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Shady Grove on the Bayou: Louisiana's Procedural Limitations on Legacy Oil Suits in a post-*Shady Grove Orthopedic Associates, P.A. v. Allstate Ins. Co.* Landscape

INTRODUCTION

The application of state procedure in federal courts ceased to be a simple question decades ago. Where a federal court, sitting in diversity, must apply the law of the state in which the court sits, the Federal Rules of Civil Procedure dictate the manner and means of adjudicating and enforcing state-created rights and remedies. State legislatures exacerbate this complexity by using procedural rules as a means of regulation, without appreciating that these regulatory-procedural rules and the Federal Rules of Civil Procedure may collide.

This Comment examines one such procedural limitation enacted by the Louisiana Legislature: the limited admission of newly minted article 1563 of the Louisiana Code of Civil Procedure. Article 1563 was enacted in response to lawsuits over environmental damage to land caused by generations of oil industry operations, more commonly known as legacy litigation. Article 1563(A)(1) allows a defendant to admit liability for environmental remediation damages, but limits the admission to only that one aspect of the plaintiff-landowner's claim, and only for the purpose of funding an environmental remediation plan. The new article's survival in federal court is important, as the defendant will be responsible for attorney's fees if found liable. Thus, by providing this procedural escape hatch, the legislature allows a defendant to effectively end further cost recoupment, ultimately discouraging landowners from advancing trial on other theories of recovery.

Part I of this Comment examines the Louisiana law before *Corbello v. Iowa Production*.¹ This Comment then discusses the *Corbello* decision, its economic impact, and the Louisiana Legislature's reforms to date. Next, Part II provides a brief overview of state procedure displacement by the Federal Rules of Civil Procedure and discusses recent cases on this issue. Finally, in Part III, this Comment discusses Louisiana Code of Civil Procedure article 1563(A)(1) and its direct conflict with the Federal Rules of Civil Procedure. This Comment concludes by asserting that, following the analysis of *Shady Grove*, state tort law reform

measures will need to either modify state substantive law or risk displacement in the federal forum.

I. THE LEGACY PROBLEM: PUBLIC HARM, PRIVATE RECOVERY

A. *The law before Corbello v. Iowa Production*

Louisiana's civilian tradition prefers specific performance over monetary damages for the failure to perform an obligation.² The principal right of an aggrieved obligor is specific performance, with an accessory right to recover damages.³ The principle remedy in Louisiana,⁴ specific performance, focuses on restoring the obligee to its original position, while also avoiding the imposition of an undue burden on the obligor.⁵ This avoidance of undue burden on the obligor was interpreted as a limitation of private property environmental damage claims to the fair market value of uncontaminated land, and ignored the cost of environmental remediation ultimately borne by the private landowner.⁶ This is in accord with the general rule for an award of damages for breach of an obligation; where damages are awarded, the award should not be excessively burdensome on a party "who, in good faith, might not have contemplated such an extensive liability at the time of entering into the contract."⁷ Louisiana's legislative enactments prefer limiting damages to principles of "enrichment, diminution in value, and fair market value."⁸ Punitive damages are available only if statutorily imposed⁹ or contained in the parties' contract.¹⁰ In

2. LA. CIV. CODE ANN. art. 1986 (2013).

3. SAUL LITVINOFF, OBLIGATIONS §1.7, in 5 LOUISIANA CIVIL LAW TREATISE 15 (2d ed. 2012).

4. *Id.*

5. Mary Beth Balhoff, *Corbello v. Iowa Production and the Implications of Restoration Damages in Louisiana: Drilling Holes in Deep Pockets for Thirty-Three Million Dollars*, 65 LA. L. REV. 271, 277 (2004).

6. *See Id.* at 271 ("Therefore, damages would equal the value of the thing, not the cost to rebuild or restore the thing.").

7. LITVINOFF, *supra* note 3, § 14.8, at 442.

8. Balhoff, *supra* note 5, at 279.

9. *See Breaux v. Taylor*, No. 06-1145, 2007 WL 1580077, at *1 (W.D. La. May 29, 2007); *Albert v. Farm Bureau Ins. Co.*, 940 So. 2d 620, 622 (La. 2006); *Int'l Harvester Credit Corp., v. Seale*, 518 So. 2d 1039, 1041 (La. 1988); *Ricard v. State*, 390 So. 2d 882, 886 (La. 1980); *Alexander v. Burroughs Corp.*, 359 So. 2d 607, 610-11 (La. 1978); *Killebrew v. Abbott Laboratories*, 359 So. 2d 1275, 1278 (La. 1978).

10. LA. CIV. CODE ANN. art. 1983 (2013) ("Contracts have the effect of law for the parties . . .").

contrast, other jurisdictions reduce damages to the probable loss in value, seeking economic efficiency.¹¹

Louisiana courts had awarded surface restoration damages for decades even though these costs were minor compared to contemporary environmental remediation damage awards.¹² Essentially, where restoration costs exceed actual value of the land, damages follow a simple formula: replacement costs less reasonable depreciation.¹³ However, there was a countervailing argument based on economics: immunizing industry actors from the true costs of their conduct would result in an industry unmindful of safety and environmental controls, if those controls pose a more expensive alternative than eventual anticipated remediation costs.¹⁴ This lack of accountability permitted Louisiana's oil and gas industry to enjoy "decades of financial success . . . while disregarding the effects of their operations on the fragile landscape."¹⁵

The opening act in this drama was a suit by the New Orleans Archdiocese following a fire at a low-income family housing unit it managed.¹⁶ There, the Louisiana Supreme Court held property damages are not limited to the fair market value of the property, where an owner has a personal reason to restore the property such that there is reason to believe the plaintiff will make the repairs.¹⁷ In *Roman Catholic Church of the Archdiocese of New Orleans v.*

11. See RESTATEMENT (SECOND) OF CONTRACTS § 348(2)(b) (1981) ("If a breach results in defective or unfinished construction and the loss in value to the injured party is not proved with sufficient certainty, he may recover damages based on . . . the reasonable cost of completing performance or of remedying the defects if that cost is not clearly disproportionate to the probable loss in value to him."); see also *Peevyhouse v. Garland Coal & Mining Co.*, 382 P.2d 109, 113 (Okla. 1962) ("[T]he 'relative economic benefit' is a proper consideration here."). The Louisiana Civil Code allows similar remedies where obligations arise without agreement between the parties where there is enrichment without cause. LA. CIV. CODE ANN. art. 2298 (2013) ("The amount of compensation due is measured by the extent to which one is enriched or the other has been impoverished whichever is less.").

12. See, e.g., *Smith v. Schuster*, 66 So. 2d 430 (La. Ct. App. 1953).

13. See, e.g., *Nippert v. Baton Rouge Railcar Services, Inc.*, 526 So. 2d 824, 827 (La. Ct. App. 1988).

14. Kenneth M. Murchison, *Liability Under the Oil Pollution Act: Current Law and Needed Revisions*, 71 LA. L. REV. 917, 938 (2011).

15. Ryan M. Seidemann, *Louisiana Wetlands and Water Law: Recent Jurisprudence and Post-Katrina and Rita Imperatives*, 51 LOY. L. REV. 861, 874–75 (2005) (stating that the industry should be held accountable for "decades of financial success . . . enjoyed while disregarding the effects of their operations on the fragile landscape.").

16. *Roman Catholic Church of the Archdiocese of New Orleans v. La. Gas Serv. Co.*, 618 So. 2d 874, 875 (La. 1993).

17. *Id.* at 880.

Louisiana Gas Service Company, the New Orleans Archdiocese purchased an apartment complex from the Department of Housing and Urban Development (HUD or Department).¹⁸ The purchase imposed an obligation on the Archdiocese to maintain the complex for two hundred low-income families for at least fifteen years, or the property would revert to the Department's control.¹⁹ Following extensive renovations, a fire on the property gutted one of the buildings.²⁰ The gas supplier admitted liability, but contested damages.²¹

The trial court found that, as the restoration costs exceeded the market value of the property, the Archdiocese's recovery was limited to market value, less depreciation.²² The Louisiana Supreme Court reversed and awarded full restoration costs, finding that the Archdiocese could not comply with its obligation to the HUD if the award was tethered to the property's fair market value.²³ Noting the Archdiocese's obligation could only be fulfilled by providing low-income housing to two hundred low-income families on the property, the Court found that where the property was used for a personal purpose to the owner, damages, including restoration costs, may exceed the market value of the property.²⁴ Despite the *Roman Catholic Church* holding, later decisions clarified that mere assertions of personal attachment with plans of future development do not justify an award in excess of market value.²⁵

Roman Catholic Church did not involve an individual private landowner, but a religious organization conducting charitable activities. There, the defendant gas company was required to pay restoration costs for a reasonably foreseeable loss due to its own negligence. Environmental remediation costs were arguably not as foreseeable to Louisiana industry and not based on a specific tortious act. This next section will discuss Louisiana's courts applying the reasoning of *Roman Catholic Church* to a case brought by a private landowner alleging decades of environmental damages and the defendant's breach of a contractual obligation to restore the land's surface.

18. *Roman Catholic Church*, 618 So. 2d at 875.

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.* at 875–76.

23. *Id.* at 880.

24. *See id.*

25. *Hornsby v. Bayou Jack Logging*, 902 So. 2d 361, 367–68 (La. 2005) (reversing trial court award of restoration damages under manifest error standard where the plaintiff put forth evidence of significant emotional ties to the land, but only plans for future development).

