

**THE LOUISIANA SUPREME COURT'S DECISION IN  
EAGLE PIPE AND SUPPLY, INC. VERSUS AMERADA HESS CORPORATION, ET AL.  
& ITS IMPLICATIONS FOR LAND OWNERSHIP IN LOUISIANA**

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**PLANO CLE PRESENTATION  
FEBRUARY 16, 2012**

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**I. INTRODUCTION TO *EAGLE PIPE*:**

On October 25, 2011, the Louisiana Supreme Court rendered its opinion in the matter of *Eagle Pipe and Supply, Inc. v. Amerada Hess Corporation, et al.*, Case No. 2010-C-2267, answering for the first time the question of whether a landowner could sue a third party for hidden damage to the landowner's property that occurred prior to its ownership. In a close four-to-three decision, the court held that it could not. The ruling, which constitutes an extension of the jurisprudentially-created "Subsequent Purchaser Rule," was vehemently opposed in a dissenting opinion written by Justice Weimer. The decision has grabbed the attention of interested groups and corporations around the state, especially in the oil and gas industry, due to its potentially broad effects for property acquisition in Louisiana. Many of these groups filed *amici briefs* in support of the landowner's Petition for Rehearing filed in November. On January 13, 2012, the court denied Rehearing, rendering its decision final. Though the full impact of the case remains to be seen, the *Eagle Pipe* decision has broad implications for property acquisition and ownership in Louisiana.

**II. BACKGROUND FACTS: *EAGLE PIPE*'S LAND PURCHASE AND DISCOVERY**

In 1988, Eagle Pipe and Supply, Inc. ("Eagle Pipe") purchased property in Lafayette Parish from the three individuals who owned it.<sup>1</sup> For several years before the sale, the Former Owners had leased the property to Union Pipe and Supply, Inc. ("Union Pipe"), who operated a pipe yard and pipe cleaning facility on the property.<sup>2</sup> In the course of these operations, Union

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<sup>1</sup> *Eagle Pipe and Supply, Inc. v. Amerada Hess Corporation, et al.*, Case No. 2010-C-2267, p. 3, (La. 10/25/11), 2011 WL 5865523, \*2.

<sup>2</sup> *Id.*

Pipe brought in and cleaned pipe used in the petrochemical industry.<sup>3</sup> The cleaning process involved removing substances having the radioactive scale TENORM<sup>4</sup> from the pipes.<sup>5</sup> The radioactive material was then deposited onto the surface of the property, contaminating the soil.<sup>6</sup> The contamination, however, was not visible to the naked eye.

According to Eagle Pipe, it occupied the land for some time unaware of the contamination. It claimed that it first learned of the radioactive contamination when the Louisiana Department of Environmental Quality (“LDEQ”) conducted a field study on the premises which revealed the presence of radioactive materials.<sup>7</sup> As a result, LDEQ held Eagle Pipe in violation of regulatory criteria for TENORM exposure and declared that the land posed a health hazard to Eagle Pipe and the public. LDEQ ordered Eagle Pipe to remediate the property.<sup>8</sup>

Eagle Pipe asserted that it had never engaged in any conduct that could result in the deposit of TENORM onto its property during its twenty years of ownership.<sup>9</sup> Facing the costs of environmental remediation, Eagle Pipe filed suit against the former landowners, as well as the oil companies and trucking/transport companies which had brought the contaminated pipes to the property.<sup>10</sup> It filed a Petition in the Civil District Court for the Parish of Orleans on July 15, 2008 alleging causes of action for breach of contract, negligence, strict liability, redhibition, fraud, and conspiracy.<sup>11</sup>

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<sup>3</sup> *Id.*

<sup>4</sup>“TENORM” refers to Technologically Enhanced Naturally Occurring Radioactive Material.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* at \*1.

