A Private Cause of Action for Violations of Air Pollution Legislation? - Remedies Under Louisiana Civil Code Articles 667-669

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The Louisiana courts have never been presented with the issue of the liability of one joint checking account signatory for an overdraft drawn by another. The reasons for this may be that cosignatories pay overdrafts created by another without questioning their liability, law practitioners are unaware that a cosignatory's liability may well be limited, and banks, especially those in smaller communities, are aware that adverse public relations may result from pursuing a cosignatory beyond the account balance for an overdraft for which he was not responsible or from which he did not benefit. Many problems can be avoided if checking account agreements are properly drafted and the banks call to the attention of their depositors the agreements' provisions. To achieve the desired uniformity, Louisiana courts should construe Title 10 to limit the liability of each cosignatory to the balance of the account in the absence of a valid indemnification agreement between the bank and its joint account depositors, or a showing of the cosignatory's participation in the negotiation of the check, enrichment through the creation of the overdraft, or negligence or fraud inducing the bank to create the overdraft.

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A PRIVATE CAUSE OF ACTION FOR VIOLATIONS OF AIR POLLUTION LEGISLATION?—REMEDIES UNDER LOUISIANA CIVIL CODE ARTICLES 667-669

During recent years, federal and state lawmakers have enacted legislation aimed at protecting the purity of the atmosphere. The major federal legislation dealing with the control of air pollution is the Clean Air Act, which was restructured and significantly strengthened in 1970. Louisiana took action in this area in 1964, when the Louisiana Air Control Law was enacted. Both laws establish administrative agen-

40. See discussion in note 32, supra.
41. See text at notes 25-33, supra.
42. See text at notes 14-21, supra.

cies whose duty is to prevent air contaminants from reaching harmful levels. This note will examine the effects of these laws and the respective agencies’ regulations and findings on the private rights of residents of Louisiana injured by prohibited air pollution.4

The Clean Air Act requires the Administrator of the Environmental Protection Agency to set up a regulatory program for all areas of the United States to control air pollutants that, in his judgment, have an adverse effect on public health and welfare.5 These pollutants are controlled by the establishment of certain standards of air quality, called ambient air standards, which set the maximum amount of pollutant that will be allowed in the ambient air.6 For each pollutant, the Administrator formulates both primary and secondary ambient air standards.7 The primary standard is that level of ambient air quality that, in the judgment of the Administrator, is “requisite to protect the public health.”8 The stricter secondary standard is that level of ambient air quality necessary to protect “public welfare.”9 For more dangerous

4. The following discussion of the Clean Air Act will cover only those portions of the Act relative to this note. For a more complete and exhaustive analysis of the Act, see Environmental Law Institute, Federal Environmental Law 1058 (1974).

5. Clean Air Act §§ 108-12, 42 U.S.C. §§ 1857c-3 to 1857c-7 (1970). The program includes control over both stationary and mobile emission sources, but only the controls over stationary sources need be discussed for purposes of this paper.

6. See text at note 11, infra. Ambient air is the outdoor air or atmosphere which surrounds the earth. Louisiana Air Pollution Control Regulations § 4.6, B.N.A. Environment Reporter 391:0501.

7. The primary and secondary ambient air quality standards promulgated by the Administrator can be found at 40 C.F.R. § 50 (1975), and include controls over the following pollutants: sulfur dioxide, particulates, carbon monoxide, photochemical oxidants, hydrocarbons, and nitrogen dioxide. The program calls for achievement of primary ambient air standards by 1975-76, and secondary standards by a “reasonable time.” Clean Air Act § 110(a)(2)(A), 42 U.S.C. § 1857c-5(a)(2)(A) (1970); Environmental Law Institute, Federal Environmental Law 1058, 1085 (1974).


9. Id. § 109(b)(2), 42 U.S.C. § 1857c-4(b)(2) (1970). “Public welfare” is defined in the Act as “effects on soils, waters, crops, vegetation, man-made materials, animal wildlife, weather, visibility and climate, damage to or deterioration of property and hazards to transportation, as well as effects on economic values and on personal comfort and well being.” Id. § 302(h), 42 U.S.C. § 1857h(h) (1970).
air pollutants, hazardous pollutant emission limitations are formulated.\textsuperscript{10} Whereas ambient standards create indirect limitations on a particular source by stating a general standard of air quality that must be maintained in a certain geographic area, emission limitations are direct controls on the amount of a pollutant a particular source may emit.\textsuperscript{11}

