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# Overview of the Application and Treatment of Act 312 in Federal Courts

Charles A. Nunmaker\*

## INTRODUCTION

The introduction and implementation of title 30, section 29 of the Louisiana Revised Statutes and articles 1552 and 1563 of the Louisiana Code of Civil Procedure—collectively known as “Act 312”—into the legacy litigation arena has brought about interesting and complex procedural considerations. Among these are the extent, if any, to which the Act is applicable in federal courts.<sup>1</sup> While the Act as a whole is roundly recognized as procedural rather than substantive, certain of its elements carry definite substantive overtones. On occasion, Louisiana’s federal courts have adopted and employed some of these elements. This article explores the development and evolution of Act 312—particularly regarding its treatment by Louisiana’s federal courts—with the objective of identifying those portions of the Act which have been, or are likely to be, adopted by federal courts handling this type of legacy litigation.

The focus of this article rests upon a survey of federal litigation implicating Act 312. Part I provides a basic history of Act 312. Parts II and III explore pertinent authority regarding jurisdictional issues in federal court litigation, with a particular eye to the *Erie* Doctrine and federal abstention, respectively. Part IV then analyzes the substantive application of Act 312 in the federal courts, concluding, in Part V, with an overview of the Act’s implications in federal court litigation.

## I. A BASIC HISTORY OF ACT 312

While a detailed discourse on the history of Act 312 (and, particularly, of section 30:29) lies beyond the scope of this article, a general review is

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1. “Act 312” is a generic label for 2006 La. Acts 312 (effective 6/08/06), which amended and re-enacted LA. REV. STAT. ANN. §§ 30:82(6), 89.1 and 2015.1(B), (C)(1), (2) and (4), (D), (E)(1), (F)(2), (H), (I) and (K), and enacted LA. REV. STAT. ANN. § 30:29, 29.1 and 2015.1(L). As used in this article, “Act 312” generally refers exclusively to LA. REV. STAT. ANN. § 30:29 and subsequently implemented LA. CODE CIV. PROC. arts. 1552 and 1563 (2015). As a practical matter, most of the cases of note arose within the past ten years, but prior to the coverage of the 2014 amendments to Act 312.

necessary to establish a chronological backdrop for the development of federal jurisprudence relating to the Act.<sup>2</sup> The proclaimed intent driving the passage of Act 312 was “to effectuate an orderly and certain procedure governing and implementing the remedy of environmental remediation in oilfield legacy cases, once the plaintiffs have asserted, and proven, a claim for remediation of environmental damages or the defendant has admitted to liability therefor”<sup>3</sup> and to effect the legislative charge of ensuring “that damage to the environment is remediated to a standard that protects the public interest.”<sup>4</sup> Act 312 changed the remedy available in legacy litigation cases by implementing a procedure aimed at safeguarding those elements of judicial awards attributable to the remediation or restoration of environmentally damaged properties to state regulatory standards.<sup>5</sup> The procedure set forth in the Act mandates the deposit of such funds into court registries for judicial oversight and administration.<sup>6</sup>

Civilian doctrine has long provided the foundational basis for the exercise of mineral rights in Louisiana, including in the context of landowner claims of surface damage or contamination through abuse of those rights. In early 2003, however, the Louisiana Supreme Court issued its opinion in *Corbello v. Iowa Production*,<sup>7</sup> an opinion that was monumental in two respects. First, it recognized that a successful landowning plaintiff was not burdened with any obligation to dedicate recovered damages to the restoration or remediation of the

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2. See Loulan Pitre, Jr., “*Legacy Litigation*” and Act 312 of 2006, 20 TUL. ENVTL. L.J. 347 (Summer, 2007) [hereinafter Pitre], for a complete and cogent discussion of the history of Act 312.

3. State of Louisiana v. Louisiana Land & Exploration Co., Inc., 2012-0884, p. 29 (La. 1/30/13); 110 So. 3d 1038, 1059 (Guidry, J., *concurring opinion*).

4. LA. REV. STAT. ANN. § 30:29(A) (2007). LA. CONST. art. IX, § 1 states: “The natural resources of the state, including air and water, and the healthful, scenic, historic, and esthetic quality of the environment shall be protected, conserved, and replenished insofar as possible and consistent with the health, safety, and welfare of the people. The legislature shall enact laws to implement this policy.”

5. *Louisiana Land & Exploration*, 110 So. 3d at 1049; *M.J. Farms, Ltd. v. Exxon Mobil Corp.*, 2007-2371, p. 30 (La. 7/1/08); 998 So. 2d 16, 37; *amended on reh’g*, 2007-2371, p. 33 (La. 09/19/08); 998 So. 2d 40. In *Savoie v. Richard*, 13-1370 (La. App. 3 Cir. 4/2/14); 137 So. 3d 78, the Louisiana Supreme Court required the deposit into the district court’s registry of the full \$38 million judgment for remediation to state requirements, even though the approved plan of remediation amounted to only \$3.9 million of that amount, subject to reimbursement to the paying defendant, Shell Oil, of any amounts remaining in the registry after the court-certified completion of the remediation required by the plan. The plaintiffs in *Savoie* recovered a separate \$18 million in damages not covered by Act 312 for private excess remediation claims under the terms of their mineral leases. *Savoie*, 137 So. 3d at 85 n.1.

6. LA. REV. STAT. ANN. §§ 30:29(C)(5–6), (D)(1–4) (2007).

7. *Corbello v. Iowa Production*, 2002-0826 (La. 2/25/03); 850 So.3d 686.

environmentally damaged property.<sup>8</sup> Second, relying upon the sanctity of contractual terms and party expectations, the court held that damages recoverable by a landowner for contractual breach of restoration obligations were not restricted by the market value of the property in question.<sup>9</sup> The impact of *Corbello* was swift and significant; the case was followed by the filing of a multitude of damage suits brought by Louisiana landowners—in such volumes as to give rise to a specified nomenclature, “legacy litigation,” to identify this type of suit.<sup>10</sup>

In the summer of 2003, title 30, section 2015.1 of the Louisiana Revised Statutes, the Groundwater Remediation Act (GRA) came into being.<sup>11</sup> Developed as an initial response to the rise of legacy litigation, the statute is noteworthy in several respects. First, its passage introduces the requirement that those filing adversarial claims for damages within the statute’s scope provide written notice of the filing of the demand, through certified mailing, return receipt requested, to the Louisiana Department of Environmental Quality (LDEQ).<sup>12</sup> An additional provision states that no judgment or order granting relief in the litigation shall issue in the absence of the requisite proof of such notification.<sup>13</sup> Moreover, the statute, as amended, recognizes the right of the LDEQ to intervene in any such action.<sup>14</sup> Section 30:2015.1 (C) and (D) of the Groundwater Remediation Act provides for the submission, review, and judicial adoption or structuring of a plan determined to be the most feasible plan for evaluating and remediating contamination and protecting the condition of usable ground water consistent with the public interest.<sup>15</sup>

Second, the law provides that all damages or payments in any civil action for the evaluation and remediation of contamination or pollution,

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8. In reaching this first conclusion, the court found no indication of legislative consideration of the merits or detriments implicated by allowing private landowners to control the decision of whether or not to use recovered damages to restore contaminated land. However, the court declared that it was clear that the legislature had implemented no procedure to ensure that the landowners so devoted the recovered monies. *Id.* at 701.

9. *Id.* at 693–95.

10. Pitre, *supra* note 2, at 348; *Marin v. Exxon Mobil Corp.*, 2009-2368, 2009-2371 (La. 10/19/10); 48 So. 3d 234, 238 n.1.

11. 2003 La. Acts 1166, effective July 2, 2003. Prior to the enactment of LA. REV. STAT. ANN. § 30:29 in 2006, LA. REV. STAT. ANN. §30:2015.1 included both the LDEQ and the Louisiana Department of Natural Resources (LDNR). As part of Act 312, the legislature amended the provisions of LA. REV. STAT. ANN. § 30:2015.1 to remove the LDNR from coverage under that statute. 2006 La. Acts 312, § 1.

12. This notice must be made through certified mailing, return receipt requested. LA. REV. STAT. ANN. § 30:2015.1(B) (2016).

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

14. *Id.*

15. LA. REV. STAT. ANN. § 30:2015.1 (C), (D) (2016).

potentially or actually impacting ground water resources, shall be paid into the court registry.<sup>16</sup> Disbursements of such amounts from the registry are subject to continuing judicial oversight and management.<sup>17</sup> The law also contains provisions for awards of costs, fees, and expenses related to claims within its ambit to successful litigants and public authorities.<sup>18</sup> Finally, the preamble to the statute expresses legislative recognition that the natural resources of the state are to be “protected, conserved and replenished insofar as possible[,]” consistent with the public interest therein, and that the legislature is mandated to enact laws to implement such policy.<sup>19</sup>

Despite its novel elements, the statute remains limited in scope. In fact, subsection (B) of the GRA restricts its coverage to claims “to recover damages for the evaluation and remediation of any contamination or pollution that is alleged to impact or threaten usable ground water.”<sup>20</sup> Thus, the post-enactment cases tended to omit—if not to disclaim entirely—allegations of breach or wrongdoing related to contamination or pollution of usable ground water.<sup>21</sup> In other words, the focus of post-2003 legacy litigation fell particularly upon claims of surface contamination. Consequently, a perception grew that landowners were pursuing financial windfalls at the expense of the public’s interest in maintaining environmental quality—i.e., that the legislative void discussed in *Corbello* had not been satisfactorily addressed.

This controversy led to the enactment of Act 312.<sup>22</sup> The Act’s resemblance to the GRA is unmistakable; all of the elements outlined in the context of the GRA find direct counterparts in section 30:29. However,

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16. LA. REV. STAT. ANN. §30:2015.1 (E).

17. LA. REV. STAT. ANN. § 30:2015.1 (E)(4).

18. LA. REV. STAT. ANN. § 30:2015.1 (F).

19. LA. REV. STAT. ANN. § 30:2015.1 (A).

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

21. See, e.g., *Brownell Land Co., L.L.C. v. Apache Corp.*, 2:05-cv-00322, 2005 U.S. Dist. LEXIS 36594, pp. 17–19, 2005 WL 3543772 (E.D.La. 10/13/05); *Frank C. Minvielle, L.L.C. v. IMC Global Operations, Inc.*, 380 F.2d 755, 761 (W.D. La. 2004) (note 19); *LeJeune Bros. v. Goodrich Petroleum Co., L.L.C.*, 2006-1557, pp. 17–18 (La. App. 3d Cir. 11/28/07); 981 So.2d 23,35, *writ den.*, 2008-0298 (La. 04/04/2008), 978 So.2d 327. “[M]any petitions expressly stated that [landowners] were not bringing claims for contamination or pollution of usable ground water subject to section 2015.1, removing such litigation from the effect of section 2015.1.” Pitre, *supra* note 2, at 349.

22. See *supra* note 1. The provisions of Act 312 became effective on June 8, 2006, and they applied to suits on record as of that date, except for any case in which the court, on or before March 27, 2006, had issued or signed an order setting the case for trial, and in which the litigant filing such demand for environmental damage did not exercise the right of designating the case for coverage under the Act. 2006 La. Acts 312, §§ 2–3.

the areas of coverage remain separate and distinct.<sup>23</sup> By express provision, section 30:29 relates to “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.”<sup>24</sup> The statute’s primary distinction lies in its application to “environmental damage,”<sup>25</sup> as opposed to the province of the GRA over “contamination or pollution that is alleged to impact or threaten usable ground water.”<sup>26</sup> Additionally, section 30:29 entails the involvement of the Louisiana Department of Natural Resources (LDNR), while the GRA now involves only the LDEQ.<sup>27</sup>

Prior to 2012, Act 312 was generally characterized as consisting of six primary elements:

- 1) *Timely Notice*. Act 312 requires that timely notice shall be furnished to the LDNR and to the Louisiana Office of Attorney General (LOAG) immediately upon the assertion of a judicial demand relating to a claim for environmental damage.<sup>28</sup>
- 2) *Stay*. The litigation in which such judicial demand is asserted shall be stayed for a period of thirty days after such notice is issued and the return receipt thereof is filed with the court.
- 3) *State Intervention*. Under subsection 30:29(B)(2), the State (particularly, the LOAG and the LDNR) has the prerogative—but not the obligation—of intervening in such litigation in accordance with the Louisiana Code of Civil Procedure.
- 4) *Determination of Most Feasible Plan*. Subsection C of section 30:29 specifies the role and function of LDNR’s Office of Conservation (OCC) in the review, development, and submission of plan(s) for the evaluation and/or remediation of environmental damage.

