

THE CONTINUING LEGACY OF ACT 312

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THE LEGACY OF ACT 312

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I. THE STATUTE AND ITS REGULATIONS

A. Act 312 of 2006

Act 312, signed by the Governor and effective on June 8, 2006, amended existing sections and enacted new sections in Louisiana Revised Statutes Title 30 (“Minerals, Oil and Gas, and Environmental Quality”), in order to address the explosive proliferation of lawsuits alleging environmental contamination of oil and gas production sites in Louisiana. In the parlance of the industry, these lawsuits are “legacy lawsuits,” based upon the rule in La. Min. Code art. 129 (La. R.S. 31:129) that “[a]n assignor or sublessor is not relieved of his obligations or liabilities under a mineral lease unless the lessor has discharged him expressly and in writing.” The effect of this rule is that a mineral lessee who has sold his interest in a lease may later—in some cases, decades later—be held liable to the then landowner for restoration of the leased premises. This trailing liability for the original lessee and subsequent assignees or sublessees is the “legacy” of their ownership interest in the lease.

In legacy lawsuits, plaintiff landowners typically implead as defendants all of the companies (or their corporate successors) who ever owned an interest in the mineral lease.

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Sometimes the defendants include companies who, or whose predecessors, have not owned an interest in the field for thirty or more years. The cases sometimes produce large settlements or jury verdicts, which created a paradox. Although the supposed purpose of such suits is to remediate the properties, prior to Act 312 Louisiana law imposed no requirement on a landowner who had received a large award for remediation actually to use the award to clean up his property. The Louisiana Supreme Court in Corbello v. Iowa Production Co., 850 So.2d 686 (La. 2003), had acknowledged this irony with a judicial shrug:

While recognizing the need for a comprehensive body of legislation wherein the state would oversee the problem of oilfield waste sites, we note that the legislature was careful not to take away a private landowner's right to seek redress against oil companies.

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There is no indication as to whether the legislature contemplated the fact that private landowners may or may not use the money from the judgment to restore land, but it is clear that it did not implement a procedure to ensure that landowners will in fact use the money to clean the property.

Id. at 699 (emphasis added).

The irony was compounded by another statute, La. R.S. 30:89.1, which in its pre-Act 312 version gave an oil company which had paid a judgment or settlement to a landowner a credit against any later enforcement actions by regulatory agencies. As a result, an oil company could pay a landowner for remediation; the landowner could take the money and not use it to remediate but instead keep it; and the Office of Conservation of the Louisiana Department of Natural Resources ("DNR") would be powerless (to the extent of the oil company's payment) later to compel the oil company to clean up the property.

The Legislature responded in Act 312 by establishing a sequenced protocol for the management of cases alleging environmental contamination and the remediation of contaminated properties. The Act is meant to carry out the Legislature’s constitutional mandate to protect the natural resources of Louisiana “consistent with the health, safety and welfare of the people,” by “providing the procedure for judicial resolution of claims for environmental damage to property arising from activities subject to the jurisdiction of [DNR].” La. R.S. 30:29A. The Act’s newly enacted Section 29 of Title 30 sets forth this procedure, and addresses other issues related to the remediation of contaminated properties.

1. “[I]mmediately” upon the filing or amendment of a pleading that alleges the occurrence of “environmental damage” (defined as “actual or potential . . . damage . . . to environmental media caused by contamination resulting from activities associated with oilfield sites . . .,” La. R.S. 30:29I(1)), the plaintiff must notify the Louisiana Attorney General and DNR. The litigation is stayed for thirty days following this notice. DNR or the Attorney General has the right to intervene, and the rights of both agencies to bring independent civil or administrative actions are not impaired. La. R.S. 30:29B.

2. Upon either (i) a party’s admission of liability for environmental damage or (ii) the factfinder’s (judge or jury; the statute uses the word “court” when it refers only to the judge) determination that such damage exists and that a party caused or is legally responsible for it, the court orders the affected party (or parties) to develop a plan for the “evaluation or remediation to applicable standards” of the contamination and to submit same to DNR and the court. The plaintiff and other (not responsible) parties may comment on the plan or submit their own plans within thirty days after the responsible party’s submission. All plans must include cost estimates

for implementation. The responsible party must pay the cost of DNR's review of all plans. La. R.S. 30:29C(1).

3. DNR conducts a public hearing on the plans within sixty days from the last day for their submittal, has another sixty days to approve one of them or to come up with its own plan, and is required to issue written reasons for its actions. (The agency may obtain extensions of no more than sixty days to conduct the hearing or to approve or promulgate a plan.) Any plan endorsed by DNR shall conform to "applicable standards," meaning Statewide Order No. 29-B, La. Admin. Code 43:XIX, Chapter 6. DNR's approval of the plan is not an "adjudication subject to appellate review. . . ." La. R.S. 30:29C(2), (3), (4).

