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State v. Louisiana Land & Exploration Co.: Louisiana Revised Statutes Section 30:29 and Its Effect on the Amount of Remediation Damages Available to Plaintiffs

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State v. Louisiana Land & Exploration Co.: Louisiana Revised Statutes Section 30:29 and Its Effect on the Amount of Remediation Damages Available to Plaintiffs

INTRODUCTION

Within the past decade, Louisiana has witnessed a surge in land contamination litigation, particularly in regards to oil and gas exploration sites.¹ These types of cases are commonly referred to as “legacy litigation.”² In a typical legacy litigation case, a landowner discovers damage to his land that was caused by either a mineral lease on the property or by some other kind of toxic exposure.³ The landowner naturally wants to hold someone responsible for the damage, and consequently the legacy litigation begins.

The Louisiana Legislature first stepped into the legacy litigation debate in 2005.⁴ Recognizing the negative environmental implications of land contamination, the Legislature passed a statute that encourages property cleanup.⁵ Louisiana Revised Statutes section 30:29 requires that any damages awarded to a plaintiff for “the evaluation or remediation of environmental damage” must be paid into the registry of the court, rather than directly to the plaintiff.⁶ This requirement reduces the chance that a plaintiff will keep the money for personal use instead of using it for the reason it was awarded.

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1. See Loulan Pitre, Jr., *Six Years Later: Louisiana Legacy Lawsuits Since Act 312*, 1 LSU J. ENERGY L. & RES. 93, 94 (2012) [hereinafter Pitre, *Six Years Later*].

2. *Id.*

3. In some circumstances, it is difficult to determine whether the landowner caused the damage or if it was the fault of a lessee. See Jim Magill, *Louisiana Ruling Keeps Chevron in Lawsuit*, PLATTS OILGRAM NEWS (Feb. 5, 2013), <http://www.terraconsultores.com/descargas/platts-oilgram-news.pdf>, archived at <http://perma.cc/8HXN-AES6>. Although this Note does not discuss the hardship in determining *who* caused the damage, it is an interesting question that should perhaps be addressed by another article.

4. See Act No. 312, 2006 La. Acts 1472.

5. See LA. REV. STAT. ANN. § 30:29(A) (Supp. 2014).

6. *Id.* § 30:29(D), (I)(1)–(2) (“‘Environmental damage’ shall mean any actual or potential impact, damage, or injury to environmental media caused by contamination resulting from activities associated with oilfield sites or exploration and production sites. Environmental media shall include but not be limited to soil, surface water, ground water, or sediment. ‘Evaluation or remediation’ shall include but not be limited to investigation, testing, monitoring, containment, prevention, or abatement.”).

Furthermore, the statute requires the Louisiana Department of Natural Resources (DNR) to play a direct role in determining the amount of remediation damages.⁷ The fact-finder first determines liability and damages, as is the case in typical litigation. After the fact-finder has determined damages, each party submits cleanup plans to DNR, which then adopts its own number—a number statutorily required under section 30:29 and based on the evidence submitted by the parties.⁸ This number is part of a comprehensive cleanup plan called “the most feasible plan.”⁹ The plan is then submitted back to the trial court, which oversees the distribution of the money and ensures that it is used to remediate the land.¹⁰

Although section 30:29 was passed with the stated intent of protecting Louisiana’s resources, the language of the statute is dense and ambiguous.¹¹ The Louisiana Supreme Court has dealt with the statute a few times, but each time it has failed to clarify it in a way that guarantees uniform interpretation among the lower courts.¹² Most recently in *State v. Louisiana Land & Exploration Co.*, the Louisiana Supreme Court grappled with section 30:29 in determining the total amount of damages available to a plaintiff.¹³ The Court addressed the issue of how to allocate the difference between a fact-finder’s determination of remediation damages and DNR’s statutorily required determination of remediation damages when the fact-finder’s determination is higher.¹⁴ The majority in *Louisiana Land* held that judgments for environmental land damage are not limited to the cost of remediation as determined under the statute’s procedure.¹⁵ Rather, the majority held that a landowner is entitled to recover damages in excess of DNR’s determination as to the cost of remediation, even if the original contract between the plaintiff-landowner and the defendant-lessee

7. *See id.* § 30:29(C).

8. *See id.*

9. *Id.*

10. *See id.* § 30:29(D)(2)–(4).

11. *See id.* § 30:29(A).

12. *See infra* Part I.D.

13. *State v. La. Land & Exploration Co.*, 110 So. 3d 1038, 1040 (La. 2013).

14. *See id.* at 1054. The Court ultimately held that the landowner is entitled to excess remediation damages “[i]f 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 Likewise, ‘any award’ for ‘additional remediation’ may be kept by the landowner, as well.” *Id.*

15. *Id.* at 1049 (“The procedure under the Act does not prohibit the award of remediation damages for more than the amount necessary to fund the statutorily mandated feasible plan, nor does the procedure described in the Act intrude into the manner in which remediation damages are determined.”).

did not expressly contract for restoration of the land.¹⁶ In other words, the fact-finder may determine that remediation damages should be higher than DNR's determination of damages, with the excess award transferring directly to the plaintiff instead of to the court's registry.

This decision rested on the Court's interpretation of section 30:29. Although the majority and dissent strongly disagreed on the interpretation of the statute's language, both argued that the statute was clear and unambiguous.¹⁷ However, with such diametrically opposed opinions on the proper statutory interpretation, this decision is a strong warning sign that the statute's language is neither clear nor unambiguous. Given the difficulty in interpreting and applying section 30:29 and the frequency with which land contamination cases are litigated,¹⁸ this Note urges the Legislature to revise the statute in a way that more accurately reflects the Legislature's intent to remediate land to the extent necessary to protect the public.¹⁹

The Legislature must act more effectively to protect Louisiana's environment. To that end, Part I of this Note provides background information on legacy litigation in Louisiana. In addition, Part I describes Louisiana's current law of damages in detail, revealing the shortcomings of section 30:29 and the Louisiana Supreme Court's various interpretations of the statute. Part II explores the Court's most recent interpretation of the statute in *State v. Louisiana Land & Exploration Co.*, discussing the facts, implications, and ensuing confusion of the decision. Part III analyzes *Louisiana Land* and its interpretations of section 30:29, parsing through its ambiguous language and stated legislative purpose. Finally, Part IV advocates that the Legislature revise the statute to more accurately reflect its original intent by explicitly recognizing that remediation damages in excess of DNR's determination may be recovered, even in the absence of an express contractual provision providing for remediation damages.

16. *Id.*

17. *See id.* at 1063–64 (Victory, J., dissenting).

18. *See, e.g.,* David E. Dismukes, *The Impact of Legacy Lawsuits on Conventional Oil and Gas Drilling in Louisiana*, LSU CTR. FOR ENERGY STUDIES, http://www.enrg.lsu.edu/files/images/presentations/2012/DISMUKES_LEGACY_RPT_02-28-12_FINAL.pdf, archived at <http://perma.cc/XB5L-3NCV> (last visited Sept. 29, 2014). In 2010, the number of active legacy litigation lawsuits was over 150. *Id.*

19. *See* LA. REV. STAT. ANN. § 30:29(A) (Supp. 2014) (“It is the duty of the legislature to set forth procedures to ensure that damage to the environment is remediated to a standard that protects the public interest.”).

I. LEGACY LITIGATION AND ITS DIFFICULTIES

By nature, legacy litigation cases usually present a myriad of problems.²⁰ The tracts of land at the center of these disputes have often been subject to numerous mineral leases over the years,²¹ making it difficult to identify the party or parties responsible for damages.²² Even when courts find a lessee responsible for the damage, they often struggle with how much money should be granted for remediation damages in the absence of an express contractual provision.²³ Such remediation damages include the costs of “investigation, testing, monitoring, containment, prevention, or abatement” of the contaminated tract of land.²⁴ Oftentimes the cost of repairing the land, or restoring it to the condition it was in before the lease was executed, is drastically more expensive than the value of the land itself.²⁵

A. Balancing Two Competing Public Policies

Part of the struggle in determining remediation damages can be explained by two competing public policies: (1) courts want to award damages significant enough to deter defendants from engaging in risky, potentially environmentally damaging practices, but (2) courts do not want the plaintiff to receive a windfall.²⁶ On the environmental side of the public policy coin, courts are very much aware that oilfield operations can have negative

20. See Pitre, *Six Years Later*, *supra* note 1, at 93.

21. The Louisiana Mineral Code defines a “mineral lease” as “a contract by which the lessee is granted the right to explore for and produce minerals.” LA. REV. STAT. ANN. § 31:114 (2000).