The federal Clean Air Act required each state to adopt and submit to the Administrator a plan that would provide for the implementation, maintenance, and enforcement of the primary and secondary ambient air standards within the state.\textsuperscript{12} The Louisiana Air Control Commission, created by the Air Control Law,\textsuperscript{13} developed and submitted an implementation plan for Louisiana,\textsuperscript{14} which was approved with minor modifications.\textsuperscript{15} The Louisiana commission, in developing this plan, went beyond the federal mandate by creating ambient air standards for a few pollutants other than those listed by the Administrator,\textsuperscript{16} and also by formulating direct emission limitations on certain kinds of operations that pollute the air.\textsuperscript{17} Although the Clean Air Act also allows each state to regulate sources of “hazardous pollutants,”\textsuperscript{18} the Louisiana commission has chosen not to do so.

Each state enforces its implementation plan,\textsuperscript{19} but if it does not, the federal Administrator may enforce it after giv-
ing thirty days notice to the state involved and to the alleged violator. In addition, under § 304 of the Clean Air Act, any person may bring a civil suit to enforce, or to require the Administrator to enforce, the standards of the Act and of any applicable state implementation plan against an alleged violator, with only slight procedural delays. Thus, a person damaged by an operation in violation of either the state commission standards or the federal hazardous emission limitations could have the violative operations abated. However, although § 304 does allow the court, in its discretion, to award costs of litigation, including reasonable attorney and expert witness fees, to either party, it makes no provision for damages. Therefore, it is necessary to look to state law for a cause of action for the recovery of damages caused by pollution in violation of the federal and state air standards.

Louisiana Civil Code articles 667-669 provide a basis for

20. Id. § 113, 42 U.S.C. § 1857c-8 (1970). Note that under this section, if the Administrator finds widespread evidence that the state is not enforcing its implementation plan, he may enforce that plan without the 30-day delay.


22. A plaintiff must give notice of the violation to the Administrator, to the State in which the violation occurs, and to the alleged violator, and wait 60 days after this notice is given before he can bring suit. Also, if the Administrator or the state has commenced and is diligently prosecuting a civil action to enforce the standards, a plaintiff may not bring an action under this section. Clean Air Act § 304(b), 42 U.S.C. § 1857h-2(b) (1970). A federal Court of Appeals has held that a private party bringing suit under this section need not meet the traditional requirements of standing in order for the federal courts to have jurisdiction. Metropolitan Washington Coalition for Clean Air v. District of Columbia, 511 F.2d 809 (D.C. Cir. 1975). Section 304 also specifically gives the district courts jurisdiction in these cases "without regard to the amount in controversy or the citizenship of the parties." For a case applying this provision, see Citizens Ass'n of Georgetown v. Washington, 383 F. Supp. 136 (D.D.C. 1974).

23. From a look at the definitions in the Act (see text at notes 8-10, supra), it appears that violations of the secondary ambient standards (which did not also violate the primary standards) could result in property damages in the area of violation. If the air quality was such that both the primary and secondary ambient standards were violated, it seems as though there could be both property damage and personal injuries in the area. Violations of the hazardous pollutant emission limitations could result in personal injury damages, and possibly also property damages because of the toxicity of these pollutants.


25. LA. CIV. CODE art. 667: "Although a proprietor may do with his estate
liability in this type of case. As Professor Yiannopoulos has noted:

Relying on the broad language of . . . [article 66927] . . . , Louisiana courts have developed an impressive body of law that corresponds with the common law of nuisance and solutions reached by French courts without the benefit of an equivalent provision in the Code civil.

Under this Louisiana "nuisance" law, the test to determine liability is whether the gravity of harm suffered by the plaintiff outweighs the social utility of the defendant's opera-

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26. The jurisprudence considers Louisiana Civil Code Articles 667-669 as the bases of Louisiana's "nuisance" law. See Robichaux v. Huppenbauer, 258 La. 139, 149, 245 So. 2d 385, 389 (1971). Professor Yiannopoulos believes that Article 669 alone is the basis for this "nuisance" law, and that Article 667 creates a separate ground of liability for an "abuse of right" of ownership. Yiannopoulos, Civil Responsibility in the Framework of Vicinage, 48 Tul. L. Rev. 195 (1974) [hereinafter cited as Yiannopoulos]. Under his theory, Article 669 creates a much broader right of recovery for a plaintiff than does Article 667. He also states that damages and injunction are available remedies under both articles, but an injunction should be available as a matter of right under Article 667, not under Article 669. Thus the only advantage a plaintiff whose action falls under both these articles would have in bringing the action under Article 667 would be to get the mandatory injunction remedy. Since in the restrictive fact situation considered in this note, the plaintiff could in effect get an injunction under § 304 of the Clean Air Act, under Professor Yiannopoulos's theory he would bring an action for damages under Article 669. So under either theory, plaintiff would bring his action under the Louisiana "nuisance" law, the only difference in the theories being the basis on which these jurisprudential rules were developed.

