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**Louisiana’s Act 312 – Legislative and Case Law Update for 2012**

PLANO Executive Night Seminar

February 16, 2012

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This paper will address recent attempts to revise Louisiana’s Act 312 (La. R.S. 30:29 *et. seq.*) in the Louisiana Legislature and examine certain rulings in various Act 312 cases pending in state and federal courts in Louisiana.

**A. Legislative Update**

1. 2011 Legislative Session

House Bill 563 (Rep. Cortez) – The proposed law would provide that the Office of Conservation shall have primary jurisdiction for all demands arising as a result of any actual or potential impact, damage, or injury to environmental media (*e.g.*, property) caused by contamination resulting from activities associated with oilfield sites or exploration and production sites. This proposed bill was referred on April 15, 2011 to the Committee on Natural Resources and Environment and did not go any further.

House Bill 564 (Rep. Seabaugh) – The proposed law would provide that monies recovered from activities conducted pursuant to the La. Oilfield Site Restoration Law shall be placed in the Oilfield Site Restoration Fund. It would also authorize the secretary of the Louisiana Department of Natural Resources to take legal action to meet the purpose of the La. Oilfield Site Restoration Law. It also provides that specific performance is the preferred remedy

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in a case of failure to restore the property subject to a mineral lease or mineral servitude. The proposed law would also require that notice be sent to the lessor and provide a reasonable opportunity to respond and perform. This proposed bill was also referred to the Committee on Natural Resources and Environment and did not go any further.

## 2. 2012 Legislative Session

Another amendment to Act 312 will be submitted in Louisiana's House of Representatives this coming session, beginning in March 2012. The proposed bill seeks to amend La. R.S. 30:29(C)(1), (4) and (5) and section (H), as follows:

Preliminary Hearing On Responsibility – After the expiration of the initial 30 day stay (set forth in Sec. B(1) of the Act) and any time prior to the trial on the merits, plaintiff must request a hearing before the district court to make a prima facie showing of the identity of the potentially responsible party or parties who caused or who are otherwise legally responsible for remediating to regulatory standards the contamination at issue. The hearing would be a summary proceeding (without a jury). The preliminary ruling would not prohibit a responsible party from challenging (1) the responsibility determination, (2) the allocation for responsibility among the potentially responsible parties or any other issues incident to responsibility. If a prima facie showing has not been made against a party, that party shall be dismissed without prejudice and could be rejoined later by another defendant, if evidence supports rejoinder. If a party is not rejoined, then it is entitled to a judgment of dismissal with prejudice following a final judgment on the claims asserted by the party against whom the preliminary dismissal was granted. The district court may also enter summary judgment in favor of any party on any issue, if appropriate.

Notice Requirements Before Sampling/Testing – To provide that any party that intends to conduct environmental testing of the “environmental media” (e.g., property) must provide 30 days notice to all parties, the court and the Louisiana Department of Natural Resources (“LDNR”). Written notice shall be sent by registered or certified mail. Failure to provide notice shall give any party the right to exclude in a subsequent proceeding the results of the testing. This provision would not affect any sampling or testing conducted prior to this proposed amendment.

Admission of Responsibility – When a party has admitted responsibility (not liability; see below) for remediation within 180 days of the preliminary hearing, the court shall not proceed to trial on any claims until after a plan to evaluate and remediate the environmental damage approved by the LDNR has been submitted to the court. Parties can still engage in the pretrial process leading to trial, however. Once admission of responsibility is received by the LDNR, then it will issue a personal and public notice to all current and past operators of record. Within 30 days of the issuance of the notice, the court shall refer the development and approval of the most feasible plan to the LDNR. The department (not court) shall order that a plan be developed and submitted within a reasonable time as determined by the LDNR. The plan shall include an estimate to implement the plan.

Admission of Responsibility, Not Liability – An admission of responsibility under Section (b) shall be an admission of responsibility solely for purposes of the evaluation and

remediation to applicable regulatory standards and shall not be construed as an admission of liability (also, not a waiver of any defenses).

Admissibility of Plan and Instructions to Jurors – Admissibility of any plan or remediation approved by LDNR in court and also provides that the court instruct the jury as to procedures for the development, review and implementation of the most feasible plan, including a procedure for (1) submission of plans to LDNR, (2) the LDNR’s review and approval of the plan, (3) the court’s adoption of the most feasible plan, etc.

