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A “Litigious State and a Judicial Hellhole”: A Legacy Louisiana Should be Proud Of?

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A “Litigious State and a Judicial Hellhole”: A Legacy Louisiana Should be Proud of?

TABLE OF CONTENTS

Introduction	559
I. Background	563
A. <i>Corbello v. Iowa Production</i>	564
II. The Development Phases of Act 312	566
A. The Initial Response: The “ <i>Corbello Bill</i> ”	567
B. A Second Attempt: Act 312 of 2006	567
1. Applying Act 312: Discovering the Shortcomings.....	570
C. Back to the Development Phases: Amending Act 312.....	572
1. Act 779.....	572
2. Act 754.....	573
III. <i>Britt v. Riceland Petroleum Company</i>	574
IV. Statutory Interpretation of Act 312: A Search for the Legislature’s Intent	578
A. A Determination of Remediation is Mandatory, Otherwise Act 312 Does Not Apply	579
B. If Remediation is Necessary, the Deposit of Funds is Mandatory	581
C. The Purpose Behind a Contradictory Hearing.....	582
D. The DNR’s Responsibility Remains the Same, Even in Settlement Agreements.....	583
V. The Solution: Stick to the Plan.....	585
Conclusion.....	586

INTRODUCTION

When describing things that do not mix well with one another, people often analogize to “oil and vinegar.”¹ However, the problem with this

analogy is that oil and vinegar can in fact mix with each other, even if only temporarily.² To truly refer to things that are unable or unwilling to mix together easily or readily, a person should say those things are “like oil and water”³—a reality that Louisiana oil and gas companies know all too well to be true.

In September 2018, the United States became the world’s largest producer of crude oil for the first time since 1973.⁴ With the expectation that U.S. crude oil production will continue to exceed that of Russia and Saudi Arabia throughout 2019,⁵ this was not only a great achievement, but also a “historic milestone” for the U.S. oil industry.⁶ While the nation enjoys the benefits of this recent increase, the same cannot be said of the oil industry in Louisiana. Despite producing almost 1.6 million barrels a day, and accounting for a little less than one-tenth of the nation’s natural gas production as recently as October 2017,⁷ Gifford Briggs, President of

1. Rebecca L. Miller, *Oil and Vinegar, Not Oil and Water*, REWRITE, REWORD, REWORK (Apr. 14, 2002, 12:43 PM), <https://rewriterewordrework.wordpress.com/2012/04/14/oil-and-vinegar-not-oil-and-water/> [<https://perma.cc/3TDJ-5Y35>].

2. *Id.*

3. *Be Like Oil and Water*, FARLAX DICTIONARY OF IDIOMS, <https://idioms.thefreedictionary.com/be+like+oil+and+water> [<https://perma.cc/3RVF-RGAF>] (last visited Sept. 22, 2019).

4. Matt Egan, *America is Now the World’s Largest Oil Producer*, CNN BUS., (Sept. 12, 2018, 3:02 PM), <https://money.cnn.com/2018/09/12/investing/us-oil-production-russia-saudi-arabia/index.html> [<https://perma.cc/8SZR-Q5V4>]; Short-Term Energy Outlook, *The United States is Now the Largest Global Crude Oil Producer*, U.S. ENERGY INFO. ADMIN. (Sept. 12, 2018), <https://www.eia.gov/todayinenergy/detail.php?id=37053&src=email> [<https://perma.cc/MTH2-BKXV>] (in February 2018, U.S. crude oil production exceeded that of Saudi Arabia for the first time in two decades according to preliminary estimates from the U.S. Energy Information Administration. Months later, the U.S. crude oil production also surpassed Russia for the first time since early 1999).

5. *Oil Producing Countries Population*, WORLD POPULATION REV., <http://worldpopulationreview.com/countries/oil-producing-countries/> [<https://perma.cc/T45S-4EVV?type=image>] (last visited Oct. 8, 2019) (as of October 2019 when this Comment was submitted for publication, the United States remained the top producer in crude oil).

6. *Id.* (quoting Bob McNally, president of Rapidan Energy Group, a consulting firm).

7. LOREN C. SCOTT, GROW LA. COAL., THE ENERGY SECTOR: STILL A GIANT ECONOMIC ENGINE FOR THE LOUISIANA ECONOMY—AN UPDATE 2–3 (2018) (at the time, production of 1.6 billion barrels daily represented 16.7% of the nation’s crude oil production).

the Louisiana Oil and Gas Association, describes the current state of Louisiana's oil industry in one word: "stagnant."⁸

Once home to hundreds of offshore rigs, there were only 15 offshore rigs and merely 8 land rigs in south Louisiana as of late 2018—a sharp contrast to the 30 land rigs that the state maintained even during the 1980s oil bust.⁹ What is the reasoning behind this decline in Louisiana's drilling activity which continues to push producers into Texas and Mississippi? Perhaps it is the same reason why, as of 2019, Louisiana ranks fifth on the American Tort Reform's annual list of Judicial Hellholes: the almost 500 coastal and legacy lawsuits currently filed against the oil and gas industry.¹⁰ It may also be the reason why Louisiana has become known as a "litigious state and a judicious hellhole" among both industry participants and the legal profession.¹¹

Referring to the "unwanted legacy" that oil and gas operations leave behind in the form of actual or alleged contamination, the trend of plaintiff-landowners filing lawsuits against oil and gas operators alleging environmental damage is appropriately known as "legacy litigation."¹² In Louisiana, legacy litigation may occur at both state and federal levels.¹³ Over the last decade, enormous costs of restoring these former waste sites have "pitted oil companies, landowners, lawyers, and the state against each

8. Greg Hilburn, *It's a Gusher: US Takes Global Oil Lead, but La. Lags*, MONROE NEWS STAR, <https://www.thenewsstar.com/story/news/2018/09/13/its-gusher-u-s-takes-global-oil-lead-but-la-lags/1288764002/> [<https://perma.cc/J2SS-CPER>] (last updated Sept. 13, 2018).

9. *Id.*

10. *Judicial Hellholes*, AM. TORT REFORM FOUND., <https://www.judicialhellholes.org/2018-2019/louisiana/> [<https://perma.cc/RGW9-ESBX>] (last visited Oct. 2, 2019) (the American Tort Reform Foundation is a nonprofit corporation whose primary purpose is to educate the general public about how the civil justice system operates, what role tort law plays in the civil justice system, and the impact tort law has on the public and private sectors. When determining what states, counties, or even courts should be listed as a Judicial Hellhole, the foundation identifies places where judges in civil case systematically apply laws and court procedures in an unfair and unbalanced manner, and typically to the disadvantage of defendants).

11. Kaki J. Johnson, Comment, *The Migration from the Rig to the Courthouse: Oil and Gas Legacy Litigation in Louisiana*, 60 LOY. L. REV. 647, 674 (2014).

12. Loulan Pitre, Jr., "Legacy Litigation" and Act 312 of 2006, 20 TUL. ENVTL. L.J. 347, 348 (2007).

13. Johnson, *supra* note 11 (survey taken in 2012 indicated that more than one out of every two barrels of crude pumped from Louisiana's oil fields were produced by a lawsuit defendant company).

other, turning Louisiana's oil and gas fields into a legal battleground."¹⁴ While the majority of these claims end in settlement agreements, those which are litigated often result in either "dramatic verdicts for the plaintiffs" or "distinct victories" for the defense.¹⁵

Historically, legacy litigation had relatively low stakes and garnered little attention from the judiciary prior to the Louisiana Supreme Court's 2003 decision in *Corbello v. Iowa Production*.¹⁶ In 2006, the Louisiana Legislature enacted Act 312 in response to the public perception that *Corbello* allowed landowners to sue for damages significantly in excess of a land's value with no obligation to spend any of the damage award on remediation.¹⁷ Act 312 establishes a procedure for claims alleging environmental damage caused by previous oil and gas operations to ensure that contaminated land is restored back to a standard consistent with the health, safety, and welfare of the people.¹⁸ Act 312 removes any remediation awards from the hands of plaintiff-landowners by requiring the deposit of these funds directly into the registry of the court.¹⁹ The court receiving these funds bears the responsibility of ensuring that they are expended in a manner consistent with the adopted remediation plan,²⁰ retaining jurisdiction over the funds until all remediation efforts are complete.²¹

14. Jason P. Theriot, *Oilfield Background: Louisiana's Legacy Lawsuits in Historical Perspective*, 57 LA. HIST.: J. LA. HIST. ASS'N 403, 460 (2016).

