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Act 312 Updates

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I. The History of Act 312

Louisiana Revised Statute § 30:29

In June 2006, Governor Kathleen Blanco signed Act 312, adopting Senate Bill No. 655 to address lawsuits and claims arising from or relating to environmental contamination at former on-shore oil and gas exploration sites. 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, such as those at issue in E&P or “Legacy” Litigation. Act 312 changed the face of Legacy Litigation in several key respects, though at this stage the full effect of its reach has not been fully determined. What follows is a brief discussion of the history and purposes of Act 312, as well as the current known state of the law under the Act.

The Louisiana Legislature passed Act 312 in reaction to a serious concern that the State’s natural resources were not being protected under then-existing laws. Prior to the passage of Act 312, there existed no mandate that oilfield contamination cases involve the expertise of the Louisiana Department of Natural Resources (“LDNR”), and plaintiffs receiving monetary awards to remediate properties impacted by oil and gas operations were under no obligation to use that money to clean up the land. Further, the parties found responsible for contaminating the properties were insulated from double-payment under Louisiana Revised Statutes 30:89.1, which entitled them to a dollar-for-dollar credit against any obligation sought to be enforced by the State of Louisiana or any state agency for any monies paid in judgment or settlement to resolve environmental contamination claims. In other words, once the responsible parties paid monies to the landowner to settle or otherwise resolve private environmental damage claims, those parties could not be ordered by a state administrative agency (i.e., the LDNR) to pay those monies again to fund an administrative remediation plan if the landowner chose not to clean up the property. This led to the undesirable result of plaintiffs/landowners frequently receiving a windfall while the natural resources of the State suffered.

These two concerns had previously been identified by the Louisiana Supreme Court in Magnolia Coal Terminal v. Phillips Oil Company, 576 So.2d 475 (La. 1991) and Corbello v. Iowa Production, 2002-0826 (La. 2/25/03), 850 So. 2d 686.
In *Magnolia Coal Terminal v. Phillips Oil Co.*, 576 So. 2d 475 (La. 1991), the Louisiana Supreme Court addressed the issue of primary jurisdiction of state regulatory agencies in environmental contamination cases. This case came before the Supreme Court after the appellate court reversed the denial of the defendant's exceptions of no right and no cause of action — the defendant contended that Magnolia had failed to exhaust its administrative remedies before the Commissioner of Conservation before seeking a judicial remedy. The Supreme Court held, in part, that deference to administrative agencies for an initial decision on matters within the expertise of the agency is a matter within the sound discretion of trial court. However, the concurring opinions of three Justices highlighted the need for legislation requiring involvement of the LDNR and Commissioner of Conservation. Justice Hall said:

The Commissioner of Conservation had concurrent jurisdiction of the issues involved in this case, and under the administrative law doctrine of primary jurisdiction the better procedure would ordinarily have been for the court to defer to the commissioner's exercise of its jurisdiction prior to adjudicating Magnolia's damage claim. However, since Phillips did not timely invoke the commissioner's jurisdiction, but waited until the eve of trial to do so, and because Phillips' exceptions filed in the district court were directed more toward exhaustion of administrative remedies than deferral, there was no abuse of discretion or error in the court suit going forward.

Similarly, Justice Lemmon opined:

The majority correctly states that the Commissioner of Conservation has no jurisdiction to award money judgments or to adjudicate a mineral lessee's contractual obligation to pay for surface damage. Nevertheless, questions and complaints as to proper plugging of abandoned wells and remediation of oil contamination at the site normally should be first presented to the Commissioner for an administrative decision as to appropriate orders necessary to protect the environment and the public.

* * *

Because the type of complaints raised by plaintiff in this case address the interest of the public and the environment as well as the rights of the landowner, and because the type of issues adjudicated by the court in this case are interconnected with the regulatory powers of the Commissioner, the court under the doctrine of primary jurisdiction should normally postpone action until the Commissioner makes a designated determination, possibly making judicial proceedings unnecessary.