## **B. Case Law Update**

1. Sweet Lake Land & Oil Co., Ltd. v. Exxon Mobil Corp., et al., 09-1100 (W.D. La.).<sup>2</sup>

This is a “legacy” lawsuit that was initiated in federal court in the Western District of Louisiana on July 1, 2009. Trial is currently set to begin on March 19, 2012. This case is significant for a couple of reasons: (1) the case originated in federal court, whereas most of these legacy lawsuits are filed in state court, later removed to federal court by defendants, and then remanded back to state court, and (2) there have been a number of interesting rulings—some made for the first time in any Act 312 case—that are worth noting.

By way of background, the property at issue is the Chalkley Field, located in Cameron Parish, where so many of these cases are filed. Plaintiff, The Sweet Lake Land & Oil Company, Ltd. (“Sweet Lake”), alleges that the defendant oil companies--Exxon, Texas Eastern Skyline Oil Company (“Skyline”) and Noble Energy, Inc. (“Noble”), et al.--have caused environmental contamination to certain portions of Sweet Lake’s property due to ongoing oil and gas operations.

### a. Bifurcation: Try Liability First, Then Damages

Until now, courts that have considered whether cases governed by Act 312 should be tried in one proceeding (liability and damages) or two (liability first, trip to LDNR, then trial on remaining damages) have all decided that Act 312 provides for one trial. See, e.g., Duplantier, Germany, Brownell; see generally La. Code of Civ. Proc. art. 1736.

On December 5, 2011, ExxonMobil filed a motion to bifurcate the liability and damages phases of trial, pursuant to Fed. R. Civ. Proc. 42. Exxon argued that the lease under which it operated did not contain an explicit obligation to remediate the surface of the property in excess of the plan to be adopted by the Court, pursuant to Act 312. Therefore, its only remediation obligation as to plaintiff is a clean-up pursuant to the applicable state regulatory standards. Exxon stated that Sweet Lake has private claims against other defendants, but not Exxon. Hence, a bifurcated trial would be warranted because Sweet Lake will have to try any private damages claims against other defendants, but only after a trial on liability. Exxon requested that trial be conducted as follows:

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<sup>2</sup> All rulings discussed in this paper are available electronically via PACER and/or Westlaw. A copy of any of these decisions may be provided upon request.

Phase I: Liability – Exxon argued that Act 312 provides a remedy not a cause of action. As such, a trial on the breach of contract and negligence causes of action should occur first. Sweet Lake would have to prove that one or more defendants are legally responsible for any alleged environmental contamination. Sweet Lake would then have to overcome defendants’ affirmative defenses. Alternatively, however, if the jury finds that Sweet Lake does not have any cause of action against any of the defendants, then the trial would conclude at the end of Phase I, saving the court and the parties time and money.

Phase II: Private Damages – According to Exxon, it would never have to participate in this phase because Sweet Lake’s only claim against it is an Act 312 clean-up. Thus, Phase II for Exxon would consist of going to the LDNR for approval of its proposed remediation plan, along with any other responsible parties. La. R.S. 30:29(C)(1)-(C)(3). Meanwhile, plaintiffs would proceed with its private damages case against any remaining defendants.

Sweet Lake responded to Exxon’s motion arguing (1) bifurcation would prejudice plaintiff, (2) every case that has considered whether to bifurcate an Act 312 trial (Duplantier, Germany, Brownell) has ruled that one trial is appropriate, and (3) Sweet Lake has private damages claims against Exxon. On this last point, Sweet Lake argued that Exxon breached an implied obligation to remediate the surface because Exxon acted unreasonably or excessively as an operator. Plaintiff also argued that evidence of the cost to remediate would be important in the liability phase so that the jury can determine the amount of the footprint that defendants were entitled to leave on the property. Finally, Sweet Lake argued that liability and damages are intertwined and not capable of being bifurcated because it would lead to duplicated testimony by expert witnesses.

After hearing oral argument on the matter on January 3, 2012, Judge Minaldi ruled from the bench, ordering that the trial be bifurcated as Exxon suggested. In her ruling, Judge Minaldi stated that given the complexity of the case, the fact that multiple parties are involved and the distinction between the issues of liability and damages, it would shorten trial to try liability first and then damages.

b. Stay of Compliance Orders

In July 2011, Sweet Lake filed a motion to stay three compliance orders issued by LDNR to Exxon, Skyline and Lapis (a current operator of the property and third-party defendant). Prior to this motion, Exxon filed a motion to stay the case in order to carry out the directives set forth in the compliance orders. The contamination addressed by the compliance orders was the very contamination involved in the lawsuit. The compliance orders were generated based on environmental data submitted by Sweet Lake, as statutorily required by Act 312.