4. The court then reviews the DNR-sanctioned plan, and "shall adopt" it unless a party proves that another plan is more feasible to protect the environment and public health. The court enters a judgment adopting a plan, assigns written reasons for its judgment, and orders the responsible party/parties to fund the plan's implementation by means of a deposit into the court's registry. The court's judgment is final under La. Code Civ. Pro. art. 2081 et seq. for appeal purposes. Any appeal is a de novo review, and "shall be heard with preference and on an expedited basis." La. R.S. 30:29C(5), (6).

5. Subsection D expressly mandates that moneys that are paid for clean-up shall be used for clean-up:

The court shall issue such orders as may be necessary to ensure that any such funds [in the court's registry] are actually expended in a manner consistent with the adopted plan for the evaluation or remediation of the environmental damage for which the award or payment is made.

La. R.S. 30:29D(3) (emphasis added).

The court may allow the clean-up funds to be deposited incrementally into the registry, but if the court does so it must require the posting of a bond, valid through completion of the remediation, in an amount sufficient for the total cost of implementation of the plan, subject to exceptions applicable to suspensive appeals (see La. Code Civ. Pro. art. 2124). The court retains jurisdiction over the deposited funds and the responsible party/parties until the plan is completely implemented, and may order the deposit of additional funds if necessary. Any funds remaining in the court's registry after the plan has been implemented will be returned to the depositor. La. R.S.30:29D(1), (2), (4).

6. Subsection E appears to be the Legislature's nod to landowners' attorneys. It provides that the responsible party must pay to "a party providing evidence . . . upon which the judgment is based" that party's costs, including expert witness fees, costs for environmental evaluation, investigation, testing, and plan development, and reasonable attorney's fees both before the court and the DNR. DNR (or the Attorney General) may likewise recover the same categories of costs and fees. Subsections F and G provide for the filing of progress reports if ordered by the court, and for the dismissal without prejudice of DNR or the Attorney General if no environmental damage exists.

7. Subsection H is another important section for landowners and their attorneys: It states that section 29 does not preclude awards for (i) "private claims suffered as a result of environmental damage," or (ii) additional remediation beyond the approved plan's requirements if required "in accordance with the terms of an express contractual provision." This "express contractual provision" language makes an award of Corbello-type damages (\$33 million jury award for remediation of property worth \$106,000 affirmed; 850 So.2d at 698) theoretically still

available despite Act 312, where the mineral lease imposes remediation standards beyond those required by Statewide Order 29-B.

8. Subsection I of newly enacted section 29 defines the terms used in the statute. Subsection J addresses settlements, which are subject to court approval following notice to and opportunity for comment by DNR and the Attorney General, regardless whether either has intervened. The court holds a hearing, and if it orders remediation it will not approve the settlement until the funds are deposited into the court's registry. If the settlement (i) is for a "minimal amount," and (ii) will not dispose of the entire litigation, the court can waive the requirements of subsection J. In cases where DNR or the Attorney General has intervened, the agency may recover from the settling defendants all the costs the agency has incurred.

The other changes effected by Act 312 on Title 30 of the Revised Statutes are the enactment of section 29.1; incidental changes in the definitions used in section 82; and amendments to sections 89.1 and 2015.1. The newly enacted section 29.1 requires a mineral lessee or operator who performs environmental testing to share the test results with the landowner, regardless whether the landowner has filed suit. Lessees, operators and landowners who perform such tests must also provide the results to DNR.

Section 89.1, which in its pre-Act 312 form granted oil companies who settled with or paid judgments to landowners a credit against subsequent regulatory enforcement actions, now extends such credit only to the extent that the judgment or settlement moneys were actually used for site restoration (to Statewide Order 29-B standards) or assessment. And section 2015.1, the earlier enacted "Corbello statute" which governs usable groundwater damage claims the way that section 29 now governs environmental contamination claims, has been amended to delete any

references to DNR, making the Louisiana Department of Environmental Quality (“DEQ”) the sole responsible agency for usable groundwater issues.

B. Amendments to Statewide Order No. 29-B

In April 2007 DNR promulgated regulations governing its consideration of evaluation or remediation plans submitted pursuant to new La. R.S. 30:29. The regulations are codified as a new part of Statewide Order No. 29-B, La. Admin. Code 43.XIX, Chapter 6.

