion caused wide speculation that the money would not be used to clean up property.

Legislative Response to Corbello

“ Act 312 (2006)

- . Post-trial hearing at DNR to determine how best to clean up the property
 - ~ Evidence is weighed
- . The “MOST FEASIBLE PLAN” is issued based on the regulatory standards in 29-B, RECAP.
- . Money sufficient to bring the property to regulatory standards must be placed in the registry of the court.
- . Money in the registry MUST be used to clean up the property to comply with regulatory standards.

Procedure vs. Substance

- ~ Act 312 established a process to achieve remediation of the property to regulatory standards.
- ~ The application of the act to pending cases (retroactivity) was found constitutional precisely because the law was procedural rather than substantive.
 - . M.J. Farms, Ltd. v. Exxon Mobil Corp., 2007-2371 (La. 7/1/08), 998 So. 2d 16

Procedure vs. Substance

- ~ Thus, Act 312 left the landowners' substantive claims intact.
 - . Breach of Contract
 - . Tort
 - . Mineral Code Liability
 - ~ La. R.S. 31:122, a mineral lessee 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."

Procedure vs. Substance

- ~ Immediately after the passage of Act 312, defendants began to insist that under Act 312 the landowner's remedies were limited to
 - (1) regulatory cleanup; and
 - (2) additional cleanup if authorized by an express contractual provision
- ~ After five years of litigating this issue in nearly every case, the Louisiana Supreme Court put the issue to rest in State v. Louisiana Land and Exploration Co., ___ So.3d ___, 2013 WL 360329, *21 (La.2013)

Procedure vs. Substance

State v. Louisiana Land and Exploration Co., —
So.3d —, 2013 WL 360329 (La.2013)

- “ Affirmed that Act 312 was procedural and thus did not contract or restrict the substantive rights of a landowner. In other words, Act 312 merely defines a process; it does not define the remedies available to a landowner.
- “ Implied obligations continue to exist in the Mineral Code.

Procedure vs. Substance

State v. Louisiana Land and Exploration Co., —
So.3d —, 2013 WL 360329 (La.2013)

- “ Act 312 did not limit the amount of remediation damages to an amount determined necessary to fund the remediation plan, but, rather [Plaintiffs] were permitted to seek additional remediation damages from [defendants] through private rights, whether they arose contractually or by law.

2012 Legislative Changes

- “ History of 2012 “Reform”
- “ HB 618 by Rep. Abramson
 - . Allows an operator to admit responsibility to clean up to regulatory standards.
 - . Pre-trial hearing at DNR to determine the MOST FEASIBLE PLAN.
 - . Admitting party pre-pays DNR costs to form the plan.
 - . Most Feasible Plan is admissible at the trial on the merits.

2012 Legislative Changes

- “ HB 618 by Rep. Abramson Continued
 - . Allows admitting party to request an “Environmental Management Order” from the Court.
 - “ Access to the property
 - “ Investigation and testing
 - “ Sampling and testing protocols
 - “ Time limitations
 - . Expressly provides that this process “shall not establish primary jurisdiction with the Department of Natural Resources.”

2012 Legislative Changes

- “ SB 555 by Sen. Adley
 - . Allows for the subpoena of DNR officials involved in developing the MOST FEASIBLE PLAN.
 - . Creates a preliminary hearing process to allow the early dismissal of parties who clearly do not belong in the litigation. Plaintiffs must produce evidence of contamination for which the defendant may be responsible.
 - . Allows a landowner to file a “Notice of Intent to Investigate” which will suspend prescription for 1 year.
 - description of the property,
 - description of the alleged damage,
 - name and address of all known owners, and
 - name and address of current operator.
 - . CAVIAT – if a landowner takes advantage of this provision, any subsequent petition shall provide a “map of the location of any alleged environmental damage” and “any environmental testing performed on the property.”

2012 Legislative Changes

- “ SB 555 by Sen. Adley Continued
 - . Prevents ex parte communication by any party, “directly or indirectly” (i.e. lobbying), with the Department between the time proposed plans are submitted and the Department’s issuance of its plan.
 - . Requires comment by DEQ, DNR and Department of Agriculture for any Department plan that provides for an exception to the Department’s regulatory standards.
 - . Authorizes the Department to issue compliance orders to enforce a feasible plan.
 - . Admitting party may not enforce an indemnity agreement for punitive damages.

The Road Ahead

- “ The results of the 2012 Session were accepted by landowners as a compromise which would end the continuous and expensive debate at the Capitol.
- “ Allow the changed process to reveal its effectiveness before changing the law again.