Sweet Lake responded that (1) the compliance orders contemplate that the Court may stay the orders pending the outcome of the litigation and (2) Sweet Lake did not learn about the orders until Exxon filed its motion to stay. Sweet Lake relied on the All Writs Act, which purportedly allows federal courts “to issue all writs necessary or appropriate in aid of their respective jurisdictions.” 28 U.S.C. § 1651. Sweet Lake argued that a federal court may enjoin a state court or an administrative agency where it is necessary to prevent interference with a federal court’s “consideration or disposition of a case as to seriously impair the federal court’s

flexibility and authority to decide that case.” Newby v. Enron Corp., 338 F.3d 467, 747 (5<sup>th</sup> Cir. 2003).

Sweet Lake further argued: (a) the compliance orders frustrate the court’s ability to follow Act 312 because it would allow Exxon to determine and implement a clean-up plan that would not be reviewed by the court, (b) the compliance orders seek to divest the court of jurisdiction that was endowed by Act 312, and (c) Sweet Lake will suffer irreparable injury because it is the owner of the property and the orders permit defendants to enter plaintiff’s land to begin remediation activities based on data submitted by Sweet Lake.

In response, Exxon argued that Sweet Lake’s request for a stay is impermissible pursuant to the All Writs Act because the filing of an Act 312 lawsuit does not alter LDNR’s ability to issue compliance orders (See La. R.S. 30:29(B)(2)) and Exxon’s fulfillment of the compliance orders would resolve the very remediation that plaintiff seeks. Exxon stated that the Fifth Circuit’s interpretation of the All Writs Act provides that it only applies to “extraordinary circumstances” that “indisputably demand” a particular course of action to “vouchsafe” the integrity of the federal court judgment. Exxon argued that the “extraordinary circumstances” prong is not present here and that the jurisdiction of the federal court is not threatened; therefore, the All Writs Act is not triggered.

Staying the case, Exxon maintained, would violate separation of powers between federal and state governments. After all, the State is in a better position (than the court) to know what remediation should be done at the property. Act 312 does not divest LDNR from issuing a compliance order. If it did, LDNR would be powerless to order any action on the property during the pendency of a lawsuit.

On September 1, 2011, following oral argument, Magistrate Judge Kay granted plaintiff’s motion to stay the compliance orders. Exxon filed a motion for reconsideration. On December 16, Magistrate Judge Kay maintained her prior decision and relied, in part, on the premise that Act 312 bestowed primary jurisdiction over the issue of remediation with the court, unless there was an emergency situation that the LDNR would have to attend to. Here, she noted, there was no such emergency; the orders only posed an obstacle to the court’s ability to timely and orderly decide the case.<sup>3</sup>

Exxon filed an appeal of the December 16 decision to the district court judge, Judge Patricia Minaldi, pursuant to Fed. R. Civ. P. Rule 72. Exxon argued, among other things, that the Magistrate Judge lacked the power to issue a stay because it effectively was an injunction, which is prohibited by the Federal Magistrates Act (28 U.S.C. §636(b)(1)(A)) and the stay was a violation of the All Writs Act because there are not any extraordinary circumstances in this case.

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<sup>3</sup> LDNR eventually intervened in the matter and filed a motion for reconsideration of the Magistrate’s September 1 order to stay compliance orders. Certain trade associations like Louisiana Oil and Gas Association (“LOGA”) and Louisiana Mid-Continent Oil and Gas Association (“LMOGA”) filed *amici curiae* briefs. Sweet Lake has also now sued LDNR in the 19<sup>th</sup> Judicial District Court for the Parish of East Baton Rouge, which is where La. R.S. §30:12 requires that the State be sued.

As of now, Judge Minaldi has not ruled on this matter; a hearing has been set for February 16, 2012 in Lake Charles, Louisiana.

c. Solidary Liability Pursuant to La. Mineral Code Arts. 128 and 129

On August 3, 2011, Noble Energy, Inc. filed a motion for summary judgment seeking to limit its liability with its predecessors in title, pursuant to La. Mineral Code articles 128 and 129. First, Noble argued that as sublessee that acquired its interest in a mineral lease before the enactment of the Mineral Code in 1975, they had no privity of contract with Sweet Lake and could not be liable to it under that lease. (Mineral Code Article 128 subsequently made both assignees and sublessees directly responsible to the lessor for the lease obligations.) The court disagreed, concluding that the Mineral Code should be applied retroactively on this issue, as there was no pre-code jurisprudence on whether a sublessee was directly responsible to the lessor for environmental restoration. Therefore, the court concluded, Noble had no vested right in a lack of privity defense, and Mineral Code art. 128 would be applied retroactively.