Justice Calogero added:
As a general matter, environmental concerns and state regulatory policy would favor initial application to the Commissioner of Conservation in regard to the plugging of abandoned or unused wells. Such a procedure avoids the possibility that a landowner might use for other purposes the damages awarded to him for the improper plugging of a well and oil contamination on his property, leaving an environmental hazard unremediated. Thus I would give close scrutiny to a district court judgment which assessed damages relating to that issue at the outset, bypassing the Commissioner.

The concurring opinions of these three Justices show a recognized interest in involving the LDNR in oilfield contamination cases as well as the need for legislation to ensure its involvement.

The Louisiana Supreme Court also expressed concern that there were no restrictions on a landowner’s use of money awarded for environmental remediation. In Magnolia Coal, supra, Justice Lemmon expressed concern about the lack of any obligation on the landowner to actually restore the property, stating:

The most difficult problem with affirming the part of the trial court's judgment which awards damages for failure to clean up the oil contamination is that the landowner receives a money judgment with no restriction on the use of the money. Plaintiff is apparently free to use this money for purposes other than restoring the land, and the public is thus left unprotected. Moreover, the Commissioner has ordered defendant to clean up the site, and defendant is possibly exposed to paying twice for the restoration.

... I would prefer for this court to formulate an abnormal solution for this abnormal situation, rather than a straight award of money damages as the remedy. Perhaps defendant should be ordered to establish a trust fund in a fixed amount to pay for the restoration of the land to be performed by a responsible third party under a bonded contract. Or perhaps some other equitable relief is more appropriate. In any event, the present relief may be insufficient to protect the parties, the public and the environment, and I would prefer to fashion more appropriate relief under the overall circumstances.

In the same case, Justice Calogero expressed a desire in most cases to “[avoid] the possibility that a landowner might use for other purposes the damages awarded to him for the improper plugging of a well and oil contamination on his property, leaving an environmental hazard unremediated.”

Twelve years later, the same concern was still present and no significant curative action had been taken by the Legislature. In Corbello
v. Iowa Production, 2002-0826 (La. 2/25/03), 850 So. 2d 686, the Supreme Court described the dilemma as follows:

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

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

It was out of these concerns that the Louisiana Legislature ultimately drafted and adopted Act 312, codified now as Louisiana Revised Statute §30:29. Act 312 provides that “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 clean up.” The overriding public policy objective of the statute is to ensure that Louisiana oil fields meet applicable environmental and health standards. And for those that do not, to invoke the expertise of the Department to expeditiously adopt, fund, and complete remediation plans to address the problem, and to ensure that money awarded in judgment or paid in the settlement of a case would actually result in clean up of any environmental damage.

II. Important Features of Act 312

Louisiana Revised Statute §30:29(B)(1) provides that it applies to “any litigation...arising from or alleging environmental damage....” Environmental damage, in turn, is defined as “any actual or potential impact...caused by contamination resulting from activities associated with oilfield sites or exploration and production sites.” La. R.S. §30:29(I)(1). Oilfield sites or exploration and production sites are also broadly defined as including:

any location or portion thereof on which oil or gas exploration, development, or production activities have occurred, including wells, equipment, tanks, flow lines or impoundments used for the purposes of drilling, workover, production, primary separation, disposal, transportation or storage of E&P wastes, crude oil and natural gas processing, transportation or storage of a common production stream of crude oil, natural gas, coal seam natural gas, or geothermal energy ...

La. R.S. §30:29(I)(4). As an important limitation, the Act is limited to environmental contamination claims “arising from activities subject to

The provisions of Act 312 apply “immediately upon the filing or amendment of any litigation or pleading making a judicial demand arising from or alleging environmental damage....” La. R.S. §30:29(B)(1). The Louisiana Supreme Court summarized the critical changes implemented through Act 312 in *M.J. Farms, Ltd. v. Exxon Mobil Corporation*, 2007-2371, 998 So.2d 16 (La. 7/1/2008). In *M.J. Farms*, the Supreme Court addressed the scope and application of Act 312 in the context of a dispute concerning the Act’s constitutionality. In addressing these issues, Justice Knoll wrote, as follows:

After reviewing this legislative enactment, we find it clear that Act 312 attaches a procedure “for judicial resolution of claims for environmental damage....” Established for purposes of ‘ensur[ing] that damage to the environment is remediated to a standard that protects the public interest.’ In that vein, Act 312 is comprised of six basic components. First, the act requires timely notice of such litigation to the State. Second, the act stays the litigation until thirty days after notice is given. Third, the act permits the State to intervene in the litigation. Fourth, the act provides a role for the Office of Conservation with the Louisiana Department of Natural Resources (‘LDNR’) in the determination of the most feasible plan for evaluation and/or remediation of environmental damage. Fifth, the act provides for the payment of all damages for the evaluation or remediation of environmental damage and further provides that the Court shall oversee actual implementation of the plan adjudicated to be ‘most feasible.’ Sixth, the act allows the landowner and the state to recover attorney and expert fees, as well as costs from the responsible party or parties.

*Id.* at 29.

Critically, the Legislature was also careful not to infringe upon a landowner’s private claims. To that end, Act 312 ensures that landowners are not precluded from pursuing a judicial remedy or receiving a judicial award for private claims suffered as a result of environmental damage, except as provided in the statute.

### III. Act 312 Litigation

#### A. Constitutionality

In *M.J. Farms*, *supra*, the Plaintiffs attacked the Constitutionality of Act 312. The Plaintiffs first argued that the retroactive application of Act 312 divested them of their vested rights because Act 312 does not allow landowners to recover damages for environmental contamination that violated public law. Plaintiffs also claimed that Act 312 was unconstitutional because it served to divest the district court of its
original jurisdiction and otherwise restricted their access to the district court. The Louisiana Supreme Court rejected these challenges, noting that Act 312 is procedural and specifically preserves private rights of action. No other Constitutional challenges to Act 312 have been ruled upon by the Louisiana Supreme Court.

B. Trial Plan

Another major dispute concerned the appropriate trial procedures under Act 312. Defendants took the position that a full fledged trial on liability and damages was improper until the LDNR had developed a remediation plan. Thus, the Defendants advanced a three-phased trial in which the district court would make an initial determination about the existence of environmental damage and who was a responsible party. Following this determination, the Defendants argued that the matter should be submitted to the LDNR to develop a remediation plan. Only after the LDNR had weighed in did the oil companies believe that a full trial was necessary. See, e.g., Germany v. ConocoPhillips Company, 2007-1145 (La. App. 3 Cir. 3/5/08), 980 So.2d 101. Alternatively, the Defendants urged a bifurcated trial, wherein damages would be tried after the LDNR hearing. Tensas Poppadoc, Inc. v. Chevron U.S.A. Inc., 2007-927 (La. App. 3 Cir. 5/21/2008), 984 So.2d 223.

The Third Circuit Court of Appeals refused to accept these approaches, and held that in the cases where the issue was presented, the protection of private rights mandates that there be a single trial on all issues before the matter is submitted to the LDNR. See Germany, supra.; see also Tensas Poppadoc, Inc., supra.; Bernard v. BP America Production Company, 07-1249, 981 So.2d 73 (La. App. 3 Cir. 4/20/2008). In addition, the Fourth Circuit Court of Appeals rejected a multi-phased approach in favor of a single jury trial. Duplantier Family Partnership v. BP Amoco, 07-293, 955 So.2d 763 (La. App. 4 Cir. 5/16/2007). As these Courts have reasoned, Act 312 protects private claims and mandates a determination by the “finder of fact” that there is environmental damage and the responsible parties before referring the matter to the LDNR. In addition, the long-standing protections of the right to a jury trial, as well as the need for consent to bifurcation require a single trial on all issues. Id. Thus, the currently accepted approach is to have a single trial on all issues before the LDNR weighs in on the issue of remediation. As discussed below, this trial procedure has led to Act 312 cases being more time consuming, more costly and still proceeding to a jury trial without the input of the LDNR, exactly the opposite of what was intended by when Act 312 was adopted.