22. Magill, *supra* note 3, at 11 (“In many cases, it is difficult for the landowners to identify the responsible party because of changes in company ownership and bankruptcies over the years.”). This Note does not discuss the potential for holding the wrong lessee accountable in legacy-type litigation cases, nor does it discuss the issue of prescription and notice.

23. See, e.g., *State v. La. Land & Exploration Co.*, 110 So. 3d 1038 (La. 2013) (illustrating two differing views held by the majority and dissenting opinions on the amount of remediation damages).

24. LA. REV. STAT. ANN. § 30:29(I)(2) (Supp. 2014).

25. Pitre, *Six Years Later*, *supra* note 1, at 95 (“In *Corbello*, the Louisiana Supreme Court held that in a claim for breach of a *contractual* obligation to restore property, damages need not be ‘tethered’ to the value of the property, thus allowing landowners to assert and receive damages that disregarded, and largely exceeded, the fair market worth of the property.”). See also *Corbello v. Iowa Prod.*, 850 So. 2d 686, 692–93 (La. 2003). The Court in *Corbello* awarded \$33 million in restoration damages, despite the fact that the land was valued at a mere \$108,000. *Corbello*, 850 So. 2d at 692–93.

26. See *Corbello*, 850 So. 2d at 701.

environmental impacts.²⁷ One common fear is that oil and other toxins will leak into groundwater, thus tainting the already scarce water supply.²⁸ This gives cause for concern particularly in Louisiana, where “oilfield operations are a leading cause of groundwater contamination.”²⁹

However, courts must balance this environmental concern with the other side of the public policy coin—preventing plaintiffs from receiving a windfall. Courts must also consider the possibility that plaintiffs might not use damage awards to clean up their land.³⁰ In awarding large damages, the courts are in effect attempting to remediate a public harm through a private forum.³¹ Thus, since environmental contamination can affect the public, remediation awards should arguably be utilized in a way that protects the public. Thus, the Louisiana Legislature and courts have struggled over the years with effectively balancing these two countervailing public policy concerns.

27. See *id.*; J. Michael Veron, *Oilfield Contamination Litigation in Louisiana: Property Rights on Trial*, 25 TUL. ENVTL. L.J. 1, 3 (2011).

28. Veron, *supra* note 27, at 3.

29. *Id.* Furthermore, the process of drilling and extracting oil alone requires an enormous volume of water. *What Goes In and Out of Hydraulic Fracturing*, DANGERS OF FRACKING, <http://www.dangersoffracking.com/>, archived at <http://perma.cc/4LTK-5TAF> (last visited Sept. 9, 2014). Each time a well is “fracked” (as a result of hydraulic fracturing), drillers use up to eight million gallons of water. *Id.* A well can be fracked up to eighteen times, so each well over the course of its life can use up to 144 million gallons of water. *Id.* Fracking has become increasingly popular in Louisiana, and in light of the fact that only 0.003% of the world’s water is now drinkable, the amount of water that is used in these oil and gas operations can be particularly worrisome. *Louisiana and Fracking*, EARTHJUSTICE, <http://earthjustice.org/features/campaigns/louisiana-and-fracking>, archived at <http://perma.cc/GWGG9-2CP9> (last visited Sept. 9, 2014); Veron, *supra* note 27, at 2. Couple that concern with the potential for drilling operations to cause contamination in underground water aquifers, and it is clear that oil and gas production presents daunting environmental dangers. Veron, *supra* note 27, at 3.

30. See Loulan Pitre, Jr., “*Legacy Litigation*” and Act 312 of 2006, 20 TUL. ENVTL. L.J. 347, 348 (2007) [hereinafter Pitre, *Legacy Litigation*]. Prior to the enactment of Louisiana Revised Statutes section 30:29, “[t]he landowner could sue for, and potentially collect, damages greatly in excess of the uncontaminated value of the property and then have no legal obligation to spend that money to remediate the property.” *Id.*

31. Loyd J. Bourgeois, Comment, *Private Actions Seeking Remediation or Restoration Damages: Who Ensures the Cleanup Actually Occurs?*, 17 TUL. ENVTL. L.J. 355, 359 (2004) (“Thus, while the private law actions currently used to recover damages are based on the traditional belief that the recovery is for *ex post* harm to an individual’s property, a public law goal of protection and prevention from environmental harm may be served by severing the distinction between public and private law and recognizing that environmental contamination of private land affects both private individuals and the public at large.”).

B. The Louisiana Supreme Court's Traditional Approach to the Legacy Litigation Problem

Historically, Louisiana courts have applied traditional breach-of-contract principles to legacy litigation cases.³² In Louisiana's civilian tradition, specific performance is the preferred remedy for the failure to perform an obligation.³³ This preference arises out of the belief that specific performance provides "the best satisfaction"—it awards the interest that the parties were entitled to expect.³⁴ Specific performance has dual effects: it restores the obligee to its original position but avoids the imposition of an undue burden on the obligor.³⁵ However, the avoidance of an undue burden on the obligor "ignore[s] the cost of environmental remediation ultimately borne by the private landowner" and ignores the public aspect of the harm.³⁶

Today, the remedy of damages is treated differently in land contamination cases depending on whether the action is a tort or a

32. Although the Mineral Code covers mineral leases, it does not provide guidance in determining remediation damages due to environmental contamination. Mineral Code article 122 outlines the lessee's obligations to the lessor but does not consider damages:

A mineral lessee is not under a fiduciary obligation to his lessor, but he is bound to perform the contract in good faith and to develop and operate the property leased as a reasonably prudent operator for the mutual benefit of himself and his lessor. Parties may stipulate what shall constitute reasonably prudent conduct on the part of the lessee.

LA. REV. STAT. ANN. § 31:122 (2009).

33. See LA. CIV. CODE art. 1986 (2012) ("Upon an obligor's failure to perform an obligation to deliver a thing, or not to do an act, or to execute an instrument, the court shall grant specific performance plus damages for delay if the obligee so demands. If specific performance is impracticable, the court may allow damages to the obligee. Upon a failure to perform an obligation that has another object, such as an obligation to do, the granting of specific performance is at the discretion of the court."); see also LA. CIV. CODE art. 2315 (2012) ("Every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it."); SAUL LITVINOFF, OBLIGATIONS § 1.7, in 5 LOUISIANA CIVIL LAW TREATISE 15 (1992) (The law of obligations allows an obligee "to demand the specific performance of the obligation."). However, when specific performance is impractical, the court may allow damages in lieu of specific performance. LA. CIV. CODE art. 1986 (2012).

34. LITVINOFF, *supra* note 33, § 1.7, at 15.

35. See Mary Beth Balhoff, Corbello v. Iowa Production and the Implications of Restoration Damages in Louisiana: Drilling Holes in Deep Pockets for Thirty-Three Million Dollars, 65 LA. L. REV. 271, 277 (2004); see also Brian Lindsey, Comment, Shady Grove on the Bayou: Louisiana's Procedural Limitations on Legacy Oil Suits in a post-Shady Grove Orthopedic Associates, P.A. v. Allstate Ins. Co. Landscape, 2 LSU J. ENERGY L. & RES. 173, 174 (2013).

36. Lindsey, *supra* note 35, at 174.

breach of contract.³⁷ The Louisiana Supreme Court held in *Roman Catholic Church v. Louisiana Gas Service Co.*, a tort case involving land contamination, that when the cost of restoration exceeds the fair market value of the property, the award should typically be tethered to the fair market value of the property.³⁸ In other words, full restoration is not required in tort cases when the damage is greater than the value of the property. The Court outlined two exceptions to the fair market value rule—lessees are liable for remediation damages instead of just the fair market value if: (1) the plaintiff has a personal tie to the land, or (2) there is reason to believe that the plaintiff will restore the property to its original condition.³⁹

Following the *Roman Catholic* rationale, many in the oil industry believed that contract damages would be similar to the remedies available in tort cases—that “damages would equal the value of the thing, not the cost to rebuild or restore the thing”—in land contamination cases.⁴⁰ However, the Louisiana Supreme Court has held that in breach-of-contract cases involving land contamination, damages are *not* necessarily limited to the fair market value of the land.⁴¹ *Corbello v. Iowa Production*, a 2003 Louisiana Supreme Court decision, opened the door to larger damage awards by holding that landowners could recover the cost of restoration of the land rather than just the fair market value of the property.⁴²

In *Corbello*, the cost of restoring the plaintiff’s land to its prior condition was 300 times the fair market value of the land.⁴³ Still, the Court respected the “four corners of the contract,” holding that since the original lease expressly stated that the lessee would

37. See *Roman Catholic Church v. La. Gas Serv. Co.*, 618 So. 2d 874, 879 (La. 1993); cf. *Corbello v. Iowa Prod.*, 850 So. 2d 686, 695 (La. 2003).