<sup>11</sup> *Id.*

### III. LOWER COURTS QUESTION EAGLE PIPE'S RIGHT TO SUE

In the district court, the defendants filed various exceptions to Eagle Pipe's Petition. All of the defendants filed or joined in an exception of no right of action, contending that Eagle Pipe had no right to assert a claim for damage to the subject property which occurred before Eagle Pipe was its owner.<sup>12</sup> At a hearing on the exceptions, the trial court sustained the defendants' exceptions of no right of action and dismissed Eagle Pipe's claims with prejudice.<sup>13</sup>

Eagle Pipe's motion for a new trial was denied. Eagle Pipe appealed the dismissal to the Fourth Circuit Court of Appeals. On original hearing, the Fourth Circuit affirmed the trial court's granting of the exception by a two-to-one vote.<sup>14</sup>

On Rehearing, the five judge panel reversed the Fourth Circuit's original decision.<sup>15</sup> The Court of Appeal distinguished the facts at issue from other cases applying the "Subsequent Purchaser Rule" to bar a landowner from suing for damage to his property that pre-dated his ownership.<sup>16</sup> Instead, the Fourth Circuit found that "the manifestation of radioactive contamination allegedly caused by defendants constituted an injury giving rise to a legitimate cause of action."<sup>17</sup>

The oil company defendants and two of the transport companies filed writs to the Louisiana Supreme Court, which were consolidated for decision.<sup>18</sup> A number of parties filed *amici briefs* both in support of and against the writs.<sup>19</sup> Because the case was dismissed on an exception of no right of action, the court's *de novo* inquiry into the correctness of the dismissal

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<sup>12</sup> *Id.* at \*2.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* at \*3.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

turned on whether Eagle Pipe had a “real and actual interest” in the suit.<sup>20</sup> In a four to three decision, the court reversed the Fourth Circuit’s ruling on Rehearing, finding that Eagle Pipe had no right of action to pursue its claims.

#### IV. THE MAJORITY OPINION OF THE LOUISIANA SUPREME COURT

##### A. RECOVERING FOR DAMAGE TO PROPERTY: A REAL OR PERSONAL RIGHT?

Writing for the majority of the court, Justice Clark issued a lengthy opinion in support of its finding that Eagle Pipe had no right of action to bring its claims. The opening pages of the opinion read like a law school textbook, tracing the fundamental principles of property and obligations to their Civil Law origins. Fortunately, an exhaustive recitation of these concepts is not necessary, as the court’s reasoning lead to its initial inquiry: whether the right to sue for damage to one’s property is a **real** right or a **personal** right.

As the court explained, a **real** right is synonymous with a proprietary interest or, in other words, ownership.<sup>21</sup> Real rights are those that may be declared against the world.<sup>22</sup> A corollary to a real right is a real obligation.<sup>23</sup> Like real rights, real obligations attach to a thing and may be enforced against the world by anyone having a right in that thing.<sup>24</sup>

In contrast with real rights and obligations are **personal** rights and obligations. A personal right defines a person’s relationship to another person.<sup>25</sup> A personal obligation is one that a person owes to another person, which may be declared only against the obligor.<sup>26</sup>

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<sup>20</sup> *Id.*

<sup>21</sup> *Id.* at \*6.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* at \*7, citing La. Civ. Code art. 1763.

<sup>24</sup> *Eagle Pipe*, 2011 WL 5865523 at \*8.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

The distinction is relevant because although both real and personal rights may develop with respect to a particular piece of property, only **real rights** transfer with property when it is sold or otherwise changes hands.<sup>27</sup> Personal rights and obligations pertaining to a piece of property remain with the person who owned the property at the time they arose, unless that person expressly transfers them to another.<sup>28</sup>

The court found that although ownership itself is a real right, when another interferes with a person's ownership, a **personal** right is created.<sup>29</sup> The owner who suffered the interference obtains the personal right to pursue compensation from the interferer, who in turn owes him a personal obligation to pay damages.<sup>30</sup> Because the right is personal, the owner retains the right to sue for damage to his property even after he sells it, unless he expressly contracts otherwise. In the context of real property, this distinction forms the basis for Louisiana's "Subsequent Purchaser Rule."<sup>31</sup>

## **B. EXPANDING THE SUBSEQUENT PURCHASER RULE**

### **1. History of the Jurisprudential Doctrine**

The "Subsequent Purchaser Rule" provides that the right to recover for damage to real property is a personal right belonging to the property owner at the time the damage occurs. Accordingly, it does not transfer to a subsequent purchaser absent an express assignment.<sup>32</sup> Though it is derived from the Civil Law concepts of real and personal rights, the Subsequent Purchaser Rule itself is a jurisprudentially-created doctrine.<sup>33</sup>

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<sup>27</sup> *Id.* at \*9.

<sup>28</sup> *Id.* at \*8; La. Civ. Code art. 1765 and 1766.