15. Loulan Pitre, Jr. & D'Ann R. Penner, *Legacy Litigation—What Is Reasonable Behavior in the Oilfield*, 28 TUL. ENVTL. L.J. 333, 334 (2015); *See generally*: *Corbello v. Iowa Prod.*, 850 So. 2d 686 (La. 2003) (awarding \$33 million to plaintiff-landowners); *Dore Energy v. Carter Langham* 901 So. 2d 1238 (La. Ct. App. 3d Cir. 2005) (awarding \$57 million to plaintiff-landowners); *Marin v. Exxon Mobil Corp.*, 48 So. 3d 234 (La. 2010) (awarding over \$21 million for remediation); *Savoie v. Richard*, 137 So. 3d 78 (La. Ct. App. 3d Cir. 2014) (awarding \$18 million for remediation); *but see also*: *Meaux v. Hilcorp Energy Co.*, 26 So. 3d 875 (La. Ct. App. 3d Cir. 2009) (denying \$25 million for remediation and awarding zero recovery to plaintiff-landowners); *Houssiere v. Asco USA*, 108 So. 3d 797 (La. Ct. App. 3d Cir. 2013) (denying plaintiff request for specific performance of the contract to have BP remediate any environmental damage to the property).

16. Johnson, *supra* note 11, at 650; *Corbello v. Iowa Prod.*, 850 So. 2d 686 (La. 2003).

17. Act No. 312, 2006 La. Acts 2006 (codified at LA. REV. STAT. § 30:29); Pitre, Jr., *supra* note 12; Johnson, *supra* note 11, at 658.

18. Act No. 312, 2006 La. Acts 2006 (codified at LA. REV. STAT. § 30:29).

19. LA. REV. STAT. § 30:29(D)(1) (2006).

20. LA. REV. STAT. § 30:29(D)(3) (2006).

21. LA. REV. STAT. § 30:29(D)(4) (2006).

With the passage of Act 312 came various procedural and legal issues, such as challenges to the statute's constitutionality,²² the scope of remediation,²³ and the rights of subsequent purchasers.²⁴ To better help Act 312 achieve its goal of prohibiting plaintiff-landowners from claiming excessive damages and in an effort to maintain the court's active role in remediation efforts, in 2012 the legislature amended Act 312 in hopes of clarifying any ambiguities.²⁵ Unfortunately, the legislature's intentions, efforts, and attention to detail may now prove to be largely useless in light of the first appellate court decision to address settlement agreements in cases governed by Act 312, decided by the Louisiana Third Circuit Court of Appeal in May 2018.²⁶

Part I of this Comment will discuss the evolution of legacy litigation in Louisiana by examining the landmark cases which form the framework of legacy litigation. Part II will discuss the legislature's response to legacy litigation, particularly Act 1166 of 2003, Act 312 of 2006, and the 2012 amendments to Act 312. Part III will discuss the Third Circuit's most recent decision regarding settlement agreements in legacy lawsuits governed by Act 312.²⁷ Using the methods of statutory interpretation, Part IV will discuss the legislative intent behind Act 312. Part V will provide reasoning why the procedural requirements of Act 312 should apply to settlement agreements.

I. BACKGROUND

After drilling the first production well into Louisiana's Evangeline field in 1901,²⁸ the oil and gas industry quickly became the state's main economic enterprise by the middle of the twentieth-century.²⁹ Over a century later, two things remain undeniable: (1) the oil and gas sector's

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

23. *Terrebonne Par. Sch. Bd. v. Castex Energy, Inc.*, 893 So. 2d 789 (La. 2005).

24. *Eagle Pipe & Supply, Inc. v. Amerada Hess Corp.*, 79 So. 3d 246 (La. 2011).

25. Act No. 779, 2012 La. Acts 2012 (codified as amended at LA. REV. STAT. § 30:29).

26. *Britt v. Riceland Petroleum Co.*, 240 So. 3d 986 (La. Ct. App. 3d Cir. 2018).

27. *Id.*

28. Dianne Lindstedt et al., *History of Oil and Gas Development in Coastal Louisiana*, LA. GEOLOGICAL SURV. 7 (1991); Ryan J. Romero, *Peeling the Onion: Legacy Lawsuit Litigation and Act 779 of 2012*, 41 S.U.L. REV. 105 (2013) (Louisiana's first petroleum processing refinery began in 1909; first production well over water was completed in 1910).

29. Theriot, *supra* note 14, at 403.

vital role in shaping Louisiana's economy and way of life,³⁰ and (2) the significant problems that oilfield waste disposal continues to pose.³¹

Produced water is the primary byproduct of oil production, resulting from water being trapped above, below, or within petroleum-containing rock.³² Produced water usually contains a combination of harmful compounds, toxic organics, and radionucleotides.³³ Historically, companies dug unlined, in-ground impoundments called "pits" to house the large volumes of oilfield waste until it could be either re-injected into subsurface wells, stored for evaporation, or flushed into various waterways during winter floods.³⁴ Prior to the enactment of Louisiana's first set of comprehensive environmental regulations for oil and gas production in 1986, this storage method served as the most efficient and economical way to handle these waste byproducts, remaining customary practice for much of the last century.³⁵ Unfortunately, over time, these "pits" inevitably result in seepage, contaminating both surrounding surface and subsurface soils and waters.³⁶ Often very expensive to remediate, the discovery of this contamination frequently prompts plaintiff-landowners to file environmental lawsuits seeking large sums in monetary damages and cleanup costs from oil and gas companies for pollution that typically began decades ago.³⁷

A. Corbello v. Iowa Production

In the realm of legacy litigation, the Louisiana Supreme Court's landmark ruling in *Corbello v. Iowa Production* marked the beginning of a "new era" of litigation that transformed Louisiana's oil and gas fields into a "legal, political, and environmental battleground."³⁸ In *Corbello*, the jury awarded the plaintiff-landowner \$33 million to remediate land valued at \$108,000.³⁹ This award was based on the jury finding that the defendant-lessee violated the surface lease on a 320-acre tract of land, trespassed after

30. *Id.*

31. Romero, *supra* note 28.

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.* (in 1986, Louisiana passed a comprehensive set of rules governing the disposal of oilfield waste with Amendments to Statewide Order No. 29-B).

36. *Id.*

37. *Id.*

38. Theriot, *supra* note 14, at 406.

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

the lease expired, and polluted the plaintiff-landowners property without making any effort to clean it up.⁴⁰

Since the legislature had not yet mandated remediation or restoration, the main question on appeal was whether the court had the authority to modify a breach of contract damage award when the private landowner had no duty to actually use the money to clean or restore the land.⁴¹ When weighing the opposing public policy concerns in its analysis, the court considered arguments from both sides, such as: (1) the defendant's assertion that unclean land might cause further injury to the public in the event that the landowners did not use the damage award for remediation, and (2) the plaintiff's claim that if landowners cannot sue for cleanup costs, only understaffed and underfunded state agencies would be able to oppose the oil companies, wherein there existed a strong possibility that the land would remain polluted.⁴² Convinced that the defendant would not clean the property unless and until forced to do so by a state agency, the court affirmed the \$33 million award.⁴³

For future environmental damage claims, the ruling in *Corbello* had two significant implications: (1) damages need not be "tethered" to the value of the property in a claim for breach of a contractual obligation to restore property, and (2) under the then-existing law, a landowner collecting such damages was not required to remediate the property on which the claim was based.⁴⁴ *Corbello* not only opened the "broader public's eyes to the industry's environmental footprint" but also "established a template for pursuing litigation" against oil and gas companies.⁴⁵ In effect, *Corbello* gave rise to the public perception that lands containing oilfield waste pits and pollution had greater monetary value than lands without,⁴⁶ making owning a contaminated property the equivalent of a winning lottery ticket.⁴⁷ With no specific regulatory or legal framework to oversee and ensure that environmental damage was remediated, *Corbello* highlighted a gap in the law: the ability of a plaintiff-landowner to seek millions of dollars for environmental damage arising

40. *Id.*

41. *Id.* at 699.

42. *Id.* at 701.

43. *Id.* (the court focused on evidence that the defendant chose to continue its negligent operations on the plaintiff's property for over seventy years without asserting any cleanup efforts, even after such cleanup was recommended by the defendant's own experts).