Noble next argued that the Mineral Code does not make an assignee or sublessee liable for environmental damages before he acquired his interest in the lease, based on the language of Article 128 that the new interest owner “becomes liable” to the landowner “to the extent of the interest acquired.” (Emphasis added). Noble argued that this comported with La. C.C. art. 2687, which makes a lessee liable for damages to the leased thing “caused by his fault.”

The court disagreed, holding that the obligation to restore the property is indivisible, and therefore all obligors with that duty are liable *in solido* to the landowner. The court did rule, however, that where the same land has been burdened by multiple mineral leases, a contractual duty to restore the surface to its “original condition” means restoration of the surface to its condition at the time that particular lease was issued, not to its condition before any oil and gas operations took place.

2. Hazel Richard Savoie v. Alice T. Richard, et al., 10-18078, 38<sup>th</sup> Judicial District Court, Cameron Parish, Louisiana

This is a lawsuit that went to trial before Judge Penelope Richard on November 7, 2011. It was supposed to last two weeks, but actually lasted four weeks. The jury awarded plaintiffs \$36 million for Act 312 remediation and \$18 million for private damages.

One of the more interesting motions that was filed in this case was a motion in limine to exclude any reference to “Act 312 of 2006” during trial. Plaintiffs filed the motion arguing that at least some of the contamination located on the Savoie property was deposited there as a result of oil and gas processes that are not regulated by the LDNR and are outside the scope of Act 312. Plaintiffs planned to introduce evidence at trial showing that at least some of the contamination occurred after the custody transfer/sales point and that most or all of the post-custody transfer/sales point contamination is commingled with contamination that occurred prior to the custody transfer/sales point. Plaintiffs stated that the jury will have to decide which contamination is attributable to sources located upstream of the custody/transfer point and which sources are located downstream of the custody transfer/sales point. Thus, plaintiffs argued, it is

improper to refer to Act 312 during trial because these determinations are within the province of the jury.

Defendants argued that there is no question that Act 312 applied to the case and, as such, (following other courts, like Tensas Poppadoc, which applied Act 312) the parties should be able to discuss Act 312 in front of the jury. Defendants argued that it defied logic to require the jury to make a determination under the Act but with no instruction that Act 312 exists, what it is, or how it works. Lastly, defendants argued that failure to make the jury aware that they are part of a process pursuant to Act 312 would be misleading and prejudicial.

The court, upon hearing oral argument, granted plaintiff's motion.

3. State of Louisiana and the Vermilion Parish School Board v. The Louisiana Land and Exploration Company, et al., 10-1341 (La. App. 3<sup>rd</sup> Cir. Feb. 1, 2012).

This is a very recent development in Louisiana jurisprudence relating to Act 312. The decision was handed down by the Third Circuit on February 1, 2012. The main issue was whether damages under Act 312 should be limited to the amount needed to fund a "most feasible plan".

Plaintiffs, the State of Louisiana and Vermilion Parish School Board, filed a lawsuit against Unocal, Chevron and Carrollton Resources alleging environmental contamination to Section 16 lands located in Vermilion Parish. Unocal admitted responsibility for environmental damages and filed a motion to refer the case to LDNR. The trial court denied the motion and ruled in favor of the School Board, which argued that the referral could not take place until all defendants admitted responsibility and all private claims were tried to a jury. Following this ruling, Unocal then filed a motion for partial summary judgment limiting the School Board's remediation damages to the amount needed to fund a "feasible plan" under Act 312. The trial court agreed. The School Board appealed to the Third Circuit.

The Third Circuit in deciding the issue agreed with the School Board that the trial court erred in granting partial summary judgment in favor of Unocal. The appellate court reviewed Act 312 and found the statute to be clear and unambiguous. In making its decision, the court relied upon Section H of Act 312, which states "[this] section shall not preclude an owner of land from pursuing a judicial remedy or receiving *a judicial award for private claims suffered as a result of environmental damage . . . .*" (Emphasis in original).

The Third Circuit found that the language of the statute provided that a landowner could receive an award in addition to an amount needed to fund a feasible plan (regardless of whether those private claims sound in tort or contract). The court also noted that Unocal's reliance on Marin for the proposition that the School Board's recovery of tort damages for restoration was limited to a regulatory clean-up is misplaced because in Marin plaintiff's tort claims had prescribed. Here, Unocal did not allege prescription. Therefore, the availability of tort damages would depend on the facts and circumstances of each case.