<sup>29</sup> *Eagle Pipe*, 2011 WL 5865523 at \*19.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> Dissenting Opinion (J. Weimer), *Eagle Pipe and Supply, Inc. v. Amerada Hess Corporation, et al.*, Case No. 2010-C-2267, p. 2, (La. 10/25/11), 2011 WL 5865523, \*27.

<sup>33</sup> *Id.*

The Subsequent Purchaser Rule was first set forth in an 1851 decision, *Clark v. J.L. Warner Co. et al.* 6 La. Ann. 408 (1851). In *Clark*, the plaintiff purchased a house situated next to an ice depot which had operated next to it for many years.<sup>34</sup> After the sale, the plaintiff sued the owner of the ice depot for damage to his house and property.<sup>35</sup> The Louisiana Supreme Court rejected the notion that the plaintiff could recover for damage to his property that existed at the time of purchase.<sup>36</sup> It held that although the purchaser of the property is presumed to purchase all actions appurtenant to the property, the right to recover for damages **actually suffered before the purchase** belongs “to him who suffered the injury.”<sup>37</sup> The correct result, it found, would be that each preceding owner of the property would have a right to recover for damages that occurred while he or she owned the premises.<sup>38</sup> Although this right could be transferred to a subsequent owner by virtue of an express assignment, the court held that the standardized language of the conveyance to the plaintiff was too general to affect such a transfer.<sup>39</sup>

In reaching its decision, the court noted that the plaintiff, who had owned the property for just twenty-months, was claiming more in damages than he had paid the former owner to purchase it.<sup>40</sup> The court reasoned that it would be “impossible” to concur with the result “that these damages, which probably caused the moderate price given for the house, should be a source of profit to the purchaser, who had perfect knowledge of their existence when he purchased it.”<sup>41</sup> The *Clark* decision illustrates the rationale underlying the Subsequent Purchaser Rule: the law should not give the buyer of property a windfall by allowing him to recover for

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<sup>34</sup> *Clark v. J.L. Warner Co. et al.* 6 La. Ann. 408 (1851).

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* at 409.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

apparent damages to his property when, because of those damages, he paid a lower price for that property. It was under this set of facts that the court created the Subsequent Purchaser Rule, and it was under this set of facts that courts applied the Subsequent Purchaser Rule for the next one-hundred and sixty years.

The majority opinion in *Eagle Pipe* traces through many of *Clark's* progeny, which illustrate the consistent application of the Subsequent Purchaser Rule through its existence. For example, in *Payne v. James*, 7 So. 457, 458 (La. 1890), the court held that the plaintiff, a former lessor, could sue his lessee for damages caused to the leased property while he owned it. The plaintiff in *Payne* had accepted a lower price for his property due to the damage caused by the lessee, and he had expressly retained his right to sue in the sales contract.<sup>42</sup> In *Matthews v. Alsworth*, 12 So. 518 (La. 1893), the court held that a new owner could not sue his lessee for damage occurring prior to the sale unless those rights had been assigned to him. The court held that the general phrase “all the aforesaid conveyor’s rights” was insufficient to effectuate the transfer.<sup>43</sup> Another case cited by the court was *Bradford v. Richard*, 16 So. 487 (1894), where the court ruled that a new property owner could not sue for a previous, unauthorized taking of timber. The majority also analogized the *Eagle Pipe* case to a number of older cases involving railroad servitudes.<sup>44</sup>

The Louisiana Supreme Court used two recent decisions to illustrate the application of the Subsequent Purchaser Rule in modern jurisprudence. In *Prados v. South Central Bell Tel. Co.*, 329 So.2d 744 (La. 1975), a purchaser of property sued a telephone company that had leased the property from its former owner, demanding that the telephone company remove

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<sup>42</sup> *Payne v. James*, 7 So. 457, 458 (La. 1890).

<sup>43</sup> *Matthews v. Alsworth*, 12 So. 518, 519 (La. 1893)

<sup>44</sup> *Eagle Pipe*, 2011 WL 5865523 at \*13-14.

buildings and other structures from the land. The telephone company's lease had terminated prior to the plaintiff purchasing the property.<sup>45</sup> The Louisiana Supreme Court initially found for the property owner, on the grounds that both the lease and the Civil Code gave him authority to have the buildings removed. It reversed its ruling on rehearing, holding that the right to demand removal of the buildings was a personal right that belonged to the former owner under the lease.<sup>46</sup> Because this personal right was not subrogated or assigned to the new owner, he could not exercise it.<sup>47</sup>