B. The Corbello Decision

Attracting fourteen amicus briefs, *Corbello v. Iowa Production* applied the rule of *Roman Catholic Church* to the oil and gas industry, allowing landowners recovery for environmental remediation damages to the tune of \$33 million.²⁶ Described as having sent “shock waves throughout the legal profession and the oil and gas community,”²⁷ *Corbello* is hardly a radical departure from prior law given *Roman Catholic Church*. *Roman Catholic Church* simply left the courthouse door unsecured, and a South Louisiana family was willing to finish the job.

In 1929, the Heyd family granted a lease to Shell Oil Company, who operated the lease until 1985, when it sold the lease to Rosewood Resources, Inc., though Shell continued to operate facilities on the property.²⁸ The surface lease expired in May of 1991, but Shell remained on the land for twenty-two additional months.²⁹ The landowners brought suit in May of 1992, seeking damages for trespass to land, unauthorized disposal of salt water, and “for the poor condition of the lease premises.”³⁰ In May 2000, the jury found Shell liable to restore the property to its original, pre-lease condition and awarded \$33 million in environmental remediation damages.³¹ Louisiana’s Third Circuit Court of Appeal affirmed the environmental damages and increased the award of attorney fees and other damages.³²

Louisiana’s Supreme Court rejected Shell’s contention that restoration damages need be reasonably or rationally related to the actual land value of \$108,000.³³ The court took notice that the contract, as the law between the parties, required Shell to restore the property to its pre-lease condition, and that if Shell wanted to limit its liability to the market value of the property “it could have bargained for such.”³⁴

While the court noted that it is sometimes logical to balance the amount owed by a negligent tortfeasor against the cost to restore the

26. *Corbello v. Iowa Prod.*, 850 So. 2d 686, 691 (La. 2003).

27. Balhoff, *supra* note 5, at 271.

28. *Corbello*, 850 So. 2d 686, 691.

29. *Id.* at 708.

30. *Id.* at 690–91.

31. *Id.* at 691.

32. *Id.* at 692 (affirming the \$33 million to restore the land and \$16 million for illegal disposal of salt water, increasing attorney fees award from \$689,510 to \$4 million, reversing the trial court’s remittitur of \$927,000 for failure to vacate the leased premises, and reversing and remanding the trial court’s dismissal of claim for exemplary damages).

33. *Id.*

34. *Id.* at 694.

injured plaintiff, the court reasoned that this balancing should not extend to a suit for a breach of contract.³⁵ Balancing was not needed where the party was a sophisticated oil company seeking to “alter the terms of this contract” to limit its liability.³⁶ If it were to tether remediation damages to property value, the Court “would give license to oil companies to perform its operations in any manner, with indifference as to the aftermath of its operations because of the assurance that it would not be responsible for the full cost of restoration.”³⁷ The Court found that tethering damages to the market value of the property would grant a windfall to the oil companies.³⁸ The Court specifically rejected Shell’s argument that a private landowner should not be awarded remediation damages when there is no mechanism to ensure that the money is actually used to remediate the property.³⁹

In *Corbello*, the court’s decision was strengthened by two policy concerns. The first concern was contaminated land with a potential for public impact. This public injury to the local water supply potentially affects entire communities. The second was discouraging landowners from bringing private actions, which would leave only “understaffed and underfunded state agencies” to “oppose oil companies.”⁴⁰ The court reasoned that, while allowing recovery to the private landowner does not guarantee the land will be decontaminated, it was unlikely that oil companies would clean up land absent the State’s coercion.⁴¹

C. Corbello’s Impact

In *Corbello*, private landowners recovered monetary damages after their land—surface, subsurface, and groundwater—was contaminated by hazardous materials.⁴² For the first time, the Louisiana Supreme Court allowed the landowners to recover those environmental damages without tethering them to the market value of the property.⁴³ Even though the court reasoned a windfall would have gone to either the landowners or the oil company, the court’s

35. *Id.* at 695.

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.* at 699.

40. *M.J. Farms, Ltd. v. Exxon Mobil Corp.*, 998 So. 2d 16, 39 (La. 2008) (Johnson, J., concurring). Justice Johnson is also the author of the *Corbello* opinion.

41. *Id.*

42. *Id.* at 38.

43. *Id.*

selection of the landowners as windfall recipients (who were, after all, now in possession of toxic land due to the actions of defendants who profited from the activity)⁴⁴ subjected the court to criticism from commentators.⁴⁵

The economic impact of *Corbello* may be connected to the comparative stagnation of energy industry activity in South Louisiana for the past decade.⁴⁶ While energy operations in the state's northern parishes have been strong due to the development of unconventional shale resources, conventional drilling in Louisiana lags behind Louisiana's own historical trends and other major energy producing states.⁴⁷ This unconventional production in North Louisiana is welcome; however, Louisiana risks becoming "exceptionally dependent" on this unconventional resource development.⁴⁸

Prior to 2000, drilling in Louisiana "was comparable and competitive with other major oil and gas producing states," but "activity has fallen considerably since that time."⁴⁹ Though the *Corbello* obligation to restore the land to its pre-lease condition only arose by contract,⁵⁰ the "strong perception that Louisiana is a litigious state that subjects producers (past and current)" to "significant legal obstacles" has contributed to Louisiana being seen as "an increasingly difficult place for conventional oil and gas producers to operate."⁵¹

One study, authored by David E. Dismukes, PhD., of Louisiana State University's Center for Energy Studies, found "an important and statistically significant deterioration in state drilling activity since the inception of the legacy lawsuits."⁵² This study argued that *Corbello* and its progeny cost the state nearly \$10.5 billion in lost economic output.⁵³ The Dismukes study further asserts that legacy

44. *Corbello*, 850 So.2d at 695.

45. See Balhoff, *supra* note 5, at 293-94.

46. David E. Dismukes, *LSU Center for Energy Studies, The Impact of Legacy Lawsuits on Conventional Oil and Gas Drilling Louisiana 2* (2012), http://www.enrg.lsu.edu/files/images/presentations/2012/DISMUKES_LEGACY_RPT_02-28-12_FINAL.pdf.

47. *Id.*

48. *Id.* at 55.

49. *Id.* at 23.

50. *Terrebonne Parish Sch. Bd. v. Castex Energy, Inc.*, 893 So. 2d 789, 800-01 (La. 2005) (concluding that the Louisiana Mineral Code, "in the absence of an express lease provision[,] . . . does not impose an implied duty to restore the surface to its original, pre-lease condition absent proof that the lessee has exercised his rights under the lease unreasonably or excessively."). *Id.* at 801.

51. Dismukes, *supra* note 45, at 3.

52. *Id.* at 4.

53. *Id.* at 5.

lawsuits have had a “severe impact” on Louisiana industry, as “Louisiana’s poor legal climate toward the oil and gas industry is causing the state to lose out on substantial conventional drilling opportunities and thousands of well-paying jobs to other states.”⁵⁴

Some have criticized this study as built on a foundation of oil industry polling data,⁵⁵ though the Louisiana Oil and Gas Association denies funding or requesting the study.⁵⁶ Academic criticism of the study was submitted to a joint session of the Louisiana House and Senate Committees on Natural Resources.⁵⁷ In a memorandum, Professor Whitelaw, an Economist from the University of Oregon, described Dr. Dismukes’ study as “fatally flawed, both theoretically and empirically.”⁵⁸ Specifically, Professor Whitelaw criticizes Dr. Dismukes use of industry data only through 2007 and not accounting for the disruptive effect by hurricanes in 2005 and 2006.⁵⁹

At that same hearing, Joseph Frost of Hilcorp Energy testified that legacy litigation has changed their business operations.⁶⁰ Before *Corbello*, Hilcorp would purchase oil fields from prior operators, assuming the obligation to restore the surface from the prior operator.⁶¹ Hilcorp now signs new leases expressly disavowing liability for any prior environmental damage.⁶² Thus, contemporary operators are contractually negating future liability from the decades of environmental damage, allegedly caused by prior operators.

54. Statement of Chris John, President, La. Mid-Continent Oil & Gas Assoc., on LSU Study on Negative Economic Impact of Legacy Cites Litigation (Feb. 28, 2012), http://www.lmoga.com/assets/LMOGA_Statement_-_LSU_Study_on_Legacy_Suits.pdf.

55. Mike Staff, *Op-Ed Response to LOGA*, LOUISIANA TRUTH.ORG (Mar. 20, 2012), <http://louisianatruth.org/?p=228>.

56. Kyle Barnett, *Plaintiff Attorney Seeks to Depose LSU Researcher Who Authored ‘Legacy Lawsuits’ Study*, LEGAL NEWSLINE LEGAL JOURNAL (Mar. 28,

Association), <http://legalnewsline.com/in-the-spotlight/235638-plaintiff-attorney-seeks-to-depose-lsu-researcher-who-authored-legacy-lawsuits-study>.

57. *Discussion of the Effects of and Potential Changes to Act 312 of the 2006 Regular Session, Hearing before the Joint H. & S. Comm. On Natural Resources, 2012 Reg. Sess.* (4/16/12).

58. Memorandum from Dr. Ed Whitelaw and Dr. Bryce Ward, EcoNorthwest, to Mr. Robert Gardes, *Review of the Dismukes Analysis 1* (Apr. 15, 2012) (on file with *LSU Journal of Energy Law and Resources*).

59. *Id.* at 1–2.