DNR’s first step in its consideration of plans will be a Commissioner’s conference, at which the Commissioner of Conservation or a hearing officer will preside. All “responsible parties” as defined in R.S. 30:29 must participate in the conference; “litigation parties,” defined in the new regulation as parties to the lawsuit who are not responsible parties, may but are not required to participate. At the conference hearing dates and prehearing dates, including those for the exchange of technical data, plans and witness and exhibit lists, will be fixed. La. Admin. Code 43:XIX.601.

Sections 609 and 611 set forth the general and specific requirements, respectively, for plans submitted to DNR. Copies of course must be submitted to all other parties, and all sampling and testing must have been done in conformity with Statewide Order No. 29-B’s requirements. The full vertical and horizontal extent of contaminant plumes must be delineated. Plans also must contain a chronological work schedule, an itemized cost basis for each event in the schedule, and a certification from a Louisiana-licensed attorney that, to the best of knowledge, information and belief, the plan “is true and correct and is based on scientific data that has been obtained in a manner compliant with all applicable regulations.” *Id.* sections 609, 611.

Section 613 allows the filing of comments and responses to plans; these also must be copied to all of the parties. According to section 617, all technical data “regarding” (which must mean “supporting,” see discussion of section 621 below) filed plans, comments or responses must be provided to all parties at the cost of the proponent of the plan, comment or response. Citation references to technical data that have already been provided must be specific, and source references for the data must also be provided.

Section 619 contemplates revisions of plans, comments and responses, and requires that such revisions be copied on all parties, along with any supporting technical data. Section 621 mandates that “[a]ll technical data available” to a proponent of a filed plan, comment or response be disclosed to all parties at that time or earlier, “regardless whether such technical data is used or referenced in such plan, comment or response.” *Id.* para. A (emphasis added). In addition “new” technical data that has “become[] available” to a party must also “be made available immediately to all [other] parties,” *id.* para. B.

The Commissioner publishes legal notice of a scheduled hearing in the official state journal. Responsible parties must also provide notice of the hearing in three ways: by posting a copy of the legal notice and a plat “in a prominent place in the area affected”; by publishing a copy of the legal notice at least fifteen days before the hearing in a newspaper published in the affected area; and by mailing copies of the legal notice to all parties. If at the hearing a continuance to a specific date, time and place is announced by the hearing officer, no further posting, publishing and mailing of the continued hearing is required. For all other continued hearings the three-part notice procedure must be repeated. *Id.* section 633.

At the hearing (which may be conducted by a Louisiana-licensed attorney appointed as hearing officer by the Commissioner, *id.* section 623), the responsible party/parties go first,

presenting “the entire scientific, technical or other basis of their plan or plan(s).” Id. section 635A. Litigation parties who support a responsible party’s plan go second and must make the same presentation. Other litigation parties, making the same full presentations, proceed next in the following order: first, those who have submitted plans; next, those who have filed comments in opposition to a responsible party’s plan; lastly, those who have filed comments in support of a litigation party’s plan.

After all of these presentations comes rebuttal evidence, first by the responsible parties, then by litigation parties. All rebuttal testimony “shall be strictly limited to a refutation of the matters covered by the opponents.” Id. section 635F. Subsection G of section 635, addressing cross-examination, limits the topics of same to testimony and exhibits already in evidence, and the witnesses’ credibility. The subsection also requires that “[m]atters peculiarly within the knowledge of the cross-examiner or his witnesses” must be presented on direct examination, preventing their use for the first time on cross-examination to surprise a witness. It is hard to think of any matters that would be “peculiarly within the knowledge” of a single party at this stage, given the previous filing of witness and exhibit lists pursuant to section 607A and the mandatory disclosure by all parties of all known technical data, pursuant to section 621A and B. Subsection H allows opening and closing statements.

Within sixty days of the conclusion of the hearing (or within such longer time as the court may allow), the Commissioner will approve one of the submitted plans or structure his own, in either case issuing written reasons for his decisions. Id. section 627. No request for a rehearing by the Commissioner is permitted, id. section 629, but neither is a rehearing needed, as the parties are all headed back to court, where pursuant to La. R.S. 30:29C(5) they may attempt to persuade the judge that the Commissioner’s approved plan is not the most feasible one.

II. ACT 312 IN THE COURTS

A. Private Claims and Higher Standards

The two-forum procedure set forth in new La. R.S. 30:29 and in new Chapter 6 of Statewide Order 29-B guides the development and implementation of plans to address “the contamination that resulted in the environmental damage.” La. R.S. 30:29C(1). Will the clean-up of this contamination—the repair of the environmental damage—pursuant to the plan, which will adhere to Statewide Order 29-B standards, be all the relief a plaintiff landowner in a legacy lawsuit is entitled to? The answer to this question is no, if the landowner has any “private claims suffered as a result of environmental damage,” or if “an express contractual provision” in the mineral lease or elsewhere requires “additional remediation in excess of the requirements of the plan adopted by the court.” Id. section 29H.