38. *M.J. Farms, Ltd. v. Exxon Mobil Corp.*, 998 So. 2d 16, 38 (La. 2008) (Johnson, J., concurring). In *Roman Catholic*, the tortfeasors were a gas service company and its insurer. Thus, the dispute was between the landowner and the gas service company and its insurer. See *Roman Catholic*, 618 So. 2d at 875. In *Corbello* and the vast majority of land contamination cases, the dispute is between the landowner and a lessee. See 850 So. 2d at 691.

39. See *Roman Catholic*, 618 So. 2d at 879–80.

40. Balhoff, *supra* note 35, at 271.

41. *Corbello*, 850 So. 2d at 695 (“However, while we find it logical in tort cases to tether the amount of damages by balancing the amount to be paid by the negligent tortfeasor against the goal to restore the plaintiff, as closely as possible, to the position which he would have occupied had the accident never occurred, this same logic should not be extended to breach of contract cases.”).

42. *Id.* at 693. The court held that “the damage award for a breach of contractual obligation to reasonably restore property need not be tethered to the market value of the property.” *Id.*

43. *Id.* at 692.

restore the land at the end of the term, the lessee was strictly bound to such terms—regardless of the fact that the fair market value was a small fraction of the restoration cost.⁴⁴ The Court further stated that had the defendant wished for the damages to be tethered to the fair market value of the land, it could have contracted for that provision in the original mineral lease.⁴⁵ The Court suggested that limiting damages to the fair market value of the land, despite the contractual provision, would give free rein to oil companies in their operations “with indifference as to the aftermath of its operations because of the assurance that it would not be responsible for the full cost of restoration.”⁴⁶

The *Corbello* case demonstrates that, in land contamination cases, courts make distinctions between contract law and tort law in the area of damages.⁴⁷ This distinction arises from the fact that in contract law, the parties can freely contract to limit damages.⁴⁸ If an oil company is concerned about the possibility of future litigation, then the company and the landowner can contract to limit damages to the fair market value of the land.⁴⁹ Courts recognize that it is vital *not* to tether contract damages to the fair market value of the land because lessees otherwise have little incentive to treat property with care.⁵⁰ In tort law, however, parties do not contract with each other on damages.⁵¹ Neither party consents to the action: the injured victim does not consent to the injury, and the tortfeasor does not consent to the remedy.⁵² Thus, the lack of consent perhaps explains why damages should be limited to fair market value in tort cases and why the opposite is true in breach-of-contract actions.⁵³

44. *Id.* at 695.

45. *Id.* at 694.

46. *Id.* at 695.

47. *Id.* at 694–95.

48. *See* LA. CIV. CODE art. 1906 (2012) (“A contract is an agreement by two or more parties whereby obligations are created, modified, or extinguished.”); *see also Corbello*, 850 So. 2d at 694–95 (“We find that the contractual terms of a contract, which convey the intentions of the parties, overrule any policy considerations behind such a rule limiting damages in tort cases.”).

49. *See Corbello*, 850 So. 2d at 694–95; *see also* LA. CIV. CODE art. 1971 (2012) (“Parties are free to contract for any object that is lawful, possible, and determined or determinable.”).

50. *See Corbello*, 850 So. 2d at 695.

51. *See* Hartwin Bungert, *Compensating Harm to the Defective Product Itself—A Comparative Analysis of American and German Products Liability Law*, 66 TUL. L. REV. 1179, 1199 (1992).

52. *Id.*

53. *Id.* (“Put simply, the basic conceptual difference between contract law and tort law lies in the consent and the lack of consent, respectively, of the party to the imposition of obligations. The notion that risks, in respect to the parties’

C. *The Legislature's Response to Corbello v. Iowa Production Co.*

Although the Louisiana Supreme Court established in *Corbello* that contract damages are not tethered to the fair market value of the land, the Court expressed concern that large damages such as those awarded in *Corbello* could result in a windfall for plaintiffs, as there is no legal requirement on the part of plaintiffs to remediate their land with damage awards.⁵⁴ In other words, landowners were being awarded private damages for public environmental harm, yet those landowners could keep the damages to the public's detriment. The *Corbello* Court discussed the Legislature's inaction and "seemed to invite consideration of a legislative reaction."⁵⁵ The Legislature accepted this invitation and passed Act 312 in 2006, now codified as Louisiana Revised Statutes section 30:29,⁵⁶ "primarily in an effort to ensure that contaminated oil and gas exploration sites were remediated to the extent necessary to protect the public interest."⁵⁷ Thus, the Legislature's goal was to protect Louisiana's natural resources and the public, rather than limiting or restricting the amount of damages awardable to plaintiffs.⁵⁸

Section 30:29 states that "all damages or payments in any civil action . . . awarded for the evaluation or remediation of environmental damage shall be paid exclusively into the registry of the court."⁵⁹ Thus, a landowner seeking recovery for environmental

economic expectations, should be allocated by private agreement and not imposed by strict law parallels this distinction between tort and contract."). This Note does not delve into the possibility of expanding beyond the fair market value of property in tort cases involving land contamination.

54. See *Corbello*, 850 So. 2d at 700 ("Since no court can order the plaintiffs in this case to expend the award on decontaminating the property, the outcome allowed by the trial court does nothing to protect the citizens of Mississippi from the dangers of . . . contamination.").

55. Pitre, *Legacy Litigation*, *supra* note 30, at 348 (claiming that the decision allows for contaminated property to be the equivalent of winning a lottery ticket for the landowner).

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

57. Pitre, *Six Years Later*, *supra* note 1, at 94.

58. See LA. REV. STAT. ANN. § 30:29(A) (Supp. 2014) ("It is the duty of the legislature to set forth procedures to ensure that *damage to the environment* is remediated to a standard that protects the public interest." (emphasis added)).

59. *Id.* § 30:29(D)(1). The full text of section 30:29(D) is provided below.

(1) Whether or not the department or the attorney general intervenes, and except as provided in Subsection H of this Section, all damages or payments in any civil action, including interest thereon, awarded for the evaluation or remediation of environmental damage shall be paid

damages must pursue a determination of the remediation damages from DNR.⁶⁰ This determination is made after the trial court stage. After a determination is made, the trial court must adopt DNR's plan, unless one of the parties proves by a preponderance of the evidence that an alternate plan is more feasible to achieve the Legislature's goals.⁶¹ Once the court adopts a plan, the damages awarded to remediate the land to regulatory standards are paid into the registry of the court, and the court then controls and oversees the remediation process.⁶² The statute does not prevent a

exclusively into the registry of the court in an interest-bearing account with the interest accruing to the account for clean up.

(2) The court may allow any funds to be paid into the registry of the court to be paid in increments as necessary to fund the evaluation or remediation and implementation of any plan or submittal adopted by the court. In any instance in which the court allows the funds to be paid in increments, whether or not an appeal is taken, the court shall require the posting of a bond for the implementation of the plan in such amount as provided by and in accordance with the procedures set forth for the posting of suspensive appeal bonds. Any such bond shall be valid through completion of the remediation.

(3) The court shall issue such orders as may be necessary to ensure that any such funds are actually expended in a manner consistent with the adopted plan for the evaluation or remediation of the environmental damage for which the award or payment is made.

(4) The court shall retain jurisdiction over the funds deposited and the party or parties admitting responsibility or the party or parties found legally responsible by the court until such time as the evaluation or remediation is completed. If the court finds the amount of the initial deposit insufficient to complete the evaluation or remediation, the court shall, on the motion of any party or on its own motion, order the party or parties admitting responsibility or found legally responsible by the court to deposit additional funds into the registry of the court. Upon completion of the evaluation or remediation, the court shall order any funds remaining in the registry of the court to be returned to the depositor. The department and the parties shall notify the court of the completion of any evaluation or remediation.

60. *See id.* § 30:29(B)(1) ("Notwithstanding any law to the contrary, immediately upon the filing or amendment of any litigation or pleading making a judicial demand arising from or alleging environmental damage, the provisions of this Section shall apply and the party filing same shall provide timely notice to the state of Louisiana through the Department of Natural Resources, commissioner of conservation and the attorney general.").