IV. Current Procedures under Act 312

Under the current interpretation of Act 312, a single trial on all issues occurs before the matter is referred to the LDNR. The finder of fact, which in most cases will be a jury, determines whether there exists
environmental damage, who is responsible for the damage, and provides a monetary award. The court is thereafter required to order the responsible party(ies) to develop a plan for remedial action within a time determined by the court. The responsible party must submit this plan to the LDNR and to the court, and all parties are allowed “at least thirty days” to review the plan and submit an alternative plan or comment on the plan submitted.

The LDNR is then vested with the authority to review the plans submitted, at the cost of the responsible party. LDNR must conduct a public hearing within sixty (60) days from the last day on which any party may comment or provide a competing plan. LDNR is then given another sixty (60) days after the public hearing to approve/structure a plan based on the evidence submitted. The court must adopt the plan approved by LDNR unless another party proves “by a preponderance of the evidence,” that another plan is more feasible. No case has reached this final stage, however it is now commonly referred to as the “preponderance hearing,” during which the court is to consider all of the evidence and determine whether or not there is a “more feasible” remediation plan.¹ The court, thereafter, shall enter a judgment adopting the plan and shall assign written reasons. This judgment is considered a final judgment for purposes of appeal.

As of this date, the LDNR has conducted a public hearing involving contested remediation plans in only one Legacy Lawsuit, Tensas Poppadoc, Inc., supra. The Tensas Poppadoc matter was tried to a jury in May of 2008, and following a $1 million jury verdict, was tried to the LDNR in 2009. The LDNR adopted its own remediation and evaluation plan with an estimated cost of $1.75 million. The “preponderance hearing” was scheduled to take place in February of 2010, but has been continued without date.

A couple of interesting discovery disputes developed in connection with the upcoming preponderance hearing in the Tensas Poppadoc case. Following the LDNR issuing its recommended plan, Plaintiff sought to depose the LDNR and LDEQ employees who sat on the panel that heard the evidence or who otherwise consulted in the decision. The Plaintiff also sought to depose Secretary Scott Angelle and Commissioner James Welsh. Both the Defendant and the State objected to the discovery on the basis that any communications among the LDNR and LDEQ employees were covered by the deliberative process privilege. The trial court denied motions for protective orders and ordered that the discovery be allowed. The parties took writs to the Louisiana Third Circuit and the Louisiana

¹ “Feasible plan” is defined as “the most reasonable plan which addresses environmental damage in conformity with the requirements of Louisiana Constitution Article IX, Section 1,” and complies with “the specific and relevant standards and regulations promulgated by a state agency....” La. R.S. §30:29(I)(3).
Supreme Court, and the writs were ultimately denied. Thereafter, depositions were taken of LDNR and LDEQ employees who had been involved in the Act 312 hearing or who consulted in the decision.

It was also argued that additional evidence should not be allowed at the preponderance hearing. The argument advanced was that there exists a complete jury trial record and LDNR hearing record upon which the agency made its recommendations. If new evidence was introduced at the preponderance hearing that was not presented to LDNR during the Act 312 hearing, the clear intent of Act 312 would be undermined and the role that the legislature mandated for LDNR would be usurped. Once again, that argument was rejected by the trial and appellate courts and the Plaintiff will be allowed to submit new evidence to the court at the Tensas Poppadoc preponderance hearing.

V. Additional Issues

A. Admission of Responsibility

It is important to note that under the Statute, the LDNR’s involvement may also be triggered by an admission of responsibility. It was the clear intent of the legislature to allow the parties to stipulate to responsibility, and expedite the process of involving the LDNR. While a stipulation was entered into in the Tensas Poppadoc matter, the Court rejected the stipulation and refused to submit the case to LDNR. It is further unknown what effect, if any, such a stipulation would have in a case that also included private damages.