Examples of “private claims” that would not be redressed by the plan would be stigma damages—the decrease in the market value of the property that might endure even after clean-up—or decreased crop yields or damage to herds attributable to contamination. And an example of an “express contractual provision” requiring remediation beyond Order 29-B standards is the language in the surface lease in Corbello that required the lessee to “reasonably restore the premises as nearly as possible to their present condition” upon termination of the lease. 850 So.2d at 694. These and other conceivable types of damages would not be compensated by a clean-up to regulatory standards.

B. The All-Important Procedural Question

The *raison d’être* of Act 312 is the remediation plan promulgated by DNR, after its consideration of competing plans proffered by the landowner and responsible parties. This

remediation plan is the way that DNR, and ultimately the court, carry out the legislative mandate that introduces the substantive portions of the Act:

[T]he Constitution of Louisiana mandates that the natural resources and the environment of the State, including ground water, are to be protected, conserved and replenished insofar as possible and consistent with the health, safety and welfare of the people. . . . It is the duty of the legislature to set forth procedures to ensure that damage to the environment is remediated to a standard that protects the public interest. To this end, this Section provides the procedure for judicial resolution of claims for environmental damage to property arising from activities subject to the jurisdiction of the Department of Natural Resources, Office of Conversation.

La. R.S. 30:29A.

But at what point in the case will the judicial proceedings be stayed for the development by the DNR of its remediation plan? Predictably, landowners and oil companies have disagreed, in the few reported cases that have addressed the question:

(a) Landowners have argued that the Act, according to their reading of the United States and Louisiana Constitutions and the Louisiana Code of Civil Procedure, must be read to contemplate a single trial of all issues. According to this interpretation, when the jury makes its initial statutorily-mandated determination whether contamination exists and who is responsible for it, it also tries all other issues in the case, including a remediation plan for the property, which will be considered again by the DNR.

(b) Oil companies have argued for a “two trial” procedure. According to this interpretation of the statute, the fact finder (almost always, a jury) early in the case makes the initial, limited determination about the existence of and responsibility for contamination, considering no other issues at that time. The court proceedings are then stayed while the case moves to the DNR, which develops a remediation plan and returns

it to the court. Then, according to the oil companies' interpretation, the court considers that plan and implements it or another one it finds more feasible, and the jury tries any remaining issues.

Both of these approaches have raised questions. The landowners' position has the jury deciding on a remediation plan, and rendering an award for same, before the DNR decides upon its own remediation plan and its cost. Why should the same issue be decided twice by different decision-makers in the same case? The answer is obvious. One may expect that almost always, a jury's award for remediation will be far higher than the cost of a DNR-sanctioned plan. The difference would go into the landowners' pockets.

Oil company defendants, alarmed by the prospect of more Corbello-sized jury awards for remediation, want the development of a remediation plan entirely removed from the jury's consideration. The "two trial" procedure they argue for accomplishes this, but must be considered in the context of the district courts' original jurisdiction over all civil matters pursuant to article V, section 16 of the Louisiana Constitution, and the requirement of La. Code Civ. Pro. art. 1736 that "[t]he trial of all issues for which a jury trial has been requested shall be by jury, [and] there shall be but one trial." (Emphasis added.)

This argument about how to try an environmental contamination lawsuit subject to Act 312 has played out in only a few cases. The stakes are high.

C. Duplantier Family Partnership v. B.P. Amoco

In Duplantier Family Partnership v. B.P. Amoco, La. App. 4th Cir. No. 2007-C-0293 (unpublished opinion), the defendant oil companies, following the enactment of Act 312, moved that the trial court amend its case management order in order to direct that (i) the jury first make a limited determination whether contamination existed, and if so, who were the responsible

parties; (ii) DNR thereupon conduct its proceeding, out of which an agency-sanctioned remediation plan would emerge; and (iii) the court thereupon consider that plan and adopt it or another, and try any remaining claims. The landowners opposed the oil companies' motion, arguing that La. Code Civ. Pro. art. 1736 mandated a single trial unless all parties consented otherwise, and they would not so consent, and that the proposed multi-step procedure would apply Act 312 in violation of the grant of original jurisdiction over all civil matters to the district courts by article V, section 16 of the Louisiana Constitution.