61. *See id.* § 30:29(C)(5) ("The court shall adopt the plan approved by the department, unless a party proves by a preponderance of the evidence that another plan is a more feasible plan to adequately protect the environment and the public health, safety, and welfare.").

62. There are six major components of Act 312, summarized by the Louisiana Supreme Court:

landowner from pursuing judicial remedies for private awards, nor does it “preclude a judgment ordering damages for or implementation of additional remediation in excess of the requirements of the plan adopted by the court.”⁶³

The procedure under the statute is not intended to affect normal trial procedure.⁶⁴ The fact-finder still has the responsibility of allocating liability and determining damages.⁶⁵ However, if either a defendant admits liability prior to trial or the fact-finder finds the defendant liable, then the defendant must submit a cleanup plan to DNR.⁶⁶ This occurs after the trial stage, and thus the trial court has already determined an appropriate amount of damages. The submitted plans are then presented before a public hearing, and DNR determines which is “the most feasible plan to accomplish the evaluation/remediation of the environmental damage while protecting the health, safety and welfare of the public.”⁶⁷ DNR makes its determination based on applicable regulatory standards but is not limited “to any one standard in its development of the

First, the act requires timely notice of such litigation to the State. Second, the act stays the litigation until thirty days after notice is given. Third, the act permits the State to intervene in the litigation. Fourth, the act provides a role for the Office of Conservation with the Louisiana Department of Natural Resources (“LDNR”) in the determination of the most feasible plan for evaluation and/or remediation of environmental damage. Fifth, the act provides for the payment of all damages for the evaluation or remediation of environmental damages and further provides that the Court shall oversee actual implementation of the plan adjudicated to be “most feasible.” Sixth, the act allows the landowner and the State to recover attorney and expert fees, as well as costs from the responsible party or parties.

M.J. Farms, Ltd. v. Exxon Mobil Corp., 998 So. 2d 16, 36 (La. 2008) (citations omitted).

63. See LA. REV. STAT. ANN. § 30:29(H) (Supp. 2014).

64. *State v. La. Land & Exploration Co.*, 110 So. 3d 1038, 1051 (La. 2013).

65. See LA. REV. STAT. ANN. § 30:29(H) (Supp. 2014).

66. *Id.* § 30:29(C). Even when the defendant is required to submit a cleanup plan, any other party is also entitled to submit a plan. *Id.*

67. *Louisiana Land*, 110 So. 3d at 1052. Section 30:29(I)(3) defines the most feasible plan. See LA. REV. STAT. ANN. § 30:29(I)(3) (Supp. 2014) (“‘Feasible Plan’ means the most reasonable plan which addresses environmental damage in conformity with the requirements of Louisiana Constitution Article IX, Section 1 to protect the environment, public health, safety and welfare, and is in compliance with the specific relevant and applicable standards and regulations promulgated by a state agency in accordance with the Administrative Procedure Act in effect at the time of clean up to remediate contamination resulting from oilfield or exploration and production operations or waste.”).

most feasible plan.”⁶⁸ The trial court then has the ultimate responsibility of enforcing the most feasible plan and overseeing the remediation process.⁶⁹

D. Legacy Litigation after Corbello

Following the enactment of section 30:29, the Louisiana Supreme Court grappled with the statute in three cases. In *Terrebonne Parish School Board v. Castex Energy, Inc.*, decided in 2005, the Court found that Mineral Code article 122’s “reasonably prudent operator” standard does not necessarily require restoration of the land; rather, restoration may only be required when the lessee has acted unreasonably or excessively in using the land, absent an express provision in the lease for damages.⁷⁰ Although full restoration is not necessarily required when a lessee acts unreasonably or excessively, the lessee must perform additional obligations in those circumstances.⁷¹ The “additional obligations” depend on the specific rights granted in the lease and the damage caused by the unreasonable or excessive

68. *Louisiana Land*, 110 So. 3d at 1052. Section 30:29(C)(3)(a) provides: “The department shall use and apply the applicable regulatory standards in approving or structuring a plan that the department determines to be the most feasible plan to evaluate or remediate the environmental damage.” LA. REV. STAT. ANN. § 30:29(C)(3)(a) (Supp. 2014). Regulatory standards are determined pursuant to Statewide Order No. 29-B. *See* LA. ADMIN. CODE tit. 43, pt. 1, §§ 101–641 (2010).

69. *See* LA. REV. STAT. ANN. § 30:29(D) (Supp. 2014).

70. *Terrebonne Parish Sch. Bd. v. Castex Energy, Inc.*, 893 So. 2d 789, 801 (La. 2005). In this case, the lease was silent on the issue of restoration, and thus the Court had to grapple with the meaning of “a reasonably prudent operator.” Mineral Code article 122 requires a lessee to act as a “reasonably prudent operator,” but the issue was whether such a requirement entails full restoration. Absent unreasonableness or excessiveness, full restoration is not required under article 122. *See* Ross Roubion, *Remediation Damages after State v. Louisiana Land & Exploration Company*, LSU J. ENERGY L. & RES. CURRENTS (May 13, 2013), <http://sites.law.lsu.edu/jelrblog/?p=240>, archived at <http://perma.cc/SE5T-QLSH>; *see also* Pitre, *Legacy Litigation*, *supra* note 30, at 349 (“[I]n the absence of an express contractual restoration obligation, the Louisiana Mineral Code did not create an implied duty of a mineral lessee to restore the surface after the ‘ordinary, customary, and reasonable acts’ done for drilling or exploration, unless caused by ‘unreasonable or negligent operations.’” (quoting *Terrebonne Parish Sch. Bd.*, 893 So. 2d at 798–801)).

71. *See Terrebonne Parish Sch. Bd.*, 893 So. 2d at 797; *see also* *Marin v. Exxon Mobil Corp.*, 48 So. 3d 234, 260 (La. 2010) (“Where the lessee has operated unreasonably or excessively, as in this case, the lessee has additional obligations, e.g., the obligation to correct the damage due to the unreasonable or excessive operations. However, that does not necessarily mean that the lessee has a duty to restore the land to its pre-lease condition . . .”).

behavior.⁷² The Court also considered the meaning of “normal wear and tear,” noting the principle “that a lessor may not compel a lessee to restore the leased premises to their former condition when the lessor has expressly approved the modifications that the lessee accomplished.”⁷³ Accordingly, when a lessor consents to certain acts of a lessee, it is likely that the lessee has not acted unreasonably or excessively in performing those acts and subsequently does not have to restore the land to its prior condition.

A few years later in 2008, the Louisiana Supreme Court in *M.J. Farms, Ltd. v. Exxon Mobil Corp.* held that section 30:29 applies retroactively, as it is procedural in nature and supplemental to any private claims.⁷⁴ The Court held that “Act 312 [the Act that created section 30:29] supplements the Mineral Code” and merely “adopts a procedure and simply seeks to ensure that the property that is environmentally damaged is actually remediated.”⁷⁵ Therefore, section 30:29 merely supplements the Mineral Code, and “[n]o conflict exists between the Mineral Code and the provisions of Act 312.”⁷⁶

In 2010, the Court ruled in *Marin v. Exxon Mobil Corp.* that the amount of restoration owed to a landowner is equal to the amount determined by DNR, as required in section 30:29.⁷⁷ Thus, compensatory damages equaled statewide regulatory standards rather than the cost of restoring the land to its pre-leased

72. See *Marin*, 48 So. 3d at 260 (citing *Terrebonne Parish Sch. Bd.*, 893 So. 2d at 800) (explaining what the phrase “additional obligations” means).

73. *Terrebonne Parish Sch. Bd.*, 893 So. 2d at 800.

74. *M.J. Farms, Ltd. v. Exxon Mobil Corp.*, 998 So. 2d 16, 21–22 (La. 2008). Act 312 became effective in June 2006, but it applied to cases in which the court had not issued or signed an order setting a trial date prior to March 27, 2006. *Id.* at 21. The plaintiffs filed suit prior to March 27, 2006, but the date for trial had not yet been set. *Id.* The plaintiffs argued that Act 312 was unconstitutional because “its cause of action vested at the time the suit was filed and subsequent legislation cannot retroactively divest it of its cause of action.” *Id.* at 22.

75. *Id.* at 28, 36.

76. *Id.* at 28.