The majority opinion next looked to the case of *St. Jude Medical Office Bldg. Ltd. Partnership v. City Glass and Mirror, Inc.*, 619 So.2d 529 (La. 1993). There, a mortgagee who acquired the former owner's property through foreclosure sued a construction company for defects in work the company had performed prior to the judicial sale. The court, finding that the mortgagee had known of the defects in the building at the time of the judicial sale, denied its right to seek redhibition.<sup>48</sup> It further held that the mortgagee had no right to intervene in the former owner's suit for damages, as that cause of action was personal to him.<sup>49</sup> As *Prados* and *St. Jude* demonstrate, application of the Subsequent Purchaser Rule has remained consistent even in recent years.

## 2. Applying the Subsequent Purchaser Rule to *Eagle Pipe*

Applying the Subsequent Purchaser Rule to the facts of the case before it, the Louisiana Supreme Court held that the Subsequent Purchaser Rule barred *Eagle Pipe*'s right of action.<sup>50</sup> It ruled that "the property owner at the time the damages were inflicted has a personal right of

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<sup>45</sup> *Prados v. South Central Bell Tel. Co.*, 329 So.2d 744, 745 (La. 1975).

<sup>46</sup> *Id.* at 749.

<sup>47</sup> *Id.*

<sup>48</sup> *St. Jude Medical Office Bldg. Ltd. Partnership v. City Glass and Mirror, Inc.*, 619 So.2d 529, 531 (La. 1993).

<sup>49</sup> *Id.*

<sup>50</sup> *Eagle Pipe*, 2011 WL 5865523 at \*19-20.

action against a tortfeasor for the disturbance of his real right in the property.”<sup>51</sup> The court noted the uncontested fact that the damage to Eagle Pipe’s property had been caused by contamination of the property prior to Eagle Pipe’s ownership.<sup>52</sup> As a result, it reasoned that the right to sue for this damage vested in the former owners of the property at the time the damage was sustained – i.e. at the time that radioactive substances were deposited onto the soil.<sup>53</sup> As a personal right of the Former Owners, the ability to bring a suit for the contamination did not automatically transfer to Eagle Pipe in the sale.<sup>54</sup>

In order to have standing to sue, Eagle Pipe would have had to obtain the right of action from the Former Owners by assignment or subrogation.<sup>55</sup> The court looked to the act of sale to determine if such an assignment existed. The relevant language in the act of sale to Eagle Pipe provided that the sellers transferred the property “with full guarantee of title and free from all encumbrances, and with full subrogation of all their rights of action of warranty against the previous owners.”<sup>56</sup> The court held that such language, like the broad language in *Clark* and *Matthews*, was insufficient to transfer the personal right of action to Eagle Pipe.<sup>57</sup> Consequently, the Subsequent Purchaser Rule barred Eagle Pipe’s claims.

### **3. No Distinction between Apparent and Non-Apparent Defects**

In an attempt to distinguish *Clark*, *Prados*, and other cases applying the Subsequent Purchaser Rule, Eagle Pipe pointed out that not one of those cases involved a hidden or latent defect. For example, in *Clark*, an ice house depot sat on the adjoining property; in *Prados*, the

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<sup>51</sup> *Id.* at \*19.

<sup>52</sup> *Id.* at \*23.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* at \*24-25.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.* at 24.

<sup>57</sup> *Id.* at 25.

former lessee left behind buildings and other structures. The rationale underlying the Subsequent Purchaser Rule in such cases is clear. When a defect is apparent, the purchaser of the property is usually “compensated” by paying a lesser amount for it. It is the **seller** of the property who is **damaged** by having to accept a lower price for his property as a result of the damage caused by a third-party. This is why the right of action remains personal to the seller. Under those circumstances, permitting a property owner to sue a third-party tortfeasor for damages caused **before the sale** would give him a windfall, allowing him to take from the seller in the form of a discount and from the tortfeasor in the form of damages. Could the same rationale really apply to non-apparent defects?

The majority observed that no formulation of the Subsequent Purchaser Rule contained a requirement that the damage be apparent.<sup>58</sup> While it is true that such a requirement was never stated, the damages were apparent in each of the cases on which the court relied. There have been only two occasions in which the Louisiana Supreme Court faced the potential application of the Subsequent Purchaser Rule in a case involving non-apparent or hidden damages, and in both instances it failed to reach the question.