The trial court amended the case management order as requested by the defendants, and the landowners then sought supervisory writs from the Louisiana Fourth Circuit Court of Appeal. According to the landowners, "Act 312 had no effect whatsoever on the total amount of damages payable by the defendants under private law. Such damages must be determined at the 'one trial' permitted under La. Civ. Code art. 1736." Duplantier landowners' writ application, at 6-7 (emphasis in original). They argued that at the initial determination by the jury of the existence of contamination and the identities of responsible parties, La. R.S. 30:29C(1), all other issues should also be tried.

On May 16, 2007 the court of appeal granted the landowners' writ application, and in a 4-1 decision reversed the trial court's order. Observing that there was no jurisprudence interpreting the statute, the court of appeal extensively quoted dicta from Corbello, 850 So.2d 686, at 694-95, 699, and found that "[t]he dicta in Corbello suggests 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." The court of appeal also found that judicial efficiency and avoidance of piecemeal litigation made "one trial of all issues . . . the most plausible interpretation of the statute." Duplantier writ application decision, at 9. The oil company

defendants sought supervisory writs from the Louisiana Supreme Court, but their application was denied on September 28, 2007. Duplantier Family Partnership v. B.P. Amoco, 964 So.2d 367 (La. 2007).

D. Germany v. ConocoPhillips

Another case featuring the same procedural issue addressed in Duplantier is Germany v. ConocoPhillips Co., 980 So.2d 101 (La. App. 3d Cir.), writ denied as not timely filed, 992 So.2d 960 (La. 2008). In Germany, the defendant oil companies filed motions in limine to establish that a two-forum procedure was required under Act 312 in order to resolve the landowner's claim. The district court denied the oil companies' motions, ordering that a single trial of all issues be conducted, as the Fourth Court in Duplantier had ordered. The Germany trial court supported its ruling by finding that the principal purpose of La. R.S. 30:29 is not to provide a trial procedure but rather only to restrict the landowner's use of a portion of a remediation award, and that the two-forum procedure would violate La. Code Civ. Pro. art. 1736. The oil company defendants then sought supervisory writs, which the Third Circuit denied in a published opinion.

The Third Circuit's denial of the defendants' supervisory writ application, which affirmed the trial court's decision, squarely sided with the landowners: "[W]e affirm . . . that, pursuant to Act 312 of 2006, there should be a single trial of all issues before the case is referred to the Louisiana Department of Natural Resources (LDNR)." 980 So.2d at 102 (emphasis added). In its reasoning in support of this conclusion, the Third Circuit made no mention of the anomaly of two factfinders deciding the same issue in the same proceeding, and only obliquely addressed what to do with the predictable difference between a jury's award for remediation and the cost of a DNR-promulgated plan:

We find no indication in the Act that the Legislature intended the procedure to be a deviation from the usual trial

procedure where issues of liability and damages are tried in one proceeding. . . .

In our opinion, the Act . . . clarifies that this new judicial procedure for claims . . . does not limit a landowner's recovery to the award determined by the administrative agency, LDNR.

Id. at 103 (emphasis added).

The Duplantier court accepted the landowners' argument that their statutory right to a jury trial in a civil case was unaffected by Act 312, because none of the exceptions to a litigant's right to a jury trial enumerated in La. Code Civ. Pro. art. 1732 applied. Additionally, according to the court, the "two trial" procedure would violate the requirement that "issues of liability and damages must be tried together unless the parties agree to separate proceedings. . . ." 980 So.2d at 103, citing La. Code Civ. Pro. arts. 1562, 1736. The Third Circuit concluded its denial of the oil companies' writ application by expressly adopting the Fourth Circuit's conclusion and reasoning in Duplantier.

E. Tensas Poppadoc v. Chevron

Hard on the heels of Germany—less than three weeks later—came Tensas Poppadoc, Inc. v. Chevron U.S.A., Inc., 984 So.2d 223 (La. 3d Cir. 2008). The Third Circuit there faced the same issue: whether the jury trial should be held "on the merits of all issues of liability and damages, including remediation, before the case can be referred to [DNR] pursuant to Act 312." Id. at 224. The trial court had answered yes to this question, granting the landowner's motion in limine, and the Third Circuit approvingly quoted the trial court's order and reasons, in full. In soldierly fashion, the trial court had marched through relevant articles in the Code of Civil Procedure to reach a "single trial" conclusion. The trial court had reasoned as follows:

- (a) La. Code Civ. Pro. art. 1732 allows for a jury trial except where same is "specifically denied by law."

(b) La. R.S. 30:29 does not “specifically” deny a jury trial on the threshold issues of the existence of environmental damage and the parties responsible for same.

(c) Pursuant to La. Code Civ. Pro. art. 1736, when a jury trial has been requested, “there shall be but one trial,” absent consent of all of the parties.