B. Attorneys’ Fees and Costs

Another issue for which there is no jurisprudential guidance deals with attorneys’ fees and costs. As an incentive for filing new environmental contamination claims, the Louisiana legislature has provided for the recovery of attorney’s fees and court costs. La. R.S. §30:29(E)(1). By its plain language, the statute limits the recovery of attorney’s fees and court costs to those expenses associated with establishing the existence of environmental contamination and developing a plan of remediation. Specifically, the statute provides that any party who submits evidence upon which the judgment is based is entitled to recover from the responsible party “all costs attributable to producing that portion of the evidence that directly relates to the establishment of environmental damage, including, but not limited to, expert witness fees, environmental evaluation, investigation, and testing, the cost of developing a plan of remediation, and reasonable attorney fees incurred in the trial court and the department.” La. R.S. §30:29(E)(1) (emphasis added). It is currently unknown how a court will calculate attorney’s fees, and this could have a significant impact on the future of legacy litigation.
The statute similarly provides that the LDNR or the Attorney General may recover attorneys’ fees and court costs. La. R.S. §30:29(E)(2). These costs and fees are not, however, tethered to the determination of contamination and the development of a remediation plan. Rather, the LDNR/Attorney General is entitled to recover “all costs” associated with “the determination of responsibility for evaluation or remediation or the approval of a plan of remediation.” Id. Thus, the responsible party(ies) may be obligated to pay for costs and fees incurred by the LDNR/Attorney General in establishing both liability and damages. This issue has also not been determined by any court.

C. Effect of Appeal on Funding/Implementing Plan

Another issue relates to a party’s obligation to fund the plan adopted by the court following a preponderance hearing. With respect to funding, Act 312 provides, in pertinent part, as follows:

Upon adoption of a plan, the court shall order the party or parties admitting responsibility or the party or parties found legally responsible by the court to fund the implementation of the plan. La. R.S. §30:29 (C)(5). However, Act 312 further provides that any judgment requiring the party or parties found legally responsible to deposit funds into the registry of the court for implementing the plan shall be considered a final judgment for purposes of appeal. La. R.S. §30:29(C)(6)(a).

There is a lack of continuity between these two provisions of Act 312. While it seemingly requires immediate funding of the plan, it also allows an immediate appeal of the judgment requiring funding. It is suggested that a suspensive appeal should negate or postpone a party’s responsibility to fund the plan immediately. This opinion is based upon the lack of any language in the Act to show that the legislature intended Act 312 to trump the appellate provisions found in the Louisiana Code of Civil Procedure.

D. What Clean Up Standard Applies

As discussed above, Act 312 requires implementation of the most “feasible plan.” That, in turn, is defined as “the most reasonable plan which addresses environmental damage in conformity with the requirements of Louisiana Constitution Article IX, Section 1,” and complies with “the specific and relevant standards and regulations promulgated by a state agency….“ La. R.S. §30:29(I)(3). Despite referencing “specific and relevant standards and regulations,” Act 312 is silent on which standards apply. As litigation under Act 312 emerges, it has become clear that the plaintiffs consistently rely upon the standards set forth under Statewide Order 29-B, LAC XIX, §101, et. seq. Among other things, Statewide Order 29-B provides rules and regulations for on-
site pit remediation. These rules and regulations provide standards for various constituents, including heavy metals.

What is not fully clear, however, is how Act 312 applies to claims concerning the contamination of groundwater. Statewide Order 29-B provides that pits should be closed properly to assure protection of aquifers and USDWs, it does not provide any guidance or screening standards for groundwater. In fact, groundwater has historically been the exclusive province of the Louisiana Department of Environmental Quality ("LDEQ"). The LDEQ has implemented a Risk Evaluation Corrective Action Program ("RECAP") that is used to evaluate groundwater contamination. RECAP is a risk-based program similar to those used by the Environmental Protection Agency. Significantly, the LDNR relied upon RECAP for guidance in addressing groundwater contamination in the Tensas Poppadoc matter. Thus, it appears as though RECAP will be considered by DNR to be an applicable standard in Act 312 cases.

Under RECAP, different screening standards and management options apply to various constituents of concern. These standards change based on the specific characteristics of the property, including whether the groundwater is used and how. Moreover, exceeding a screening standard does not, in itself, mandate corrective action under RECAP. Instead, RECAP requires further evaluation and can, in fact, result in a determination that no further action is necessary. In this respect, RECAP and Statewide Order 29-B differ. While one sets forth specific parameters, the other provides for additional analysis and evaluation.