44. Pitre, Jr., *supra* note 12.

45. Theriot, *supra* note 14, at 459.

46. *Id.* at 455–56.

47. Romero, *supra* note 28, at 120.

from previous drilling activities without being subject to any obligation to actually remediate the polluted property.⁴⁸

II. THE DEVELOPMENT PHASES OF ACT 312

Prior to the enactment of the Louisiana Mineral Code in 1974,⁴⁹ plaintiff-landowners could bring claims for environmental damage originating from oil exploration and production activities under Louisiana Civil Code articles 2719 and 2720.⁵⁰ At its core, the Mineral Code focuses on creating mutual economic benefits for both producers and landowners.⁵¹ Even though the Mineral Code provided limited guidance for environmental contamination claims prior to 2003, this guidance was not nearly enough to address the “onslaught of legacy cases” filed in the wake of *Corbello*.⁵² In response to the dramatic increase of litigation by landowners seeking compensation for environmental damage to their property, particularly in relation to oil and gas exploration and production sites, the legislature acted quickly in hopes of stopping *Corbello*’s potential domino effect by providing some oversight and cost containment for these remediation efforts.

48. R. Gary Higgins, Jr., *Deep-Pocketed or Duty-Bound Defendant: The Evolution of “Legacy Lawsuits” in Louisiana and the Impact of Acts 779 and 754*, 41 S.U. L. REV. 133, 135 (2013); see also Romero, *supra* note 28, at 120.

49. Act No. 50, 1974 La. Acts Vol. III (codified as LA. REV. STAT. §§ 31:1–31:214 (1974)); see also Romero, *supra* note 28, at 110 (the Mineral Code was enacted during the regular legislative session of 1974, becoming effective on January 1, 1975).

50. At the time, Louisiana Civil Code article 2719 read:

Return of things leased under inventory. If an inventory has been made of the premises in which the situation, at the time of the lease, has been stated, it shall be the duty of the lessee to deliver back everything in the same state in which it was taken by him, making, however, the necessary allowance for wear and tear and for avoidable accidents.

Romero, *supra* note 28, at 108–09. At the time, Louisiana Civil Code article 2720 read: “Return of things leased without inventory. If no inventory has been made, the lessee is presumed to have received the thing in good order, and he must return it in the same state, with the exception contained in the preceding article.” *Id.*

51. *Id.*

52. Theriot, *supra* note 14, at 459.

A. The Initial Response: The “Corbello Bill”

Act 1166 of 2003, often referred to as the “*Corbello bill*,” is the first legislative attempt to address the negative impacts of *Corbello*.⁵³ Specifically, Act 1166 gives the Department of Natural Resources (DNR) the authority to intervene in oilfield pollution cases where plaintiffs allege contamination of usable groundwater as a result of past oilfield activities.⁵⁴ With its scope limited to claims of groundwater contamination, Act 1166 only creates another gap in the law: the ability for “imaginative plaintiffs” to avoid involving the state in their private matters by constructing their pleadings in a way that alleges only soil damage, not usable groundwater contamination.⁵⁵ In doing so, plaintiffs receiving a judicial demand to recover for environmental damage can bypass certain procedural requirements, rendering Act 1166 worthless.⁵⁶

B. A Second Attempt: Act 312 of 2006

Enacted by the Louisiana Legislature during the 2006 Regular Session, Act 312⁵⁷ establishes the procedural framework for environmental damage claims made by plaintiff-landowners who allege environmental

53. Act No. 1166, 2003 La. Acts 3511 (codified as LA. REV. STAT. § 30.2015.1 (2006)) (specifically, Act 1166: (1) requires certain notifications to be sent to the Louisiana Department of Natural Resources (LDNR) and the Louisiana Department of Environmental Quality (LDEQ) in the event that any judicial demand to recover damages for alleged contamination to usable groundwater was rendered; (2) provides the LDNR and the LDEQ a right of action to intervene in such a judicial proceeding; (3) requires the submission of a plan for the evaluation of remediation to the LDNR and LDEQ for review and approval; (4) prohibits a court from adopting a remediation plan without first consulting the LDNR or LDEQ; and (5) requires that the funds awarded for groundwater contamination be placed in the registry of the court to ensure completion of the remediation plan).

54. Theriot, *supra* note 14, at 456.

55. PATRICK OTTINGER, LOUISIANA MINERAL LEASES: A TREATISE, § 4-26 at 571 (Claitor’s Law Books & Publ’g Div., Inc., 2016); THOMAS SHACHTMANN, TO DO THE RIGHT THING: AN EPIC COURTROOM BATTLE AGAINST BIG OIL OVER THE RESTORATION OF A GULF COAST MARSH 101 (Cameron Meadows Pres. Tr., 2010).

56. Pitre, Jr., *supra* note 12, at 348, 350.

57. Signed by Governor Kathleen Blanco, Act 312 amends the Conservation Act and enacts § 30.29, 29.1, and 2015.1(L) to require environmental assessments and cleanups of allegedly contaminated oilfield sites.

contamination from previous oil and gas operations.⁵⁸ Within the first few lines of Act 312, the legislature declares that pursuant to Article IX, Section 1 of the Louisiana Constitution, “the natural resources and the environment of the state, including groundwater, are to be protected, conserved, and replenished insofar as possible and consistent with the health, safety, and welfare of the people.”⁵⁹ Furthermore, Act 312 recognizes that it is the “duty of the legislature to set forth procedures to ensure that damage to the environment is remediated to a standard that protects the public interest”⁶⁰ and “further mandates that the legislature enact laws to implement this policy.”⁶¹

At its core, Act 312 sets forth a process by which the state, through the Louisiana Department of Natural Resources (DNR), maintains direct involvement in environmental remediation actions.⁶² Applicable “immediately upon the filing or amendment of any litigation or pleading making a judicial demand arising from or alleging environmental damage,”⁶³ Act 312 facilitates environmental remediation of oilfield sites to state standards by following a site-specific, defendant-funded, court-approved, and court-supervised remediation plan⁶⁴ when a court finds a party liable for cleanup.⁶⁵

Act 312 specifically mandates the state’s involvement in the environmental remediation process if a party admits liability or is found to be legally responsible by the court at any point during the proceedings.⁶⁶ When this occurs, the liable party must develop a remediation plan and

58. Act No. 312, 2006 La. Acts 1472 (“Act No. 312 of 2006”) (specifically, Act 312: (1) applies to all litigation claiming environmental damages arising from oilfield operations, not just those alleging usable groundwater contamination; (2) requires timely notice of any such litigation to be given to the State; (3) allows the State to intervene in such litigation by providing a role for the Office of Conservation within the LDNR to determine the most feasible plan for evaluation and/or remediation of the environmental damage, in addition to overseeing the actual implementation of the plan it determines to be most feasible; and (4) allows the landowner and the State to recover expert fees, attorney fees, and costs from the responsible party or parties); Pitre, Jr., *supra* note 12, at 351.

59. LA. REV. STAT. § 30.29(A) (2006).

60. *Id.*

61. *Id.*

62. Romero, *supra* note 28, at 107.

63. LA. REV. STAT. § 30.29(A) (as defined in § 30.29(I)(2), “environmental damage” shall mean “any actual or potential impact, damage, or injury to environmental media caused by contamination resulting from activities associated with oilfield sites or exploration and production sites. Environmental media shall include but not be limited to soil, surface water, groundwater, or sediment.”).

64. *Marin v. Exxon Mobil Corp.*, 48 So. 3d 234 (La. 2010).