(d) The plaintiff landowner had not agreed to multiple trials.

(e) Therefore, since La. R.S. 30:29 expressly requires the finder of fact (jury) to determine the existence of contamination and the identity of the responsible parties before referral of the remediation issue to DNR, “this court must conduct a single trial of all issues before any referral to [DNR].” 984 So.2d at 225.

Citing Duplantier, which had been decided by a different panel just a few weeks earlier, the Third Circuit predictably affirmed the trial court’s “single trial” ruling:

We agree with the trial court that La. R.S. 30:29C provides that referral to LDNR must await a determination by the fact finder on whether environmental damage exists and who are the responsible parties. Since plaintiff has not consented to a bifurcated trial, the jury will not determine whether environmental damage exists until the verdict is rendered at the “one trial” permitted under La. Code Civ. Pro. art. 1736. The overlapping evidence in the two trials proposed by defendants would greatly increase the risk of contradictory findings.

984 So.2d at 229 (emphasis added). As in Germany, therefore, the defendant oil companies’ application for supervisory writs was denied.

Back to the trial court went Tensas Poppadoc after the Third Circuit’s writ denial, and in due course the case was tried to a jury. The jury rendered a \$1 million verdict against one defendant, Chevron, and absolved all of the other oil company defendants from liability. These defendants submitted to the trial court a final judgment of dismissal conforming to the jury verdict in their favor. But the trial court, at the urging of the landowners, refused to sign a

judgment of dismissal and instead referred all of the parties to the DNR, on the theory that “La. R.S. 30:29 requires that the matter be sent to the LDNR before any judgment is rendered and . . . only after a remediation plan is approved by the LDNR may the trial court render a judgment.” Tensas Poppadoc, Inc. v. Chevron U.S.A., Inc., 10 So.3d 1259, 1261 (La. App. 3d Cir. 2009).

The non-Chevron defendants therefore filed a writ of mandamus with the Third Circuit, complaining of the trial court’s refusal to sign a final judgment in their favor in conformity with the jury’s verdict. This time, those defendants got a better reception. The Third Circuit cited La. Code Civ. Pro. art. 1916(A), which requires that “the court shall prepare and sign a judgment in accordance with the verdict of the jury within ten days of the rendition of the verdict” (emphasis added), and held that nothing in La. R.S. 30:29 suggested that the Legislature intended for this provision not to apply in oilfield contamination cases. The Third Circuit therefore granted the non-Chevron defendants’ writ of mandamus and made it peremptory, ordering the trial court to “prepare and sign [a] partial final judgment with regard to Applicants in accordance with [the] jury’s verdict in this matter.” Id. at 1264. Thus has the Third Circuit resolved at least one possible problem raised by the “single trial” approach. But other, harder questions remain unanswered.

F. Brownell v. Oxy

A federal court has added its voice to the chorus of decisions on the one trial/two trial question. In Brownell Land Co. v. Oxy U.S.A., Inc., 538 F. Supp. 2d 954 (E.D. La. 2007), the oil company defendant filed a motion in limine, in which it argued for the two-trial interpretation of the statute. In his ruling on the motion, Judge Carl Barbier acknowledged the post-Corbello “perception that contaminated property was the equivalent of a winning lottery ticket for the

landowner.” Id. at 956, quoting Pitre, “Legacy Litigation” and Act 312 of 2006, 20 Tul. Envtl. L.J. 347, 348 (2007). Act 312, the court acknowledged, was enacted by the Legislature as part of then Governor Blanco’s reform of legacy litigation.

The court begin its analysis by observing that the Louisiana Supreme Court had not issued a final decision on the issue. This required the court to make an “Erie guess” about how the Louisiana Supreme Court would decide the issue if presented with it. For guidance when the state’s highest court has not ruled on an issue, a federal court may refer to, but is not strictly bound by, decisions by the state’s intermediate courts of appeal. In re Katrina Canal Breaches Litigation, 495 F.3d 191, 206 (5th Cir. 2007).

The district court accordingly examined the unpublished Duplantier opinion by the Louisiana Fourth Circuit Court of Appeal, making clear that the Fourth Circuit’s decision was not precedent “in the sense that the case is not necessarily controlling on this court or any other court for that matter.” 538 F. Supp. 2d at 958 n.3. The Brownell court noted that in Duplantier, the Fourth Circuit had acknowledged that La. R.S. 30:29A is susceptible to two interpretations. This required a search into the Legislature’s intent, and the district court ultimately answered the question in this way:

The issue at hand is whether the Act requires a separate determination of liability and damages. 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 damages. Therefore there is nothing wrong with a jury determination of the amount of the 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.