In 2001, the court decided the case of *Hopewell Inc. v. Mobil Oil, Co.*, 2000-3280, (La. 2/9/01), 784 So.2d 653. Hopewell, the plaintiff, sued the former owners of its property and a third-party oil company for pollution and contamination of the property. The defendants filed an exception of no right of action against Hopewell, the plaintiff.<sup>59</sup> The appellate court held that the defendant’s exception of no right of action was valid, relying on *Prados*.<sup>60</sup> On writs, the Louisiana Supreme Court reversed and reinstated Hopewell’s suit. In a brief *per curiam* opinion,

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<sup>58</sup> *Id.* at \*11.

<sup>59</sup> *Hopewell, Inc. v. Mobil Oil Co.*, 33,774, p. 1–2 (La.App. 2 Cir. 11/1/00), 770 So.2d 874, 875–876.

<sup>60</sup> *Id.* at 878.

the court held that “*Prados v. South Central Bell Tel. Co.*, 329 So.2d 744 (La. 1975) (on rehearing), which the Court of Appeal relied upon, involves rights arising under a lease and is distinguishable from the instant facts.”<sup>61</sup> The court did not issue further reasons on what facts were integral to the distinction and different result.

The second case in which the Louisiana Supreme Court approached the Subsequent Purchaser Rule’s application to non-apparent defects was the decision in *Marin v. Exxon Mobil Corporation*, 2009-2368 (La. 10/19/10), 48 So.3d 234, where the court granted writs to address this very question. Ultimately, however, it did not reach this issue because it found that the subsequent purchaser’s claims had prescribed regardless of how it applied the Subsequent Purchaser Rule.<sup>62</sup>

The Louisiana Supreme Court dismissed both *Hopewell* and *Marin* as guiding authority on the merits of the *Eagle Pipe* case because neither decision had reached the question of whether a non-apparent defect altered application of the Subsequent Purchaser Rule.<sup>63</sup> Considering the issue as a matter of first impression, the court rejected *Eagle Pipe*’s argument that it should draw any distinction between cases involving apparent defects and the hidden contamination of *Eagle Pipe*’s property.<sup>64</sup> Its rationale for this holding was that the nature of the **defect** as obvious or hidden did not change the nature of the **right of action** as personal or real.<sup>65</sup> It accused *Eagle Pipe* of confusing a cause of action with a right of action.<sup>66</sup> The court reasoned that the right to sue vests in the property owner when the damage is caused.<sup>67</sup> In this case,

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<sup>61</sup> *Hopewell Inc. v. Mobil Oil, Co.*, 2000-3280, (La. 2/9/01), 784 So.2d 653. The Fourth Circuit relied on the *Hopewell* decision on rehearing of this case.

<sup>62</sup> *Marin v. Exxon Mobil Corporation*, 2009-2368 (La.10/19/10), 48 So.3d 234, 256 n. 18.

<sup>63</sup> *Eagle Pipe*, 2011 WL 5865523 at \*19.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> *Id.* at \*22.

<sup>67</sup> *Id.* at \*21-22.

contamination of the property had occurred completely during prior ownership. The right to sue for its contamination remained with its prior owners, just as the court had ruled in *Clark*.<sup>68</sup>

The majority had no interest in addressing the concerns, expressed by the dissenting justices or the Plaintiff, that its decision extended the reach of the Subsequent Purchaser Rule. The court remarked, “Whether this [decision] should be called an extension of the subsequent purchaser rule, or simply the way in which the fundamental principles of property law operate, the result is the same.”<sup>69</sup> Regardless of the court’s desire to acknowledge the impact of its decision, its opinion did effectively broaden the scope of the Subsequent Purchaser Rule to include even cases of hidden or latent damage.

### C. EXISTING REMEDIES UNDER THE CODE: RESCISSION AND REDHIBITION

In the majority’s view, extension of the Subsequent Purchaser Rule to cases of non-apparent or latent damage did not leave a landowner without recourse.<sup>70</sup> The court observed that Louisiana law **already** provides remedies for the purchaser when the property contains defects that are not apparent at the time of sale. The Civil Code grants the purchaser a remedy against his vendor to seek rescission of the sale or damages in redhibition when the property he purchases is discovered to be defective.<sup>71</sup> Specifically, under Louisiana Civil Code article 2520, a purchaser may seek rescission of a sale when a defect in the property renders it useless or its use so inconvenient that the buyer would not have purchased it if he had known of the defect.<sup>72</sup> Alternatively, when the defect diminishes the property’s usefulness or value to the extent that the

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<sup>68</sup> *Id.* at \*21.