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23. In conjunction with the 2006 enactment of LA. REV. STAT. ANN. § 30:29, subsection (L) was added to LA. REV. STAT. ANN. § 30:2015.1 (2016) to expressly provide that the latter “shall not apply to oilfield sites or exploration and production (E&P) sites regulated by the Department of Natural Resources, office of conservation.” Such sites were expressly noted to be the same sites within the definitions and coverage of LA. REV. STAT. ANN. § 30:29(I)(4) (2007). *See supra* note 11.

24. LA. REV. STAT. ANN. § 30:29(A) (2016).

25. *Id.*

26. LA. REV. STAT. ANN. § 30:2015.1(B) (2016). LA. REV. STAT. ANN. § 30:2015.1(L) (2016) provides expressly that the statute shall not apply to oilfield sites or exploration and production sites regulated by LDNR.

27. LA. REV. STAT. ANN. § 30:29; LA. REV. STAT. ANN. § 30:2015.1.

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

- 5) *Provision for Payment of Damages.* The statute provides for the payment of all claims associated with the evaluation or remediation of environmental damages and it further provides that the court shall oversee the actual implementation of the plan adjudicated to be “most feasible.”<sup>29</sup>
- 6) *State Recovery of Costs and Expenses.* Section 30:29(E) addresses the recovery from the responsible party of costs, fees, and expenses by successful litigants and by the State.<sup>30</sup>

In addition to the six foregoing elements, subsections 30:29(J)(1) and (2)—both part of the original statute—establish what could be described as another fundamental element of the Act:

- 7) *Settlement Oversight.* Court approval is required for any settlement reached in connection with a case subject to the statute.<sup>31</sup> Moreover, notice of the settlement must be communicated to the LOAG and the LDNR, both of which have a statutory minimum thirty day period to review the given settlement and comment to the court before any judicial confirmation of the settlement occurs.<sup>32</sup> If the court requires remediation after a contradictory hearing, the court shall not certify or approve any settlement until monies sufficient to fund such remediation are deposited into the registry of the court.<sup>33</sup> The court has the prerogative of waiving the requirements of the statute if the settlement is for a minimal amount and is not dispositive of the entire case.<sup>34</sup> Subsection (J) includes provision for the recovery of costs, expenses, and fees by the LDNR and the LOAG if either had intervened in the matter prior to the settlement having been reached.

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29. LA. REV. STAT. ANN. §§ 30:29(D), (F).

30. These six elements were delineated in 2007 in *Pitre*, 20 TUL. ENVTL. L. J. at 350–53. The Louisiana Supreme Court reiterated the six-element description of the Act in *M. J. Farms, Ltd. v. Exxon Mobil Corp.*, 2007-2371, p. 29 (La. 07/01/08); 998 So. 2d 16, 36, *amended on reh'g*, 2007-2371, p. 33 (La. 09/19/08); 998 So. 2d 40.

31. LA. REV. STAT. ANN. § 30:29(J)(1) (2007).

32. *Id.*

33. *Id.*

34. *Id.*

In 2012, Act 312 was revised and amended to introduce additional procedures,<sup>35</sup> more particularly described as follows:

- 8) *The Notice of Intent to Investigate*. The 2012 amendments added subsection (B)(7) of title 30, section 29 of the Louisiana Revised Statutes to provide for the suspension of up to one year of the prescriptive period applicable to any claim covered under the statute upon service on the LDNR and key parties of a notice of intent to investigate alleged environmental damage and the identification of environmental testing information in any judicial demand filed subsequent thereto.
- 9) *The Environmental Management Order*. The Environmental Management Order is a mechanism for managing the investigation, testing, and discovery procedures related to environmental damage cases. It was established under Louisiana Code of Civil Procedure article 1552, which was enacted through the 2012 amendments to Act 312.<sup>36</sup>
- 10) *The Preliminary Hearing*. The 2012 amendments also enacted subsection 30:29(B)(6), which sets forth the procedure for a preliminary hearing to traverse “whether there is good cause for maintaining the defendant as a party in the litigation.” The hearing process specifically focuses upon the plaintiff’s allegations of environmental damage and causation.<sup>37</sup> A claimant bears the *prima facie* burden of introducing evidence to support the allegations of environmental damage.<sup>38</sup> After that, the preliminary hearing movant has the burden of establishing the absence of genuine issue of material fact as to that party’s lack of legal responsibility for the alleged environmental damage. Any dismissal as a result of a preliminary hearing shall be without prejudice. However, if the dismissed defendant is not rejoined, that defendant shall be entitled to a judgment of dismissal with prejudice following entry of the final judgment in the case-in-chief. The

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35. 2012 La. Acts 779, sec. 1. Section 2 of Act 779 provided, “The provisions of the Act shall not apply to any case in which the court on or before May 15, 2012, has issued or signed an order setting the case for trial, regardless of whether such trial setting is continued.” The effective date of the 2012 amendments was August 1, 2012. The same provision was included in Section 3 of 2012 La. Acts 754, which rendered LA. CODE CIV. PROC. ANN. arts. 1552 and 1563 (2016) effective as of August 1, 2012.

36. 2012 La. Acts 754, sec. 1.

37. LA. REV. STAT. ANN. § 30:29(B)(6) (2016).

38. *Id.*

preliminary hearing procedure is available in addition to the general pretrial rights and remedies available to all party litigants under the Louisiana Code of Civil Procedure.

- 11) *The Limited Admission of Responsibility for Environmental Damage.* The original terms of Act 312 allowed for a responsible party's admission of liability for environmental damage.<sup>39</sup> However, the 2012 amendments introduced article 1563 and its concept of the *limited* admission of liability for environmental damage into the Louisiana Code of Civil Procedure. More specifically, article 1563 provides for an admission of liability for environmental damage limited to a party's responsibility to implement the most feasible plan to evaluate and, if necessary, to remediate to regulatory standards all or a portion of the contamination that is the subject of the litigation or remediation. The limited admission does not constitute an admission of liability for private damages liability under subsection 30:29(H), and it cannot result in any waiver of the admitting party's rights and defenses in such a case. However, the admission is subject to the evidentiary parameters set forth in articles 702–705 of the Louisiana Code of Evidence and in article 1425 of the Louisiana Code of Civil Procedure. Article 1563(A)(6) of the Louisiana Code of Civil Procedure additionally requires the deposit of a minimum \$100,000 sum to cover the cost of the OCC's review of the plans and submittals under section 30:29, subject to reimbursement to the payor of any unused amounts.<sup>40</sup>
- 12) *Waiver of Indemnification for Punitive Damage Liabilities.* Subsection 30:29(L), also added through the 2012 amendments, mandates that when a responsible party admits liability for remediation of environmental damage pursuant to the terms of the statute, the admission constitutes a waiver of the right to enforce contractual indemnification clauses bearing on punitive damages arising out of environmental damage covered under Act 312.<sup>41</sup>

Act 312 was amended and modified once again in 2014, but with the provision that the changes would not apply to (1) any case filed before

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39. See, e.g., LA. REV. STAT. ANN. § 30:29(C)(1) (2007).

40. 2012 La. Acts 754, sec. 1.

41. For a listing of the key elements added by the 2012 amendments, see Loulan Pitre Jr., *Six Years Later: Louisiana Legacy Lawsuits since Act 312*, 1 LSU J. OF ENERGY L. & RESOURCES (2012), available at <http://digitalcommons.law.lsu.edu/jelr/vol1/iss1/10>.

March 10, 2014; or (2) any case in which the court had, on or before that date, issued or signed an order setting the case for trial, regardless of whether the trial setting had been continued.<sup>42</sup> These amendments became effective on August 1, 2014.

Subsection 30:29(B)(6) was modified to provide for the award of fees and costs in favor of any named defendant which succeeded at the preliminary hearing stage and was not later rejoined into the action. This element is generally regarded as a penal-type sanction against a plaintiff's assertion of a frivolous Act 312 claim against a given defendant.<sup>43</sup>

Additionally, the legislature added subsection 30:29(C)(2)(c), which establishes a rebuttable presumption in cases of a limited admission of liability under Louisiana Code of Civil Procedure article 1563. That presumption provides that the plan approved or structured by the LDNR (after appropriate consultation with LDEQ) represents the most feasible plan to address the environmental damage made subject of the limited admission.<sup>44</sup> Upon a party's request, the jury is to be instructed to this effect.<sup>45</sup> Article 1563(A)(2) was likewise amended to include the same substantive wording.

"Contamination" had always been a key element of the definition of "environmental damage" under Act 312, but the 2014 amendments added an express definition for the term "contamination."<sup>46</sup> The new statute states that "contamination" means, "the introduction or presence of substances or contaminants into a usable ground water aquifer, an underground source of drinking water (USDW) or soil in such quantities as to render them unsuitable for their reasonably intended purposes."<sup>47</sup> Thus, in the context of "any actual or potential impact, damage, or injury to environmental media caused by contamination resulting from activities

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42. 2014 La. Acts 400, Section 3. 2015 La. Acts, No 448 did not directly amend LA. REV. STAT. ANN. § 30:29 (2007), but enacted LA. REV. STAT. ANN. § 30:29.2, which requires a "meet and confer" of the parties to LA. REV. STAT. ANN. § 30:29 cases within sixty days of the end of the stay provided by LA. REV. STAT. ANN. § 30:29(B)(1), in an effort to assess the dispute, narrow the issues, and reach agreements pertaining to the litigation of the action. The statute also provides mechanisms for convening and conducting mediations of such cases. The effective date of LA. REV. STAT. ANN. § 30:29.2 occurred on August 1, 2015, with applicability extending to those cases then pending which had not then been set down for trial, or which are set down for trial—originally or as continued—after February 1, 2016.

43. See, e.g., Kaki J. Johnson, *The Migration from the Rig to the Courthouse: Oil and Gas Legacy Litigation in Louisiana*, 60 LOY. L. REV. 647, 682 (Fall 2014).

44. LA. REV. STAT. ANN. § 30:29(C)(2)(c) (2016).

45. *Id.*

46. LA. REV. STAT. ANN. § 30:29(I)(1) ("Contamination") and (2) ("Environmental damage").

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

associated with oilfield sites or exploration and production sites[.]” consideration of “environmental damage” must involve the assessment of contamination under the new definition.<sup>48</sup> Of course, the burden initially faced by a plaintiff attempting to survive a preliminary hearing under subsection 30:29(B)(6) and article 1563 requires the introduction of evidence to support the allegations of *environmental damage*.<sup>49</sup> The 2014 amendment appears to heighten that burden, at least to the extent that it requires an additional degree of proof relating to contamination.

In what may have been a response to the Louisiana Supreme Court’s opinion in *State of Louisiana v. Louisiana Land & Exploration Company, Inc.*,<sup>50</sup> the 2014 amendments eliminated the provision of section 30:29(H)(1), which had provided that nothing in that section should be construed to “preclude a judgment ordering damages for or implementation of additional remediation in excess of the requirements of the plan adopted by the court pursuant to this Section, as may be required in accordance with the terms of an express contractual provision.”<sup>51</sup> Furthermore, the 2014 amendments added a clause to section 30:29(H)(1) specifying that any award granted in connection with the judgment for additional remediation in excess of the requirements of the feasible plan adopted by the court would not have to be paid into the registry of the court.<sup>52</sup> At the same time, the legislature added a sentence to subsection 30:29(H)(2) stating that awardable damages under the statute would be governed by new subsection (M), which was added to the statute for the purpose of delineating the elements of recoverable damages under Act 312. Specifically, subsection (M) set out four exclusive categories of damages recoverable in an action under Act 312:

- 1) the cost of funding the most feasible plan, as adopted by the court;
- 2) the cost of any additional remediation required by an express contractual provision providing for remediation to original condition or to some other specific remediation standard;

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48. LA. REV. STAT. ANN. § 30:29(I)(2).