77. See *Marin*, 48 So. 3d at 261–62. The Court noted that it did not appear logical to “award the landowner money to remediate unusable groundwater, with no oversight by the DNR, when the statute enacted to classify and protect groundwater does not require a cleanup. Further, it is unclear from the record what additional damage this contaminated groundwater caused, beyond what was caused by the contaminated soil.” *Id.* The Louisiana Supreme Court held that although the lessee, Exxon, acted unreasonably and without the landowner’s consent, the lessee was not required to remediate the land when such remediation would not improve the unusable groundwater supply and when the damages are unclear. *Id.*

condition.⁷⁸ The lessee in this case did act unreasonably and excessively, and the court found that the lessee's additional obligation was a "duty to correct the contamination," not the cost of restoration.⁷⁹

Those three decisions left the lower courts with three new rules: (1) absent an express provision, restoration is only required when a lessee acts unreasonably or excessively;⁸⁰ (2) Louisiana Revised Statutes section 30:29 is procedural and supplements private claims;⁸¹ and (3) compensatory damages equal DNR's determination of regulatory standards, rather than full remediation.⁸² In 2013, the Louisiana Supreme Court built upon these rules in deciding *State v. Louisiana Land & Exploration Co.*

II. *STATE V. LOUISIANA LAND & EXPLORATION CO.*

Prior to *Louisiana Land*, it was clear that the "four corners of the contract" would be respected, meaning that if the parties to the lease specifically contracted for the lessee to restore the land to its original condition upon expiration of the lease, then the lessor could recover the full restoration value of the land.⁸³ However, it was unclear whether the lessor could recover full restoration costs, if that amount was greater than the amount determined by DNR as required by section 30:29, when the lease did not contain an express contractual provision providing for remediation. The Louisiana Supreme Court in *Louisiana Land* addressed this question.

The Court in *Louisiana Land* held that even when a landowner and lessee do not expressly contract that the lessee will restore the land to its prior condition, the lessee can still be required to remediate the land, despite the fact that the cost of restoring the land may be considerably more expensive than the value of the land itself.⁸⁴ The Court further held that a plaintiff's remediation damages are not limited to those determined under section 30:29;

78. *Id.* at 262 ("The trial court's award of the amount necessary to restore the land to regulatory standards, rather than to its original condition, is appropriate.").

79. *Id.* at 259–60.

80. *Terrebonne Parish Sch. Bd. v. Castex Energy, Inc.*, 893 So. 2d 789, 801 (La. 2005).

81. *M.J. Farms*, 998 So. 2d at 21–22.

82. *Marin*, 48 So. 3d at 262.

83. *Corbello v. Iowa Prod.*, 850 So. 2d 686, 695 (La. 2003).

84. *See State v. La. Land & Exploration Co.*, 110 So. 3d 1038, 1054 (La. 2013); *see, e.g., Corbello*, 850 So. 2d at 692 (awarding damages exceeding property value by more than 300 times).

in other words, the Court explained that a plaintiff can recover damages in excess of the amount determined by DNR.⁸⁵ It is important to note that the Court did not say that the plaintiff should receive excess damages; rather, the Court merely held that the plaintiff should not be barred from pursuing excess damages.⁸⁶ In other words, the Court left open the possibility of the fact-finder awarding more damages than those determined under DNR's most feasible plan.

A. Factual and Procedural Background

In 2004, the Vermillion Parish School Board and the State of Louisiana filed a "Petition for Damages to School Lands," seeking to recover remediation and damages from Louisiana Land & Exploration Company.⁸⁷ The plaintiffs alleged that oil and gas operations polluted a tract of land located in Vermillion Parish and damaged the land's soil, surface waters, and ground waters.⁸⁸ Specifically, the plaintiffs sought to recover under several theories of action, including negligence, strict liability, unjust enrichment, trespass, breach of contract, and various Mineral Code and Civil Code violations.⁸⁹

The plaintiffs alleged that the pollution was considered "to be extensive and to be a threat to the fish, wildlife, and the safety of the seafood supply in the White Lake area," a Wetland Conservation area in Vermillion Parish consisting of approximately 108 square miles.⁹⁰ The land at issue had been subject to two oil, gas, and mineral leases, one granted in 1935 and the other in 1994.⁹¹ The 1994 surface lease contained an express contractual provision concerning remediation, and thus the courts did not interfere with

85. See *Louisiana Land*, 110 So. 3d. at 1054; Pitre, *Six Years Later*, *supra* note 1, at 95.

86. See *Louisiana Land*, 110 So. 3d at 1054 ("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.").

87. *Id.* at 1040.

88. *Id.* The Vermillion Parish School Board managed the tract of land, while the State owned it. *Id.*

89. *Id.* at 1040–41.

90. *State v. La. Land & Exploration Co.*, 85 So. 3d 158, 159 (La. Ct. App. 2012) (appellate court decision); *White Lake Wetlands Conservations Area*, STATE OF LA: DEP'T OF WILDLIFE AND FISHERIES (Jan. 23, 2014, 11:14 AM), <http://www.wlf.louisiana.gov/refuge/white-lake-wetlands-conservations-area>, archived at <http://perma.cc/8QSL-SAYV>.

91. See *Louisiana Land*, 110 So. 3d at 1040.

that contract.⁹² However, the 1935 lease did not contain an express provision concerning remediation.⁹³

During discovery, one of the defendants, Unocal, admitted responsibility for environmental damage under section 30:29(C).⁹⁴ Unocal sought to have the case referred to DNR, as required by the statute.⁹⁵ Vermillion Parish objected, arguing that a fact-finder first needed to determine fault among all of the defendants and adjudicate their private claims before a referral to DNR.⁹⁶ Both the trial and appellate courts agreed with the plaintiffs, concluding that “a reasonable time under the statute within which the trial court should order the Unocal defendants to submit a remediation plan to [DNR] would be some time *after* liability and damages issues have been resolved regarding all of the defendants.”⁹⁷

Because the court found that a fact-finder must hear the claims against Unocal first, the defendants next claimed that the plaintiffs had no right to damages in excess of those necessary to fund the remediation plan under DNR.⁹⁸ Filing a motion for summary judgment, the defendants claimed that excess damages are only allowed under an express contractual provision providing for remediation or restoration, and because the 1935 lease did not contain an express contractual provision, the plaintiffs could not claim excess damages.⁹⁹ The Louisiana Supreme Court granted

92. *See id.* at 1045 (“La. R.S. 30:29 specifically states its provisions shall not be construed to impede or limit provisions under private contracts which impose their own remediation obligations.”).

93. *See id.*

94. *See id.* at 1041; *see also* LA. REV. STAT. ANN. § 30:29(C)(1) (Supp. 2014) (“If at any time during the proceeding a party admits liability for environmental damage or the finder of fact determines that environmental damage exists and determines the party or parties who caused the damage or who are otherwise legally responsible therefor, the court shall order the party or parties who admit responsibility or whom the court finds legally responsible for the damage to develop a plan or submittal for the evaluation or remediation to applicable regulatory standards of the contamination that resulted in the environmental damage. . . . The department shall submit to the court a schedule of estimated costs for review of the plans or submittals of the parties by the department and the court shall require the party admitting responsibility or the party found legally responsible by the court to deposit in the registry of the court sufficient funds to pay the cost of the department’s review of the plans or submittals.”).

95. *See Louisiana Land*, 110 So. 3d at 1041.

96. *See id.*

97. *Id.*

98. *See id.* at 1042.

99. *Id.* In the defendants’ motion for summary judgment, they also argued that Chevron U.S.A., Inc., should be dismissed from the suit. The trial court granted a partial summary judgment in favor of the defendants and dismissed Chevron. The appellate court reversed, citing that “there [was] a genuine issue

writs to review the summary judgment and “determine the correct interpretation of Act 312 [Louisiana Revised Statutes section 30:29].”¹⁰⁰

B. The Majority Opinion—Excess Remediation Damages Are Possible

The majority ultimately held that the plaintiffs could recover in excess of the remediation damages determined by DNR, even absent an express contractual provision.¹⁰¹ In so holding, the majority relied on the theory of implied obligations under Civil Code article 2683—that a lessee should “return the thing at the end of the lease in a condition that is the same as it was when the thing was delivered to him, except for normal wear and tear.”¹⁰² Thus, even though the original 1935 lease did not contain an express contractual provision for remediation, the lessee still had an implied obligation to repair or restore the thing.¹⁰³

The majority found the language of section 30:29 to be unambiguous, noting that the statute “ensures the damages awarded for remediation will be used only for remediation to the extent necessary to fund the statutorily required plan.”¹⁰⁴ The Court interpreted the statute as procedural and not meant to “interfere with private rights.”¹⁰⁵ Thus, per the Court, the amount of remediation determined under the most feasible plan does not limit a plaintiff’s right to seek damages in excess of that amount, nor does it affect the manner in which remediation damages are determined.¹⁰⁶ Under the statute, the court merely acts as a

of material fact as to whether Chevron U.S.A., Inc. is a successor in interest to Unocal.” *Id.* at 1043–44 (citing *State v. La. Land & Exploration Co.*, 85 So. 3d 158 (La. Ct. App. 2012)). The Louisiana Supreme Court ultimately affirmed the appellate court’s decision, thereby retaining Chevron U.S.A., Inc., as a defendant. *Id.* at 1059.