Further, RECAP relies, in part, on certain drinking water standards referred to as Maximum Contaminant Levels ("MCLs"). While there are primary MCLs that implement health-protective standards, these apply to hazardous substances such as lead and arsenic. There are also Secondary MCLs that are driven by taste and appearance, rather than the protection of public health. These apply to some of the most common oilfield constituents, such as chlorides. Plaintiffs rely on these standards to argue that Act 312 requires the remediation of chlorides in usable groundwater, even in the absence of any other contaminant in excess of regulatory limits. While the LDNR has shown its intent to rely upon RECAP, it is unclear whether courts will follow suit.

In 2010, the LDNR gave notice of its intent to amend Rule 29B by adopting a new Chapter 8 which will set forth specific soil and groundwater cleanup standards at oilfield sites. The new regulations include the adoption of Site Evaluation and Remediation Procedures Manual. ("SERP"). SERP is similar to the risk evaluation program adopted by the RECAP manual. The period for comment on the proposed changes remains open and a public hearing is set for April 5, 2010.
E. Regulatory Cleanup and Excess Damages/Funds

As discussed above, Act 312 requires that any money awarded for environmental damage be deposited into the registry of the Court for the implementation and funding of the plan adopted by the Court. Act 312 further requires that any money left in the registry of the Court after remediation is complete be returned to the responsible party.

However, Act 312 preserves all private claims and causes of action. Plaintiffs have taken the position that the private claims preserved by Act 312 include those for environmental remediation in excess of regulatory limits. This is based upon the Louisiana Supreme Court’s rulings in Corbello and Castex that, combined, require a clean up to “original condition” when there is either a contractual basis for such a claim or when there is evidence that the Defendants’ use of the property or exercise of lease rights has been in excess of what a reasonably prudent operator would do.

Plaintiffs in these cases are taking the position that the procedures and provisions of Act 312 apply only to claims for a regulatory cleanup. If there is an award for damages that require a cleanup to background, Plaintiffs maintain that they are entitled to the difference between the two. Although this appears to contradict the plain language of the statute, it is uncertain how the courts will respond to these competing concerns. This issue is currently being litigated in the matter of M.J. Farms, LTD v. ExxonMobil Corporation, where the Plaintiffs are seeking a complete restoration, and claiming that Act 312 does not apply to anything that exceeds a regulatory cleanup.

F. Settlement of Act 312 Cases

Settlements of Act 312 cases are governed by La.R.S. 30:29(J). That provision provides that any settlement in an Act 312 case is subject to court approval. The LDNR and Attorney General shall be provided the settlement and have thirty days to comment. If a court determines that remediation is required under the statute, the money to cover the cost of remediation shall be placed in the registry of the court and the settlement cannot be funded until these requirements are met. Finally, the requirements of Section J do not apply if the settlement is for a “minimal amount” and does not dispose of the entire litigation.

In Raymond Thomas, et.al. v. Ashley Investment Company, et.al. No. 38,839 (5th JDC 4/1/09), plaintiff settled with less than all defendants. The non-settling defendant moved for the disclosure of the settlement agreement and for the court to allow it to participate in the hearing on the settlement. Plaintiff argued that the settlement was for “private” damages under Act 312 and thus, no remediation was required, the settlement funds did not have to be put into the registry of the court and no court approval was needed.
After an extensive review of the language of Act 312, the court held that the settling parties must disclose the settlement to the court, the LDNR and the Attorney General. The parties did not have to disclose the settlement to the non-settling defendants. However, the court considered the required disclosures to be within the public record and thus, would be available to the non-settling defendant. The court further held that before the settlement could be approved, it would have to hold a hearing to determine whether remediation would be required. The court based its holding, in part, upon LDNR's position that the agency was going to leave the determination regarding the need for remediation to the court, and would not review the settlement for that purpose. Finally, the court held that only the settling parties, the LDNR and the Attorney General would be allowed to participate in the hearing.

VI. Removal

At least two federal court cases have held that Act 312 cases can be removed to Federal Court. In Kling v. Realty co., Inc. v. Chevron U.S.A., Inc. 575 F.3d 510 (5th Cir. 2009) and C.S. Gaidry, Inc v. Union Oil Co., 2009 WL 2765814 (E.D. La. 2009), motions to remand were denied. In C.S. Gaidry, the court rejected the argument that Act 312 created difficult issues of law and a special forum that required litigation in state court and thus, Burford abstention should apply. The court held that Act 312 created only a procedural mechanism for addressing these claims and that any required involvement of the state agencies could still be accomplished in Federal Court.