49. See LA. REV. STAT. ANN. § 30:29(B)(6) and La. Code Civ. Proc. Ann. art. 1563 (2016).

50. 12-0884 (La. 01/30/13); 110 So. 3d 1038.

51. LA. REV. STAT. ANN. § 30:29 (H)(1) (2012) (later amended).

52. *Id.*

- 3) the cost of evaluating, correcting, or repairing environmental damage shown to have been caused by unreasonable or excessive operations,<sup>53</sup> provided that such award is not duplicative of any damages recovered in items (1) and (2); and
- 4) the cost of non-remediation damages.

Subsection (M) additionally provides that none of its provisions shall be construed to alter the traditional burden of proof or to imply the existence or extent of damages, or to affect an award of attorney's fees or costs under the other provisions of section 30:29.

## II. THE ERIE CONUNDRUM: THE FUNDAMENTAL CHARACTER OF THE ACT 312

The *Erie* doctrine frames the question of governing law in federal courts.<sup>54</sup> Louisiana's federal courts generally apply the *Erie* analysis of governing law as follows:

The district court, sitting in diversity jurisdiction, must apply the substantive law of Louisiana, while employing Federal procedural rules. In the absence of a valid Federal Civil Rule addressing the point, the court must determine whether a particular rule is procedural or substantive by considering the "twin aims of the *Erie* rule: discouragement of forum-shopping and avoidance of inequitable administration of the laws."<sup>55</sup>

The *Erie* characterization of Act 312 elements plays a critical role in defining the legal analysis. Thus, in a federal diversity context, a fundamental issue with regard to Act 312 lies in whether the statutory provision under scrutiny is procedural or substantive in nature.

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53. Subsection (M) spells out that the determination of unreasonableness or excessiveness of operations with regard to Item (3) is to be assessed under the rules, regulations, lease terms, and implied lease obligations arising by operation of law, or under standards applicable at the time of the activity that is the subject of the complaint. LA. REV. STAT. ANN. §30:29(M).

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

55. *Frank C. Minvielle v. IMC Global Operations*, 380 F.Supp.2d 755, 759 (W.D. La., 2004) (citing *Erie R. Co. v. Tompkins*, *supra*; *Hanna v. Plumer*, 380 U.S. 460, 85 S.Ct. 1136, 14 L.Ed.2d 8 (1965)). If the diversity case involves an unsettled question of state substantive law, the federal court must apply an "*Erie*-guess" as to how the state's highest court would resolve the issue. If the state's highest court has not yet spoken on the issue, federal courts may refer to the rulings of the state's intermediate appellate courts for guidance. *TS & C Investments, L.L.C. v. Beusa Energy, Inc.*, 637 F.Supp.2d 370, 373–74 (W.D. La., 2009).

Until the 2014 amendments, as a matter of Louisiana state law, the answer was certain: “30:29 is procedural, rather than substantive, and does not create a right of action in favor of landowners.”<sup>56</sup> Indeed, the Louisiana Supreme Court recognized section 30:29 to be a “solely procedural statute” that does not create or abrogate any substantive rights.<sup>57</sup> The courts cited subsection 30:29(H) as principal support for this conclusion.<sup>58</sup>

In some instances, federal courts considering Act 312 have reached the same conclusion that the Act is procedural rather than substantive. Accordingly, courts abiding by this conclusion found no compelling need under *Erie* to employ Act 312 as governing law.<sup>59</sup> In other instances, the courts have found it unnecessary to reach an *Erie* determination, concluding that specific terms of Act 312 are of fundamental significance or can otherwise be read to open the door to the exercise of inherent judicial discretion. In this way, federal judges find the latitude to adopt pre-trial and trial procedures that are consistent with Act 312’s approach to the handling of legacy litigation cases.<sup>60</sup>

That being said, the enactment of the 2014 amendments to Act 312<sup>61</sup> raises the prospect of renewed focus upon the debate concerning the procedural or substantive nature of the Act—particularly in the federal courts. While the essential general characterization of the Act as procedural does not appear to have changed, the addition of subsection 30:20(M) and its delineation of compensable Act 312 damage elements brings with it the potential of new *Erie*-based legal arguments. The most that can be said at this juncture is that the question of whether the 2014 amendments to section 30:29 introduced substantive elements of law has yet to be definitively resolved in the jurisprudence.

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56. *Wagoner v. Chevron U.S.A. Inc.*, 45-507, pp. 12–13 (La. App. 2d Cir. 11/24/10); 55 So.3d 12, 26 (on rehearing).

57. *State of Louisiana v. Louisiana Land & Exploration Co., Inc.*, 2012-0884, pp. 21–23 (La. 01/30/13); 110 So. 3d 1038, 1053–54.

58. *M.J. Farms, Ltd. v. Exxon Mobil Corp.*, 2007-2371, p. 29 (La. 7/1/08); 998 So. 2d 16, 35–36.

59. *See, Alford v. Chevron, U.S.A., Inc.* 13 F.Supp.3d 581, 589 (E.D. La. 04/01/14) n.25 (order as modified); *see also Alford v. Anadarko E&P Onshore, L.L.C.*, 2:13-cv-05457 (ref 2:13-cv-05703), 2014 U.S. Dist. LEXIS 55724, 2014 WL 1612454 (E.D. La. 04/22/14) (R.Doc. 165, n.25).

60. *Consider, Brownell Land Co., L.L.C. v. Oxy USA, Inc.*, 538 F.Supp 954, 957-59 (E.D. La. 2007).

61. LA. REV. STAT. ANN. § 30:29 (2016). *See generally*, 2014 La. Acts 400.

### III. THE ISSUE OF FEDERAL COURT ABSTENTION

In a manner similar to the *Erie* approach, federal courts have rejected the position that Act 312 cases must be brought and heard exclusively in Louisiana's state courts. In the past, the argument typically presented by plaintiffs (usually landowners whose cases have been removed to federal court) was that federal court abstention was required under the so-called *Burford* abstention doctrine. Alternatively, plaintiffs call for federal deferral to the "primary jurisdiction" of the regulatory authorities (in the particular case of Act 312, the LDNR).

#### A. *Burford* Abstention

The argument raised by parties seeking to effect abstention in legacy litigation cases focused primarily upon the fact scenario arising in *Burford v. Sun Oil Co.*<sup>62</sup> In that case, an oil company sued in federal court to collaterally attack the validity of a conservation order issued by the Texas Railroad Commission (Commission), the mineral-rights regulatory authority in Texas. The conservation order granted Burford a drilling permit for four wells on a small piece of East Texas land.<sup>63</sup> One of the claims raised by the plaintiff was that the regulatory action represented a deprivation of due process of law, but in essence, the case was a simple proceeding in equity to enjoin the enforcement of the Commission's order. The central issue presented to the Supreme Court was whether the federal courts should intervene in a matter of such fundamental state interest and discretion.<sup>64</sup> The Court presented a full review of the Commission's history and its function as part of a coordinated state regulatory system—a system complete with provision for thorough judicial review by the Texas' own courts. In the end, the Supreme Court concluded that "[t]hese questions of regulation of the industry by the state administrative agency, whether involving gas or oil prorationing programs or Rule 37 cases [the state's well spacing rule], so clearly involves basic problems of Texas policy that equitable discretion should be exercised to give the Texas courts the first opportunity to consider them."<sup>65</sup> Hence, the species of federal abstention recognized by the Court has come to be known as *Burford* abstention.

The *Burford* abstention doctrine has been raised several times with regard to Act 312, but it appears that none of these efforts has met with success.

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62. *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943).

63. *Id.* at 316.

64. *Id.*

65. *Id.* at 332.

In 2007, the plaintiff in *Brownell Land Co., L.L.C. v. Oxy USA, Inc.* opposed the post-removal litigation of its Act 312 suit in the Eastern District of Louisiana, arguing that, under *Burford*, the court should abstain from hearing the case out of deference to the role assigned the LDNR under the Act.<sup>66</sup> District Judge Carl Barbier, presiding over the case, first noted the superficial appeal of the plaintiff's argument, before ultimately giving effect to binding Fifth Circuit authority set forth in *Webb v. B.C. Rogers Poultry, Inc.*<sup>67</sup> Relying on *Webb*, Judge Barbier held that a federal court cannot exercise *Burford* abstention in an Act 312 action for damages, since the court is not being asked to equitably weigh competing interests.<sup>68</sup> Rather, in an Act 312 case, the court has no discretion on whether to award damages upon a jury's determination that, as a matter of fact, contamination existed.<sup>69</sup> Application of *Burford* abstention would therefore be inappropriate.<sup>70</sup>

Similarly, in *C.S. Gaidry, Inc. v. Union Oil Company of California*, District Judge Sarah Vance rejected a landowner's assertion that *Burford* required federal court abstention in a case brought under Act 312.<sup>71</sup> The basis for this determination was simple: "Plaintiffs' contention that this statute requires the Court to abstain under *Burford* ignores the fact that they are asking primarily for damages and not equitable relief."<sup>72</sup> Applying *Webb*, the court found that *Burford* abstention does not apply to cases involving legal, as opposed to equitable, claims.

Furthermore, the fact that the *Gaidry* complaint included a prayer for injunctive relief to compel restoration of the property did not render *Burford* applicable to the case. Addressing that contention, Judge Vance reiterated the findings set forth prior to the enactment of Act 312 in a different *Brownell Land* case, *Brownell Land Co. v. Apache Corp.*, wherein District Judge Africk held that the disposition of legacy litigation in a federal setting would involve no difficult or unsettled state

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66. *Brownell Land Co. v. Oxy USA, Inc.*, 538 F. Supp. 2d 954, 958–59 (E.D. La. 2007). See also *supra*, note 60, for other mention of this case.

67. 174 F.3d 697, 704–05 (5th Cir. 1999). The *Webb* case built upon the development of *Burford* abstention as set forth in *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 729, 116 S.Ct. 1712, 135 L.Ed.2d 1 (1996), with *Webb* recognizing the rule that "a court may not remand pursuant to *Burford* abstention if the plaintiff seeks damages." *Webb*, 174 F.3d at 701. In essence, the *Burford* abstention doctrine has been limited to actions in equity. *Id.*

68. *Brownell Land*, 538 F. Supp. 2d. at 958–59.

69. *Id.* at 959.

70. *Id.*

71. *C.S. Gaidry, Inc. v. Union Oil Co. of Cal.*, 2:09-cv-02762, 2009 U.S. Dist. LEXIS 83096, at \*14 (E.D. La. Aug. 26, 2009).

72. *Id.*

law implicating substantial matters of state policy.<sup>73</sup> The same rationale underscored the rejection of *Burford* abstention in a 2010 GRA case brought in the United States District Court for the Middle District of Louisiana.<sup>74</sup>

### *B. Brillhart Abstention in Declaratory Judgment Actions*

*Chevron U.S.A. Inc. v. Cureington* represents a case of a federal court's deeming appropriate the grant of a stay in an Act 312 dispute.<sup>75</sup> The distinctive feature of that suit, filed by Chevron in federal court in response to the landowner's threat to institute state court litigation, lay in the fact that the Plaintiff sought purely declaratory relief.<sup>76</sup> Chevron sought a judgment declaring that it was not liable to the landowner under any theory of liability for damages resulting from oil and gas operations conducted on the property.<sup>77</sup> Alternatively, Chevron sought a judicial decree under section 30:29, referring the case to the LDNR for approval of a remedial plan and authorizing Chevron to enter the property for the purpose of implementing the approved remediation plan.<sup>78</sup> The landowner subsequently filed the state court action and soon thereafter launched a direct summary challenge in the federal action against maintenance of the federal case.<sup>79</sup> Specifically, the landowner sought dismissal of the federal declaratory judgment case on abstention grounds.<sup>80</sup>

At the outset of its analysis, the court found that Chevron's inclusion of the request for alternative relief in the form of referral to the LDNR indicated "a calculated effort to thwart" the abstention doctrine particularly applicable to declaratory judgment actions through *Brillhart*

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73. *Id.* at \*14–20; see *Brownell Land Co. v. Apache Corp.*, 2:05-cv-00322, 2005 U.S. Dist. LEXIS 36594, at \*16 (E.D. La. Oct. 13, 2005).