Id. at 959 (emphasis added).

G. M.J. Farms v. ExxonMobil

Lawyers who represent parties in legacy lawsuits are familiar with M.J. Farms, Ltd. v. ExxonMobil Corp., 998 So.2d 16 (La. 2008), where the Louisiana Supreme Court held that Act 312 is constitutional. Although the Supreme Court did not address the precise question whether the “one trial” or “two trial” procedure (or some third way) should be employed to develop a remediation plan, the court’s treatment of the parties’ constitutionality arguments indicates how it might decide the issue.

A starting point is the doctrine of “primary jurisdiction.” This is a doctrine governing a court’s exercise of its discretion to defer to an administrative agency when the agency has concurrent jurisdiction over an issue along with the court:

The doctrine of “primary jurisdiction” is applicable when a court and a state/governmental agency have concurrent jurisdiction over a claim or a dispute leading to potential conflicts on how such disputes are resolved. In such cases, a court in its discretion may dismiss the claims before it and defer the matter to the agency that has been granted primary jurisdiction over the claims.

Id. at 22 n.6, citing The Daily Advertiser v. Trans-La, 612 So.2d 7 (La. 1993) (distinguishing between primary jurisdiction and exclusive jurisdiction), and Magnolia Coal Terminal v. Phillips Oil Co., 576 So.2d 475 (La. 1991).

The defendants in M.J. Farms cited the primary jurisdiction doctrine as support for their position that Act 312 was constitutional, arguing that the Act did not make substantive changes in the jurisdiction concurrently shared by the courts and DNR’s Office of Conservation. According to the defendants, “Act 312 does not expand the existing jurisdiction, but only mandates the involvement of the state agencies for assessment of appropriate damages and remediation plans.” 998 So.2d at 25.

The Supreme Court in M.J. Farms ultimately held that Act 312 had not violated the landowners' rights by depriving them of any of their vested property rights. The court pointed out that article I, section 4 of the Louisiana Constitution subjects private rights to "reasonable statutory restrictions and reasonable exercise of the police power," and held that "[t]he provisions of Act 312 represent such reasonable restrictions." 998 So.2d at 35.

Nor, according to the Supreme Court, did Act 312 divest the district courts of their original jurisdiction in contravention of article V, section 16 of the Louisiana Constitution, or deny landowners their right of access to the district courts under article I, section 22. On this second point, the Supreme Court held:

[T]he Constitutional Convention did not intend to limit the Legislature's ability to restrict causes of action. . . . The access to courts clause does not "prohibit legislative restriction of legal remedies." . . . Instead, the clause "operates only to provide remedies which are fashioned by the Legislature."

Although Act 312 changes the remedy available to M.J. Farms in its efforts to obtain surface restoration of its immovable property, we do not find this denies it access to the courts.

998 So.2d at 37 (emphasis added), quoting Williams v. Kushner, 524 So.2d 191, 196 (La. App. 4th Cir. 1988), amended and aff'd, 549 So.2d 294 (La. 1989).

The doctrine of primary jurisdiction is salutary, in that it recognizes and counsels a court's deference to the expertise of an administrative agency over areas within the agency's jurisdiction. This principle argues in favor of staying the judicial proceedings early in the case, after an initial, limited determination by the jury whether contamination exists and who is responsible for it, so that the DNR can consider and promulgate its remediation plan.

Likewise, the power of the Legislature to restrict causes of action seems to favor the oil companies' "two trial" argument, perhaps with some modifications appropriate to the jury's role

in civil trials. The Supreme Court in M.J. Farms expressly recognized the Legislature’s power to restrict parties’ legal remedies, and characterized a landowner’s remediation claim as its effort to “obtain surface restoration of its immovable property,” 998 So.2d at 37, not to obtain a large damages award which it could pocket. These aspects of the Supreme Court’s reasoning in M.J. Farms provide some support for an argument that the remediation claims should be “tried” first to the DNR, early in the case, before the jury’s consideration of the private damage and additional remediation claims.

H. An Amendment to the Statute?

The issue whether court proceedings should be stayed while DNR conducts hearings and ultimately approves a remediation plan depends upon the interpretation of La. R.S. 30:29C(1), one of the provisions enacted by Act 312. The first sentence of this paragraph now reads as follows:

C(1). If at any time during the proceeding a party admits liability for environmental damage or the finder of fact determines that environmental damage exists and determines the party or parties who caused the damage or who are otherwise legally responsible therefor, the court shall order the party or parties who admit responsibility or whom the court finds legally responsible for the damage to develop a plan or submittal for the evaluation or remediation to applicable standards of the contamination that resulted in the environmental damage.