27. See discussion in note 26, supra.

28. Yiannopoulos at 236.
tions, that is, whether defendant's operations constitute an unreasonable use under the circumstances of the particular case. If the defendant's operations are found to be unreasonable, plaintiff need not show that the defendant was negligent in order to recover. In the Air Control Law, the Louisiana legislature included provisions that preserved the then-existing rights of an injured party to recover for damages caused by a nuisance. It is necessary to determine if and to what extent the federal and state air control legislation have broadened a private litigant's right to recover damages for a nuisance, or have affected the availability of proof necessary to prosecute or defend a nuisance claim.

Although the balancing process stated above is always used to determine nuisance liability, certain activities are so unreasonable under any circumstances that judicial inquiry into their reasonableness in each case is unnecessary. Such activities are called nuisances per se, or absolute nuisances; for example, a nuisance per se may exist when the legislature has forbidden an activity by statute. When the plaintiff does not base his action on a nuisance per se theory, but on proving a nuisance in fact, the judiciary must inquire into the reasonableness of the defendant's activity under the circumstances by weighing the gravity of harm suffered by the plaintiff against the social utility of the defendant's activity.


32. LA. R.S. 40:2215 (Supp. 1964): "[I]t is not intended to create in any way new rights or to enlarge existing rights or to abrogate existing private rights" (emphasis added). See LA. R.S. 40:2216 (1950): "Nothing herein shall be construed to prevent private actions to abate nuisances under existing laws."

33. See text at notes 29-30, supra.

34. Even in a case in which the judiciary does not inquire into the reasonableness of the defendant's activity, the rights of the parties have still been balanced; however, the balancing has been done before the parties ever become involved in litigation.

35. PROSSER § 87 at 582-83; Yiannopoulos, Violations of the Obligations of Vicinage, 34 LA. L. REV. 475, 492 (1974).

36. Id.

37. See text at notes 29-30, supra.
Another categorization of nuisances is made between public and private nuisances. Generally, a public nuisance is an act or omission that injures or substantially interferes with the safety, health, or morals of the public in general; a private nuisance is an offense against a private person. Since Louisiana has formulated the Air Control Law and the Commission regulations with the purpose of protecting the public from unreasonable emission practices, operations in violation of the Commission regulations could be considered both a nuisance *per se* and a public nuisance.

Only the state may take action against a purely public nuisance, but some activities can be both public and private nuisances, and in this instance a private party may recover for the private nuisance caused him. According to the jurisprudence, a private party may recover damages caused by a public nuisance if he can show particular damage, that is, damage different from that suffered by the public generally. Personal injury or damage to property will generally be considered particular damage. Arguably, a person so injured by conduct that violates state commission regulations could recover under this jurisprudential theory of particular damage. However, the Louisiana Air Control Law provides:

> The basis for proceedings of other actions that shall result from violations of any rule or regulation which shall be promulgated by the commission shall inure solely to and shall be for the benefit of the people of the state generally and it is not intended to create in any way new rights or to enlarge existing rights or to abrogate existing private rights.

From the broad language used in this statute, the legislature apparently intended to preclude the recovery of damages by

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38. Prosser §§ 88-89.
39. See text at note 49, *infra*.
41. *State ex rel. Dema Realty Co. v. McDonald*, 168 La. 172, 121 So. 613 (1929); *Barrow v. Gaillardanne*, 122 La. 558, 47 So. 891 (1908).
44. See discussion in note 23, *infra*.
private persons for the mere fact of a violation of the Commission regulations. Such an interpretation precludes use of the Commission regulations to find liability based on a nuisance *per se* theory. Thus, mere proof of a violation of the regulations plus particular damage will not suffice; the Louisiana claimant arguably must prove nuisance *in fact*, i.e., that the defendant's activities are unreasonable under the circumstances of the particular case.