74. *Jumonville v. Hercules*, 3:10-cv-00393, 2010 U.S. Dist. LEXIS 115177 (M.D. La. Sept. 22, 2010), *report adopted*, 3:10-cv-00393, 2010 U.S. Dist. LEXIS 115164 (M.D. La. Oct. 27, 2010).

75. *Chevron U.S.A. Inc. v. Cureington*, 3:10-cv-00764, 2011 U.S. Dist. LEXIS 28978, 2011 WL 1085661 (W.D. La., Feb. 18, 2011), *adopted by, dismissed without prejudice by*, 3:10-cv-00764, 2011 U.S. Dist. LEXIS 28735 (W.D. La., Mar. 21, 2011).

76. *Id.* at \*3–4.

77. *Id.* at \*4–6.

78. *Id.*

79. *Id.* at \*7–8.

80. *Chevron*, 2011 U.S. Dist. LEXIS 28978, at \*8.

*v. Excess Texas Employers' Insurance Co. of America*.<sup>81</sup> In fact, the landowner and Chevron had already agreed that, upon a finding of liability in the state court action, the case should be referred to the LDNR for implementation of a remediation plan.<sup>82</sup> Because no dispute between the parties existed as to this point, there was no justiciable case or controversy to support the exercise of federal jurisdiction over Chevron's alternative claim.<sup>83</sup> Therefore, the court considered the case to be a pure declaratory judgment action subject to the edicts of *Brillhart* abstention.<sup>84</sup> The court concluded that Chevron's federal suit amounted to a procedural forum shopping maneuver that could not prevail over the interests of comity and the prudent administration of justice as effected through state court resolution of the case.<sup>85</sup> The court recognized the appropriateness of abstention, granted the landowner's motion for summary judgment, and dismissed the federal case without prejudice.<sup>86</sup>

The application of *Brillhart* abstention as recorded in *Cureington* is limited to the remote factual scenario of an Act 312 defendant's instituting a federal declaratory judgment action in the face of state court litigation on the same issues. As a general rule, the *Brillhart* abstention doctrine is simply inapplicable to the typical Act 312 case of a federal suit brought by a landowning plaintiff or a state suit removed to federal court.

### C. Erie and Abstention Conclusions

Act 312 does not divest federal courts of original jurisdiction, and any argument that the LDNR holds primary jurisdiction over remediation matters to the exclusion of the federal or state judiciary has been put to rest. Therefore, the position that Act 312 requires a federal court to defer to the regulatory authority of the LDNR in legacy litigation cases or to otherwise abstain from hearing the case has been soundly rejected.

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81. *Id.* at \*13 (referencing *Brillhart v. Excess Texas Employers' Insurance Co. of America*, 316 U.S. 491, 495 (1942)). This specific abstention doctrine pertaining to declaratory judgments is generally referred to as "*Brillhart* abstention." The *Brillhart* abstention doctrine is based upon the principle that it would be uneconomical as well as vexacious for a federal court to proceed with a declaratory judgment action where another suit is pending in state court between the same parties with the same non-federal issues. *Brillhart*, 316 U.S. at 495.

82. *Chevron*, 2011 U.S. Dist. LEXIS 28978, at \*13.

83. *Id.*

84. *Id.* at \*12–13. In adopting such an approach, the court rendered arguments for application of the more stringent parameters of *Colorado River* abstention inapposite. *Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976).

85. *Chevron*, 2011 U.S. Dist. LEXIS 28978, at \*28–29.

86. *Id.* at \*30–31. See also *Chevron*, 2011 U.S. Dist. LEXIS 28978, at \*3–4.

While the jurisprudential consensus is that the Act is procedural overall, sweeping categorization can be perilous. As examination of the case law bears out, certain elements of the statute have worked their way into application by the federal courts, while other elements have been expressly rejected.<sup>87</sup> Moreover, the 2014 amendments to section 30:29, and the enactment of subsection 30:29(M) in particular, may have introduced new substantive elements into the analysis. Nevertheless, federal courts have generally adhered to federal procedure in adjudicating the various elements of legacy litigation complaints.

#### IV. SUBSTANTIVE APPLICATION IN THE FEDERAL COURTS: PARTICULAR ELEMENTS OF THE ACT

##### A. *The Order of Trial and Assessment of the Most Feasible Plan*

In *Brownell Land*<sup>88</sup>—a case that arose during the pendency of *Weyerhaeuser Co. v. Petro-Hunt L.L.C.*<sup>89</sup>—Judge Barbier refused to bifurcate the pending suit into separate proceedings for the determination of liability and damages.<sup>90</sup> The court held that Act 312 was procedural, so that nothing precluded the court from presenting the damages case to the same jury that was to decide liability.<sup>91</sup> Moreover, the court found no requirement under either *Erie* or the Act compelling separate treatment for the damages associated with remediation.<sup>92</sup> Judge Barbier explained:

[T]here is nothing wrong with a jury determination of the amount of the damages. Thereafter [L]DNR will decide (with the court's approval) how much of those damages are to be used for remediation. The Louisiana Fourth Circuit has held that there is no need for a second jury for damages, and there is no reason for this Court to

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87. *Consider Brownell Land Co.*, 538 F.Supp. at 957–59.

88. *Id.*

89. In a September 2008 ruling in *Weyerhaeuser Co. v. Petro-Hunt L.L.C.*, No. 1:04-cv-02177, 2008 U.S. Dist. LEXIS 84329, at \*6 (W.D. La. Sept. 29, 2008), the court opted against applying the “procedural aspects” of LA. REV. STAT. ANN. § 30:29(C)(1) in a diversity case to order the development of a remediation plan or similar procedural undertaking. Nevertheless, and in a “more substantive vein,” the court affirmatively noted the statute’s provisions regarding the substantive right to the recovery of costs, expenses, and attorney’s fees. *Weyerhaeuser*, 2008 U.S. Dist. LEXIS 84329, at \*11-13. The *Weyerhaeuser* case is discussed in different contexts, *infra* at Parts IV (B, C, E, F and H).

90. *Brownell Land Co.*, 538 F. Supp. 2d. at 959.

91. *Id.*

92. *Id.*

disagree.<sup>93</sup>

In so ruling, the court effectively followed the Louisiana Fourth Circuit Court of Appeal's opinion in *Duplantier Family Partnership v. B.P. Amoco*.<sup>94</sup> Moreover, Judge Barbier questioned the plaintiff's supposition that the Act's provisions for a LDNR hearing during the pendency of litigation likely could not be enforced upon removal of the case to federal court:

[I]t is unclear why that would be so. This court is bound to follow the substantive law of the state, and even its procedural law, when it affects substantive rights. Such a rule allows this Court to enforce state procedural requirements related to medical malpractice, and it is not clear why this case is any different. In each of these cases, the federal court determined whether a plaintiff had complied with the procedures of the Louisiana Medical Malpractice Act. Other Courts have held that even though compliance with Medical Malpractice schemes is procedural, it must be followed by a federal court sitting in diversity. Regardless, this particular issue does not have to be decided by this Court at this particular time.<sup>95</sup>

Separately, in another federal case involving Act 312, on April 1, 2014, Judge Vance rejected the notion that Act 312 could support an independent substantive cause of action:

The Court does not interpret plaintiffs' complaint to assert a standalone claim under La. Rev. Stat. § 30:29. That statute is 'procedural, rather than substantive, and does not create a right of action in favor of landowners.' Section 30:29 merely specifies the procedures applicable to lawsuits alleging environmental damage; the substantive law is supplied by the Louisiana Civil and Mineral Codes and other applicable statutory law and jurisprudence.<sup>96</sup>

The *Brownell Land* order is fully consistent with the Louisiana Supreme Court's subsequent opinion in *State v. Louisiana Land & Exploration Co.*, wherein the court described the order of trial as follows:

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93. *Id.*

94. *Duplantier Family P'ship v. BP Amoco*, 2007-0293 (La. App. 4 Cir 5/16/07), 955 So. 2d 763; *writ denied*, 2007-1271 (La. 09/28/07), 964 So. 2d 368; 2007-1265 (La. 9/28/07), 964 So. 2d 368. As indicated in the cited passage, *Duplantier* was a state court legacy litigation case that turned on the issue of the order of trial in a case under section 30:29. 07-1271 (La. 09/28/2007); 964 So. 2d 367, 368.

95. *Brownell Land Co.*, 538 F. Supp. 2d at 959 (internal citations omitted).

96. *Alford v. Chevron U.S.A., Inc.*, 13 F. Supp. 3d 581, 589 (E.D. La. 2014); *see also*, *Alford v. Anadarko E&P Onshore L.L.C.*, No. 13-5457, 2014 U.S. Dist. LEXIS 55724, at \*10 n.25 (E.D. La. Apr. 22, 2014) (internal citations omitted).

In Subsection H, the legislature specifically makes clear the statute was not intended to change the substantive law. Subsection H states that the procedure enacted by this Section shall not preclude a landowner from pursuing a judicial remedy or receiving a judicial award for private claims, other than those remediation damages necessary to fund the feasible plan to remediate the land to a standard that protects the public interest, i.e. “except as otherwise provided in this Section.” If a court awards remediation damages pursuant to an express contract provision that is a greater amount than that ordered to be placed into the court’s registry to fund the remediation plan, then the landowner is entitled to those “excess” remediation damages. Likewise, “any award” for “additional remediation” may be kept by the landowner, as well. If the money judgment for remediation exceeds the amount necessary to fund the plan, the plaintiff is granted a personal judgment for the “excess” remediation damages; plaintiff is also granted a personal judgment on his other non-remediation private claims (if he prevailed on such claims at trial). All of these determinations are made part of a single judgment, and any party aggrieved by any aspect of this single judgment may appeal. The court of appeal correctly determined “[t]he clear language of the statute contemplates the landowner receiving an award in addition to that provided by the feasible plan.” The legislature states that the procedure it enacts in this legislation should not be interpreted as creating any cause of action or to impose additional implied obligations under the Mineral Code or arising out of a mineral lease that is not already there. As previously discussed, this procedural statute does nothing to the substantive rights of the landowner, whether arising out of (1) the implied obligations of the mineral lease under the Civil Code or (2) the implied obligation arising out of La. R.S. 31:122 if the landowner can show a mineral lessee has acted unreasonably or excessively under the lease.<sup>97</sup>

### *B. Notice, Stay and State Intervention Provisions*

As noted *supra*, the notice and stay provisions of Act 312 appear in subsection 30:29(B). This subsection requires that the party filing a judicial demand for environmental damage shall immediately “provide timely notice to the state of Louisiana through the Department of Natural

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97. State v. La. Land & Expl. Co., 2012-0884 (La. 10/30/13), 110 So. 3d 1038, 1054.