100. *Id.* at 1044.

101. *Id.* at 1054.

102. *Id.* at 1046, 1054; LA. CIV. CODE art. 2683(3) (2012) (instructing that absent an express contractual provision concerning remediation, one should apply the Civil Code articles on leases).

103. See *Louisiana Land*, 110 So. 3d at 1054.

104. *Id.* at 1049 (emphasis omitted).

105. *Id.* at 1049, 1053 (“The legislature has not, in this solely procedural statute, stripped landowners of any of their substantive rights. The statute repeatedly assures this.”).

106. *Id.* at 1049. The Louisiana Supreme Court describes the procedure of Louisiana Revised Statutes section 30:29 as follows: “The only change accomplished by Act 312 is how the damages to remediate property are spent. Under Act 312,

“gatekeeper,” ensuring that the ultimate purpose of the Act—“remediation of the property to the extent of the public’s interest”—is upheld.¹⁰⁷

While the defendants urged that section 30:29 limits remediation damages to those determined by DNR under section 30:29(D)’s most feasible plan, the majority disagreed, finding that the defendants were reading section 30:29(D) in isolation.¹⁰⁸ According to the majority, when the statute is read as a whole, section 30:29(H) allows a plaintiff to recover in excess of the amount determined by DNR to fund the most feasible plan.¹⁰⁹ The majority stated: “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.”¹¹⁰ For example, if the trial court first determines that remediation damages are \$4 million, and DNR’s most feasible

landowners do not receive that portion of the remediation damages awarded needed to fund the statutorily mandated feasible plan; these funds must be deposited into the registry of the court.” *Id.* However, the Third Circuit in *Savoie v. Richard* altered the way in which remediation damages are determined. *See Savoie v. Richard*, 137 So. 3d 78 (La. Ct. App. 2014). Rather than providing the jury with a form that indicated a single number for remediation, the judge in *Savoie* had the jury break down remediation damages into two categories: the amount needed to remediate to regulatory standards and the amount to remediate beyond regulatory standards. *Id.* at 81. By altering the jury verdict form, the court in *Savoie* violated the Louisiana Supreme Court’s explicit interpretation of La. R.S. 30:29: “no provision of the Act changes normal trial procedures.” *See Louisiana Land*, 110 So. 3d at 1051.

107. *See Louisiana Land*, 110 So. 3d at 1049.

108. For the text of Louisiana Revised Statutes section 30:29(D), see *supra* note 59.

109. *See Louisiana Land*, 110 So. 3d at 1054. The full text of section 30:29(H) provides:

This Section shall not preclude an owner of land from pursuing a judicial remedy or receiving a judicial award for private claims suffered as a result of environmental damage, except as otherwise provided in this Section. Nor shall it 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. Any award granted in connection with the judgment for additional remediation is not required to be paid into the registry of the court. This Section shall not be interpreted to create any cause of action or to impose additional implied obligations under the mineral code or arising out of a mineral lease.

LA. REV. STAT. ANN. § 30:29(H) (Supp. 2014).

110. *Louisiana Land*, 110 So. 3d at 1054.

plan determines the remediation damages are \$3 million, the plaintiff could recover the \$1 million excess.¹¹¹ Thus, the majority concluded that a plaintiff can recover in excess of the remediation damages determined under the procedure of the statute in two different ways: (1) an express contractual provision; or (2) an implied lease obligation if the lessee has exercised his rights excessively or unreasonably.¹¹² Finding that an issue of genuine material fact existed, the *Louisiana Land* Court affirmed the appellate court's holding that reversed the trial court's grant of partial summary judgment in favor of the defendant.¹¹³

C. The Concurrence

Justice Guidry ultimately concurred with the majority's reversal of the defendant's partial summary judgment but questioned whether a plaintiff can recover excess damages absent an express contractual provision.¹¹⁴ He saw no distinction between the environmental remediation given to a plaintiff under the Mineral and Civil Codes and the compensatory award to fund the most feasible plan under section 30:29.¹¹⁵ He expressed concern that the majority's holding could "thwart the goal of the legislation" since the Legislature's goal was to remediate the land to the extent necessary "to protect the health, safety and welfare of the public."¹¹⁶

Justice Guidry argued that the only time a plaintiff can recover in excess of the most feasible plan amount is when an express contractual provision providing for remediation exists.¹¹⁷ Otherwise, all remediation damages, regardless of whether the fact-finder's amount is greater than the most feasible plan's amount, should be deposited into the registry of the court under the statute.¹¹⁸ If there is any leftover money, that amount should be returned to the depositor.¹¹⁹

111. This presupposes that the trial court's finding of remediation damages was not broken down into two different categories (i.e., remediation damages based on regulatory standards and remediation damages beyond regulatory standards). The court in *Savoie v. Richard* improperly distinguished between such remediation damages. See generally *Savoie*, 137 So. 3d at 78; see also *supra* note 107.

112. See *Louisiana Land*, 110 So. 3d at 1054.

113. *Id.* at 1058–59.

114. *Id.* at 1059 (Guidry, J., concurring).

115. *Id.*

116. *Id.*

117. *Id.* at 1060.

118. *Id.*

D. The Dissent

Justice Victory wrote a passionate dissent, going further than Justice Guidry who merely questioned the issue of excess damages by asserting that the clear language of section 30:29 does not allow excess damages absent an express contractual provision.¹²⁰ Justice Victory argued that there are only two exceptions to the rule that all remediation damages must be paid into the registry of the court.¹²¹ The first exception is “for private claims suffered as a result of environmental damage,” and the second is for claims involving an express contractual provision.¹²² Whereas the majority believed that private claims include excess remediation damages, Justice Victory asserted that excess remediation damages are not an exception under section 30:29’s plain language.¹²³ According to Justice Victory, if the majority’s interpretation were true, then:

[T]here would be no need for the second sentence of La. R.S. 30:29(H), which specifically covers claims for damages for “additional remediation in excess of the requirements of the plan adopted by the court pursuant to this Section,” and allows such damages “as may be required with the terms of an express contractual provision.”¹²⁴

Justice Victory then specifically addressed the majority’s view that a lessee is impliedly obligated to restore the land to its pre-

In my view, there appears to be no distinction between the environmental remediation damages to which the plaintiffs are entitled under the Civil Code and the Mineral Code, absent an express contractual provision for remediation to a different standard, and the compensatory award to fund the so-called ‘feasible plan’ for remediation of the land envisioned by La. Rev. Stat. 30:29, which was enacted to ensure that the environmental damage is remediated to applicable regulatory standards so as to protect the health, safety and welfare of the public.

Id. at 1059.

119. *Id.* at 1060 (“Thus, the statute mandates that all payments or damages awarded for evaluation or remediation, other than those awarded for additional remediation pursuant to an express contractual provision, must be deposited in the registry of the court to fund the remediation plan selected by the trial court, and the remainder, if any, is to be returned to the depositor.”).

120. *Id.* at 1063 (Victory, J., dissenting).

121. *Id.* at 1064.

122. *Id.*

123. *Id.*

124. *Id.* (quoting LA. REV. STAT. ANN. § 30:29(H) (Supp. 2014)).

lease condition.¹²⁵ He found that the statutory language is clear and unambiguous and specifically precludes any new cause of action founded under implied obligations.¹²⁶ He asserted that the majority's decision conflicts with section 30:29(H), which provides that "[t]his Section shall not be interpreted to create any cause of action or to impose additional implied obligations under the mineral code or arising out of a mineral lease."¹²⁷ According to Justice Victory, by allowing one to recover excess damages under the theory of implied obligations, "the majority opinion [did] just what is prohibited in [30:29(H)], not to mention creating substantive rights."¹²⁸

Justice Victory argued that the majority's opinion cannot be reconciled with *Marin*, where the Court specifically held that damages should be evaluated according to regulatory standards rather than full remediation.¹²⁹ He stated that implied obligations under the Mineral or Civil Codes are limited to regulatory standards as determined under the procedure of section 30:29, and thus "the majority's holding that a landowner is indeed entitled to such excess remediation damages in the absence of an express contractual provision amounts to the creation of new substantive rights."¹³⁰

In conclusion, *Louisiana Land* resulted in two different opinions on the issue of excess damages. The majority position held that despite DNR's determination of the most feasible plan, the plaintiffs can be allowed to recover in excess of the plan, provided that either an express contractual provision provides as such or the lessee acted unreasonably or excessively.¹³¹ Both the concurrence and the dissent argued for a more limited position, suggesting that excess damages should only be available when an express contractual provision specifically provides for such.¹³²

III. ANALYSIS OF *STATE V. LOUISIANA LAND & EXPLORATION CO.* AND SECTION 30:29

It is well established that a statute that is clear, unambiguous, and does not lead to absurd results should be interpreted as written,

125. *Id.* at 1064–65 (Victory, J., dissenting).