Therefore, we look to see if the federal and state air standards may be used in the determination of liability for a nuisance *in fact*. Air pollution control is a complex and technical area, and the federal and state agencies concerned in its regulation have large amounts of scientific data, and the time, scientific experts, and other staff to help them study it. For this reason, the Louisiana judiciary might consider adopting the state commission regulations and the federal hazardous emission limitations as standards of liability in their determination of the reasonableness of a defendant's activity. However, this should be done only if the factors used by the agencies in formulating the federal and state air standards are the same factors used to determine the reasonableness of a defendant's activities in a judicial context.

On the state level, "undesirable levels" (the term used by the Commission to determine which pollution levels should be prohibited) is defined as the presence in the atmosphere of a pollutant or pollutants in quantities such as to "appreciably injure human life beyond inconvenience or . . . to materially injure or interfere with the reasonable use of animal or plant life or property." This language is similar to that found in Civil Code Articles 667-669. Furthermore, the Louisiana legislature stated that the purpose of the Air Control Law is to maintain purity of the air resources of the state consistent with the protection of the health and physical prop-

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46. This is evident from a reading of the particular air quality standards and the approved methods of measuring the quantities of these air pollutants, 40 C.F.R. §§ 50, 51 (1975).
47. LA. R.S. 40:2202(C) (Supp. 1964) (emphasis added).
48. The basic principle permeating Civil Code Articles 667-669 is that one must endure some inconveniences caused by operations on nearby estates, but if his injury is beyond an inconvenience, so that he suffers a real damage, he will have an action against the neighbor causing this damage. See the language emphasized in the text of these articles quoted in note 25, supra.
Thus, the objectives of the Louisiana commission in formulating its regulations do not relate solely to environmental concerns, but are aimed also at balancing between the competing interests of necessary industry and persons who might be injured by the industry.\(^49\) Likewise, the federal statutory definition of "hazardous pollutants"\(^51\) indicates a concern that damage that could be caused by such pollutants would be of such a serious nature that the gravity of harm suffered by an injured party would outweigh the social utility of a defendant's operations. Thus, the weighing process that the state and federal legislation mandates for the development of air standards is very similar to the weighing test used by the Louisiana judiciary in determining liability in a nuisance case.

However, there are strong reasons for not using the state commission and federal hazardous emission standards as standards in determining liability for a nuisance in fact. First, to use the air standards in such a manner may be prohibited by the Louisiana Air Control Law.\(^52\) Since a defendant's conduct would be considered unreasonable without looking into the particular circumstances of the case, one could argue that the judiciary would in effect be declaring operations in violation of the air standards nuisances \textit{per se}. As noted earlier, the statute seems to prevent use of commission standards as standards of absolute liability.\(^53\) Secondly, though the weighing test used by the federal and state administrative agencies is similar to that used by the courts in determining liability in a nuisance case, the latter determination includes factors not considered by the administrative

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\(^{50}\) The fact that other interests besides purely environmental interests are considered by the Commission can also be seen from the statutory requirements of the make-up of the Commission, LA. R.S. 40:2203 (Supp. 1964).

\(^{51}\) For definition of "hazardous pollutant," see note 10, supra.

\(^{52}\) LA. R.S. 40:2215 (Supp. 1964). This provision is quoted in the text at note 45, supra.

\(^{53}\) See text following note 45, supra. For the same reasons, the air standards developed under the federal and state air pollution legislation cannot be used as standards of conduct to determine fault under Louisiana Civil Code Article 2315, \textit{a la} Langlois v. Allied Chemical Corp., 258 La. 1067, 249 So. 2d 133 (1971).
agencies. The judiciary additionally looks at the character of the particular neighborhood (rural, urban, residential, industrial, etc.) and the prior use of each party's property (how it was used in the past, who moved into the area first, etc.), both of which are important in the determination of liability for a nuisance in fact.