65. Pitre, Jr., *supra* note 12, at 358.

66. LA. REV. STAT. § 30:29(C)(1) (2006).

submit it to the DNR for review.⁶⁷ Upon submission, the DNR, plaintiff, and any other party with a vested interest is allowed a minimum of 30 days to review the plan and either provide their own plan or comment in response.⁶⁸ After a public hearing on the submitted plan(s) and any responses thereto, the DNR shall approve the plan it determines to be the “most feasible.”⁶⁹ The court shall then adopt the DNR’s approved plan, merging it with the final judgment.⁷⁰ After a plan is agreed on, Act 312 requires that any funds awarded for purposes of evaluation and remediation be deposited exclusively into the registry of the court rather than given to the plaintiffs.⁷¹ While the court retains jurisdiction over these funds through completion of the remediation plan,⁷² both the court and the DNR retain oversight of the defendant’s cleanup efforts to ensure compliance with the remediation plan.⁷³ Any funds remaining in the registry of the court are returned to the depositor once the cleanup efforts are complete.⁷⁴

Hailed by former Governor Kathleen Blanco as a milestone in the management of Louisiana’s oil and gas environmental impacts, Act 312 “restores the balance needed between economic development and the environment,” a balance that was disrupted by legacy lawsuits stalling oil and gas exploration, creating an uncertain business climate, and leaving oil and gas sites damaged.⁷⁵ Filling the gap left by Act 1166, Act 312 applies regardless of whether the environmental damage claim is for groundwater contamination or for surface contamination.⁷⁶ Not only is Act

67. *Id.*

68. *Id.*

69. LA. REV. STAT. § 30:29(C)(2); Feasibility plan is defined this way:

Feasible Plan means the most reasonable plan which addresses environmental damage in conformity with the requirements of Louisiana Constitution Article IX, Section 1 to protect the environment, public health, safety and welfare, and is in compliance with the specific relevant and applicable standards and regulations promulgated by a state agency in accordance with the Administrative Procedure Act in effect at the time of cleanup to remediate contamination resulting from oilfield or exploration and production operations or waste.

LA. REV. STAT. § 30:29(I)(4).

70. LA. REV. STAT. § 30:29(C)(5)–(6).

71. OTTINGER *supra* note 55, § 4-26(d)(2).

72. LA. REV. STAT. § 30:29(D)(4) (2006).

73. LA. REV. STAT. § 30:29(F) (2006).

74. LA. REV. STAT. § 30:29(D)(4) (2006).

75. Theriot, *supra* note 14, at 456.

76. Romero, *supra* note 28, at 121.

312 constitutional,⁷⁷ it is strictly procedural and does not limit a landowner's right to recover damages in addition to the funds approved by the trial court as necessary to remediate the land back to state standards.⁷⁸

1. Applying Act 312: Discovering the Shortcomings

Despite the legislature's intent to bring more rationality and consistency to legacy litigation, Act 312 initially achieved little remediation due to the novel legal issues it created in practice.⁷⁹ For example, often in legacy lawsuits a defendant may not admit fault on all of the plaintiff-landowner's claims but may be willing to concede liability for the environmental damage to the property in question.⁸⁰ Prior to the Act's 2012 amendments, a party conceding liability would be permitted to develop a remediation plan through the process provided in Act 312 but would nonetheless remain a party to the litigation despite this admission.⁸¹ Not only would this delay remediation until after the court decided the case, culpable defendants had no incentive to come forward and begin the process of remediation under Act 312 since they would remain in the tedious, resource-consuming litigation even after conceding responsibility for the property damage.⁸²

In the Louisiana Legislature's 2011 Regular Session, the oil and gas industry strongly supported two bills: Senate Bill 146 and House Bill 563.⁸³ Following an "unsuccessful"⁸⁴ 2011 Regular Session, the Louisiana Legislature asked the DNR to study House Bill 563 and report any

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

78. OTTINGER, *supra* note 55, § 4-26.

79. Loulan Pitre, Jr., *Six Years Later: Louisiana Legacy Lawsuits since Act 312*, 1 LSU J. ENERGY L. & RESOURCES 94, 116 (2012).

80. *State v. La. Land & Expl. Co.*, 110 So. 3d 1038, 1041 (La. 2013).

81. Johnson, *supra* note 11, at 680.

82. *Id.*

83. S.B. 146, 37th Reg. Sess. (La. 2011); H.B. 563, 37th Reg. Sess. (La. 2011); Pitre, Jr., *supra* note 79, at 109 (S.B. 146 was presented by Senator Adley and the duplicate, H.B. 563, was presented by Representative Cortez. These original bills were short "placeholder" bills, intended to be amended as they went through the legislative process.).

84. Shortly before a House Natural Resources Committee hearing on H.B. 563, extensive amendments were circulated and the bill was subsequently involuntarily deferred in committee, effectively killing the legislation for the session. *See also*, History of H.B. 563, 37th Reg. Sess. (La. 2011) *available at* <http://www.legis.state.la.us> [<https://perma.cc/Z7DX-X3QY>] (follow "Sessions" hyperlink; follow "2011 Regular Legislative Session" hyperlink; then search for "HB 563"; and click on "History" hyperlink) (last visited September 21, 2019).

findings.⁸⁵ This report found that of the 271 legacy lawsuits subject to Act 312, 60 did not provide a specific site description; only 61 were supported by testing data submitted to the DNR as required by law; only 2 were identified by the Louisiana Office of Conservation⁸⁶ as having long-term risk;⁸⁷ and only 1 case had gone through a complete hearing process at the Office of Conservation, but had not yet adopted or implemented any plans pursuant to Act 312.⁸⁸ Moreover, the report found that of the 64 cases that settled, 29 were made without the Office of Conservation receiving environmental data; and of the 35 remaining cases, only 3 required remediation while the other 32 had environmental data showing there was no need to remediate.⁸⁹ This report from the Office of Conservation ultimately served as the “backdrop” for re-assessing Act 312 during the Louisiana Legislature’s 2012 Regular Session and effectively set the stage for a “legislative battle” in 2012.⁹⁰

85. H.R. Con. Res. 167, 37th Reg. Sess. (La. 2011); J. BLAKE CANFIELD, STATE OF LA. DEP’T OF NATURAL RESOURCES, REPORT TO THE HOUSE COMMITTEE ON NATURAL RESOURCES AND ENVIRONMENT AND SENATE COMMITTEE ON NATURAL RESOURCES AS REQUESTED IN HOUSE CONCURRENT RESOLUTION 167, 2011 REGULAR LEGISLATIVE SESSION (2012); Pitre, Jr., *supra* note 79, at 110.

86. The Louisiana Office of Conservation is a branch of the Louisiana Department of Natural Resources.

87. Upon receiving environmental test data, Conservation’s staff reviews the data for completeness and Quality Assurance/Quality Control purposes to ensure that the data is compliant with DNR’s Lab Manual. Upon review, Conservation classifies sites based upon the DEQ RECAP Site Ranking System which is designed to identify any site that poses an immediate and severe health risk to the public or the environment. The classification includes Ranks 1-4: Rank (1) includes sites that pose an immediate threat to human health, safety, or sensitive environmental receptors; Rank (2) includes sites that pose a short-term (0-2 years) threat to human health, safety, or sensitive environmental receptors; Rank (3) includes sites that pose a long-term (>2 years) threat to human health, safety, or sensitive environmental receptors; and Rank (4) includes sites which pose no demonstrable long-term threat to human health, safety, or sensitive environmental receptors. At the time of the report, of the sixty-one Act 312 lawsuits that Conservation had received environmental test data for, no site was found to rise to a Rank 1 or 2 classification, two cases had sites classified as Rank 3, and fifty-nine cases had sites classified as Rank 4.

88. J. BLAKE CANFIELD, STATE OF LA. DEP’T OF NAT. RESOURCES, REPORT TO THE HOUSE COMMITTEE ON NATURAL RESOURCES AND ENVIRONMENT AND SENATE COMMITTEE ON NATURAL RESOURCES AS REQUESTED IN HOUSE CONCURRENT RESOLUTION 167, 2011 REGULAR LEGISLATIVE SESSION (2012).

89. *Id.*

90. Pitre, Jr., *supra* note 79, at 110.

C. Back to the Development Phases: Amending Act 312

In 2012, the Louisiana Legislature amended Act 312 for the first time since its enactment six years prior.⁹¹ With over 20 bills filed relating to legacy litigation, the result of this “all-out battle for the oil and gas industry”⁹² is often referred to as a “legislative compromise.”⁹³ While the majority of this compromise package addresses admissions of responsibility for environmental damage through Act 779,⁹⁴ the package also creates two novel procedures through Act 754.⁹⁵

*1. Act 779*⁹⁶

Act 779 revises the procedural framework of legacy litigation by supplanting the pretrial procedure ordinarily followed in environmental remediation actions.⁹⁷ This amendment creates a procedure by which a

91. *Id.* at 96.

92. Romero, *supra* note 28, at 125 (quoting Don Briggs, *A Successful Legislative Session for Oil and Gas*, BEAUREGARD DAILY NEWS, June 7, 2012).

93. The 2012 Regular Legislative Session enacted articles 1552 and 1563 of the Louisiana Code of Civil Procedure and amended and reenacted portions of Louisiana Revised Statutes § 30:29 with Act No. 754 and Act No. 779.