<sup>69</sup> *Id.* at \*19.

<sup>70</sup> *Id.* at \*20.

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

buyer would have still purchased it, but for a lesser price, then he may recover a reduction of the price.<sup>73</sup>

The majority reasoned that rescission of the sale or reduction of the price were traditionally the appropriate remedies for the buyer of property with non-apparent defects under Louisiana law. Summarizing these principles, the court commented, “With damage that is not apparent, the law does not provide the subsequent purchaser with both the right to sue for rescission of the sale, reduction of the purchase price, **and** the right to sue for damages against the tortfeasor.”<sup>74</sup>

**D. THE MAJORITY RESPONDS TO QUESTIONS OF UNCERTAINTY**

*Eagle Pipe*'s holding raises a number of questions and hypothetical scenarios where application of this rule would result in inequity. What if the damage were not discovered for decades after it was caused, as it had been by *Eagle Pipe*? Would difficult issues of prescription arise? What if the property had frequently changes hands? The court took the opportunity to address these concerns, although whether it did so satisfactorily is debatable. It said, “We find that rules of discovery and prescription are deliberate legislative choices which ultimately limit otherwise imprescriptible torts and which maintain certainty in transactions involving immovable property.”<sup>75</sup> The court suggested that legislative change would be the proper means to address factual scenarios involving latent pollution or other hidden defects in property.

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<sup>73</sup> *Id.*, citing La. Civ. Code art. 2520.

<sup>74</sup> *Eagle Pipe*, 2011 WL 5865523 at \*20, emphasis in original.

<sup>75</sup> *Id.*

## V. JUSTICE WEIMER'S DISSENT

Despite its attempt to address some of these issues, the majority opinion is subject to several criticisms. Many of these were succinctly addressed in the dissenting opinion of Justice Weimer, which was joined by Justice Lobrano.<sup>76</sup> Justice Johnson dissented as well.

In his opinion, Justice Weimer criticized the majority's adoption of an expanded Subsequent Purchaser Rule. He emphasized that the Subsequent Purchaser Rule was created as a "common sense approach to situations where known or overt conditions of immovable property result in a diminution of value that in turn results in a lower price paid for the property."<sup>77</sup> Justice Weimer pointed out that in each and every case cited by the majority, including the railroad cases, the Subsequent Purchaser Rule was applied to property defects that were apparent and overt.<sup>78</sup> In these cases, the rationale for the Subsequent Purchaser Rule is to prevent a windfall to the plaintiff who has paid a lesser price for his property and recovers damages, to the detriment of his seller, who sells his property at a reduced price and recovers nothing.<sup>79</sup> He reasoned that where defects in property are latent or hidden, the rationale in favor of the rule simply does not apply.<sup>80</sup> Accordingly, Justice Weimer cautioned that the majority's adoption of an inflexible rule for the "myriad of factual circumstances that may present themselves" was unwise and conducive to inequitable results.<sup>81</sup>

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<sup>76</sup> Justice Lobrano sat *ad hoc* for Justice Knoll, recused.

<sup>77</sup> Dissenting Opinion (J. Weimer), *Eagle Pipe and Supply, Inc. v. Amerada Hess Corporation, et al.*, Case No. 2010-C-2267, p. 2, (La. 10/25/11), 2011 WL 5865523, \*28.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> *Id.* at \*27.

Further dissecting the court’s analysis, the dissent accused the majority of dismissing the *Hopewell* case too quickly.<sup>82</sup> *Hopewell* arose under facts nearly identical to *Eagle Pipe*, but the court had distinguished the case from *Prados*, as it had failed to do in *Eagle Pipe*.

The dissenting opinion also contended that, despite the lip service paid to Civil Law concepts, the majority’s expansion of the Subsequent Purchaser Rule contradicted the Civilian tradition of following the Code in favor of the non-civilian concept of expanding a jurisprudentially-created rule.<sup>83</sup> Justice Weimer contended that the expanded rule was inconsistent with Civil Code article 2315, one of the Code’s oldest and most fundamental concepts, which provides that “Every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it.”<sup>84</sup> Article 2315 mandates three requirements for a cause of action: fault, causation, and damages.<sup>85</sup> He reasoned that a seller who receives full price for his property, like each of the Former Owners in *Eagle Pipe*, is not “damaged” by the sale.<sup>86</sup> The damage occurs when the subsequent purchaser discovers that the condition of the property renders it useless and detrimentally affects its value, which was precisely what *Eagle Pipe* had urged in its Petition.<sup>87</sup> Weimer pointed out that the Subsequent Purchaser Rule, as restated in the majority opinion from *St. Jude Med. Office Building Ltd. P’Ship*, 619 So.2d at 530-531 and *Prados*, 329 So.2d at 749-751, gives the right of action to the property owner **at the time the damage occurs**.<sup>88</sup> The damage requirement is inherent in the rule. In this case, damage occurred

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<sup>82</sup> *Id.* at \*29.