Even though a court might hold that the federal and state air standards cannot be used as standards in determining liability for nuisance, the resources and information of the administrative agencies could be utilized in the judicial balancing process of a nuisance case involving pollution. Under § 114 of the federal Clean Air Act, the Administrator may require the owner or operator of an emission source to maintain records, make reports, and install and use monitoring equipment in order to determine if they are in violation of any air standard; he also has the right to enter the premises to check the emissions. In addition, the federal act gives the Administrator the power to delegate this monitoring authority to a state if the state's implementation plan is "adequate." Since all emission data, i.e., data on how much of each pollutant a certain operation is actually emitting, gathered under the authority of the act must be made public, it seems that such data could be used by either party in a nuisance case to contribute significantly to the factual determination of liability. However, the Louisiana Air Control Law states:


58. Clean Air Act § 114(b)(1), 42 U.S.C. § 1857c-9(b)(1) (1970). In Louisiana, each source of pollutants must report to the commission how much of each pollutant they are emitting, but the commission does not continuously monitor each source to check on these reports. Louisiana Air Pollution Control Regulations §§ 8.5-8.6, B.N.A. ENVIRONMENT REPORTER 391:0501, 0505-0506.

59. Clean Air Act § 114(c), 42 U.S.C. § 1857c-9(c) (1970). Note that § 114(c) creates an exception for certain information entitled to proprietary protection, but that emission data is excluded from this exception, so that in all cases the emission data must be made public.
A determination by the commission . . . that any rule or regulation has been disregarded or violated . . . shall not create by reason thereof any presumption of law or finding of fact which shall inure to or be for the benefit of any person other than the state. 60

Although this language could be construed to prohibit the private litigants' use of this emission data, arguably the "determination" mentioned in the statute refers to a formal commission conclusion that a violation has occurred (an ultimate finding), and not to the information gathered by the commission (the basic facts). An interpretation that it applied to information gathered by the commission would lead to the unfair result that if such information indicated that the operation was not in violation of any commission regulation, the defendant could use the information as evidence in his case, but if the data indicated that a violation had occurred, the plaintiff could not use the information. Certainly the legislature could not have intended such a result, and there is no apparent reason why such information should not be admitted just as any other body of factual information.

The federal Clean Air Act authorizes the Administrator to conduct, and to cause others to conduct, extensive research on the exact effects certain pollutants have on living things and property. 61 Because the statute does not seem to preclude the use of the results of this research in a private suit, the judiciary should allow a plaintiff to use these research results, along with the emission data compiled by these agencies, to help prove the causal connection between his damage and the defendant's operations.

The federal and state air pollution legislation has only slightly broadened an injured party's rights against one operating in violation of air quality standards developed under this legislation. Under federal legislation, he may have the operation abated by enforcing the air standards in a civil suit in federal court if the appropriate state and federal officials do not enforce them. 62 However, the broad language of the Louisiana Air Control Law arguably should preclude him from recovering damages simply by showing that his damages were caused by a violation of an air standard; he must

show, just as in any other nuisance suit, that the defendant's activity was unreasonable under the circumstances of the particular case: he must prove a nuisance in fact. However, the regulatory standards should be given great weight by the Louisiana judiciary in determining liability in a nuisance case, because the weighing process used by the administrative agencies in developing these standards is very similar to the judiciary's nuisance test. Also, the judiciary, in their determination of the issues involved in a nuisance case, should allow private litigants to take full advantage of the emission data and the research data on the damages caused by pollutants compiled under the authority of the Clean Air Act.

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IDENTITY: A NON-STATUTORY EXCEPTION TO OTHER CRIMES EVIDENCE

Evidence that the accused committed crimes other than the one being prosecuted usually is inadmissible because of the inherent danger that the factfinder will convict the accused of the crime charged because he has a propensity toward criminal conduct. However, the general prohibition is subject to recognized exceptions based on the independent relevancy of other crimes evidence to material questions other than the defendant's character or propensity toward crime. Admissibility under these exceptions is predicated on a determination that the probative value of the evidence outweighs its inherently prejudicial effect on the accused.


2. MCCORMICK §§ 43, 190, 288; WIGMORE §§ 218, 305, 980. See, e.g., People v. Molineaux, 168 N.Y. 264, 61 N.E. 286 (1901) (listing the major common law exceptions: knowledge, intent, plan, design, system, motive, emotion, and identity). See also People v. Johnson, 228 N.Y. 332, 127 N.E. 186 (1920) (impeachment).

3. MCCORMICK §§ 184-85; Comment, Other Crimes Evidence in Louisiana—To Show Knowledge, Intent, System, Etc., In the Case in Chief, 33 LA. L. REV. 614 (1973) [hereinafter cited as Other Crimes—I]; cf. FED. R. EVID. 402, 403.

4. WIGMORE §§ 216, 416; Trautman, Logical or Legal Relevancy—A