94. Act No. 779, 2012 La. Acts 2012 (a party admitting liability under Louisiana Revised Statutes § 30:29 may make a “limited admission,” i.e., limit the admission to responsibility for remediation to applicable regulatory standards).

95. Act No. 754, 2012 La. Acts 2012; Pitre, Jr., *supra* note 79, at 113.

96. Act No. 779, 2012 La. Acts 2012 (codified as amended at LA. REV. STAT. § 30:29) (Act 779 amends and reenacts certain portions of Louisiana Revised Statutes § 30:29, codified as Louisiana Revised Statutes § 30:29(B)(6)).

97. *Id.* (codified as amended at LA. REV. STAT. § 30:29 (this Act became effective on August 1, 2012; it applies to any lawsuit not set for trial on or before May 15, 2012. The eight major changes from the previous law are: (1) it regulates discovery issues involving the formulation and approval of the most feasible plan by allowing any party to subpoena, for the purposes of deposition or trial, any employee, contractor, or representative of the LDNR or agency involved in the formulation of the most feasible plan; (2) it provides a procedure for the defendant to request a preliminary hearing to determine whether there is good cause for maintaining the defendant as a party in the litigation; (3) it suspends the prescriptive period for one year for the claims it covers; (4) it provides that if a public hearing is held following a limited admission, there cannot be a second public hearing for the same environmental damage; (5) it prevents *ex parte* communication between parties and anyone involved in the formulation of the most feasible plan until after the LDNR has approved and submitted the most feasible plan to the court; (6) it provides a procedure for the review of a plan that requires regulatory standards of agencies beside the LDNR; (7) it allows the

defendant may request a preliminary hearing to determine whether environmental contamination requiring remediation exists, and, if so, whether there is good cause for maintaining the defendant as a party in the litigation.⁹⁸ Providing another layer to an already complex litigation scheme, Act 779 serves as additional vetting for plaintiffs in environmental damage actions to proceed beyond initial pleadings.⁹⁹

2. Act 754

Act 754 enacted Article 1552 and Article 1563 in the Louisiana Code of Civil Procedure.¹⁰⁰ Article 1552 outlines the procedure to request an environmental management order, while Article 1563 allows a defendant in a suit filed under Act 312 to limit his or her admission of liability to only the responsibility for implementing the most feasible plan.¹⁰¹

Under Article 1563, a party admitting liability may make a “limited admission” for remediation to applicable regulatory standards without waiving their defenses to any private claims for additional damages.¹⁰² When a party chooses to make a limited admission, the court shall make a timely referral to the Office of Conservation to conduct a public hearing

LDNR to issue compliance orders to the responsible party or operator of record; and (8) it provides for a waiver of the right to enforce the contractual right to indemnification against such punitive damages caused by the responsible party’s acts or omission, if the responsible party admits responsibility for the remediation of the environmental damage under applicable regulatory standards).

98. LA. REV. STAT. § 30.29(B)(6) (2012) (at this preliminary hearing, a plaintiff bears the initial burden of introducing evidence to support the allegations of environmental damage to his property. If the plaintiff satisfies this, the burden shifts to the moving party, who then bears the burden of demonstrating the absence of a genuine fact that he caused, or is otherwise legally responsible for, the alleged environmental damage. The parties can introduce evidence in affidavit or written form. Successful defendants will be dismissed without prejudice, subject to being brought back in upon discovery of evidence not reasonably available at the time of the preliminary dismissal. A defendant obtaining a preliminary dismissal will be entitled to a dismissal with prejudice following a final non-appealable judgment in the case).

99. Romero, *supra* note 28, at 107.

100. Act. No. 754, 2012 La. Acts 2012; Rick Curry, *New Legislation to Address Legacy Lawsuits in Louisiana*, MCGLINCHAY STAFFORD (June 14, 2002), <https://www.mcglinchey.com/New-Legislation-to-Address-Legacy-Lawsuits-in-Louisiana-06-14-2012/> [<https://perma.cc/PY82-NG5D>].

101. LA. CODE CIV. PROC. art. 1552 (2012). LA. CODE CIV. PROC. art. 1563 (2012).

102. LA. CODE CIV. PROC. art. 1563 (A)(1)-(2).

to either approve or structure a remediation plan to regulatory standards.¹⁰³ After adopting the most feasible remediation plan, the Office of Conservation is required to facilitate the plan's implementation,¹⁰⁴ and the party admitting responsibility shall be required to deposit funds to cover the Office of Conservation's costs with at least an initial deposit of \$100,000.¹⁰⁵

Designed to promote efficient remediation and less complex adjudication, the 2012 amendments to Act 312 present a "more refined system that recognizes the importance of both Louisiana's ecosystem and economy" by "effectively [balancing] protection of the environment with stimulation of the oil and gas industry."¹⁰⁶ Yet despite these 2012 amendments, a new question as to Act 312's applicability now exists—particularly regarding settlement agreements.

III. BRITT V. RICELAND PETROLEUM COMPANY¹⁰⁷

On June 25, 2014, eight individuals, all domiciliaries of Jefferson Parish, filed suit against Riceland Petroleum Company (Riceland) and BP America Production Company (BP), the current and former operators of the plaintiff's property.¹⁰⁸ Over two years later, Riceland filed a third-party demand adding alleged insurers (herein "Certain Insurers") of Riceland as

103. Act No. 779, 2012 La. Acts 2012 (codified as amended at LA. REV. STAT. § 30.29) (there is a one-time limit to formulating remediation plans after an admission of responsibility, and there is a prohibition against *ex parte* communication with agency personnel during such formulation).

104. *Id.* (codified as amended at LA. REV. STAT. § 30.29); LA. REV. STAT. § 30.29(C)(2) (2006).

105. Pitre, Jr., *supra* note 79, at 113.

106. Johnson, *supra* note 11, at 681.

107. 240 So. 3d 986 (La. Ct. App. 3d Cir. 2018).

108. The petition stated the following:

Plaintiffs appear in one or more of the following capacities: (1) lessors, assignees, and third-party beneficiaries of certain mineral and surface leases between plaintiffs and defendants; (2) successors in interest to certain mineral and surface leases between plaintiffs and defendants; (3) owners of Property contaminated by the oil and gas activities conducted or controlled by one of more of the defendants; (4) successors in interest to, or the assigns of, the owners of Property contaminated by the oil and gas activities conducted or controlled by one or more of the defendants; (5) servitude owners who have the right to sue for remediation damages under the Mineral Code; and (6) parties who possess the right of action to file this lawsuit under Louisiana law.

Petition for Damages at 3, *Britt*, 240 So. 3d 986 (No. C-397-14).

third-party defendants, asserting claims for contribution and indemnity, as well as a claim for defense costs incurred.¹⁰⁹ Certain Insurers answered, denying coverage under any and all of Riceland's applicable policies.¹¹⁰

The plaintiff-landowners alleged that the defendants were "liable for damage resulting from the operation of the gas plant and wells in the South Jennings Oil & Gas Field" and the "operation of other equipment and facilities related thereto located on the property and adjacent property."¹¹¹ The plaintiff-landowners also sued for damages alleging that the defendants: (1) knowingly disposed of toxic and hazardous materials onto plaintiffs' property; (2) allowed the migration of this pollution to offsite properties; (3) failed to properly maintain their facilities where these toxic and hazardous materials were transported, handled, stored, or disposed of; and (4) egregiously violated applicable environmental health and safety regulations and applicable field-wide orders.¹¹² The plaintiff-landowners alleged that the defendants, who operated as early as the 1930s, or at some time thereafter, knew or should have known that their day-to-day operations and disposal methods were causing the soil, surface water, and groundwater of the property to be contaminated with dangerous substances.¹¹³ In fact, the plaintiff-landowners alleged that for many years, the defendants did know that they were disposing, storing, discharging, and otherwise releasing toxic poisons and pollutants onto and into the ground, groundwater, and surface water on or near the plaintiffs' property, and instead chose to cover and conceal the contamination.¹¹⁴

Believing that these actions constitute wanton or reckless disregard for public safety in the storage, handling, or transportation of hazardous or toxic substances, the plaintiff-landowners sought both punitive and exemplary damages, as well as a prohibitory and mandatory permanent injunction requiring and ordering the defendants to remove any

109. Brief for Appellants at 6, *Britt*, 240 So. 3d 986 (No. 17-941).

110. *Britt*, 240 So. 3d at 989.