The Road Ahead

- “ Questions which still need to be answered:
 - . Has litigation diminished or at least accelerated?
 - . Have admissions been made?
 - . Is property being cleaned up?
 - . Are cases being resolved more quickly?
 - . Are fewer defendants being sued?
 - . Are defendants utilizing the new procedures?
 - . Are exceptions being requested? Approved?

Subsequent Purchaser Doctrine

- “ Jurisprudential rule
- “ An owner of property has no right to recover *in tort* from a third party (Oil Company) for damage to the property which occurred before his purchase.
- “ Rule applies unless there is an assignment or subrogation of the rights belonging to the owner of the property when the damage was inflicted.

Subsequent Purchaser Doctrine

- “ A purchaser may not sue for damages when those damages are apparent and considered in the price.
 - . Used Car Analogy
- “ There is a long-running dispute about whether SPD applies when the damage is hidden, unknown to the buyer, and NOT factored into the price.
- “ Louisiana courts were split on this issue prior to Eagle Pipe.

Subsequent Purchaser Doctrine

Eagle Pipe and Supply, Inc. v. Amerada Hess Corp.

- “ Only 3 justices joined fully in the opinion.
- “ The controlling value of Eagle Pipe continues to be in question.
- “ The plurality opinion stated expressly that it is limited in that it does not apply to mineral leases or obligations under the Mineral Code.
 - . Only applies to Tort Claims.

Subsequent Purchaser Doctrine

Eagle Pipe and Supply, Inc. v. Amerada Hess Corp.

- “ To avoid the dilemma of Eagle Pipe, the contract of sale should include an assignment or subrogation of the rights belonging to the owner when the damage occurred.
- “ Regardless, any landowner can petition the Office of Conservation to order the clean up of contaminated property.

Ultra-Deep Unit Formation

- ~ Allows the Office of Conservation to create a unit or pool of up to 9,000 acres for wells exceeding 22,000 feet in depth
- ~ Before the recent changes, a "deep well" consisted of 15,000 feet
- ~ Two wells in southwest LA at 29,000 feet.
 - . The typical cost of these wells exceeds \$100 Million as opposed to \$10 million for a standard well
- ~ Technological advances allow for the production of these ultra deep structures.
- ~ Could mean billions of dollars and thousands of jobs for LA.
- ~ Beneficial to both industry and landowner alike.

Ultra-Deep Unit Formation

- ~ Operator must provide a "plan of work" detailing his intentions with the unit.
- ~ Many questions/concerns were presented by landowners
 - . How long will the unit be in tact? Will it shrink to the size of the structure once it is determined?
 - ~ Old law defined a unit as the maximum area that may be efficiently drained by a particular well.
 - . The new law allows the landowner to petition the Office of Conservation to study whether the unit should continue. If the operator has not complied with the plan of work, he bears the burden to show why the unit should not be eliminated or reduced.

Ultra-Deep Unit Formation

- ~ Ultra Deep units are permitted in federal waters. The process is less troublesome in federal waters where there is only one lessor, the government.
- ~ On land, you have hundreds, maybe thousands of landowners.
- ~ Companies have a vested interest in securing all landowners in a lease prior to operations.

Risk Charge

- ~ 200% penalty charged to a lease holder unwilling to participate in the production costs.
 - . This issue became a great concern when discussing the ultra-deep structures.
 - . Changes to the law were added to Ultra-Deep Bill.
- ~ Legislative Changes in 2012
 - . Requirement that the operator pay the royalty owner on behalf on the non working interest.
 - ~ 100% on alternate wells.

Revisions to the Law of Expropriation

- ~ La. R.S. 19:2.2 Amended to require a *private* expropriator to send a letter to the landowner 30 days prior to filing a petition for expropriation stating:
 1. The basis on which the expropriating authority exercises its power.
 2. The purpose, terms, and conditions of the proposed acquisition.
 3. The compensation to be paid for the rights sought to be acquired.

Revisions to the Law of Expropriation

- ~ La. R.S. 19:2.2 Continued
 4. A complete copy of all appraisals of, or including, the subject property previously obtained by the expropriating authority.
 5. A plat of survey signed by a Louisiana licensed surveyor illustrating the proposed location and boundary of the proposed acquisition, and any temporary servitudes or work spaces. If the expropriating authority is unable to obtain access to the property for formal surveying, a plat that fairly identifies the proposed boundary and servitudes may be utilized.
 6. A description and proposed location of any proposed above-ground facilities to be located on the property.
 7. A statement by the entity of considerations for the proposed route or area to be acquired.