Resources, commissioner of conservation and the attorney general,” and makes additional provision for a stay of the litigation with respect to any such judicial demands until thirty days after the issuance of the notice and the filing into the record of return receipt(s) establishing receipt of the notice.<sup>98</sup> The law allows for the state’s intervention in the proceeding “in accordance with the Louisiana Code of Civil Procedure.”<sup>99</sup> Finally, subsection 30:29(B)(4) provides: “No judgment or order shall be rendered granting any relief in such litigation to which this Section applies, nor shall the litigation be dismissed, until timely notice is received by the state of Louisiana as set forth in this Subsection.”<sup>100</sup>

*Weyerhaeuser v. Petro-Hunt* represents one instance of a federal court’s refusal to apply the notice and stay provisions of section 30:29 (B)(1) and (2).<sup>101</sup> That case was filed on October 21, 2004, prior to the enactment of section 30:29.<sup>102</sup> However, during the course of the litigation, section 30:29 was enacted, the plaintiff thereafter sought to invoke subsection 30:29(B)’s regulatory notice and stay provisions.<sup>103</sup> The defendant opposed this effort.<sup>104</sup> On September 22, 2006, the court denied the plaintiff’s motion to stay the action, with the note: “Denied. A state statutory procedural stay is not applicable in this court.”<sup>105</sup>

It should be noted that, in response to a primary jurisdiction defense raised by the defendant before the enactment of Act 312,<sup>106</sup> the *Weyerhaeuser* court had ordered the Plaintiff to seek the following from the LDNR:

- 1) a determination regarding whether the well and/or wells at issue had been operated according to the rules and regulations of the OCC;
- 2) a determination regarding whether the plaintiff’s request for injunctive relief (to prevent further environmental contamination) was within the jurisdiction of the Commissioner of Conservation; and

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98. La. R.S. § 30:29 (2007).

99. *Id.*

100. *Id.*

101. *Weyerhaeuser Co. v. Petro-Hunt L.L.C.*, No. 1:04-cv-02177 (W.D. La.).

102. The effective date of 2006 La. Acts 312 was June 8, 2006.

103. *See Weyerhaeuser Co. v. Petro-Hunt L.L.C.*, No. 1:04-cv-02177, 2008 U.S. Dist. LEXIS 84329, at \*6 (W.D. La. Sep. 29, 2008) (Doc. 101).

104. *See generally*, *Weyerhaeuser Co.*; *id.* (Doc. 102).

105. *Id.* (Doc. 104).

106. *Id.* (Doc. 13).

- 3) such additional data as may be useful in disposing of the issues before the court.<sup>107</sup>

Contemporaneously, the court had also stayed all proceedings in the case, with the exception of those pertaining to discovery, pending the receipt of information from the OCC.<sup>108</sup> By the time the court's denial of a stay under the newly enacted section 30:29(B) in September, 2006,<sup>109</sup> the plaintiff had already initiated proceedings before the OCC. In denying a stay under subsection 30:29(B), the court rejected the plaintiff's argument that the May, 2006 referral of issues to the OCC stood at odds with the new statute and should be withdrawn.<sup>110</sup> As a practical matter, the LDNR had already been put on notice of the litigation.<sup>111</sup>

The Groundwater Remediation Act (GRA)<sup>112</sup> contains a provision similar to subsection 30:29(B). In fact, the GRA's Part (B) requires that those filing suit give notice of the filing to the LDEQ, and it recognizes LDEQ's right to intervene in litigation containing claims for recovery for the evaluation and remediation of any contamination or pollution that is alleged to impact or threaten usable ground water, in accordance with the Louisiana Code of Civil Procedure. However, unlike section 30:29(B), Part (B) of the GRA does not contain any provision for a stay of the litigation after issuance of the notice. In *Turner v. Murphy Oil USA, Inc.*, District Judge Fallon of the Eastern District refused to dispense with the notice requirement of GRA, Part (B), which he characterized as "not burdensome" and a procedure "that serves the purpose of allowing the state agencies to intervene in the litigation."<sup>113</sup>

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107. *See id.*

108. *Id.*

109. *Weyerhaeuser Co.*, 2008 U.S. Dist. LEXIS 84329, at \*6 (Doc. 104).

110. *Id.* (Doc. 99).

111. *Id.*

112. LA. REV. STAT. ANN. § 30:2015.1(B) (2016).

113. 2005 U.S. Dist. LEXIS 45123, at \*19–20 (E.D. La. Dec. 29, 2005). In a related ruling, Judge Fallon recognized that the plaintiffs had asserted a cause of action in the case under the GRA (LA. REV. STAT. ANN. § 30:2015.1). *Turner v. Murphy Oil USA, Inc.*, 234 F.R.D. 597, 609–10 (E.D. La. 2006). *Cf.*, with *Brownell Land Co., v. Apache Corp.*, 2005 U.S. Dist. LEXIS 36594, at \*18 (E.D. La. Oct. 13, 2005) (finding that the notification was not necessary since plaintiff did not make a claim that related to usable ground water), and *Frank C. Minvielle. L.L.C. v. IMC Global Operations, Inc.*, 380 F. Supp. 2d 755, 761 n.19 (W.D. La. 2004) (notification was not required because the plaintiffs expressly disclaimed the pursuit of any claims for, or remediation of, ground water contamination.).

### C. The Preliminary Hearing

Subsection (B)(6) of title 30, section 29 of the Louisiana Revised Statutes, in providing for the preliminary hearing added by the 2012 amendments, prescribes: “Within sixty days of being served with a petition or amended petition asserting an action, a defendant may request that the court conduct a preliminary hearing to determine whether there is good cause for maintaining the defendant as a party in the litigation.”<sup>114</sup> From the time of its enactment, disputes have arisen around whether Act 312 facilitates the employment of the preliminary hearing vehicle in federal cases.

Of particular note in this vein is the ongoing litigation in *Constance v. Austral Oil Exploration Co.*<sup>115</sup> That case was filed on April 11, 2012, and, within a short period of time, several defendants moved for the setting of a preliminary hearing under newly enacted subsection 30:29(B)(6).<sup>116</sup> Their efforts were unsuccessful, for on December 13, 2013, District Judge Patricia Minaldi refused the defendants’ applications for preliminary hearings under section 30:29(B)(6).<sup>117</sup>

Judge Minaldi started her analysis by noting the plaintiffs’ point under *Erie* and the Rules Enabling Act<sup>118</sup> that section 30:29 is a purely procedural statute,<sup>119</sup> so that it could not apply in federal court proceedings. She also considered the defendants’ counterarguments that: (1) section 30:29 satisfied *Erie*’s parameters for federal application notwithstanding *Louisiana Land*,<sup>120</sup> and (2) the statute must be applied in the federal setting in order to discourage forum-shopping.<sup>121</sup> Her analysis of the *Erie* issue included her express consideration of the *Brownell Land* holding that, even though it is procedural, parts of the Act are of such significance that they can be applied in federal cases. In the end, the *Constance* court found it unnecessary to reach an *Erie* determination in disposing of the defendants’ motions for preliminary hearings:

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114. LA. REV. STAT. ANN. § 30:29(B)(6) (2016).

115. *Constance v. Austral Oil Exploration Co.*, 2013 WL 6578178 (W.D. La. Dec. 13, 2013).

116. The court’s ruling identifies the defendants’ motions covered thereby. *See, id.* at \*1.

117. *Id.* at \*17

118. Rules Enabling Act, 28 U.S.C. §§ 2072–2077 (2016).

119. The plaintiffs relied upon *Louisiana Land & Exploration*, 110 So. 3d at 1053 for this position. *Constance*, 2013 WL 6578178, at \*15.

120. The defendants asserted that section 30:29 did not conflict with any federal rule, so that, with application of the outcome-determinative test and consideration of whether the state rule is “‘bound up’ with state-secured substantive rights and obligations,” the statute must be regarded as part of a cohesive statutory scheme designed to regulate the remediation of oilfield sites in the state. *Constance*, 2013 WL 6578178, at \*15.

121. *Id.*

Assuming, *arguendo*, that the Act is applicable to a federal court sitting in diversity, the Act's plain language merely asserts that "a defendant *may request* that the court conduct a preliminary hearing.

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Applying [the] interpretative principles [of statutory construction], a plain reading of the Act indicates that it merely gives the defendants the option to request a preliminary hearing. The Act does not require that a preliminary hearing be held. Rather, that decision seems to be at the discretion of the court.<sup>122</sup>

The court acknowledged the objective of Act 312's preliminary hearing to ensure a good faith basis for suit against each defendant, but it also found that this objective was redundant given the plaintiff's underlying good faith obligation under the Federal Rules of Civil Procedure. In addition, the court noted that the plaintiffs had submitted affidavit evidence of environmental damage in support of the basis for maintaining the action.<sup>123</sup> The court's opinion continued:

There are two possibilities: either the Act is substantive in nature or it is procedural. If it is substantive, then it must be applied by a federal court sitting in diversity. However, in this instance, assuming without deciding that the Act is substantive in nature, it merely permits a defendant to request a preliminary hearing to determine whether good cause is shown for maintaining suit against it. As the Act does not guarantee that a preliminary hearing be granted, and as the court finds that good cause has already been shown by the plaintiff, the court is disinclined to grant the defendants' requests for a preliminary hearing. On the other hand, if the Act is purely procedural in nature, then the Federal Rules of Civil Procedure control and a federal court sitting in diversity need not follow the Act's procedural guidelines.<sup>124</sup>

Similarly, in *Tureau v. 2H, Inc.*,<sup>125</sup> the defendants moved for the setting of a preliminary hearing pursuant to section 30:29(B)(6) prior to the removal of the case.<sup>126</sup> Post removal, and after an initial round of motion practice before the federal district court, the case was broken up

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122. *Id.* at \*16.

123. *Id.*

124. *Id.*

125. 2015 WL 4623615 (W.D. La. July 31, 2015).

126. *See the discussion in* Defendant Hess Corporation's Memorandum in Support of Motion for Preliminary Hearing Pursuant to La.Rev.Stat. § 30:29(B)(6) at 943, *Tureau v. 2H, Inc.*, No. 1:13-cv-02969 (W.D. La. Oct. 23, 2014) (Doc. 54-1).

into three related cases.<sup>127</sup> The pending motions were terminated, but with an express grant of leave to refile.<sup>128</sup> Hess Corporation, one of the *Tureau* defendants, re-urged its motion for the setting of a preliminary hearing on October 23, 2014, within a renewed sixty-day period.<sup>129</sup> The plaintiff filed an opposition to the motion on both factual and legal grounds; in particular, the plaintiff directly challenged the applicability of Act 312 in federal courts as a matter of law.<sup>130</sup> Citing *Weyerhaeuser, Constance*, and *Louisiana Land & Exploration*, the plaintiff asserted that “there is no reasonable basis upon which to conclude that Act 312’s procedural rules should be applied to the instant case.”<sup>131</sup> The plaintiff also contended that Judge Barbier’s conclusion in *Brownell Land* that a federal court is “bound to follow the substantive law of the state, and even its procedural law, when it affects substantive rights” was distinguishable.<sup>132</sup> Hess responded by filing a reply to the opposition maintaining the general applicability of section 30:29 under *Erie* principles.<sup>133</sup>

In a Memorandum Order issued on April 22, 2015,<sup>134</sup> the court denied Hess’s motion for a preliminary hearing.<sup>135</sup> Following the analysis set forth in *Constance*, the court found the preliminary hearing vehicle of section 30:29 to be procedural—even if it were not (i.e., even if it were substantive), it would not be binding because the preliminary hearing mechanism is volitional for defendants and discretionary for the courts.<sup>136</sup> In addition, the court criticized the preliminary hearing concept as implicating illogical and wasteful federal

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127. *See id.*, Memorandum Order at 2318, *Tureau v. 2H, Inc.*, No. 1:13-cv-02969 (W.D. La. Apr. 22, 2014) (Doc. 106), 2014 U.S. Dist. LEXIS 139780.

128. *Id.*

129. *Id.*, Defendant Hess Corporation’s Motion for Preliminary Hearing Pursuant to La. Rev. Stat. §30-29(B)(6) at 941, *Tureau v. 2H, Inc.*, No. 1:13-cv-02969 (W.D. La. Oct. 23, 2014) (Doc. 54).

130. Plaintiff’s Opposition to Motion for Preliminary Hearing, and in the Alternative, Opposition to Preliminary Dismissal Filed on Behalf of Defendant, Hess Corporation at 981, *Tureau v. 2H, Inc.*, No. 1:13-cv-02969 (W.D. La. Nov. 13, 2014) (Doc. 57).