60. *Discussion of the Effects of and Potential Changes to Act 312 of the 2006 Regular Session, Hearing before the Joint H. & S. Comm. On Natural Resources, 2012 Reg. Sess.* (4/16/12) (statement of Joseph Frost, Executive of HilCorp Energy).

61. *Id.*

62. *Id.*

These evolving business practices militate against the projected impact of legacy litigation on future mineral exploration and production in Louisiana.⁶³

Corbello highlighted two “meaningful disincentives” to encourage prudent oil production operations: regulatory sanction and suits by the landowner.⁶⁴ The Louisiana Supreme Court, however, labeled the Louisiana Department of Natural Resources (“LDNR”) as “understaffed and underfunded”;⁶⁵ thus the only practical disincentives are suits by the private landowner. The next step in the legacy litigation saga would be a response from the legislature. When the Louisiana Supreme Court affirmed *Corbello* and held deep-pocketed industrial defendants accountable, the Louisiana legislature heeded the call to action on behalf of industry.

D. The 2003 Louisiana Legislative Response and its Impact

At the time of *Corbello*, the Louisiana Oilfield Site Restoration Law⁶⁶ did not offer a “comprehensive solution to the problem of oilfield waste sites.”⁶⁷ Landowners could seek environmental remediation damages, and as in traditional tort doctrine, “there was no statutory mandate which required landowners to actually use the damages awarded to implement remediation or restoration.”⁶⁸ The legislative response was the enactment of legislation to address this very issue.⁶⁹

In 2003, the Louisiana legislature passed the “usable ground water-remediation” statute⁷⁰ to “cure the problems caused by the *Corbello* decision.”⁷¹ The legislative intent was for environmental remediation damage awards to have a public benefit by requiring the

63. These business practices also may result in more legacy litigation arriving in federal court by way of diversity jurisdiction. By releasing the current producer, the landowner may find himself completely diverse from prior lessees. Prior operators may be out of state companies or no longer considered citizens of Louisiana for diversity of citizenship purposes.

64. Gladstone N. Jones III & Andrew Jacoby, *Recent Developments in Oilfield Pollution Lawsuits*, TULANE LAW SCHOOL SUMMIT ON ENVIRONMENTAL LAW & POLICY 2 (Feb. 24, 2012), http://www.law.tulane.edu/uploadedFiles/Student_Org_Sites/Tulane_Environmental_Law_Conference/Fri%20200pm%20Sabine%20-%20Glad%20Jones%20Article.pdf.

65. *M.J. Farms, Ltd. v. Exxon Mobil Corp.*, 998 So. 2d 16, 39 (La. 2008).

66. LA. REV. STAT. ANN. §§ 30:80–30:101 (2007).

67. *M.J. Farms*, 998 So. 2d at 38 (Johnson, J., concurring).

68. *Id.*

69. Act No. 1166, 2003 La. Acts 3511 (codified at LA REV. STAT. ANN. § 30:2015.1 (2003) (amended in 2006)).

70. *Id.*

71. Balhoff, *supra* note 5, at 299.

landowner to clean up the site and prevent future environmental damages.⁷² The act required the landowner to notify the LDNR and the Louisiana Department of Environmental Quality when the suit is filed.⁷³ Further, where the court finds that the polluter is liable and that contamination is threatening usable ground water, the court “shall order” the development of a remediation plan.⁷⁴ Consideration is also given to any plan submitted by the plaintiff.⁷⁵ The court then determines which plan is most feasible and orders the responsible party “to fund implementation of the plan” and to deposit the funds with the court.⁷⁶

An issue arose concerning the prospect of “double damages”: would an industry defendant be forced to pay remediation damages to a private landowner (damage number one), and then face additional liability (damage number two) in a remediation suit or regulatory action brought by the LDNR? The legislature addressed this issue by giving the “oil companies a credit for amounts paid to the landowner in a subsequent enforcement action.”⁷⁷ However, the act applied only where landowners claimed groundwater contamination damages,⁷⁸ encouraging artful pleading by landowners.⁷⁹ The act did not tether remediation damages to property value or balance remediation costs against economic benefit allowing restoration damages perceived by some as unreasonable.⁸⁰

E. The Legislative Response: Act 312 of 2006

In the 2006 Regular Session, the Legislature of Louisiana passed Act 312,⁸¹ which one commenter described as “reforming the procedure in litigation claiming environmental damages arising from oilfield operations.”⁸² Act 312 contained six components

72. Act No. 1166, 2003 La. Acts 3511; *M.J. Farms*, 998 So. 2d at 39.

73. LA. REV. STAT. ANN. § 30:2015.1(B).

74. LA. REV. STAT. ANN. § 30:2015.1(C)(1) (2003) (amended in 2006).

75. *Id.*

76. LA. REV. STAT. ANN. § 30:2015.1(C)(3) (2003) (amended 2006).

77. *Corbello v. Iowa Prod.*, 850 So. 2d 686, 699 (citing LA. REV. STAT. ANN. § 30:89.1 (2003) (amended 2006)).

78. Balhoff, *supra* note 5, at 299.

79. *See, e.g., Frank C. Minvielle, L.L.C. v. IMC Global Operations, Inc.*, 380 F. Supp. 2d 755 (W.D. La. 2004); *Duhé v. Texaco, Inc.*, 779 So. 2d 1070 (La. Ct. App. 2001); Balhoff, *supra* note 5, at 299.

80. Balhoff, *supra* note 5, at 299–300.

81. Act No. 312, 2006 La. Acts 1472.

82. Loulan Pitre, Jr., “*Legacy Litigation*” and *Act 312 of 2006*, 20 TUL. ENVTL. L.J. 347, 347 (2007).

implemented to protect the public interest in legacy litigation.⁸³ Specifically, (1) the state must receive timely notice of the litigation;⁸⁴ (2) proceedings are stayed until after notice is given;⁸⁵ (3) the state is permitted to intervene;⁸⁶ (4) the LDNR determines the environmental damage and most feasible remediation plan;⁸⁷ (5) the LDNR is to oversee the implementation of that plan;⁸⁸ and (6) the act allows recovery of attorney and expert fees.⁸⁹ A commenter observed that Act 312 did not address “claims that are nonoilfield and do not allege damage to usable ground water.”⁹⁰

The court shall adopt the plan adopted by the LDNR unless a party proves that another plan is more feasible by a preponderance of the evidence.⁹¹ Act 312 requires the court to order those legally responsible to fund the implementation of the remediation plan⁹² by depositing those funds into the registry of the court,⁹³ subject to dual oversight by the court and the LDNR.⁹⁴

Though the Act is “generally perceived as adverse to the landowner community,” several sections arguably protect the rights and benefits of the landowner.⁹⁵ Act 312 specifically states that it does not impede private contractual agreements obligating a party to remediate the site beyond state regulatory requirements.⁹⁶ The legislation is to have no effect on environmental damage claims not subject to remediation damage,⁹⁷ and costs and attorney fees are recoverable by the victorious landowner.⁹⁸ Parties are not free to compromise their claims without court approval, and even where settled, the remediation costs are deposited with the court.⁹⁹ This requirement could be waived if the settlements was a “minimal

83. *Id.* at 350.

84. LA. REV. STAT. ANN. § 30:29(B)(1) (2013).

85. *Id.*

86. LA. REV. STAT. ANN. § 30:29(B)(2) (2013).

87. LA. REV. STAT. ANN. § 30:29(C) (2013).

88. LA. REV. STAT. ANN. § 30:29(D) (2013).

89. LA. REV. STAT. ANN. § 30:29(E) (2013).

90. Pitre, *supra* note 83, at 351.

91. LA. REV. STAT. ANN. § 30:29(C)(5) (2013).

92. LA. REV. STAT. ANN. § 30:29(D) (2013); *see also* Pitre, *supra* note 83, at 353.

93. LA. REV. STAT. ANN. § 30:29(D)(1) (2013).

94. LA. REV. STAT. ANN. § 30:29(F) (2013).

95. Pitre, *supra* note 83, at 353.

96. LA. REV. STAT. ANN. § 30:29(A) (2013).

97. LA. REV. STAT. ANN. § 30:29(H) (2013).

98. LA. REV. STAT. ANN. § 30:29(E)(1) (2013).

99. LA. REV. STAT. ANN. § 30:29(J)(1) (2013).

amount and is not dispositive of the entire litigation,”¹⁰⁰ but what exactly constituted a minimal amount was not defined.¹⁰¹

Act 312 succeeded in lengthening and increasing the cost of litigation,¹⁰² added a layer of understaffed bureaucracy, and “generally discouraged such suits from being filed.”¹⁰³ Act 312 failed in “its ostensible purpose of getting more of these sites cleaned up.”¹⁰⁴ In fact, “[s]ince the enactment of Act 312, very few cases have made it through the Act 312 process.”¹⁰⁵ Though Louisiana based industry has adapted to the new operational environment,¹⁰⁶ the legislature again took up the task of legacy litigation reform in 2012. These recent enactments are discussed in the next section.