126. *Id.* at 1064.

127. *Id.* See LA. REV. STAT. ANN. § 30:29(H) (Supp. 2014).

128. See *Louisiana Land*, 110 So. 3d at 1064 (Victory, J., dissenting).

129. *Id.* at 1065.

130. *Id.*

131. See *id.* at 1054 (majority opinion).

132. *Id.* at 1060 (Guidry, J., concurring); *id.* at 1064 (Victory, J., dissenting).

without any further effort to determine the Legislature's intent.¹³³ Both the majority and dissent in *Louisiana Land* claimed that the language of section 30:29 was, in fact, clear and unambiguous.¹³⁴ However, although the majority found that the clear language of the statute permits the recovery of excess remediation damages under the theory of implied obligations, the dissent claimed that the clear language of the statute prohibits precisely such a recovery.¹³⁵ When members of Louisiana's highest court disagree over the language of a statute, the language is likely neither clear nor unambiguous.

A. Subsections D and H

The ambiguity of the statute lies in the textual conflict between sections 30:29(D) and 30:29(H). Section 30:29(D) states that "except as provided in Subsection H of this Section, all damages or payments in any civil action . . . awarded for the evaluation or remediation of environmental damage shall be paid exclusively into the registry of the court . . ." ¹³⁶ Section 30:29(H) then provides that the statute does not prevent a plaintiff from receiving an award for private claims due to environmental damage, "[n]or shall it preclude a judgment ordering damages for or implementation of additional remediation in excess of the requirements of the plan . . . as may be required in accordance with the terms of an *express contractual*

133. See LA. CIV. CODE art. 9 (2012) ("When a law is clear and unambiguous and its application does not lead to absurd consequences, the law shall be applied as written and no further interpretation may be made in search of the intent of the legislature."); see also LA. REV. STAT. ANN. § 1:4 (2003) ("When the wording of a Section is clear and free of ambiguity, the letter of it shall not be disregarded under the pretext of pursuing its spirit.").

134. See *Louisiana Land*, 110 So. 3d at 1049. The majority stated that it "agree[s] with the court of appeal [that] the language of Act 312 is clear and unambiguous." *Id.* The dissent remarked that "when the words of a statute are clear and unambiguous, and the application of the law does not lead to absurd consequences, the statute should be applied as written and no further effort should be made to determine the legislature's intent." *Id.* at 1063 (Victory, J., dissenting). Justice Victory then claimed that the "court of appeal and the majority opinion ignored these basic rules in their interpretation of La. R.S. 30:29." *Id.*

135. See *id.* at 1054 (majority opinion) (discussing that the statute does not affect any claim arising out of a Mineral Code or Civil Code implied obligation); *id.* at 1065 (Victory, J., dissenting) (remarking that "there are no implied obligations" in this case "to provide anything more than a regulatory remediation in compliance with La. R.S. 30:29").

136. LA. REV. STAT. ANN. § 30:29(D)(1) (Supp. 2014) (emphasis added). For the full text of Louisiana Revised Statutes section 30:29(D)(1), see *supra* note 59.

*provision.*¹³⁷ The statute further states that it is not intended to “impose additional implied obligations.”¹³⁸ Thus, the statute requires that *all* remediation damages be deposited into the registry of the court, except when the lease has a specific contractual provision that results in higher damages than DNR’s determination as to statutory damages.¹³⁹ The statute also provides that damages awarded from private claims are exempt from the deposit requirement.¹⁴⁰

The fact that the statute recognizes that remediation damages may be awarded in excess of those found under the statute when there is an express contractual provision might indicate *a contrario* that excess damages cannot be awarded unless an express contractual provision provides otherwise.¹⁴¹ Making a strict textual argument, “private claims” do not include those that may result in an award for remediation damages since the statute only explicitly identifies one exception in which remediation damages need not be deposited into the registry of the court.¹⁴² Thus, the “private claims” contemplated under the statute could arguably be those that result in damages for emotional and mental distress, negligence, etc.—not remediation damages.

B. A Lessee’s Implied Obligation

However, the majority did not take a literal contextual approach and instead looked at whether the statute interfered with the substantive rights of the landowner. The majority held that “this procedural statute does nothing to the substantive rights of the landowner” arising out of the implied obligations found under the Civil Code and Mineral Code.¹⁴³ In contrast with the dissent, the majority found that the “private claims” language in the statute includes claims asserted under the theory of implied obligations,

137. LA. REV. STAT. ANN § 30:29(H) (Supp. 2014) (emphasis added). For the full text of Louisiana Revised Statutes section 30:29(H), see *supra* note 109.

138. LA. REV. STAT. ANN § 30:29(H) (Supp. 2014).

139. *Id.*

140. *Id.*

141. See *State v. La. Land & Exploration Co.*, 110 So. 3d 1038, 1064 (La. 2013) (Victory, J., dissenting) (“Both the court of appeal and majority opinion conclude that these ‘private claims’ include claims for excess remediation damages. However, if this were true, there would be no need for the second sentence of La. R.S. 30:29(H), which specifically covers claims for damages for ‘additional remediation . . . as may be required in accordance with the terms of an express contractual provision.’” (citing LA. REV. STAT. ANN. § 30:29(H) (Supp. 2014))).

142. *Id.*

143. *Id.* at 1054 (majority opinion).

which can result in remediation damages.¹⁴⁴ Thus, the difference between the majority and dissent's interpretations of the statute rests on their respective understandings of the term "implied obligation" and whether it qualifies as a private claim.¹⁴⁵ Both sides agreed that a lessee has the implied obligation to restore the property to its pre-leased condition, minus normal wear and tear.¹⁴⁶ What both sides failed to do, however, was deliver a thorough explanation of how to determine normal wear and tear.

The dissent asserted that DNR's most feasible plan takes into account normal wear and tear; accordingly, permitting a plaintiff to recover in excess of the most feasible plan under an implied obligation theory creates new substantive rights.¹⁴⁷ The creation of new rights is expressly prohibited under the terms of the statute, which states that the statute "shall not be interpreted to create any cause of action or to impose additional implied obligations under the mineral code or arising out of a mineral lease."¹⁴⁸ On the other hand, the majority was not convinced that DNR's regulatory standard based plan—i.e., the most feasible plan—necessarily fulfilled this implied obligation to restore the property to pre-leased condition absent normal wear and tear.¹⁴⁹ Although not explicitly stated, it can be inferred that the majority did not view the implied obligation to restore the property as an additional obligation, which would be barred by the statute, but rather as a pre-existing one created at the time of the lease.¹⁵⁰

Past jurisprudence reveals that damages contemplated by section 30:29 account for normal wear and tear.¹⁵¹ In other words,

144. *Id.*

145. *Id.* at 1054 (majority opinion), 1064 (Victory, J., dissenting).

146. *Id.* at 1046 (majority opinion), 1064 (Victory, J., dissenting).

147. *Id.* at 1064.

148. LA. REV. STAT. ANN. § 30:29(H) (Supp. 2014) ("Nor shall it 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.").

149. *See Louisiana Land*, 110 So. 3d at 1054 (majority opinion).

150. Although the majority does not explicitly state that the implied obligation to restore the land is a pre-existing rather than an additional obligation, it can be inferred that the majority interpreted it as such. Otherwise, if the implied obligation to restore was an additional obligation, then this would run afoul of the statute: "This Section shall not be interpreted to create any cause of action or to impose additional implied obligations under the mineral code or arising out of a mineral lease." LA. REV. STAT. ANN. § 30:29(H) (Supp. 2014).