131. *Id.* at 993.

132. *Id.* The plaintiff argued that *Brownell Land*’s analogy to Louisiana’s medical malpractice laws [now LA. REV. STAT. ANN. §§ 40:1231.1 to 1231.10] was inapposite because Act 312 contains no requirement for the exhaustion of administrative procedures prior to filing suit.

133. Hess Corporation’s Reply to Plaintiff’s Opposition to Motion for Preliminary Hearing Pursuant to Louisiana Revised Statute Section 30:29(B)(6) at 2061, *Tureau v. 2H, Inc.*, No. 1:13-cv-02969 (W.D. La. Jan. 20, 2015) (Doc. 78). Hess cited *All Plaintiffs v. All Defendants*, 645 F.3d 329, 335-36 (5th Cir. 2011) in support of an *Erie* argument for application of Act 312’s preliminary hearing feature based on *Brownell Land*.

134. Memorandum Order at 2318, *Tureau v. 2H, Inc.*, No. 1:13-cv-02969 (W.D. La. Apr. 22, 2014) (Doc. 106).

135. *Id.* at 2318–19.

136. *Id.* at 2319.

court proceedings.<sup>137</sup> Finally and, as the court noted, most importantly, the court had already found that the plaintiff had effectively stated a cause of action for alleged contamination of his property.<sup>138</sup> Thus, the court denied the motion for preliminary hearing.<sup>139</sup>

In sum, the question of the availability of an Act 312 preliminary hearing in federal court is unsettled. The issue appears to be regarded as one within the realm of judicial discretion, as described in *Constance*.<sup>140</sup> Its practical similarity to Rules 12 and 56 of the Federal Rules of Civil Procedure is a salient consideration prejudicing liberal application of the preliminary hearing mechanism in federal courts.

#### *D. The Limited Admission and LDNR Determination of the Most Feasible Plan*

The Western District has recently recognized and employed, albeit in absence of direct objection, two of the newest elements of the Act 312 panoply—namely, the option of the limited admission under Louisiana Code of Civil Procedure article 1563 and the concomitant provision governing the submission of a proffered “most feasible” remediation plan. *Moore v. Denbury Offshore, L.L.C.* involved the rupture of a six-inch saltwater flowline in Richland Parish, Louisiana.<sup>141</sup> Following the rupture, Denbury Offshore, L.L.C. (Denbury) notified the LDEQ of the incident and began assessment and remediation activities at the site under the supervision of the LDEQ.<sup>142</sup> Roughly a year later, the plaintiff landowners instituted an action in the Fifth Judicial District Court for the State of Louisiana.<sup>143</sup> Denbury removed the case to the Western District on the basis of diversity of citizenship.<sup>144</sup> Subsequently, Denbury stipulated to the presence of environmental damage and moved for the entry of an order referring the case to the LDNR pursuant to subsection 30:29(I)(1) and Louisiana Code of Civil Procedure article 1563.<sup>145</sup> The plaintiffs

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137. *Id.*

138. *Id.*

139. *Id.*

140. Of additional note, in consolidated cases concerning the Bayou Corne Sinkhole, several defendants filed motions for preliminary hearings under section 30:29(B)(6). *LeBlanc v. Texas Brine Co., L.L.C.*, No. 2:12-cv-2059 (E.D. La. Aug. 10, 2012) (Docs. 59; 171; 174).

141. *Moore v. Denbury Onshore, L.L.C.*, No. 3:14-cv-00913 (W.D. La.).

142. *See* Motion for Entry of Order to Refer Matter to La. Dep’t of Natural Res. for Public Hearing and Limited Admission of Responsibility for Envtl. Damage at 75, *Moore v. Denbury Onshore, L.L.C.* (W.D. La. Jan. 28, 2015) (Doc. 21).

143. Notice of Removal at 75, *Moore v. Denbury Onshore, L.L.C.* (W.D. La. Apr. 29, 2014) (Doc. 1).

144. *Id.*

145. *See supra* note 142. LA. REV. STAT. ANN. § 30:29(I)(1) (2007).

responded to the Denbury motion,<sup>146</sup> but they did not directly oppose Denbury's request for referral to the LDNR. The focus of their opposition was the concern that the referral would delay the trial of the case.<sup>147</sup> Stated differently, the principal dispute between the parties at the time concerned the procedural operation of article 1563—and not the defendant's right to invoke the procedure in a federal setting.<sup>148</sup> In fact, three days before the plaintiffs submitted their memorandum, the court had vacated the Scheduling Order that had provided for a June 2015 trial date, with any future scheduling “pending the Court's ruling on Defendant's Motion for Entry of an Order to Refer the Matter to the Louisiana Department of Natural Resources . . . .”<sup>149</sup> The court granted the referral “for the development of the most feasible plan to evaluate or remediate the environmental damage on the Plaintiffs' property to applicable state regulatory standards, in accordance with [subsection] 30:29(C).”<sup>150</sup> In the same Order, the court specified the sequence and schedule for the submission of proposed plans to the LDNR, as well as the requirement that Denbury post \$100,000 with the LDNR as security for the costs related to the OCC's review of the plans and the subsequent public hearing mandated under section 30:29.<sup>151</sup>

The parties to the case abided by the court's requirements, and each presented proposed plans of remediation to the LDNR.<sup>152</sup> The LDNR conducted a hearing and issued its determination of the most feasible remediation plan.<sup>153</sup> Its written findings, together with its reasons and pertinent supporting documentation, were accepted for filing into the record

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146. Memorandum in Opposition to Motion for Entry of an Order to Refer Matter to La. Dep't of Natural Res. for Public Hearing and Limited Admission of Responsibility for Env'tl. Damage at 125, *Moore v. Denbury Onshore, L.L.C.* (W.D. La. Feb. 20, 2015) (Doc. 21).

147. *Id.*

148. *Id.*

149. Order Granting in Part and Denying in Part Motion for Extension at 124, *Moore v. Denbury Onshore, L.L.C.* (W.D. La. Feb. 17, 2015) (Doc. 20).

150. Order Granting Motion 11 to Refer Matter to La. Dep't of Natural Res. Office of Conservation at 193, *Moore v. Denbury Onshore, L.L.C.* (W.D. La. Mar. 23, 2015) (Doc. 26).

151. *Id.*

152. The competing plans are available at the Environmental Division's page on the LDNR's website. See *Environmental Division*, LDNR, <http://dnr.louisiana.gov/index.cfm?md=pagebuilder&tmp=home&pid=134&pnid=21&nid=27> (last viewed Feb. 24, 2016) [<https://perma.cc/775V-3XYJ>].

153. See Motion for Leave to File Most Feasible Plan, Written Reasons, & Affidavits with Consent of La. Dep't of Natural Res. Office of Conservation at 203, *Moore v. Denbury Onshore, L.L.C.*, (W.D. La. Oct. 22, 2015) (Doc. 28); Order Granting Motion 28 for Leave to File Most Feasible Plan, Written Reasons, & Affidavits at 244, *Moore v. Denbury Onshore, L.L.C.* (W.D. La. Oct. 23, 2015) (Doc. 29); Most Feasible Plan by La. Dep't of Natural Res. at 245, *Moore v. Denbury Onshore, L.L.C.* (W.D. La. Oct. 23, 2015) (Doc. 30).

of the federal case on October 23, 2015.<sup>154</sup> The case settled shortly before it was scheduled to go to trial in March 2016.

In practical terms, the applicability of Code of Civil Procedure article 1563 in the *Moore* case involved no controversy. But what was left unresolved by the course of the case was the timing of the determination of the most feasible plan in relation to a trial on the merits. As it turned out in *Moore*, the LDNR reached a most feasible plan determination well prior to any scheduled trial date, rendering that the issue moot.<sup>155</sup> However, questions remain, both on the state and federal levels, as to whether an unresolved administrative process pursuant to article 1563 can serve to forestall or delay an Act 312 trial.

*Moore* is also interesting when contrasted against *Brownell* and *Constance*, both of which predated enactment of the limited admission provisions of article 1563. In *Constance*, the federal court characterized the Act 312's preliminary hearing provisions as discretionary in federal court.<sup>156</sup> The court reasoned that, even if Act 312's preliminary hearing vehicle were a substantive right under *Erie*, the Act does not guarantee the right to such a hearing.<sup>157</sup> Correspondingly, the *Constance* court found that if Act 312's preliminary hearing element creates a procedural right, then the federal court is not bound to follow the Act's procedural guidelines.<sup>158</sup>

In *Moore*, the defendant submitted that Act 312's *limited admission procedures* affect substantive rights.<sup>159</sup> Moreover, in contrast to the potentially discretionary preliminary hearing provisions of subsection 30:29(B)(6), article 1563(A)(2) directs that, upon submission of a timely limited admission, a court "shall refer the matter to the [Louisiana] Department of Natural Resources, office of conservation . . . to conduct a public hearing to approve or structure a plan which the department determines to be the most feasible plan to evaluate or remediate the environmental damage under the applicable regulatory standards pursuant to the provisions of R.S. 30:29."<sup>160</sup> Thus, in terms of existing jurisprudence, the argument in favor of federal courts applying article 1563's limited admission and most feasible plan elements would appear to rest on stronger footing than its preliminary hearing counterpart.

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154. See Order Granting Motion 28 for Leave to File Most Feasible Plan, Written Reasons, & Affidavits at 244, *Moore v. Denbury Onshore*, L.L.C. (W.D. La. Oct. 23, 2015) (Doc. 29); Most Feasible Plan by La. Dep't of Natural Res. at 245, *Moore v. Denbury Onshore*, L.L.C. (W.D. La. Oct. 23, 2015) (Doc. 30).

155. The LDNR submittal took place in October, 2015. The case was scheduled for trial in March, 2016.

156. *Constance*, 2013 WL 6578178, at \*16.

157. *Id.* at \*17.

158. *Id.*

159. *Moore v. Denbury Onshore*, L.L.C., No. 3:14CV913, 2016 WL 393549, at \*1 (W.D. La. Feb. 1, 2016); see, e.g. Rec.Doc. 19, Page ID # 120.

160. LA. CODE CIV. PROC. ANN. art. 1563 (A)(2) (2014).

### *E. The Remediation Plan Provisions*

With the exception of the *Moore* case, there appears to be no other instance of a federal court's application of the "most feasible plan" provisions of Act 312. Based on spoliation of evidence, the court in *Weyerhaeuser* entered an adverse evidentiary inference against the defendant of environmental damage, but it reserved determination of the extent of such damage for future resolution.<sup>161</sup> However, in addressing the plaintiff's insistence upon the applicability of section 30:29, the *Weyerhaeuser* court stated:

While finding the statute helpful in reaching the present ruling, we decline to apply the procedural aspects of this state statute in the present diversity action. Accordingly, we refrain from ordering the development of 'a plan or submittal for the evaluation or remediation to applicable standards of the contamination that resulted in the environmental damage' or similar procedural undertakings in this case.<sup>162</sup>

The *Weyerhaeuser* case proceeded through additional discovery and pre-trial development following this ruling, and it ultimately settled.<sup>163</sup> Interestingly, in presenting the settlement to the court, the parties acknowledged the applicability of Act 312 and affirmatively sought court approval pursuant to subsection 30:29(J).<sup>164</sup>

### *F. The Approval of Settlements*

Subsection 30:29(J) addresses the requisites for any settlement reached in a case "subject to the provisions of this Section." It has not been amended since its original enactment in 2006. In addition to requiring court approval, the subsection requires that the parties notify the LDNR and the LOAG of the settlement in principle. Those agencies are allowed thirty days to review the settlement and comment to the court. Section 30:29(J)(1) further states:

If after a contradictory hearing the court requires remediation, the court shall not certify or approve any settlement until an amount

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161. *Weyerhaeuser Co. v. Petro-Hunt L.L.C.*, No. CIV A 1:04-CV-02177, 2008 WL 4425466, at \*3 (W.D. La. Sept. 30, 2008).