F. The Compromise: Acts 754 and 779 of 2012

The 2012 legislative response to the ongoing legacy litigation reformed the procedures for processing legacy lawsuits. The bill’s intention was to expedite remediation of environmental contamination to state regulatory standards and foster earlier resolution of litigated claims.¹⁰⁷

House Bill 618, “the oil industry’s solution,”¹⁰⁸ enacted as Act Number 754 of 2012, added article 1563 to the Louisiana Code of Civil Procedure.¹⁰⁹ Specifically, article 1563(A)(1) allows a party to make a “limited admission of liability” whereby the “party may elect to limit this admission of liability for environmental damages” and “if necessary remediate all or a portion of the contamination.”¹¹⁰ Then, the court refers the case to the LDNR, which, after a public hearing, structures the most feasible remediation plan and submits it

100. LA. REV. STAT. ANN. § 30:29(J)(1) (2013).

101. Pitre, *supra* note 83, at 354.

102. Jones & Jacoby, *supra* note 65, at 9.

103. *Id.*

104. *Id.*

105. Claire Juneau, *Act 312 – Louisiana Legislature Passes New Measures to Speed Remediation Process*, LOUISIANA LAW BLOG (Sept. 11, 2012), <http://www.louisianalawblog.com/legacy-oil-field-sites-act-312-louisiana-legislature-passes-new-measures-to-speed-remediation-process.html>.

106. *See supra* notes 60–63 and accompanying text.

107. La. Act No. 779 (2012), available at <http://www.legis.la.gov/legis/ViewDocument.aspx?d=812324>.

108. Mark Ballard, *Committee Backs ‘Legacy’ Bill*, THE ADVOCATE, Apr. 27, 2012, at 05A, available at <http://www.lmoga.com/news/committee-backs-legacy-bill>.

109. La. Act No. 754 (2012), available at <http://www.legis.la.gov/legis/ViewDocument.aspx?d=812233>.

110. *Id.*

to the court.¹¹¹ The second enactment, Senate Bill 555, modifies Louisiana Revised Statutes section 30:29¹¹² to allow for the new procedural code articles added by Act 754.¹¹³

Some have suggested that the legislation allows the remediation standard to be varied based on the property's intended use, which allows the LDNR to circumvent state regulatory levels in formulating the environmental remediation plan.¹¹⁴ Others have accused the LDNR of bias and a conflict of interest, based on the LDNR's goal of helping the oil industry to extract and produce revenues.¹¹⁵

These enactments come as a direct result of prior failed attempts at legacy litigation reform. The previous attempts "failed to live up to expectations, and it is not clear whether a significant number of defendants will invoke the procedure authorized by this new legislation."¹¹⁶ As of the time of this writing, no court has yet to apply this newly enacted procedural rule.

G. The Actual Effect of Louisiana Code of Civil Procedure article 1563(A)(1)

Article 1563(A)(1) must be read *in pari materia* with section 30:29. Specifically, section 30:29 provides for the recovery of costs and fees "[i]n any civil action in which a party is responsible for damages or payments for the evaluation or remediation of environmental damage."¹¹⁷ The recoverable fees and expenses are "all costs attributable to producing that portion of the evidence that directly relates to the establishment of environmental damage."¹¹⁸ Here, environmental damage is any actual or potential damage

111. *Id.*

112. *Id.*

113. La. Act No. 779 (2012), available at <http://www.legis.la.gov/legis/ViewDocument.aspx?d=812324>.

114. Press Release, La. Farm Bureau, Louisiana Farm Bureau Concerned over HB 618 (Apr. 25, 2012), <http://web.archive.org/web/20120506124237/http://www.pressreleasepoint.com/louisiana-farm-bureau-concerned-over-hb-618>.

115. Kevin Mooney, *Study Alleges Majority of Legacy Lawsuits Fail to Produce Hard Evidence of Contamination*, THE PELICAN POST (Mar. 29, 2012, 11:26 AM), <http://www.thepelicanpost.org/2012/03/29/study-alleges-majority-of-legacy-lawsuits-fail-to-produce-hard-evidence-of-contamination> (quoting Haywood Martin, Chairman of the Louisiana Chapter of the Sierra Club).

116. *New Legislation to Address Legacy Lawsuits in Louisiana*, MCGLINCHY STAFFORD PLLC (June 14, 2012), <http://mcglinchey.com/content/Detail.asp?id=12062>.

117. LA. REV. STAT. ANN. § 30:29(E)(1) (2013).

118. *Id.*

caused by oilfield exploration or production to soil, surface water, groundwater, or sediment.¹¹⁹

Therefore, by admitting liability for environmental remediation, the defendant will effectively extinguish further liability for costs and attorney's fees to prove environmental damages. These costs would otherwise be imposed after a finding of liability to include costs of taking the case to trial. Section 30:29(E)(1) only provides for costs specifically for proving environmental remediation. Thus, to the extent that the landowner has filed suit seeking further recovery, he may not have a basis to recover costs and attorney fees. Forced with the loss of his main cause of action, and with the prospect of further costs and fees being deducted out of a later recovery, many landowners will dismiss the rest of their claims or seek settlement on unfavorable terms.

Ironically, by permitting a defendant oil company to escape from the civil court system and seek refuge behind a state agency, those defendants facing near certain liability are the most likely to invoke this procedure. This gives the more egregious defendant lower costs as compared to one whose liability is not as clear. Also, with fewer suits proceeding to trial due to the environmental remediation claim being removed, these defendants ultimately face less ancillary claims, as would a defendant who chooses to contest the claims to trial.

The fate of this limited admission is thus a matter of importance to plaintiff-landowners able to reach federal court.

II. STATE PROCEDURE IN FEDERAL COURT

A. The Not-So Ancient History of the Erie Doctrine

The application of state law in federal courts is governed by the *Erie* doctrine. *Erie* famously held that "except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the state."¹²⁰ Soon after the *Erie* decision, *Erie's* simplifications ceased. *Erie* doctrine problems often go undetected and unnoticed by courts and litigators unless a party is willing to delve into the substantive purpose of state procedural rules. It requires treading into the distinction of substantive law and procedural rules, a distinction that eludes litigants, stumps scholars, and lately splinters the normal alliances of the Supreme Court.¹²¹

119. LA. REV. STAT. ANN. § 30:29(I)(1) (2013).

120. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938).

121. See *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393 (2010), where Justice Scalia authored the opinion of the court in part I and

The complex development of the *Erie* Doctrine is beyond the scope of this paper.¹²² Instead, this paper focuses on recent Supreme Court interpretations where the Federal Rules of Civil Procedure are at odds with state legislative use of procedure to advance substantive policy goals.

In brief, Congress delegated the power to promulgate uniform rules of federal procedure to the Supreme Court in the Rules Enabling Act.¹²³ In *Sibbach v. Wilson*, the Court found the Federal Rules within the scope of Congress's delegation.¹²⁴ Referring to the language of the Rules Enabling Act, *Sibbach* found that, in order to promulgate procedure, the promulgated rule must not "abridge, enlarge nor modify the substantive rights of any litigant."¹²⁵ A rule is procedural if it regulates "the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress."¹²⁶ The *Sibbach* majority understood that where a state recognizes a right incompatible with a Federal Rule, the Federal Rule governs.¹²⁷

Decisions contemporary with *Sibbach* held that, where the Federal Rules of Civil Procedure did not "speak directly and unmistakably to the exact same matter as the state procedure," the collision between state and federal procedure was dodged by narrow interpretation of the Federal Rules.¹²⁸ The Court's decisions of this period represent the "high-water mark of the Court's deference to state procedural rules."¹²⁹ Courts were directed to apply federal

II–A, joined by Chief Justice Roberts and Justices Stevens, Thomas, and Sotomayor. Justice Scalia also penned the plurality opinion, joined by Chief Justice Roberts and Justices Thomas and Sotomayor as to parts II–B and II–D. Chief Justice Roberts and Justice Thomas also joined in part II–C of Justice Scalia's opinion. Justice Stevens filed an opinion concurring in part and concurring in the judgment. Justice Ginsburg wrote the dissent, which was joined by Justices Kennedy, Breyer and Alito.

122. See Allan Ides, *The Supreme Court & the Law to be Applied in Diversity Cases: A Critical Guide to the Development & Application of the Erie Doctrine & Related Problems*, 163 F.R.D. 19 (1995).

123. 28 U.S.C. § 2072 (2006).

124. *Sibbach v. Wilson & Co.*, 312 U.S. 1, 9–10 (1941).

125. *Id.* at 10.

126. *Id.* at 14.

127. Donald L. Doernberg, "The Tempest": Shady Grove Orthopedic Assocs., P.A. v. Allstate Insurance Co.: *The Rules Enabling Act Decision That Added to the Confusion—But Should Not Have*, 44 AKRON L. REV. 1147, 1161 (2011).

128. *Palmer v. Hoffman*, 318 U.S. 109 (1943); see also Margaret S. Thomas, *Constraining the Federal Rules of Civil Procedure Through the Federalism Canons of Statutory Interpretation*, 16 N.Y.U. J. LEGIS. & PUB. POL'Y 187, 201 (2013).