In the author’s opinion, any argument about the timing of the referral of the case to DNR would be pretermitted, if paragraph C(1) were amended to replace the quoted sentence with the following (material changes underlined):

C(1). At the earliest reasonable time during the proceeding, the finder of fact shall determine two limited issues: (i) whether environmental damage exists and, (ii) if so, which party or parties caused the damage or are otherwise legally responsible therefor. Additionally, a party may admit liability for environmental damage. In either event, after the factfinder’s

limited determination or a party's admission, the court shall immediately stay all further proceedings in the litigation, and shall order the party or parties who admit responsibility or whom the court finds legally responsible for the damage to develop a plan or submittal for the evaluation or remediation to applicable standards of the contamination that resulted in the environmental damage. The stay of proceedings in the litigation shall remain in effect until the court has entered a judgment approving a plan pursuant to paragraph C(5) of this Section.

If the existing first sentence in section 29C(1) were replaced with these four sentences, there could be no argument about the sequence of events. The finder of fact (jury) would make an initial, limited determination whether environmental contamination exists, and which party or parties were responsible. The court case would then be stayed, while the parties submit remediation plans to DNR, DNR considers them and ultimately approves a plan, and the case then returns to the court for entry of judgment adopting the DNR-approved plan or another plan that the court finds more feasible. Private claims and contractual claims for additional remediation, referred to in section 29H, would not be pursued by a landowner until after all these steps had been completed and the stay had been lifted. The suggested amendment would remedy the Duplantier and Germany paradox: A jury renders a verdict for remediation in excess of the requirements of Rule 29-B; DNR then considers and approves a lower-cost remediation plan that follows Rule 29-B; and the landowner pockets the difference.

This sequence of events, which oil company defendants say is already mandated by the existing language of section 29C(1), ascribes different meanings to the terms “court” and “finder of fact” in the statute, which the author believes mean “judge” and “jury,” respectively. But ascribing different meanings to these two terms would cause the remediation issue to be withheld from the jury upon the return of the case to the trial court from the DNR. Landowners would argue that that would usurp their legally protected right to trial by jury.

It is true that the proffered interpretation, which seems to be the same interpretation advanced by the oil company defendants in Duplantier and Germany, is that the statute has removed decisionmaking power on remediation plans from the jury and has vested same in the DNR and ultimately the judge. Landowners have argued that Louisiana's constitution and statutes limit the Legislature's power to exclude certain civil claims, even those that implicate strong public interests, from a jury's consideration. This argument could be avoided if, when the case returns from the DNR, a full trial on the merits of all claims, including remediation, were to occur. Under this procedure, the DNR-sanctioned plan would be one piece of evidence the factfinder (jury) would consider, along with all other evidence on remediation and other issues.

The landowners' interpretation, advanced and judicially sanctioned in Duplantier and Germany, is that the jury should render a remediation verdict (and a verdict on all other issues) before DNR considers and approves a remediation plan. This approach will not work. If the jury verdict is larger than what DNR ultimately approves, presumably the landowner keeps the difference and the landowner's counsel (in the cynical view, the real party in interest) pockets a large fee. If the jury's remediation verdict is smaller than what DNR ultimately approves, however, the enforceability of DNR's more expensive plan would be suspect. And what would happen if the jury finds that there is some contamination and identifies which producer defendant is responsible, but nonetheless holds that no remediation is necessary? Would the remediation issue still be referred to DNR, which presumably could "reverse" the jury's determination and approve a remediation plan? These issues illustrate why the Duplantier and Germany holdings are so problematic.

III. CONCLUSION

Some (not all) landowners who file legacy lawsuits are interested only in large monetary awards, and have no intention of using such awards for clean-up of their property. For them Act 312 is an unwelcome development. There is no denying that the legislation has introduced a new decisionmaker into legacy lawsuits: the DNR, which subject to court approval will determine (i) the length, breadth and depth of soil and groundwater contaminant plumes; (ii) the identity and concentrations of contaminants; (iii) how important these concentrations are as a practical matter (for example, do they affect only Class 3 groundwater, not a source of drinking water under DEQ's Risk Evaluation and Corrective Action Program ("RECAP") standards?); and (iv) the reasonable measures that will be mandated to remediate the contamination "insofar as possible," and "consistent with the health, safety and welfare of the people." La. R.S. 30:29A.

DNR's development of a remediation plan is the foundational event in a legacy lawsuit. Act 312's purpose and procedure dictate that this occur after the factfinder's limited determination of the contamination's existence and the responsible parties' identities, and before the trial of any additional claims, which by their nature are derivative of the remediation claims subject to the plan.