162. See LA. REV. STAT. ANN. § 30:29 (C)(1) (2007).

163. See, e.g., *Weyerhaeuser v. Petro-Hunt, L.L.C.*, 1:04-CV-02177 (W.D.La. 07/22/09) (Rec.Doc. 402; Page ID #5022).

164. *Id.*, (07/20/09) (Rec.Doc. 396, Page ID# 4964) and (07/29/09) (Rec.Doc. 401, Page ID# 5021).

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.<sup>165</sup>

*Weyerhaeuser*, as discussed *supra*, involved a joint motion made by settling parties under subsection 30:29(J) for the approval of a settlement based upon the submission of correspondence to and from the LDNR and the LOAG.<sup>166</sup> The parties made no representation in their motion of the absence of court-ordered remediation, and the settlement under review involved all parties then in the case.<sup>167</sup> The settlement agreement was submitted to the court under seal.<sup>168</sup> Based upon this information, the court approved the settlement and ordered the dismissal of the case upon the submission of a stipulation of dismissal by the parties, with each party to bear its own costs.<sup>169</sup>

In *Crowell Land & Mineral Corp. v. Sonoran Energy, Inc.*, the parties invoked subsection 30:29(J) and affirmatively sought the federal district court's validation of a settlement reached in litigation negotiations.<sup>170</sup> The parties secured a letter of no objection from the LDNR and submitted that document to the court in compliance with the requirements of the statute.<sup>171</sup> They also produced copies of the underlying settlement agreements for submission to the court.<sup>172</sup>

However, unlike *Weyerhaeuser*, the settlement of the case involved fewer than all parties to the litigation—the remaining defendants being two CGL insurers for a bankrupt defendant.<sup>173</sup> The settling defendants requested that the court retain jurisdiction over the case while the

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165. LA. REV. STAT. ANN. §30:29(J)(2) provides:

“In the event a settlement is agreed to between the parties in a case in which the department or the attorney general has intervened, such agency shall be entitled to recover from the settling defendants all costs, including investigation, evaluation, and review costs; expert witness fees; and reasonable attorney fees.”

166. *Weyerhaeuser Co.*, 1:04-CV-02177, (07/20/09; Rec.Doc. 396, Page ID# 4964) and (07/29/09; Rec.Doc. 401, Page ID# 5021).

167. *Id.*

168. *Id.*

169. *Weyerhaeuser Co.*, 1:04-CV-02177 (07/29/09; Rec.Doc. 401, Page ID# 5021).

170. *Crowell Land & Mineral Corp. v. Sonoran Energy, Inc.*, 1:10 CV 01684 (W.D.La.); see Rec.Doc. 35, Page ID# 396 (06/06/12).

171. *Id.*

172. *Id.*

173. *Id.*

remediation contemplated in the settlement proceeded and the parties attempted to work out *inter sese* the resolution of the remaining claims.<sup>174</sup> Having considered the positions of the parties, the court concluded that the settlement complied with the provisions of section 30:29 and entered judgment approving the settlement in June, 2012.<sup>175</sup> In so doing, however, the court required periodic reporting from the parties as to the progress of the extra-judicial remediation plan encompassed within the settlement.<sup>176</sup>

No apparent issue arose concerning the actual applicability *vel non* of the provisions of subsection 30:29(J) in federal cases; the parties affirmatively represented that the case was indeed subject to the provisions of that section.<sup>177</sup> The record made no indication of a court-ordered remediation, nor of the court's requiring or waiving a deposit into the registry of the court of money sufficient to fund the extra-judicial remediation.<sup>178</sup> Although the settlement, on its face, involved fewer than all parties to the case, the settling parties sought and were granted a judgment that included, *inter alia*, the plaintiffs' assignment—and the settling defendants' correlative reservation—of rights as against all non-settling defendants.<sup>179</sup>

The record did not indicate that the settlement had been reached for a "minimal amount." Nevertheless, the settlement presented to the court called for remediation to be carried out extra-judicially,<sup>180</sup> with no formal edict of the court requiring remediation. Thus, while the record does not dispel the possibility that the court and the parties viewed the statutory provisions as being non-binding, there appeared a firm basis for the manner of judicial acceptance of the settlement, even under the terms of subsection 30:29(J).

*Sweet Lake Land and Oil Company v. Exxon Mobil* stands as another example of an Act 312 case involving settlements subject to the review of the federal district court. All principal parties to that suit reached two agreements in principle to settle the litigation in February, 2012; the basic

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174. *Id.*

175. *Id.*, (06/21/12) (Rec.Doc. 42, Page ID# 451; Rec.Doc. 44 (transcript), Page ID# 454).

176. *Id.*; see Minute Entry (11/16/12, Rec.Doc. 50, Page ID# 472); Joint Status Report (05/31/13, Rec.Doc. 51, Page ID# 473); Order, Rec.Doc. 52 (09/11/13, Page ID# 482); Updated Joint Status Report, Rec.Doc. 53 (12/31/13, Page ID# 483); Order, Rec.Doc. 54 (01/07/14, Page ID# 489); Updated Joint Status Report, Rec.Doc. 55 (12/31/14, Page ID# 490).

177. See *Crowell Land & Mineral Corp. v. Sonoran Energy, Inc.*, Joint Motion for Approval of Settlement (06/06/12, Rec.Doc. 35, Page ID# 396).

178. *Id.*

179. *Id.*; see Transcript of Motion Hearing, (07/11/12, Rec.Doc. 44, Page ID# 454).

180. *Id.*

settlements provided for the resolution of all but a third party demand of a single defendant.<sup>181</sup> As in *Crowell Land*, details of the two proposed settlements were thereafter presented to the OCC; and the OCC issued a letter of no objection regarding both.<sup>182</sup> Subsequently, the parties moved under subsection 30:29(J)(1) for orders from the federal court approving the settlements and for judgments of partial dismissal.<sup>183</sup> In their motions, the parties noted that the case was subject to section 30:29, and subsection (J)(1) in particular.<sup>184</sup> Both motions contained representations that neither of the settlements resolved the entire litigation and that the parties had made arrangements to remediate the property to regulatory standards.<sup>185</sup>

The OCC response letter, submitted into the record in support of both motions, represented that the OCC bore no objections to the settlements, but noted in addition: “Based upon the two settlements, it does not appear that any portion of the settlement amounts are to be placed into the registry of the court for remediation expenses associated with the Property as may be required under certain circumstances pursuant to La. R.S. 30:29.”<sup>186</sup> In August of 2012, the court granted the approval motions and entered partial dismissals in both instances, without requiring the deposit of monies into the registry of the court for the investigation and/or remediation of the subject property.<sup>187</sup> Furthermore, despite its earlier intervention in the case, the LDNR did not judicially seek costs, fees, or expenses in connection with the resolution of the case.

Another federal legacy litigation case, *Maryland Company, L.L.C. v. Exxon Mobil*, was brought to settlement in May, 2012, under the oversight of District Judge Haik.<sup>188</sup> In the course of the litigation, defendant Exxon-Mobil moved to compel the plaintiff and other defendants which had agreed to a settlement among themselves to comply with the requirements of subsection

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181. *The Sweet Lake Land and Oil Co., v. Exxon Mobil Corp.*, 2:09-CV-01100 (W.D.La.). *See also*, Joint Motion to Approve Settlement Pursuant to La.R.S. 30:20.J and for Partial Final Judgment, 2:09-CV-01100 (07/12/12; Rec.Doc. 613; Page ID# 10092); Joint Motion and Incorporated Memorandum to Approve Settlement Pursuant to La.R.S. 30:20.J and for Partial Final Judgment, 2:09-CV-01100 (07/27/12; Rec.Doc. 617; Page ID# 10125).

182. *Id.* at 2:09-CV-01100 (07/10/12; Rec.Doc. 612; Page ID# 10088).

183. *See supra* note 181.

184. *Id.*

185. *Id.*

186. *Id.* at Rec.Doc. 612, Page ID # 10088 (07/10/12).

187. *See Minutes of Court*, 2:09-CV-01100 (08/28/12; Rec.Doc. 623; Page ID# 10144); Partial Final Judgment of Dismissal with Prejudice, 2:09-CV-01100 (08/28/12; Rec.Doc. 625 Page ID# 10168); and Partial Final Judgment of Dismissal with Prejudice, 2:09-CV-01100 (08/28/12; Rec.Doc. 627 Page ID# 10434).

188. *Maryland Co. v. Exxon Mobil Corp.*, 6:10-CV-01781 (W.D.La. Feb. 1, 2012).

(J) of title 30, section 29 of the Louisiana Revised Statutes.<sup>189</sup> The court, however, deferred ruling on that motion and the case ended up settling in its entirety.<sup>190</sup> Of the subsequent motions for settlement approval, none called for continuing judicial oversight of remediation or registry deposits of settlement funds, and all were supported by conditional letters of no objection from the LDNR.<sup>191</sup> While the settlement agreements themselves were confidential, the court ruled that: (1) the settlements were approved; (2) the third party defendant was to accept responsibility for clean-up of the site and the handling of all issues of regulatory compliance pursuant to the settlement agreement involving that party; and (3) the plaintiff's claims and the third party claim were dismissed with prejudice, and for the most part with all parties being ordered to bear their own costs.<sup>192</sup>

Judge Vance of the Eastern District followed a similar course of action in June, 2012, in *C. S. Gaidry* case.<sup>193</sup> Based upon the presentation by the parties of a joint motion supported by the requisite correspondence to and from the public authorities, together with a redacted copy of the settlement agreement confected in the case,<sup>194</sup> the court ordered the dismissal of the action, with prejudice, subject to "[d]efendants' obligation to perform the obligations set forth in the Settlement Agreement."<sup>195</sup> Again, there was no requirement that

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189. *Id.*, Motion to Require Compliance with Settlement Provisions of La.R.S. 30:29 on Behalf of Exxon Mobil Corporation, 6:10-CV-01781 (01/31/12; Rec.Doc. 231; Page ID# 7694). The motion was subsequently denied as moot. *Id.*, Order, 6:10-CV-01781 (03/28/12; Rec.Doc. 252; Page ID# 7856).

190. *Id.*, Order, 6:10-CV-01781 (03/29/12; Rec.Doc. 253; Page ID# 7858). In this provisional thirty-day order of dismissal based on the settlement, the court required the parties to submit a joint stipulation of dismissal pursuant to FED. R. CIV. P. 41 in addition to a joint motion for approval of the settlement. The court retained jurisdiction over the case and the settlement for the purposes of, *inter alia*, receiving input from the LOAG and the OCC and considering approval of the settlement.

191. *Id.*, Motion on Behalf of Maryland to: (1) Approve Settlement with Burlington and (2) to Dismiss Maryland's Claims against Burlington and Quintana Defendants, 6:10-CV-01781 (03/27/12; Rec.Doc. 247; Page ID# 7806); Joint Motion per Order Doc. No. 253 (1) to Approve Settlement and (2) for Dismissal Pursuant to FED. R. CIV. P. 41, 6:10-CV-01781 (05/10/12; Rec.Doc. 257; Page ID# 7875).

192. *Id.*, Judgment, 6:10-CV-01781 (05/31/12; Rec.Doc. 264; Page ID# 7900). The qualification on each party paying its own costs is due to the absence of any statement in the final judgment to that effect with regard to the third party claim.

193. *C. S. Gaidry, Inc. v. Union Oil Co. of California*, 2:09-CV-02762, 2009 U.S. Dist. LEXIS 83096 (E.D.La. Aug. 26, 2009).

194. *Id.*; See Joint Motion for Court Approval of Settlement Pursuant to Act 312 of 2006, La.R.S. 30:29 § J(1) and to Dismiss with Prejudice, (06/07/12; Rec.Doc. 125).