129. Thomas, *supra* note 128, at 203.

procedural law with a high deference to state policy, so the litigation's outcome would be substantially the same as if the case was in state court.¹³⁰

In 1965, the Court began to turn away from strong deference to state procedure, instead focusing on Congress's constitutional power to set rules of federal procedure and the reach of these rules via the Rules Enabling Act.¹³¹ The fact that a state procedural rule was actually substantive policy by the state legislature was of no consequence, so long as the Federal Rule was within congressional power.¹³² This echoed the initial simplicity of *Sibbach*, with the question squarely set on determining if "a rule really regulates procedure."¹³³ However, the Court only shifted the dispute to the scope of the Federal Rule, allowing later courts to narrowly interpret the scope of the Federal Rules of Civil Procedure in order to avoid collision with state procedure.¹³⁴

One commenter observed that the Court continued to examine state policy to determine the substantive purpose underlying the state rule to determine if the state rule spoke to the same issue as the Federal Rule.¹³⁵ Spawning further confusion, decisions of statutory interpretations created different meanings for some Federal Rules, meanings that varied based on the specific context of the litigation.¹³⁶ These decisions led one commentator to argue that the Supreme Court adopted the following policy: evaluating state policy rationale to determine the interpretation of Federal Rules, while avoiding conflict between state and federal procedure.¹³⁷ The debate centered on whether a Federal Rule controlled the issue,¹³⁸ while avoiding narrow construction of the Federal Rules when the rule's plain meaning required otherwise.¹³⁹

What emerged from the "murky waters"¹⁴⁰ was a two-track *Erie* analysis. On track one, there existed cases involving a federal rule

130. *Guar. Trust Co. v. York*, 326 U.S. 99, 109 (1945).

131. *See Hanna v. Plumer*, 380 U.S. 460, 464 (1965).

132. *Id.* at 468 n.9.

133. *Sibbach v. Wilson & Co.*, 312 U.S. 1, 14 (1941).

134. Richard D. Freer, *Some Thoughts on the State of Erie After Gasperini*, 76 *TEX. L. REV.* 1637, 1642 (1998); Thomas, *supra* note 128, at 206.

135. *Walker v. Armco Steel Corp.*, 446 U.S. 740, 749 (1980); *see also* Thomas, *supra* note 127, at 207.

136. *See West v. Conrail*, 481 U.S. 35, 39 & n.4 (1987); *see also* Stephen P. Burbank, *Of Rules and Discretion: The Supreme Court, Federal Rules and Common Law*, 63 *NOTRE DAME L. REV.* 693, 702 (1988).

137. Thomas, *supra* note 128, at 208.

138. *Walker*, 446 U.S. at 749–50.

139. *Id.* at 750 n.9.

140. *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 398 (2010).

and a conflicting state rule. In those cases, the federal rule governs unless it runs afoul of the Enabling Act,¹⁴¹ the Enabling Act, in turn, prohibits federal procedural rules from abridging, enlarging, or modifying any substantive right.¹⁴² One leading scholar observed lower courts gave certain Federal Rules “implausibly broad interpretations in order to apply federal law while emptying the others of content in order to avoid an Enabling Act challenge.”¹⁴³ Where there was no federal rule on point, courts would determine if the state law was “sufficiently substantive in that its application was required by constitutionally based principles of federalism and *Erie*’s policy goals of avoiding, where possible, disparate outcomes in state and federal court as well as the discouragement of undue federal-state forum shopping.”¹⁴⁴

The disjointed reading of Federal Rules as having variable meanings based on the context of the suit was ultimately an untenable position. The Court would have to confront this issue and decide if the Federal Rules should be read to avoid collision with state procedural rules advancing substantive state policy, or if federal procedural rules have a uniform meaning for all litigants. The case that emerged was *Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co.*¹⁴⁵

B. Shady Grove: A Complicated Simplification

The latest case to emerge along *Erie*’s twisted path, *Shady Grove* began with an automobile accident that injured Sonia Galvez,¹⁴⁶ who sought medical treatment with Shady Grove Orthopedic Associates. Shady Grove then billed Allstate Insurance Co.¹⁴⁷ New York law gave Allstate thirty days to pay or deny the claim.¹⁴⁸ Allstate paid the claim late, and then refused to pay accrued statutory interest on the overdue payment.¹⁴⁹ Shady Grove filed a diversity suit in the Eastern District of New York to recover the unpaid interest on behalf of a class of all others owed interest by Allstate.¹⁵⁰ The district court dismissed the suit for lack of

141. 28 U.S.C. § 2072 (2006).

142. 28 U.S.C. § 2072(b).

143. Burbank, *supra* note 136, at 18.

144. Jeffrey W. Stempel, *Shady Grove and the Potential Democracy-Enhancing Benefits of Erie Formalism*, 44 AKRON L. REV. 907, 923 (2011).

145. *Shady Grove*, 559 U.S. 393.

146. *Id.* at 397.

147. *Id.*

148. See N.Y. INS. LAW § 5106(a) (McKinney 2009).

149. *Shady Grove*, 559 U.S. at 397.

150. *Id.*

jurisdiction, reasoning that New York Civil Law and Rules Section 901(b), which precludes a class action suit for a statutory penalty absent express statutory authorization,¹⁵¹ applied in a federal court diversity suit.¹⁵² The Second Circuit affirmed.¹⁵³

A five-justice majority reversed, finding the suit could proceed as a class action due to Federal Rule 23 controlling the requirements for class certification in federal court¹⁵⁴ although five justices were not able to reach a majority on the rationale for the decision.¹⁵⁵ The Scalia plurality refused to search for New York's purpose, noting that, in the face of a direct collision between state and federal procedure, the aspirations of the state legislature should not determine if a state statute survives preemption.¹⁵⁶ Justice Scalia criticized the dissent's method of statutory interpretation to avoid a collision between state law and Rule 23, except in those cases where the court may be interpreting an ambiguous federal rule to "avoid substantial variations between state and federal litigation."¹⁵⁷ The opinion considered class action litigation as a tool of litigation aggregation altering "only how the claims are processed."¹⁵⁸

Though lacking a majority regarding the scope of rulemaking power under the Enabling Act,¹⁵⁹ the plurality opined that a Federal Rule is valid if the rule actually regulates procedure, defined as "the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them."¹⁶⁰ To make this determination, the analytical focus should be on the Federal Rules themselves, not their effect on individual litigants.¹⁶¹ Writing for a plurality of four justices, Justice Scalia read *Sibbach* to overrule *Gasperini*.¹⁶² Justice Scalia's plurality opinion held that even state procedural rules "bound up with substantive rights could be displaced by [the]

151. N.Y. C.P.L.R. 901(b) (McKinney 2006).

152. *Shady Grove*, 559 U.S. at 397.

153. *Id.* at 398.

154. *Id.* at 399–400.

155. *See id.* at 395–96 (Scalia J., plurality); *id.* at 1448 (Stephens, J., concurring) (agreeing with dissenting opinion's approach but not in agreement on the result reached by the dissent.)

156. *Id.* at 404–05.

157. *Id.* at 405 n.7.

158. *Id.* at 408.

159. *Id.* at 406; *see also* Thomas, *supra* note 128, at 213.

160. *Shady Grove*, 559 U.S. at 394 (citing *Sibbach v. Wilson & Co.*, 312 U.S. 1, 14 (1941)); *see also* *Hanna v. Plumer*, 380 U.S. 460, 464 (1965); *Burlington N. R.R. v. Woods*, 480 U.S. 1, 8 (1987).

161. *Shady Grove*, 559 U.S. at 410.

162. Thomas, *supra* note 128, at 213

Federal Rules.”¹⁶³ The plurality also accused Justice Stevens’ concurrence of “wanting effectively to overrule *Sibbach* rather than to apply it.”¹⁶⁴

The Stevens concurrence shared the analytical approach of the dissent but arrived at the opposite conclusion.¹⁶⁵ With the Rules Enabling Act, Stevens noted, Congress restricted the Supreme Court from promulgating “procedural rules that interfere with state substantive law.”¹⁶⁶ Stevens interpreted that restriction as support for the proposition that federal procedure may not displace how a state chooses to define “its own rights or remedies.”¹⁶⁷ Justice Stevens therefore advocated interpreting the Federal Rules “with sensitivity” to state interests and policies, despite signing on to parts of the majority opinion that labeled this very inquiry “standardless.”¹⁶⁸

For Stevens, the distinction between substantive and procedural state law hinged not on the law’s form,¹⁶⁹ but “on whether the state law actually is part of a State’s framework of substantive rights or remedies.”¹⁷⁰ In *Shady Grove*, Justice Stevens found the New York statute so generic as to apply to class action suits to recover penalties brought in New York for other jurisdiction’s laws, where such suits are permitted.¹⁷¹ Further, he noted the law’s legislative history lacked “particularly strong evidence,” indicating that New York “wished to create a ‘limitation’ on New York’s ‘statutory damages.’”¹⁷² Additionally, Justice Stevens noted that some state procedural rules “must apply in diversity cases because they function as part of the State’s definition of substantive rights and remedies.”¹⁷³ That a procedural device makes “litigation easier” does not alter who may obtain or how much an individual plaintiff may obtain via the statutorily created remedy.¹⁷⁴ Thus, Stevens thought the state law in *Shady Grove* was not a part of New York’s

163. *Id.*

164. Doernberg, *supra* note 127, at 1162.

165. *Shady Grove*, 559 U.S. at 416–17 (Stevens, J., concurring).

166. *Id.* at 418.

167. *Id.*

168. *Id.* at 405 n.7 (quoting *Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 427 n.7 (1996)); *see also* Thomas, *supra* note 128, at 213.

169. *Shady Grove*, 559 U.S. at 420 (Stevens, J., concurring) (“In our federalist system, Congress has not mandated that federal courts dictate to state legislatures the form that their substantive law must take.”).

170. *Id.* at 419.

171. *Id.* at 434.

172. *Id.* at 432, 434 (quoting *id.* at 443 (Ginsburg, J., dissenting)); *see also* Stempel, *supra* note 144, at 937–55 (conducting a thorough review of legislative history of the New York statute).