111. Petition for Damages, *supra* note 108, at 3-4 ("Defendants' activities include the operation or construction of various oil and gas facilities, including but not limited to, a gas plant, pit, wells, sumps, flowlines, pipelines, tank batteries, wellheads, measuring facilities, separators, and injection facilities.").

112. *Id.* at 13-14.

113. *Id.*

114. *Id.* at 7 (At no time did the defendants inform or warn the plaintiffs concerning the extent, nature, cause, or origin of this pollution. The defendants did not disclose that the wastes from the oil and gas activities would not degrade or break down in the environment in the foreseeable future, constituting an "ongoing and continuing source of pollution and environmental damage for generations.").

contamination they caused to the groundwater and soils underlying plaintiffs' lands.¹¹⁵ To the extent that Louisiana Revised Statutes section 30:29 applies, the plaintiff-landowners sought a judgment approving a feasible plan that complied with all applicable state regulations, and that protected and replenished the natural resources of the state.¹¹⁶

After reaching a compromise to resolve all of the plaintiff-landowners' claims against BP and Riceland, the plaintiff-landowners gave notice and a redacted copy of the settlement agreement to the DNR and the Attorney General (AG) on April 28, 2017, as required by Louisiana Revised Statutes section 30:29(J)(1).¹¹⁷ Receiving no objection from the DNR, the plaintiffs filed a motion for approval on May 16, 2017, seeking court approval of the settlement agreement proposed between the plaintiffs, Riceland, and BP.¹¹⁸ In the redacted copy of the proposed settlement agreement attached to the motion, the settlement purported to resolve all claims between the plaintiffs, Riceland, and BP in exchange for a redacted settlement amount and Riceland and BP's promise to conduct certain remediation activities on the property.¹¹⁹ However, the plaintiffs

115. *Id.* at 16 (plaintiffs stated causes of action in tort as well as separate causes of action for: breach of contract; breach of obligations imposed by the Mineral Code and Civil Code; breach of implied obligations under the Mineral Code and Civil Code; and for the violation of the provisions of Civil Code and Mineral Code. Specifically, the plaintiffs sought the following damages: (A) sufficient funds to conduct a complete scientific analysis of the extent and nature of the contamination of their Property associated with defendants' operation of waste pits, tank batteries, production and/or injection wells, pipelines, and other oil and gas related facilities and equipment; (B) the cost to restore the Property to its pre-polluted original condition; (C) punitive or exemplary damages; (D) An award of damages for defendants' unauthorized use of plaintiffs' land to store and dispose of their wastes without consent, or compensation to plaintiffs from time of placement to time of final removal; (E) An award for stigma damages for diminution in property value before, during, and after restoration; (F) Any civil fruits derived from defendants' illegal trespass; (G) Damages occasioned by the nuisance created by defendants, including loss of full use and enjoyment of plaintiffs' Property; (H) Damages for loss of use of land and loss profits and income; (I) Attorneys' fees and other costs and expenses under La. R.S. § 30:29, or under any contract or applicable law that specifically provides for attorney fees, costs, and expenses; and (J) Damages sustained as a result of defendants' failure to provide proper notification under article 2688).

116. *Id.* at 20.

117. *Britt*, 240 So. 3d at 989.

118. *Id.*

119. Brief for Appellants, *supra* note 109, at 6–7 (also attached to the motion for approval of settlement was a letter from the DNR, stating that the "Settlement Communication does not disclose the actual amount of the settlement, nor is there

sought to reserve any claims against any and all insurers of the released parties, and Riceland agreed to assign to the plaintiffs any and all rights, causes of action, claims, or abilities to recover under any applicable insurance contracts.¹²⁰ Less than ten days after receiving the motion for approval of settlement and without conducting any hearing, the district court signed a judgment approving and granting the motion.¹²¹

Having not consented to the May 25 approval, Certain Insurers requested a conference with the trial court.¹²² During a telephone conference on June 1, the district court acknowledged that the approval was premature and agreed to hold a meeting on the matter eight days later.¹²³ At the subsequent hearing, Certain Insurers again maintained that they did not oppose the settlement *per se*, but that pursuant to Louisiana Revised Statutes section 30:29(J), the district court was required to hold a contradictory hearing to determine if remediation was necessary and, if so, to order the deposit of any remediation funds into the registry of the court prior to approving any settlement agreement.¹²⁴ Acknowledging that it should have set the matter for hearing based on Certain Insurers' objection, the district court voided the May 25 approval but subsequently approved the settlement agreement again without making any findings as to whether remediation was necessary and without requiring the deposit of any remediation funds into the registry of the court.¹²⁵ On appeal to the Third Circuit, the primary issue before the court became a question of statutory interpretation, specifically regarding Louisiana Revised Statutes section 30:29(J)(1).¹²⁶

any reference as to whether any portion of the settlement amount will be deposited into the registry of the court pursuant to [§ 29(J)].”)

120. *Id.* at 6 (the settlement agreement specifically did not resolve any claims against Riceland's insurers or the co-defendant, ConocoPhillips Company).

121. Brief for Defendant-Appellees at 6–7, *Britt*, 240 So. 3d 986 (No. 17-941).

122. Brief for Appellants at 8, *Britt*, 240 So. 3d 986 (No. 17-941).

123. *Id.* at 8–9.

124. *Britt*, 240 So 3d at 989 (Certain Insurers requested, at a minimum, that the district court make a ruling that no remediation besides what was provided for in the Settlement Agreement was necessary since the plaintiffs intended to pursue claims for the exact same damage against Certain Insurers as alleged insurers of Riceland.)

125. Transcript of Hearing at 706, *Britt*, 240 So. 3d 986 (No. C-397-14).

126. *Britt*, 240 So. 3d at 990.

IV. STATUTORY INTERPRETATION OF ACT 312: A SEARCH FOR THE LEGISLATURE'S INTENT

Statutory interpretation begins with examining the language of the statute itself.¹²⁷ As Louisiana Civil Code article 9 provides, “when a law is clear and unambiguous and its application does not lead to absurd consequences, the law shall be applied as written and no further interpretation may be made in search of the legislature’s intent.”¹²⁸ As a general rule, courts are to construe words and phrases according to their common and approved usage; the word “shall” indicates that something is mandatory, the word “may” indicates that something is permissive.¹²⁹

The language of Louisiana Revised Statutes section 30:29(J) provides:

In the event that any settlement is reached in a case subject to the provisions of this Section, the settlement shall be subject to approval by the court. The department and the attorney general shall be given notice once the parties have reached a settlement in principle. The department shall then have no less than thirty days to review that settlement and comment to the court before the court certifies the settlement. If after a contradictory hearing the court requires remediation, the court shall not certify or approve any settlement until an amount of money sufficient to fund such remediation is deposited into the registry of the court. No funding of a settlement shall occur until the requirements of this Section have been satisfied. However, the court shall have the discretion to waive the requirements of this Section if the settlement reached is for a minimal amount and is not dispositive of the entire litigation.¹³⁰

After applying a plain reading of this specific provision, the Third Circuit in *Britt* found only three requirements applicable to all settlements in claims governed by Act 312: (1) that the settlement “shall be subject” to the trial court’s approval; but before which (2) notice of the settlement “shall be given” to the DNR and the AG; and (3) the DNR and the AG “shall then have” 30 days to review the settlement and provide any comment to the trial court.¹³¹ The Third Circuit also found that Louisiana

127. *Id.*

128. LA. CIV. CODE art. 9 (2019).

129. LA. REV. STAT. § 1:3.

130. LA. REV. STAT. § 30:29(J)(1) (2006).

131. *Britt v. Riceland Petroleum Co.*, 240 So. 3d 986, 991 (La. Ct. App. 3d Cir. 2018).

Revised Statutes section 30:29(J)(1) does not require: (1) a contradictory hearing; (2) a finding concerning remediation; or (3) a deposit of necessary funds for court approval in all settlements under Act 312.¹³² In the Third Circuit’s opinion, reading these requirements into the statute would, in effect, “expand its provisions beyond the explicit intent of the legislature, which both contemplated and sought to encourage court-approved settlements in these legacy lawsuits.”¹³³

The rules of statutory construction are designed to ascertain and enforce the intent of the legislature.¹³⁴ Thus, in all cases of statutory interpretation, the fundamental question is legislative intent and ascertainment of the reason(s) that prompted the legislature to enact the law.¹³⁵ If the language of a law is susceptible to different meanings, the language must be interpreted as having the meaning that best conforms to the purpose of the law.¹³⁶ When interpreting statutes, courts “should give effect to all parts of a statute and should not give a statute an interpretation that makes any part superfluous or meaningless.”¹³⁷ Unfortunately, the Third Circuit’s statutory interpretation does just that—renders meaningless the procedure of Act 312 in cases where the parties agree to settle.