195. See *id.*; Order and Final Judgment (06/18/12; Rec.Doc. 126).

a deposit into the court registry of funds associated with remediation of the property.<sup>196</sup> The settlement disposed of the entire litigation.<sup>197</sup>

*Martin v. Tesoro Corp.* represents a more recent handling of judicial approval of settlements pursuant to Act 312. The parties in that suit included in their motions the representations that no finding had been made in the case that any defendant was a responsible party within the meaning of section 30:29, or that any environmental damage existed on any portion of the property.<sup>198</sup> Consistent with the motions, the court entered final judgments dismissing the action, with prejudice, with no requirement of deposit and with no provision for continuing judicial oversight of the remediation plans.<sup>199</sup>

In sum, this survey of Act 312 federal litigation reveals no instance of a court's ordering any settling party to deposit monies into a court registry pursuant to subsection 30:29(J)(1). Likewise, there appears to be no recorded instance of a settlement involving a federal courts' mandate of remediation, apart from the rare qualification that the parties remediate the involved property in accordance with the terms of the given settlement agreement. Furthermore, none of the cases reviewed include any award to the state pursuant to subsection 30:29(J)(2). A higher likelihood of coming across a settlement involving a registry deposit, or court-supervised remediation, or regulatory reimbursement seemingly would exist in an Act 312 case that included the LDNR as a direct party.

#### *F. Judicial Oversight of the Most Feasible Remediation Plan's Implementation*

As noted earlier, in *Crowell Land*, the settlement presented to and approved by the court called for the parties themselves to manage any extra-judicial remediation to be carried out under LDNR's oversight; no

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196. *Id.*

197. *Id.*

198. *Martin v. Tesoro Corp.*, 2:11-CV-01413 (W.D.La. May 21, 2012). See Joint Motion to Approve Settlement Pursuant to La.R.S. 30:29.J and for Final Judgment under FED. R. CIV. P.54(b) Dismissing with Prejudice Plaintiff's Claims against Defendants Koch, Tesoro, and ConocoPhillips (*id.*, Aug. 29, 2013 (Rec.Doc. 116; Page ID# 1612)); Order, (*id.*, Sept. 5, 2013 (Rec.Doc. 117; Page ID# 1627)); Motion to Approve Settlement Pursuant to La.R.S. 30:29.J and for Final Judgment under FED. R. CIV. P.54(b) Dismissing with Prejudice Plaintiff's Claims against Defendants BP America Production Company, Successor in Interest to Amoco Production Company and Stanolind Oil and Gas Company (*id.*, June 19, 2014 (Rec.Doc. 118; Page ID# 1629)); Order, (*id.*, July 24, 2014 (Rec.Doc. 119; Page ID# 1635); and OCC Letter (*id.*, Oct. 8, 2014 (Rec.Doc. 120; Page ID# 1637)).

199. *Id.*

court-ordered remediation was involved.<sup>200</sup> Nevertheless, the settlement did not dispose of the case, and the court maintained authority over the course and completion of the remediation.<sup>201</sup> In fact, the court continued to require the parties to submit periodic reports on the progress of the effort.<sup>202</sup> Further, any open litigation matters on the docket regarding other parties were preserved for future action as necessary.<sup>203</sup>

In comparison, the settlements in *Sweet Lake Land* and *Maryland Company* also provided for private, extra-judicial remediation of the properties made subject of the suits.<sup>204</sup> Again, no court-ordered remediation was provided for as part of the approval process.<sup>205</sup> In those cases, however, the courts did not exercise supervisory authority over, nor monitoring of, the progress of the remediation efforts.<sup>206</sup>

### G. Provisions for the Allowance of Costs and Attorney's Fees

While this article has discussed *Weyerhaeuser*,<sup>207</sup> *supra*, in the contexts of the notice and stay provisions of subsection 30:29(B), the court's rejection of the remediation plan feature of subsection 30:29(C)(1), and the settlement approval processes set forth in subsection 30:29(J), the case also reaches into substantive considerations.<sup>208</sup> In the very same ruling in which it rejected the procedural aspects of the statute—the *Weyerhaeuser* court noted, “in a more substantive vein,” the statute's provision for the award of attorney's fees against the party responsible for the environmental damage.<sup>209</sup> The court acknowledged the plaintiff's request for an award of fees under the statute arising out of the adverse inferential finding of environmental damage entered against the defendant.<sup>210</sup> Citing

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200. *Crowell Land & Mineral Corp. v. Sonoran Energy, Inc.*, 1:10-CV-01684 (W.D.La. July 11, 2012); Joint Motion for Approval of Settlement (June 6, 2012, Rec.Doc. 35, Page ID# 396).

201. *Id.* See also Transcript of Motion Hearing, *Crowell Land & Mineral Corp. v. Sonoran Energy, Inc.*, 1:10-CV-01684, Rec.Doc. 44, Page ID# 454 (W.D.La. July 11, 2012).

202. See *supra* note 200.

203. *Id.*

204. *Sweet Lake Land & Oil Co.*, 2:09-CV-01100; *Maryland Co.*, 6:10-CV-01781.

205. See *supra* notes 181–192.

206. *Id.*

207. *Weyerhaeuser Co. v. Petro-Hunt L.L.C.*, No.1:04-CV-02177, 2008 WL 4425466 (W.D.La. Sept. 29, 2008).

208. *Weyerhaeuser Co. v. Petro-Hunt L.L.C.*, No. 1:04-CV-02177, 2006 WL 1228843 (W.D.La. May 2, 2006) *dismissed by*, *Weyerhaeuser Co. v. Petro-Hunt L.L.C.*, 2008 WL 4425466 (W.D. La. Sept. 29, 2008).

209. *Weyerhaeuser*, 2008 WL 4425466 at \*4.

210. *Id.* at \*3–4.

*Ingalls Shipbuilding v. Federal Insurance Company*,<sup>211</sup> the court also noted that an award of attorney's fees is governed by the "substantive law applied to the underlying claims."<sup>212</sup> Thus, while recognizing a basis for an award, the court held the determination of the amount of any fee award in abeyance pending resolution of the case on the merits "or otherwise."<sup>213</sup>

## V. CONCLUSION

One common factor appearing repeatedly in federal cases dealing with Act 312 is the courts' lack of hesitation in assessing various legacy litigation elements and claims under the parameters of Rules 12(b)(6), 12(e), and 56 of the Federal Rules of Civil Procedure and Louisiana substantive law apart from Act 312.<sup>214</sup> Clearly, federal courts are more focused upon the substantive elements of legacy litigation than the procedures prescribed by Act 312.<sup>215</sup> In fact, Act 312 appears to assume only secondary importance in the analysis, at least with regard to the pre-judgment stages.<sup>216</sup>

As for the practical order of litigation, "[u]nless a defendant admits responsibility or liability for 'environmental damage' as defined by the Act . . . all claims, including contractual and private claims, are determined by the finder of fact at trial."<sup>217</sup> The procedure at trial is well established; the notion that the Act requires that there first be a trial on liability—and only thereafter a trial on damages—has been widely rejected by both state and federal courts.<sup>218</sup> Instead, the fact-finder reaches a determination on both liability and damages.<sup>219</sup> At that point, assuming a finding for the claimant, Act 312 sets forth additional procedures to be used for the post-trial determination of the

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211. *Ingalls Shipbuilding v. Federal Insurance Co.*, 410 F.3d 214, 230 (5th Cir. 2005).

212. *Weyerhaeuser*, 2008 WL 4425466, at \*3–4; *See also Ingalls*, 410 F.3d 214, 230 (5th Cir. 2005).

213. *Weyerhaeuser*, 2008 WL 4425466 at \*4.

214. *See, e.g., Constance v. Austral Oil Expl. Co.*, No. 2:12-CV-1252, 2013 WL 6578178, at \*1 (W.D. La. Dec. 13, 2013); *Alford v. Chevron, U.S.A., Inc.*, 13 F.Supp. 3d 581, 589 n.25 (E.D.La. Apr. 1, 2014) (order as modified); *Alford v. Anadarko E&P Onshore, L.L.C.*, No. 2:13-CV-05457 (*ref.* 2:13-CV-05703), 2014 WL 1612454, at \*4 (E.D.La. Apr. 22, 2014).

215. *Id.*

216. "Section 30:29 merely specifies the procedures applicable to lawsuits alleging environmental damage; the substantive law is supplied by the Louisiana Civil and Mineral Codes and other applicable statutory law and jurisprudence. *See* La. Rev. Stat. § 30:29(H)." *Alford*, 13 F.Supp.3d at 589 n.25.

217. *Louisiana v. La. Land & Exploration Co.*, 2012-0884, p. 18 (La. Jan. 30, 2013); 110 So.3d 1038, 1051. "At trial (in the absence of an admission), the finder of fact must initially determine whether environmental damage exists and whether the defendant or defendants are legally responsible therefore." *Id.*

218. *Id.*; *see also, Brownell Land Co.*, 538 F.Supp. 2d at 957–59.

219. *Brownell Land Co.*, 538 F.Supp. 2d at 957–59.

most feasible remediation plan. Once the most feasible plan is determined, the court will order the parties found legally responsible to fund the implementation of that plan, and the portion of the damage award attributable to that implementation shall be deposited into the registry of the court, for disbursement during the course of plan implementation under the continued monitoring and oversight of the trial court.<sup>220</sup>

Federal courts have accepted invitations to approve pre-trial settlements of legacy litigation claims under subsection 30:29(J), at least through the exercise of judicial discretion or party consent.<sup>221</sup> Although subsection 30:29(J)(1) provides that “[n]o funding of a settlement shall occur until the requirements of this Section have been satisfied,” the key distinguishing element is likely the voluntary—and not judicially imposed—assumption of responsibility for the remediation effort.

Finally, it appears that fees may be awardable to a party successfully suing for environmental damage and remediation based, at least in part, upon the provisions of subsection 30:29(E). The argument would be that the subsection gives rise to a substantive basis under Louisiana law for the allowance of such an award.

A key point to be taken from this discussion lies in the conclusion that the public interest at stake in judicial confirmation of litigation-funded remediation implementation is so great that labels of procedure and substance lose primary significance. In fact, the theme of this analysis harkens back to Judge Barbier’s prescient statements in 2007 in *Brownell Land*. The public’s interest in protecting, conserving, and replenishing the natural resources and environment of the state remains so fundamental and significant that, notwithstanding the overall procedural nature of the mother statute, some elements of Act 312 simply must be enforced by the federal courts. The Western District has echoed this principle: “Act 312 and the proper administration of justice compels [a federal] court to consideration of existence of contamination, responsibility for its remediation, and a plan for that remediation for the property involved in [the] litigation.”<sup>222</sup> Primarily, this might include the post-judgment aspects of the Act, such as the judicial determination, oversight and certification of the most feasible judicially mandated remediation plan—whether that mandate be through order, or verdict, or approved settlement calling for judicial involvement and oversight.

As the Louisiana Supreme Court stated in *Louisiana Land & Exploration*, and reiterated in *Savoie*, the Act makes no change to normal trial

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220. *Id.*

221. *Cf. Sweet Lake, with Crowell Land, supra* note 181.

222. *Sweet Lake Land & Oil Co.*, 2:09-cv-01100 (09/01/11, Rec.Doc. 236; Page ID# 3252 at pp. 12–13).

procedures.<sup>223</sup> Unless a defendant admits liability for environmental damage or remediation, or both, a case proceeds to trial in the same manner as any other proceeding.<sup>224</sup> Even though all claims go to the fact-finder, the trial judge remains the final arbiter and administrator of the most feasible plan for remediation of the property to state regulatory standards.<sup>225</sup> This approach would appear to apply equally in Louisiana's federal courts.

Therefore, while questions might persist as to the applicability of purely procedural elements of Act 312, such as the preliminary hearing or notice and stay provisions of the Act, public policy considerations countenance in favor of a federal court's adherence to the post-judgment and settlement-approval features of the Act 312.

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223. *State of Louisiana v. Louisiana Land & Exploration Co.*, 2012-0884, p.15 (La. 01/30/13); 110 So. 3d 1038, 1051; *Savoie v. Richard*, 2013-1370, pp. 7-8 (La. 04/02/14); 137 So.3d 78, 85-86.

224. *Id.*

225. *Id.*