173. *Shady Grove*, 559 U.S. at 416–17 (Stevens, J., concurring).

174. *Id.* at 435.

substantive rights and remedies and was therefore subject to displacement by federal procedural rules in a diversity suit.¹⁷⁵

Writing for four in her dissent, Justice Ginsburg relied on the Court's precedent and accused the majority of departing "radically" from that precedent.¹⁷⁶ Seeking to interpret Rule 23 "with sensitivity to state interests,"¹⁷⁷ the dissent sidestepped the collision of federal and state procedure, finding Rule 23 "prescribes the considerations relevant to class certification . . . but it does not command that a particular remedy be available."¹⁷⁸ Justice Ginsburg read section 901(b) as a substantive limitation on damages and Rule 23 to only facilitate efficient litigation.¹⁷⁹ In Justice Ginsburg's view, Rule 23 "governs procedural aspects of class litigation, but allows state law to control" the monetary remedy.¹⁸⁰

Described by one commentator as the "most significant *Erie* opinion of the relatively young twenty-first century,"¹⁸¹ *Shady Grove* pitted the functional approach, which gives high deference to state law, against the formalist approach, which empowers the Federal Rules of Civil Procedure within the federal court system. The Scalia plurality took an "aggressive view that federal procedural rules eject contrary state procedural codes, even where they embody substantive state law or policy, so long as the federal rule is actually procedural and on point."¹⁸² Changes to the Supreme Court bench since the decision leave uncertainty as to the how the Court would rule if the issue was reargued under the current Court. One thing remains certain; namely, divisions amongst the Supreme Court Justices over *Erie* questions "leave[] litigants, lawyers, and policymakers uncertain as to precisely when their state laws will or will not displace a federal civil rule in federal court."¹⁸³ This uncertainty should be unsettling for state legislatures using procedural rules to advance substantive state policy goals.

Louisiana sits within the U.S. Fifth Circuit Court of Appeals. How the Fifth Circuit interprets and applies *Shady Grove* will determine the fate of Louisiana Code of Civil Procedure article 1563(A)(1).

175. *Id.* at 435–36.

176. *Id.* at 437 (Ginsburg, J., dissenting).

177. *Id.* at 442 (Ginsburg, J., dissenting) (citing *Gasperini*, 518 U.S. 415, 427 n.7 (1996)).

178. *Shady Grove*, 559 U.S. at 446.

179. Doernberg, *supra* note 127, at 1167 (quoting *Shady Grove*, 559 U.S. at 447 (Ginsburg, J., dissenting)).

180. *Shady Grove*, 559 U.S. at 446–47.

181. Stempel, *supra* note 144, at 908.

182. *Id.* at 910.

183. *Id.* at 911–12.

C. Shady Grove's Shadow Reaches New Orleans

Only one reported decision has come down from the U.S. Fifth Circuit Court of Appeals addressing conflicting federal and state law since *Shady Grove* was decided, *All Plaintiffs v. All Defendants*.¹⁸⁴ In *All Plaintiffs*, antitrust class action settlement checks mailed to plaintiff class members were returned or not cashed by the recipients.¹⁸⁵ The district court decided to use the unclaimed funds to impose a *cy pres*¹⁸⁶ award payable to the University of Texas.¹⁸⁷ The State of Texas intervened, asserting that under Texas unclaimed-property laws,¹⁸⁸ the state was entitled to those unclaimed funds mailed to Texas citizens.¹⁸⁹ Texas asserted that its Unclaimed Property Act was substantive state law that did not conflict with federal procedure.¹⁹⁰ The opposition argued that FRCP 23(e), which grants broad authority for approval of class action settlements, makes a district court's decision regarding disbursement of funds applicable to the plaintiff class, regardless of Texas's claim to the property.¹⁹¹

The court observed that the scope of a federal rule must be determined first.¹⁹² This threshold determination is to ascertain if the rule's scope is overly broad, as to cause a direct collision with state law, or is controlling on the issue before the court.¹⁹³ In analyzing the scope of the rule, a court must consider the "plain meaning of the Rule's language."¹⁹⁴ Where a direct collision is found, the Federal Rule must be applied "as long as that Rule is a valid exercise of Congress's rulemaking authority."¹⁹⁵ If this "initial inquiry is not determinative[.]" only then will the court "wade into the 'murky waters' of *Erie* itself."¹⁹⁶

184. *All Plaintiffs v. All Defendants*, 645 F.3d 329 (5th Cir. 2011).

185. *Id.* at 330.

186. *Id.* at 332 n.1 ("Cy pres refers to the proposition . . . that where distribution to the class who should ideally receive a fund is impracticable or inappropriate, the distribution should be made in the next best fashion in order as closely as possible to approximate the intended disposition.") (citing *Wilson v. Sw. Airlines, Inc.*, 880 F.2d 807, 811 (5th Cir. 1989) (internal quotation marks omitted)).

187. *Id.* at 330.

188. TEX. PROP. CODE ANN. §§ 72.001–74.710 (West 2012).

189. *All Plaintiffs*, 645 F.3d at 331.

190. *Id.* at 332.

191. *Id.*

192. *Id.* at 333.

193. *Id.* (quoting *Burlington N. R.R. v. Woods*, 480 U.S. 1, 4–5 (1987)).

194. *All Plaintiffs*, 645 F.3d at 333 (citing *Walker v. Armco Steel Corp.*, 446 U.S. 740, 750 n.9 (1980)).

195. *Id.* (citing *Burlington N. R.R.*, 480 U.S. at 4–5).

196. *Id.* (citing *Shady Grove*, 559 U.S. at 398).

The court first distinguished *Shady Grove* on the basis that Federal Rule of Civil Procedure 23(e) “contain[ed] no categorical rule entitling plaintiffs to *cy pres* distribution.”¹⁹⁷ Rather, it “merely empower[ed] a district court to approve a settlement.”¹⁹⁸ Too broad of a reading of Rule 23(e) would have been required to conclude that the rule “implicitly occupie[d] the field that the [Texas] Act seeks to regulate.”¹⁹⁹

The Fifth Circuit then proceeded under the traditional *Erie* analysis, turning to the “twin aims” of *Erie*.²⁰⁰ The court concluded that the portions of the Act that are “arguably procedural are plainly ‘bound up’ with ‘state-created rights and obligations.’”²⁰¹ The act grants to the state “an enforceable property right in the income from unclaimed property.”²⁰² The Fifth Circuit found the district court erred in disregarding the Unclaimed Property Act and Texas property law because both were substantive law.²⁰³

Note that the Fifth Circuit followed the framework of the Scalia plurality opinion. The state substantive goals of the Texas Unclaimed Property Law were only important where there was no federal procedural rule on point.²⁰⁴ The federal rule was not read so broadly as to control the issue,²⁰⁵ therefore, there was no direct collision, and, in such a case, the traditional *Erie* twin-aims analysis is necessary.²⁰⁶

III. THE FATE OF LOUISIANA’S ACT 754 IN FEDERAL COURT

Understanding *Shady Grove* and its application in the Fifth Circuit by way of *All Plaintiffs* is the key to understanding article 1563(A)(1)’s fate in federal court. Recall that federal courts follow federal procedure, but apply state substantive law. As discussed in the prior section, the court first determines if a federal rule controls the issue. Only if the rule fails that test will any analysis of the state rule be conducted.²⁰⁷

Louisiana Act 754 of 2012 created Louisiana Code of Civil Procedure article 1563(A)(1), which allows a party to make a limited

197. *Id.* at 333.

198. *Id.* at 334.

199. *Id.* at 335.

200. *Id.* at 336–37.

201. *Id.* at 337 (quoting *Blue Ridge Rural Elec. Coop., Inc.* 356 U.S. 525, 535 (1958)).

202. *All Plaintiffs*, 645 F.3d at 337.

203. *Id.*

204. *Id.* at 334–37.

205. *Id.* at 335.

206. *Id.* at 335–37.

207. *Id.* at 333 (citing *Walker v. Armco Steel Corp.*, 446 U.S. 740, 750 n.9 (1980)).

admission of liability for evaluating and remediating the alleged contamination.²⁰⁸ It is important to understand that this is an actual admission, but the purposes to which the admission may be used are limited by article 1563(A)(1). This limited admission allows a defendant to make an admission, while effectively conditioning the admission as only applicable to a specific remedy. Under Federal Rule 36, a party's admission of liability "establishes, conclusively, a legally operative truth."²⁰⁹ A party may partially deny or qualify an admission,²¹⁰ but once admitted, the matter is "conclusively established."²¹¹ Federal procedural rules deem admissions as including those things admitted at oral arguments or in the pleadings of the parties,²¹² which to be effective at limiting the disputed issues, must give litigants reliability that an admitted matter is not in dispute.²¹³ Parties are not free to make conditional or partial admissions.²¹⁴

A. Federal Rule 36 Collides with Louisiana Code of Civil Procedure article 1563

The initial step is to determine if the plain meaning of the federal law has a sufficiently broad scope that it directly collides with article 1563(A)(1) and controls the issue before the court.²¹⁵ The plain language of the Rule is read to determine its coverage of the particular issue²¹⁶ without reading the Rule to avoid a conflict with state law.²¹⁷

208. La. Act No. 754 (2012), available at <http://www.legis.la.gov/legis/ViewDocument.aspx?d=812233>.

209. *Dillon v. Wal-Mart Stores, Inc.*, 161 F.3d 8, at *2 (5th Cir. 1998).