<sup>83</sup> *Id.* at \*27.

<sup>84</sup> *Id.* at \*29-30.

<sup>85</sup> *Id.* at \*30.

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Id.* at \*27.

to Eagle Pipe, the current owner of the property and the only party detrimentally affected by its radioactive contamination.<sup>89</sup>

Justice Weimer further observed that the Code expressly recognizes a discovery rule in Civil Code article 3493, which commences prescription upon knowledge. He disagreed with the majority that such a ruling would create an unworkable, imprescriptible tort or that it would be at odds with other Civilian law.<sup>90</sup> Instead, he maintained the expansion of a jurisprudential rule conflicted with the Legislative intent as set forth in the Civil Code.

Although Justice Weimer's dissent did not address all facets of the majority's opinion, it cast doubt on the necessity of broadening the Subsequent Purchaser Rule under the facts of *Eagle Pipe*. Weimer believed that the court could have appropriately incorporated the Civil Code articles on knowledge and discovery to the doctrine, making it applicable only in cases where the purchaser knew or should have known of the defects in his property.<sup>91</sup> It would have prevented the seemingly inequitable result that befell Eagle Pipe while simultaneously preserving the goal of avoiding a windfall to purchasers who buy property aware of its defects.

## **VI. EAGLE PIPE'S PETITION FOR REHEARING IS DENIED**

Eagle Pipe filed a Petition for Rehearing on November 8, 2011. Defendants Shell Oil Company, Shell Offshore, Inc., SWEPI, LP, Kerr-McGee, Hess Corporation, Chevron USA, Inc., Exxon Mobil Corporation, Oxy USA, Inc., and Berry Petroleum Company opposed the rehearing. Global Marketing Solutions, LLC and Hunter Farms & Timber, LLC, along with several individuals, filed briefs in support of the Petition for Rehearing.

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<sup>89</sup> *Id.* at \*30.

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

On January 13, 2012, the Supreme Court denied Eagle Pipe's application for Rehearing. The denial, which had been pending for several months, is somewhat surprising given the court's close four-to-three decision on original hearing. The court's denial of Rehearing renders the *Eagle Pipe* opinion final. The effects of the *Eagle Pipe* decision and the expanded Subsequent Purchaser Rule on real estate transactions, old and new, will undoubtedly be the subject of discussion in courts and law offices in the immediate future.

## **VII. IMPLICATIONS FOR PROPERTY ACQUISITIONS AND OWNERSHIP**

### **A. ACQUISITIONS**

Now that the *Eagle Pipe* decision has become final, purchasers, sellers, and their attorneys must grapple with its implications on real property transactions. Purchasers of property with apparent defects are in the same position as they have been for one-hundred and sixty years, when *Clark* was decided. The *Eagle Pipe* decision, however, means that purchasers and their attorneys must take an extra step to structure their transactions in a way that protects the buyer from hidden property damage that could appear even decades after the sale.

The Subsequent Purchaser Rule denies the landowner a right of action for prior damage to his property *absent an express assignment of that right*. Thus, there is little doubt that, in order to protect the himself against hidden defects, the buyer must obtain an express assignment of the seller's rights to seek recompense for any for hidden or latent damage existing on the property. In most cases, the seller should be amenable to such an assignment, because it relieves him from being the sole person responsible for potential defects. (In the majority's view, the appropriate remedies for hidden damage were rescission or redhibition, effective only against the seller.)

The *Eagle Pipe* decision makes the necessity of such an assignment clear, but it sheds little light on how an effective assignment should be drafted. Eagle Pipe’s act of sale contained the following language:

“[the sellers] do by these presents sell, transfer and deliver, with full guarantee of title and free from all encumbrances, and with full subrogation to all their rights and action of warranty against previous owners...”

*Id.* at 25.