A. A Determination of Remediation is Mandatory, Otherwise Act 312 Does Not Apply

As the legislature states in the plain language of Act 312, the natural resources and the environment of the state are to be “protected, conserved, and replenished insofar as possible and consistent with the health, safety, and welfare of the people.”¹³⁸ Pursuant to the legislature’s duty to set forth procedures to ensure that damage to the environment is remediated to a standard that protects the public interest, Louisiana Revised Statutes section 30:29 provides the procedure for judicial resolution of claims for environmental damage to property arising from activities subject to the jurisdiction of the Department of Natural Resources, office of conservation.¹³⁹ Once a party makes a judicial demand arising from or

132. *Id.* at 990.

133. *Id.* at 992.

134. *Id.* at 990.

135. *In re Succession of Boyter*, 756 So. 2d 1122, 1129 (La. 2000).

136. *Sweet Lake Land & Oil Co. v. Oleum Operating Co., L.C.*, 229 So. 3d 993, 996 (La. Ct. App. 3d Cir. 2017).

137. *Id.* at 997.

138. LA. REV. STAT. § 30:29(A) (2006).

139. *Id.*

alleging environmental damage, the provisions of the statute shall apply once timely notice is received by the state of Louisiana through the DNR, the commissioner of conservation, and the attorney general.¹⁴⁰

When drafting Act 312, the legislature carefully noted certain fundamental, threshold requirements that must be satisfied in order for Act 312's procedure to apply.¹⁴¹ To prevent frivolous environmental damage claims, "contamination" shall include the "introduction or presence of substances or contaminants into a usable aquifer, an underground source of drinking water (USDW) or soil in such quantities as to render them unsuitable for their reasonably intended purposes."¹⁴² Claims of environmental damage shall include "any actual or potential impact, damage, or injury to environmental media caused by contamination resulting from activities associated with oilfield sites or exploration and production sites," including, but not limited to, environmental media such as soil, surface water, ground water, or sediment.¹⁴³ Evaluation and remediation shall include, but not be limited to, "the investigation, testing, monitoring, containment, prevention, or abatement" of the contaminated area.¹⁴⁴

With these precise, particular definitions, Act 312 applies only to those claims with evidence of actual or potential impact, damage, or injury to environmental media caused by contamination resulting from activities associated with oilfield exploration and production sites.¹⁴⁵ If a claim does not meet this threshold criteria, the claim is not subject to the procedure set forth in Act 312.¹⁴⁶ For this simple reason, a court must find remediation necessary because until such finding is made, the court cannot be sure whether Act 312 even applies. This factual finding is critical because if remediation is necessary for the land to be in compliance with the applicable regulatory standards, Act 312 requires the court to utilize the "sequenced protocol" that the legislature has established for "the management of cases alleging environmental contamination and the remediation of contaminated properties."¹⁴⁷

140. LA. REV. STAT. § 30:29(B)(1).

141. LA. REV. STAT. § 30:29(I) (specifically, the statute defines "contamination," "environmental damage," "evaluation or remediation," "feasible plan," "oil field" or "exploration and production (E&P) site," and "timely notice").

142. LA. REV. STAT. § 30:29(I)(1).

143. LA. REV. STAT. § 30:29(I)(2).

144. LA. REV. STAT. § 30:29(I)(3) (2006).

145. LA. REV. STAT. § 30:29(I)(2) (2006).

146. LA. REV. STAT. § 30:29(J)(1) (2006).

147. Sweet Lake Land & Oil Co. v. Oleum Operating Co., L.C., 229 So. 3d 993, 997 (La. Ct. App. 3d Cir. 2017).

B. If Remediation is Necessary, the Deposit of Funds is Mandatory

It is a determination that remediation is necessary and not the holding of a contradictory hearing that triggers the requisite deposit of funds into the registry of the court. Likewise, if any remediation is necessary, the court should only approve a settlement agreement once the defendant deposits the funds necessary to implement the remediation plan into the registry of the court. As Act 312 states:

[w]hether or not the department or the attorney general intervenes, and except as provided in Subsection H of this Section, all damages or payments in any civil action, including interest thereon, awarded for the evaluation or remediation of environmental damage shall be paid exclusively into the registry of the court in an interest-bearing account with the interest accruing to the account for cleanup.¹⁴⁸

Even further, the statute allows the court discretion to waive this requirement only if the settlement reached is “for a minimal amount and is not dispositive of the entire litigation.”¹⁴⁹ If the legislature intended for the court to have discretion to waive the deposit of funds in any and all settlement agreements, this provision would not be necessary.

As the Third Circuit pointed out in *Britt*, the phrase “shall be paid exclusively into the registry of the court” implies that the deposit of all damages or payments in any civil action—including settlement payments—into the registry of the court is mandatory, so long as these damages or payments are compensation for the evaluation or remediation of environmental damage.¹⁵⁰ The statute states that the “court shall retain jurisdiction over the funds deposited and the party or parties admitting responsibility, or the party or parties found legally responsible by the court, until such time as the evaluation or remediation is completed.”¹⁵¹ If courts continue to follow the Third Circuit’s interpretation that the deposit of funds into the registry of the court is not required, what happens to the defendant who goes bankrupt shortly after settling? In such a scenario, there would be no relief for the parties, nor for the damaged land.

148. LA. REV. STAT. § 30:29(D)(1) (2006).

149. LA. REV. STAT. § 30:29(J)(1) (2006).

150. LA. REV. STAT. § 30:29(D)(1).

151. LA. REV. STAT. § 30:29(D)(4).

C. The Purpose Behind a Contradictory Hearing

According to Louisiana Revised Statutes section 30:29(J)(1), if after a “contradictory” hearing to ensure that the proposed remediation plan aligns with the DNR’s evaluation and assessment, remediation or additional remediation is necessary, the court shall not certify or approve any settlement until an amount of money sufficient to fund such remediation is deposited into the registry of the court.¹⁵² In *Britt*, the Third Circuit focused on the fact that “contradictory,” when used as an adjective, is generally understood to mean opposing or inconsistent views.¹⁵³ Thus, the court reasoned that the need for a hearing is triggered by and conditioned upon an objection to the remediation plan proposed by the settling parties; if no opposition or concern for the settlement is raised by either the state actors or another party with a vested interest, then there is no corresponding need for a contradictory hearing and determination by the court on the issue of remediation.¹⁵⁴

However, the Third Circuit’s interpretation that a “contradictory” hearing is not required in settlement agreements disregards the legislative intent behind Act 312. In the realm of legacy litigation, parties who agree to settle save the court from waiting until trial to determine who is responsible for the environmental damage. By agreeing that environmental damage exists and proposing a remediation plan with funding estimates in the form of a settlement agreement, the parties are, in a way, merely expediting the remediation efforts. Even when parties agree to settle, the DNR still has a responsibility to review the environmental data submitted to determine if remediation is necessary and if so, whether the submitted remediation and estimation of funds is the “most feasible” plan for the court to adopt.¹⁵⁵ If the DNR reviews the requisite information in a motion for approval of settlement and determines from the environmental data submitted that additional remediation or funds are necessary than what the proposed settlement agreement accounts for, then the DNR at that point would trigger the need for a contradictory hearing. Similarly, if the DNR reviews the information and determines the land already meets the state regulatory standards and no remediation is necessary, a contradictory hearing would be triggered for the court, acting as a gatekeeper, to decide whether the case even falls under Act 312. If the court agrees with the DNR that remediation

152. LA. REV. STAT. § 30:29 (J)(1).

153. *Britt v. Riceland Petroleum Co.*, 240 So. 3d 986, 991 (La. Ct. App. 3d Cir. 2018).

154. *Id.*

155. LA. REV. STAT. § 30:29(I)(4) (2006).

is not necessary for the land to meet state standards, the procedure found in Act 312 does not apply.