210. FED. R. CIV. P. 36(a)(4).

211. FED. R. CIV. P. 36(b).

212. See, e.g., *United States v. One Heckler-Koch Rifle*, 629 F.2d 1250, 1253 (7th Cir. 1980) (considering statements made in a party's brief as an admission for ruling on a motion for summary judgment); *McKinley v. Afram Lines (USA) Co.*, 834 F. Supp. 510, 512-13 (D. Mass. 1993); see also 10A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 2722 (3d ed. 2013) ("[A]dmissions need not be pursuant to rule 36.").

213. See *American Auto. Ass'n v. AAA Legal Clinic of Jefferson Crooke, P.C.*, 930 F.2d 1117, 1119 (5th Cir. 1991).

214. See, e.g., *Matz v. Household Int'l Tax Reduction Inv. Plan*, No. 96-C-1095, 2009 WL 3242298, at *4 (N.D. Ill. Oct. 6, 2009) ("Plaintiff should expressly admit or deny the entirety of a request; it cannot offer only partial or conditional admissions or denials.").

215. See *All Plaintiffs v. All Defendants*, 645 F.3d 329, 333 (citing *Hanna v. Plumer*, 380 U.S. 460, 469-70 (1965)).

216. *Id.* at 333 (citing *Walker v. Armco Steel Corp.*, 446 U.S. 740, 750 n.9 (1980)).

217. See *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 442-43 (Ginsburg, J., dissenting); see also Glenn S. Koppel, *The Fruits of*

This plain reading reveals that Rule 36, in direct contrast to article 1563, provides that any matter admitted is “conclusively established.”²¹⁸ To be effective, admissions must give litigants the ability to rely on what is admitted.²¹⁹ Article 1563(A)(1) seeks to limit the admission of liability for environmental damage so as “not [to] be construed as an admission of liability” for environmental damage that is not specifically covered by Title 30, Section 29 of the Louisiana Revised Statutes.²²⁰ Article 1563(A)(1) speaks to the same issue as Rule 36(b) of the Federal Rules of Civil Procedure—the effect of an admission as between the parties to the litigation.

Under article 1563(A)(1), an opposing party may admit to a contested legal issue, but the article seeks to restrict that admissions effect and use. Conclusively establishing a contested issue of fact is an express feature of Rule 36. This conclusive establishment is the very core of the admissions’ legal effect. This effect permits litigants to rely on what is admitted and remove otherwise contested issues from dispute. Conditioning the admission, so that the admitted fact must still be proven by an opposing party to the litigation, necessarily means that the admitted fact has not been conclusively established. Thus, by operation of an article 1563(A)(1) admission, no legal issues are, in actuality, removed from dispute, as nothing is actually conclusively established. This lack of conclusive establishment limits the effectiveness of an admission in federal court and creates a direct collision with the plain language of Rule 36 and its purpose.

This analysis is in line with post-*Shady Grove* appellate cases, finding a direct collision between federal and state procedure. *Jones v. United Parcel Services, Inc.* found federal common law, which permitted submitting punitive damages to the jury, in direct conflict with the state law requiring the court determine the issue in a separate proceeding.²²¹ There, the collision occurred not in the plain text of Rule 38,²²² but concerned a prior Supreme Court decision that squarely held the following: “under federal common law, juries

Shady Grove: Seeing the Forest for the Trees, 44 AKRON L. REV. 999, 1002 (2011).

218. FED. R. CIV. P. 36(b).

219. See *American Auto. Ass’n v. AAA Legal Clinic of Jefferson Croke*, P.C., 930 F.2d 1117, 1119 (5th Cir. 1991).

220. La. Act No. 754 (2012), available at <http://www.legis.la.gov/legis/ViewDocument.aspx?d=812233>.

221. *Jones v. United Parcel Serv., Inc.*, 674 F.3d 1187, 1202, 1206 (10th Cir. 2012), cert. denied, 133 S. Ct. 413 (2012).

222. FED. R. CIV. P. 38(a) (“The right of trial by jury as declared by the preserved to the parties inviolate.”).

determined issues relating to punitive damages.”²²³ That a rule collision may be based on jurisprudential decisions interpreting a Federal Rule supports the conclusion that a collision exists between article 1563(A)(1) and jurisprudential rules discussed above. As prior court cases interpreting Rule 36 have broadly read this rule, a court should look to those cases to determine if Rule 36 occupies the field in such a manner to displace article 1563(A)(1).

One Louisiana district court has written a post-*Shady Grove* opinion finding that, while federal and state procedural rules may have a “commonality of purpose,” there must be evidence of a clear intention of federal exclusivity for a collision to occur.²²⁴ Secondly, where a state rule imposes an additional burden on the litigants, so long as the “burdens and standards imposed . . . directly correspond with the burdens and standards [of a Federal Rule],” no collision occurs.²²⁵

At a basic level, both article 1563’s and the Federal Rules’ mandates concerning admissions serve a common purpose: allowing parties to reduce litigation costs by eliminating undisputed facts from contention. However, article 1563’s effects are different from the effects of an admission in federal court.²²⁶ Under the federal rules on the matter, a party’s admission removes the burden from the other party of proving that which is admitted, whereas if a defendant makes an admission under article 1563, this burden remains. The admission does not conclusively establish that which is admitted, as article 1563 makes the admission conditional. Louisiana’s Code of Civil Procedure thus imposes a burden not imposed under the Federal Rules of Civil Procedure; namely, a party must prove that which was previously admitted by an opposing party. Where the state procedural rule imposes burden on the litigants, that burden must “directly correspond” with the federal burden.²²⁷ Here, the burdens imposed by Louisiana Code of Civil Procedure article 1563 do not correspond in this manner, and state procedure collides with the federal.

A prior district court opinion found no collision between Federal Rule 56 and Louisiana Code of Civil Procedure article 971, which stayed discovery until the plaintiff showed a probability of success on

223. *Jones*, 674 F.3d at 1202 (citing *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 16 (1991)).

224. *La. Crisis Assistance Ctr. v. Marzano-Lesnevich*, 827 F. Supp. 2d 668, 676 (E.D. La. 2011) (“The Court finds no evidence that these rules were intended to apply so broadly that they control the issue.”).

225. *Id.* at 679.

226. *See supra* notes 108–113 and accompanying text.

227. *La. Crisis Assistance Ctr.*, 827 F. Supp. 2d at 679.

his claims.²²⁸ The court found no direct collision, as “Rule 56 summary judgment remains available to the parties and [the Louisiana special motion to strike] permits the court to order specified discovery where necessary,” similar to that allowed by Federal Rule 56.²²⁹ In contrast, article 1563(A)(1)²³⁰ does not give the judiciary discretion to find that the limited admission is conclusively established.

Article 1563(A)(1) seeks to limit the admission—or attach strings to it—in ways not allowed by the Federal Rules. The two may not coexist; this collision supports a finding of direct conflict.²³¹ Also, recall that the majority opinion in *Shady Grove* found the lack of limitations on Rule 23 relevant and “resisted what it saw as New York’s attempt to add an additional limitation to the Rule.”²³² The fact that article 1563(A)(1) seeks to attach a limitation on an admission cuts against the plain language of Rule 36 and its purpose. The Louisiana limited admission is not “a supplemental and substantive rule to provide added protections” to the defendant,²³³ rather, it is an attempt to directly speak to the purpose and effect of a party’s admission, a field already occupied by federal procedural law in federal court.

The federal court cannot apply the state limited admission procedure while at the same time giving admissions a conclusive effect, as the conclusiveness of an admission is not a discretionary decision.²³⁴ Though the admission may not support that party’s alternate theories of recovery or affirmative defenses, a court must consider any admission as conclusively established.²³⁵ Further, even if the admission may prevent the defendant from admitting evidence

228. LA. CODE CIV. PROC. ANN. art. 971 (2013); *Armington v. Fink*, No. 09–6785, 2010 WL 743524, at *3 n.2 (E.D. La. Feb. 24, 2010) (citing *Henry v. Lake Charles Am. Press, L.L.C.*, 566 F.3d 164, 168–69 (5th Cir. 2009)).

229. *Armington*, 2010 WL 743524, at *3 n.2.

230. La. Act 754 (2012), available at <http://www.legis.la.gov/legis/ViewDocument.aspx?d=812233>.

231. *Nuveen Mun. Trust ex rel. Nuveen High Yield Mun. Bond Fund v. Withumsmith Brown, P.C.*, 692 F.3d 283, 302–04 (3d Cir. 2012) (holding a state affidavit of merit filing requirement was able to coexist with federal filing requirements, as the affidavit could be filed up to thirty days after the complaint, thus it did not require an additional filing requirement above federal procedural rules).

232. Doernberg, *supra* note 127, at 1169.

233. *Godin v. Schencks*, 629 F.3d 79, 88 (1st Cir. 2010).

234. *See Burke v. Air Serv. Int’l, Inc.*, 685 F.3d 1102 (D.C. Cir. 2012) (holding there is no direct conflict where a Federal Rule permits expert testimony and a district rule required expert testimony, as this discretion meant the Federal Rule did not control the issue; therefore, the district rule requiring expert witness testimony would apply).