Eagle Pipe argued that this broad language was sufficient to transfer the Former Owners’ rights to recover for property damage with the sale. The majority disagreed, looking to two other decisions where the court had expressly rejected broad contractual language as conferring the right to sue for prior damage. In *Matthews v. Alsworth*, 12 So. 518 (La. 1893), the court held that the phrase “all the aforesaid conveyor’s rights” was insufficient to effectuate a transfer. Likewise, it rejected as inadequate the contractual language from *Prados v. South Central Bell Tel. Co.*, 329 So.2d 744 (La.1975) (on rehearing), which provided:

“[the seller] does by these presents, grant, bargain, sell, convey, transfer, assign and set over with full guarantee against all mortgages, liens, claims, evictions, or other encumbrances or alienations whatsoever, and with subrogations to all her rights and actions of warranty against all previous owners, and with full guarantee of title, unto [buyer]...”

*Eagle Pipe* tells us that overly broad and standardized language in a contract for sale will not protect a purchaser from the Subsequent Purchaser Rule. Other than dismissing the ineffective language, however, the court does not provide guidance on how to create an effective assignment. Such guidance would have been *dicta* in any case. Definitive law on this topic will likely arise only through future litigation or perhaps legislative intervention. In the interim, parties may glean from the *Eagle Pipe* decision that an assignment must be both express and

explicit. The assignment should be tailored narrowly enough to prevent the result in *Matthews* and *Prados*, but broad enough to protect the purchaser. Without doubt, striking the perfect balance will require trial and error.

Even if these drafting concerns are resolved, other implications of the *Eagle Pipe* decision may still plague land owners. An assignment of rights from the seller simply may not be extensive enough to protect the buyer. Consider a scenario similar to that of *Clark*, where a portion of the property damage occurred during periods of ownership by several different people. Obtaining an assignment from a long line of preceding property owners would likely be impossible. No prior case suggests any other solution. Under that scenario, one option might be to allow the property owner to recover proportionately for the amount of damage that was covered by his assignment. In addition to the practical difficulties of making such a calculation, the property owner would run the risk that the recoverable damages would be too small to compensate him for the amount of damage or costs of remediation. Unrecoverable damages would constitute a loss to the buyer.

## **B. CURRENT OWNERS**

The implications of *Eagle Pipe* extend beyond acquisitions of property. Property owners may have no recompense for hidden damage to property they **currently** own. Existing owners cannot track down the person who sold them property ten, twenty, or fifty years ago to obtain an assignment of rights. In the likely event that they failed to contract for an *Eagle Pipe* scenario, property owners will be left with redhibition as their only remedy. If their sellers were also unaware of the defects, the buyer's action for redhibition prescribes in **one** or **four years** from the date of delivery (depending on the type of property). In other words, a property owner who discovers hidden damage decades after the sale will be completely without remedy if his seller

shares in his ignorance. The possibility for this outcome in property transactions where the land has changed hands multiple times is great.

### C. OIL AND GAS CONCERNS

Parties involved in oil and gas transactions and property acquisitions must be particularly wary of *Eagle Pipe*. Property which has been the site of oil and gas or chemical operations for a number of years may hide contaminants or other damage. The nature of mineral leasing also means the property may have changed hands numerous times. Both of these factors put a property owner at risk of “holding the bag” on latent property defects, because his rights for redhibition and rescission may be limited. In these cases, even an effective assignment may not fully protect a landowner.

## VIII. CONCLUSION

The Louisiana Supreme Court’s recent opinion in *Eagle Pipe and Supply Inc. v. Amerada Hess Corporation, et al.*, expanded the jurisprudentially-created Subsequent Purchaser Rule to include cases of hidden or latent property defects. Now, a property owner cannot recover for damage to his property that occurred prior to the sale, regardless of whether the damage was apparent or non-apparent, unless he has obtained an assignment of that right from his seller. The court provides little explanation of what may constitute a valid assignment, except to say that broad, standardized language in an act of sale is insufficient. Absent an effective assignment, a land owner is limited to an action for redhibition or rescission against his seller. *Eagle Pipe* may force harsh results for landowners, particularly in the oil and gas industry, because redhibitory actions and assignments may provide little relief for defects that have been hidden for a long period or that exist on property that has frequently changed owners. Only jurisprudential

guidance or legislative action over the coming years can provide landowners with definitive answers on how to protect themselves in the wake of *Eagle Pipe*.

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