D. The DNR's Responsibility Remains the Same, Even in Settlement Agreements

In accordance with Louisiana's public policy favoring settlement agreements, the reality of legacy litigation is that many cases settle before going to trial.¹⁵⁶ Most often, a plaintiff's experts insist that appropriate remediation will cost millions of dollars, while experts for the defense usually have a much lower assessment of the need for and extent of remediation.¹⁵⁷ With these competing expert assessments driving the majority of cases to settlement, plaintiff-landowners typically agree to accept some amount of money—often a large amount, but a modest percentage of their expert's damage estimate—in exchange for an agreement to allow the defendants to remediate the property on their own according to the regulatory standards acceptable to the Office of Conservation, instead of urging a remediation plan that will cost hundreds of millions of dollars.¹⁵⁸ As a neutral third-party to these conflicting estimations, the DNR has an even greater responsibility when reviewing and approving remediation plans attached to settlement agreements.

In *Britt*, the settling parties sent a redacted copy of their settlement agreement to the DNR for approval.¹⁵⁹ As the DNR's letter to the court noted, the settlement agreement sent for approval did not disclose the actual amount of settlement, nor was there any reference to whether any portion of the settlement amount was going to be deposited into the registry of the court to cover remediation or evaluation costs.¹⁶⁰ Despite these omissions, the DNR still signed the motion for approval, which the Third Circuit interpreted as the settlement agreement receiving the DNR's confirmation.¹⁶¹

Counsel for the defendants pointed out to the court that not long after receiving the letter of no objection from the DNR, Riceland received correspondence from the DNR asking Riceland to develop a cleanup plan for the particular property.¹⁶² However, why would this request need to be made since the DNR had already signed the letter of no objection, stating

156. Pitre, Jr., *supra* note 79, at 109.

157. *Id.*

158. *Id.*

159. Brief for Appellants, *supra* note 109, at 6.

160. *Id.* at 7.

161. *Id.*

162. Transcript of Hearing, *supra* note 125, at 703.

that it did not object to the terms of the settlement agreement—including the proposed remediation plan? This then begs the question, how could the DNR have approved the remediation plan if there was no estimation of funds specified? The simple answer to both of these questions is this: in practice, the DNR is not reviewing remediation plans attached to settlement agreements to determine if these plans are the most feasible for the court to adopt, because the DNR simply is not reviewing the details of these plans at all. Even more unsettling is that this is the normal practice in settlement agreements under Act 312, despite the DNR's role explicitly set forth in the statute.¹⁶³

As Act 312 mandates, the DNR shall have no less than 30 days to review a proposed settlement agreement and comment to the court before the settlement is certified.¹⁶⁴ During these 30 days, the DNR is responsible for reviewing the submitted environmental data, proposed remediation plan, and estimation of funds to determine whether the parties have agreed on the most feasible plan. This minimum 30-day period is largely equivalent to the minimum 30-day period that begins under Louisiana Revised Statutes section 30:29(C)(1) when a party admits liability, or is found legally responsible by the court, and submits a plan to the DNR for approval. Even in settlement agreements, the Louisiana Legislature intended that the DNR use this time to review the environmental data and proposed remediation plans to ensure that the plan and estimation of funds are sufficient to remediate the existing environmental damage.

When granting the motion for approval in *Britt*, the district court stated:

The terms of the settlement are fairly explicit. I don't think there's any reference to money being put up, or there may be, but I think it was blacked out on my copy. I don't remember funds specifically being mentioned, but the obligation to remediate was there on behalf of Riceland and BP and I'm satisfied that the judgment I originally signed in May would be appropriate judgment to execute by the Court at this time.¹⁶⁵

As *Britt* exemplifies, the DNR's actions in settlement agreements do not align with the legislative intent behind Act 312. Since the purpose of this 30-day period is to allow the DNR time to determine what will be the most feasible plan, any plan or submittal to the DNR within a settlement agreement should also contain an estimation of implementation costs.¹⁶⁶

163. Brief for Appellants, *supra* note 109, at 8.

164. LA. REV. STAT. § 30:29(J)(1) (2006).

165. Brief for Appellants, *supra* note 109, at 10.

166. LA. REV. STAT. § 30:29(J)(1) (2006).

Furthermore, the legislature specifically includes the possibility of a necessary contradictory hearing if the DNR, during its review, finds that additional remediation or funds are necessary than that for which the settlement agreement accounts.¹⁶⁷ If the DNR's role in settlements was merely to approve of the parties agreeing to settle, the legislature would not have included the possibility for a contradictory hearing, especially since—as counsel for the defendants in *Britt* noted—parties agreeing to settle do not oppose the agreement's terms.¹⁶⁸

V. THE SOLUTION: STICK TO THE PLAN

Because settlement negotiations occur during the proceedings, the effect of parties engaging in a settlement agreement is largely analogous to a defendant conceding liability to remediate environmental damage. Thus, when parties agree to settle, the remaining provisions of Louisiana Revised Statutes section 30:29(C)(1) should apply:

If at any time during the proceeding . . . the finder of fact determines that environmental damage exists and determines the party or parties who caused the damage or who are otherwise legally responsible therefore, the court shall order the party . . . whom the court finds legally responsible for the damage to develop a plan or submittal for the evaluation or remediation to applicable standards of the contamination that resulted in the environmental damage. The court shall order that the plan be developed and submitted to the department and the court within a time that the court determines is reasonable and shall allow the plaintiff or any other party at least thirty days from the date each plan or submittal was made to the department and the court to review the plan or submittal and provide to the department and the court a plan, comment, or input in response thereto.¹⁶⁹

The purpose of Act 312 is to prevent plaintiffs from having the ability to claim and receive damages that exceed both the value of the property as well as the damage, and furthermore to ensure that the damage award is used to remediate the land.¹⁷⁰ When considering this motivation for enacting and later amending Act 312, the legislature likely intended the provisions to apply regardless of whether parties go to trial or settle their environmental

167. LA. REV. STAT. § 30:29(J)(1) (2006).

168. Brief for Defendant-Appellees, *supra* note 121, at 8.

169. LA. REV. STAT. § 30:29(C)(1) (2006).

170. LA. REV. STAT. § 30:29(G) (2006).

damage claims outside of court. The process of litigating environmental damages claims can take many years, meaning that both sides risk incurring excessive court costs and attorneys' fees in addition to potentially having to pay a substantial damage award. Not only are a significant amount of these costs avoided when parties agree to settle outside of court, but settlement agreements also expedite the remediation process, helping achieve the ultimate goal of restoring the environment to a standard that protects the health, welfare, and safety of the public more quickly.

In settlement agreements, the court's duty to determine liability is already taken care of; the parties agree that environmental damage exists, and the defendant agrees to remediate the land back to the applicable state regulatory standards. However, this cooperation does not dispose of the DNR's responsibility to review the environmental data submitted, determine whether remediation is necessary, and to review the remediation plan proposed in a settlement agreement to determine if it is the most feasible plan to achieve the necessary remediation. If the DNR's recommendation of what is the most feasible plan for remediation aligns with the settlement agreement's proposed plan, then the court should approve the settlement, adopt the remediation plan, and require the portion of the settlement award intended for the remediation to be deposited into the registry of the court.

CONCLUSION

In Louisiana, the legacy of the oil and gas industry is one of economic dependence, cultural survival, and costly environmental consequences.¹⁷¹ Enacted for the purpose of ensuring that environmental damage to land is remediated to a regulatory standard, the procedural framework established by Act 312 should apply regardless of whether parties litigate their claims in the courtroom or agree to settle without going to trial. Specifically, Act 312 requires that upon finding a need for remediation, the court, along with the DNR, shall determine the most feasible plan of remediation and require the deposit of funds necessary to implement this plan into the registry of the court. The court then retains jurisdiction and oversight of these funds and plan implementation through completion.

Since most legacy lawsuits end up settling outside of court, the procedure found in Act 312 must also apply to settlement agreements; otherwise, the procedure will be rendered meaningless. Without a determination that remediation is necessary, a court cannot be sure if the procedure set forth in Act 312 even applies. Furthermore, if the court does not require settling defendants to deposit the funds necessary for

171. Theriot, *supra* note 14, at 462.

remediation into the court's registry, there is significant risk that land will remain damaged if a liable defendant goes bankrupt. Unfortunately, Louisiana's oil and gas industry will likely remain stagnant after the Third Circuit's most recent interpretation of Act 312 and the Louisiana Supreme Court's denial of writs in the case of *Britt v. Riceland Petroleum Co.* Even a decade later, *Corbello's* legacy may continue to live on after all—despite the Louisiana Legislature's extensive efforts to end it.

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