VII. Lejune Defense

Act 312 does not undermine or otherwise hinder the basic affirmative defenses pled in prior Legacy Lawsuits. Such defenses include the defense of prescription, comparative fault, the lack of contractual obligations; the reasonably prudent operator defense, or defenses based on the unfeasibility of the plans proffered by plaintiffs. These defenses are usually fact-intensive and are often referred to the merits at trial. Thus, they are rarely determined prior to trial and will not be covered herein.

There is one defense that has often been litigated and determined prior to trial in Legacy Lawsuits. This defense attacks the plaintiff's right to sue for damages that occurred to the property prior to his/her acquisition. Under Louisiana law, the right to assert a claim for damages to land is a personal right, not a real right, and is therefore not transferred to the new owner by a mere transfer of title to the land; rather, for the subsequent owner of the land to be in a position to assert the claim, the previous owner must have specifically assigned the right to him. La. C.C. art. 1764; Prados v. South Central Bell Tel. Co., 329 So.2d 744, 750 (La. 1975); LeJeune Brothers, Inc. v. Goodrich Petroleum Co., 2006-1557
In *LeJeune*, the Third Circuit re-affirmed the well-settled principle that "[u]nder no sound theory can [a claim for property damage] be considered as attached to or accessory to the immovable property." *Id.* at 32. The court specifically reasoned as follows:

[U]nder Louisiana law, generally a claim for damages to property belongs to the person who owns the property at the time it was damaged. [Defendant] contends this is a personal right, not a real right, and does not automatically transfer to the succeeding owner of the property. It is established that this right can be transferred to the succeeding property owner, but a specific assignment of this right is required to accomplish such a transfer. *Id.* at 29-30. The Third Circuit sustained the defendant’s exception of no right of action as to the plaintiff’s tort claims, including tort claims arising under Louisiana Mineral Code articles 11, 22, and 122. *Id.* at 32.

The *Lejune* analysis has also recently been adopted by the Fourth Circuit in *Eagle Pipe and Supply, Inc. v. Amerada Hess Corporation, et.al.*, No 2009-CA-0298 (4th Cir. 2/10/2010) where the Fourth Circuit upheld the district court’s dismissal of plaintiff’s claims for property remediation because the plaintiff did not own the property at the time the alleged contamination took place.

In *Donald Marin, et.al. v. Exxon Mobil Corporation, et.al* the First Circuit Court of Appeal refused to apply *LeJune* and dismiss plaintiffs’ claims. However, this case involved a unique set of fact. First, the plaintiffs in this case were parties to contracts directly with ExxonMobil, which plaintiffs contend were breached by the failure to properly remediate the property. In addition, ExxonMobil had conducted remedial work on the property after the plaintiffs acquired ownership. The court found that the remedial work by ExxonMobil did not remediate the property as required and that ExxonMobil had misrepresented the condition of the property to the current owner after the remediation occurred.

In many existing legacy cases, the current landowners acquired neither mineral rights nor the right to sue for pre-acquisition property damage. Many times, the current landowners came into possession of the property years, if not decades after oil and gas operations ceased. Thus, this is becoming a common defense to these lawsuits. It is important to note that the Louisiana Supreme Court has yet to weigh in on this issue.

**VIII. Summary and Conclusion**

Although the Louisiana Legislature had high hopes in drafting Act 312, it has done very little to alter pre-trial proceedings. The impact of
Act 312 is most significant in post-trial proceedings in that it mandates the involvement of the LDNR, and provides for the funding of an environmental remediation plan through the registry of the Court. Undeniably, these new procedures create some uncertainty, all of which will have to be resolved through existing litigation. If anything, Act 312 has only served to lengthen and increase the cost of legacy litigation. The outcome of existing litigation may, in turn, result in future legislative changes or amendments to Act 312. However, at this time, much of the uncertainty will be resolved in the judiciary.