235. *Armour v. Knowles*, 512 F.3d 147, 153–154 (5th Cir. 2007).

that contradicts the admission of liability for environmental damages, the court must still consider the admission conclusively established.²³⁶

In direct contrast, article 1563(A)(1) permits a party to make a limited admission while not waiving any defenses.²³⁷ Given this contrast, the two procedural rules directly collide and cannot coexist within the same civil action. Secondly, where the federal rule makes no limitation, a collision arises where the state rule is read to place a limitation on the federal rule. Where two rules collide, the next determination is if the rule is valid under the Enabling Act.²³⁸

B. Is Federal Rule of Civil Procedure 36 Valid Under the Rules Enabling Act?

Where a direct collision is found, the Federal Rule is applied “as long as that Rule is a valid exercise of Congress’s rulemaking authority.”²³⁹ The rule must “really regulate procedure, —the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them.”²⁴⁰ It is worth noting that the Supreme Court gives a presumption of validity to the Federal Rules of Civil Procedure, and no rule has yet to be invalidated.²⁴¹

Giving an admission a conclusive effect and disallowing the limited admission may have “some practical effect on the parties’ rights,” but such a position “undeniably regulate[s] only the process for enforcing those rights.”²⁴² To Justice Stevens, the question is what the rule itself regulates; in the case of Rule 36, the rule regulates the conclusive effect of an admission and leaves the plaintiff’s entitlement to relief unaltered.²⁴³ The limited admission neither

236. See *Keller v. United States*, 58 F.3d 1194, 1198 n.8 (7th Cir. 1995); *American Auto. Ass’n Inc. v. AAA Legal Clinic of Jefferson Crooke, P.C.*, 930 F.2d 1117, 1120 (5th Cir. 1991); *Hinesville Bank v. Pony Express Courier Corp.*, 868 F.2d 1532, 1538 (11th Cir. 1989) (Johnson, J., concurring) (citing 999 v. C.I.T. Corp., 776 F.2d 866, 869–70 (9th Cir. 1985)).

237. La. Act 754 (2012), available at <http://www.legis.la.gov/legis/ViewDocument.aspx?d=812233>.

238. 28 U.S.C. § 2072 (2006).

239. *All Plaintiffs v. All Defendants*, 645 F.3d 329, 333 (5th Cir. 2011).

240. *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 407 (quoting *Sibbach v. Wilson & Co.*, 312 U.S. 1, 14 (1941)).

241. *Id.* at 407 (“[W]e have rejected every statutory challenge to a Federal Rule that has come before us.”); *Ides*, *supra* note 122, at 57; see also *Hanna v. Plumer*, 380 U.S. 460, 471 (1965).

242. *Shady Grove*, 559 U.S. at 407.

243. See *id.* at 407–08 (“What matters is what the rule itself regulates: If it governs only ‘the manner and the means’ by which the litigants’ rights are ‘enforced,’ it is valid.”).

provides an additional defense to the defendant, nor shifts the burden of proof—both of which would constitute a potential “substantive aspect[.]”²⁴⁴

We might consider how scholars approach the issue. Professor Carrington proposes that a rule is functionally procedural if the rule pertains to federal court operation and is part of a system generally applicable to all civil actions.²⁴⁵ A procedural rule is one “designed to achieve ‘just, speedy, and inexpensive’ determinations.”²⁴⁶ The conclusive effect of an admission is precisely what Professor Carrington’s test defines as procedural. This effect is integrated into the federal system, and generally applicable to all civil actions. The conclusive effect removes undisputed issues and provides reliability to the parties, expediting the civil dispute and reducing costs for everyone involved.

In addition to Professor Carrington’s proposal, we might consider Professor Doernberg’s approach. Doernberg advocates an “elements approach,” where a court first asks “whether the state law and Federal Rule at issue tend to establish or negate an element of the claimant’s cause of action or a defense on the merits.”²⁴⁷ If the state law does not, then the court must ask if the federal rule does.²⁴⁸ If the federal law does, “it trenches upon [the Enabling Act’s] forbidden territory; otherwise it is ‘procedural’ for [the Enabling Act’s] purposes and can apply.”²⁴⁹ Applying Professor Doernberg’s approach, article 1563(A)(1) does not prove or negate an element of the cause of action; it only seeks to restrict the purpose to which an admission of the defendant can be used by the plaintiff in establishing an element of his cause of action. On the federal side, the conclusive nature and unrestricted use of an admission by the opposing party does not establish or negate an element of a cause of action, nor does it establish or negate defense on the merits. Using Professor Doernberg’s elements approach, it is clear that Federal Rule 36 “is ‘procedural’ for [Enabling Act] purposes and can apply.”²⁵⁰

Justice Stevens advocated that one cannot determine if a federal rule “impermissibly affects a substantive right without looking to the source of the supposed right and considering whether the right-creating sovereign sought to address substantive goals.”²⁵¹ The

244. See, e.g., *Godin v. Schencks*, 629 F.3d 79, 89 (1st Cir. 2010).

245. Paul D. Carrington, “*Substance*” and “*Procedure*” in the Rules Enabling Act, 1989 DUKE L.J. 281, 308 (1989).

246. *Id.*

247. Doernberg, *supra* note 126, at 1185.

248. *Id.*

249. *Id.*

250. *Id.*

251. *Id.* at 1173.

purpose of the rule must be known, and “only the sovereign establishing the rule can define that.”²⁵² In the case of Louisiana’s legacy litigation reform, the sovereign has established the rule’s purpose: it is known from a decision in the highest court of the sovereign.²⁵³ The purpose is also directly established by the sovereign itself in legislation.²⁵⁴ While Justice Stevens no longer sits on the Supreme Court, some courts have read his concurrence as controlling.²⁵⁵ However, *All Plaintiffs* was decided by a Fifth Circuit panel that followed the framework of the *Shady Grove* plurality. District courts within the Fifth Circuit may be forced to follow this framework until overruled by an *en banc* decision or faced with binding Supreme Court precedent.²⁵⁶

The conclusive effect of an admission is grounded in federal procedural law. The rule allows for cost effective litigation; parties may focus on litigating the disputed issues. The pertinent Federal Rules of Civil Procedure regulate only the procedure for enforcing rights, and confer no substantive rights. Here, the conclusiveness of an admission is within the scope of the Enabling Act, and thus Federal Rule 36 is valid in all federal courts regardless of whether it conflicts with state law to the contrary. Federal courts should not follow article 1563(A)(1).

CONCLUSION

In her recent article, Professor Margaret S. Thomas advocates a restrained reading of the Federal Rules.²⁵⁷ Where a state procedural rule actually regulates areas traditionally within the states’ police powers, Professor Thomas cautions that “any targeted calibration of tort liability using procedural mechanisms, may be swept aside by a Federal Rule to the contrary.”²⁵⁸ As one commentator perfectly

252. *Id.* at 1174.

253. *See* *M.J. Farms, Ltd. v. Exxon Mobil Corp.*, 998 So. 2d 16, 35 (La. 2008).

254. LA. REV. STAT. ANN. §30:29(A) (2013) (“It is the duty of the legislature to set forth procedures [T]his section provides the procedure for judicial resolution of claims for environmental damage to property.”).

255. *Marks v. United States*, 430 U.S. 188, 193 (1977) (holding that, where there is no majority opinion, the holding may be viewed as the position taken by concurring opinions on the narrowest grounds); *see, e.g.*, *Estate of C.A. v. Grier*, 752 F. Supp. 2d 763, 767 (S.D. Tex. 2010).

256. *See* *Jimenez v. Wood Cnty., Tex.*, 621 F.3d 372, 376 (5th Cir. 2010) (“A panel of this court can only overrule a prior panel decision if ‘such overruling is unequivocally directed by controlling Supreme Court precedent.’”) (quoting *Martin v. Medtronic, Inc.*, 254 F.3d 573, 577 (5th Cir. 2001) (quoting *United States v. Zuniga-Salinas*, 945 F.2d 1302, 1306 (5th Cir. 1991))).

257. Thomas, *supra* note 128, at 245–51.

258. *Id.* at 259.

surmised, “*Shady Grove* provides a stark example of what can happen when [state legislatures try] to reach a substantive outcome—decreased liability for defendant businesses—by tinkering with procedural mechanisms”²⁵⁹ Ultimately, when a state rule collides with a federal rule, *Shady Grove* renders procedural based tort reform ineffectual in federal court.

This procedural tinkering by the Louisiana Legislature to address legacy litigation reform will fare the same as the substantive policy choice of New York in *Shady Grove*. It will fail in federal court. In this post-*Shady Grove* landscape, the Federal Rules’ supremacy over conflicting state procedure is unaffected by the state substantive policy goals underlying the rule. Louisiana, and all other states, should take great care in modifying state procedural rules to advance state substantive policy.

Given the steps taken by Louisiana oil and gas producers in response to *Corbello*,²⁶⁰ perhaps the “legacy” of *Corbello* is up for debate. Louisiana policy makers must decide whether *Corbello*’s story will be one of industry accountability and the sanctity of freedom of contract between producers and landowners, or the tale of an opportunistic and extortionist plaintiff’s bar. While the impact and ultimate story of *Corbello* continues to take shape, it is clear that—for the near future—state-level tort reform measures should modify state substantive law and avoid procedural modifications. A change to substantive law may be more difficult: it would involve more political capital and might result in a more heavy-handed solution. However, tort reform based on substantive law would survive a trip to federal court.

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259. Mark P. Gaber, *Maintaining Uniform Federal Rules: Why the Shady Grove Plurality Was Right*, 44 AKRON L. REV. 979, 997 (2011).

260. See *supra* text accompanying notes 56–60.

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