151. *See Marin v. Exxon Mobil Corp.*, 48 So. 3d 234, 259 (La. 2010) ("Both lower courts essentially held that even where unreasonable or excess use are proven, courts must still take into account normal wear and tear in calculating the appropriate cost for remediation, and that remediation to 29B standards

the most feasible plan should not include damages to restore the land to pristine condition; it is okay that the land be restored to its original condition, minus normal wear and tear. Thus, in this regard, Justice Victory is justified in his dissent. However, he incorrectly asserts that the majority's position amounts to the creation of new substantive rights.¹⁵² Determining what constitutes normal wear and tear depends on the nature and terms of the lease.¹⁵³ Evaluating normal wear and tear is thus a *factual* question—one to be determined by the fact-finder. It is easy to envision that DNR's determination of wear and tear, based on regulatory standards, might be different than that of a fact-finder's.¹⁵⁴ Both DNR and the trial court consider the same facts, but regulatory standards "are more tolerant of contamination and require less remediation than most lease contracts."¹⁵⁵ Thus, DNR's determination of damages could be different than the damages determined by a fact-finder based on an implied obligation theory. Such a result does not indicate a creation of new substantive rights; it is simply a different calculation of normal wear and tear.

The correct interpretation of the statute does not outright prohibit a recovery in excess of DNR's most feasible plan.¹⁵⁶

would account for normal wear and tear."). "The lower courts both correctly recognized this point and held that remediation to 29B standards satisfied the *Castex* requirements." *Id.* at 260. The requirements command the lessee "to correct the damage due to the unreasonable or excessive operations." *Id.*

152. See *Louisiana Land*, 110 So. 3d at 1065 (Victory, J., dissenting).

153. The Louisiana Supreme Court has recognized that normal wear and tear can differ case by case. See *Terrebonne Parish Sch. Bd. v. Castex*, 893 So. 2d 789, 800 (La. 2005). In determining wear and tear, "it is useful to consider the character of the specific rights granted in the lease." *Id.*

154. Indeed, in *Savoie v. Richard*, the jury determined that total remediation warranted damages of \$52 million, while DNR found that damages based on regulatory standards would only cost \$4 million. See *Savoie v. Richard*, 137 So. 3d 78, 81 (La. Ct. App. 2014).

155. Veron, *supra* note 27, at 10–11.

156. The Third Circuit in *Savoie v. Richard*, the first court (and the only Louisiana court as of this Note's publication) to discuss *State v. Louisiana Land & Exploration Co.* in great depth, supports this assertion. See generally *Savoie*, 137 So. 3d at 78. The court ultimately held that the excess should go into the registry of the court rather than into the hands of the plaintiffs. *Id.* at 90. At the first stage of proceedings, the jury awarded the plaintiffs \$34 million for restoration of the property to state regulatory standards and \$18 million for remediation of property beyond regulatory standards. *Id.* at 81. Pursuant to Louisiana Revised Statutes section 30:29, DNR then adopted a remediation plan to regulatory standards. *Id.* DNR's most feasible plan found that only \$4 million was needed to remediate to regulatory standards. *Id.* Thus, the difference between the jury's and DNR's amount of damages needed to restore the

Instead of asserting that a plaintiff is not entitled to recover in excess of DNR's most feasible plan, the dissent should have argued that a plaintiff is not entitled to recover in excess of those damages found under the theory of implied obligations. Discerning what damages are allowable under implied obligations necessarily means determining normal wear and tear, which is a factual question to be determined by the fact-finder.

C. The Legislature's Intent: Balancing Public Policy Issues

The Civil Code requires that when the language of a law is unclear and ambiguous, or is "susceptible of different meanings, it must be interpreted as having the meaning that best conforms to the purpose of the law."¹⁵⁷ Thus, the true interpretation of the statute lies within the Legislature's intent. Passed in response to the potential windfall for plaintiffs, the statute intended to control damages to the "extent necessary to protect the public interest."¹⁵⁸ Section 30:29 states that "the natural resources and the environment of the state, including ground water, are to be protected, conserved, and replenished insofar as possible and consistent with the health, safety, and welfare of the people."¹⁵⁹ The statute is not intended to limit a

property to regulatory standards was about \$30 million. When DNR's plan was submitted to the trial court for approval, the plaintiffs failed to contest the \$4 million plan. *Id.* The Third Circuit remarked that "[s]ince the Savoies [plaintiffs] waived that right completely of their own volition, the trial court had no choice but to adopt the DNR's plan as submitted." *Id.* at 86. Although the trial court effectively had no choice but to adopt DNR's plan as the most feasible plan, the trial court judge still entered final judgment of \$34 million, pursuant to the jury's findings, giving the \$30 million difference to the Savoies personally. *Id.* at 87. On appeal, the Third Circuit held that the Savoies were not entitled to the \$30 million difference: "landowners are not to recover any award made specifically for remediation to state standards, i.e., that amount required to return the land to a state that suits the public interest." *Id.* Thus, the Third Circuit stated that the Savoies were not entitled to the \$30 million difference, as any amount awarded to remediate up to regulatory standards falls under the purview of Louisiana Revised Statutes section 30:29. *Id.* However, the appellate court did not disturb the jury's award of \$18 million to restore beyond regulatory standards, which was awarded directly to the plaintiffs rather than into the registry of the court. *Id.* at 90. It is this "excess" that is given to the plaintiffs—the difference between remediation to regulatory standards and remediation to a higher standard.

157. LA. CIV. CODE art. 10 (2012).

158. Pitre, *Six Years Later*, *supra* note 1, at 94.

159. LA. REV. STAT. ANN. § 30:29(A) (Supp. 2014). The full text of this Section states:

The legislature hereby finds and declares that Article IX, Section 1 of the Constitution of Louisiana mandates that the natural resources and the

plaintiff's judgment but rather to ensure that the part of the judgment necessary to protect the public interest—remediation damages determined by DNR under regulatory standards as the most feasible plan—is distributed through the court.¹⁶⁰ In sum, environmental concerns formed the basis of this statute's purpose, not economic concerns.

Since the intent of the Legislature was to protect the public welfare and that goal can be accomplished regardless of whether a plaintiff receives damages in excess of the amount required by the statute, the majority's interpretation of the statute is most consistent with the Legislature's intent. Based on the plain language of the statute, it is clear that the Legislature did not intend to interfere with any damages other than those necessary to bring the land up to regulatory standards.¹⁶¹ Therefore, a landowner's right to recover damages should not be limited by the statute; the statute should only require that the amount of remediation necessary to fund the plan, as determined by the court, be filtered through the court. Additionally, if a trial court awards remediation damages beyond regulatory standards, then the plaintiff should receive the excess amount.¹⁶²

In addition to the majority's position being consistent with the true purpose of the law, the majority opinion is also consistent with past jurisprudence. The majority reaffirmed the procedural nature

environment of the state, including ground water, are to be protected, conserved, and replenished insofar as possible and consistent with the health, safety, and welfare of the people and further mandates that the legislature enact laws to implement this policy. It is the duty of the legislature to set forth procedures to ensure that damage to the environment is remediated to a standard that protects the public interest. To this end, this Section provides the procedure for judicial resolution of claims for environmental damage to property arising from activities subject to the jurisdiction of the Department of Natural Resources, office of conservation. The provisions of this Section shall be implemented upon receipt of timely notice as required by Paragraph (B)(1) of this Section. The provisions of this Section shall not be construed to impede or limit provisions under private contracts imposing remediation obligations in excess of the requirements of the department or limit the right of a party to a private contract to enforce any contract provision in a court of proper jurisdiction.

LA. REV. STAT. ANN. § 30:29(A) (Supp. 2014).

160. *See id.* § 30:29(A), (D)(1).

161. *Id.* § 30:29(C)(3)(a) (“The department shall use and apply *the applicable regulatory standards* in approving or structuring a plan that the department determines to be the most feasible plan to evaluate or remediate the environmental damage.” (emphasis added)).

162. *See Savoie v. Richard*, 137 So. 3d 78, 90 (La. Ct. App. 2014).

of section 30:29,¹⁶³ as the Louisiana Supreme Court did in *M.J. Farms*.¹⁶⁴ Consistent with *Castex Energy*, a lessee still must act unreasonably or excessively in order for the plaintiff to be eligible for remediation damages in the absence of an express contractual provision providing for remediation.¹⁶⁵ The majority recognized that additional steps are required when a lessee acts unreasonably or excessively, and determining those steps depends on the nature of the lease.¹⁶⁶ In some cases—like *Marin* in 2010—those additional steps may be the statutorily required regulatory standard under section 30:29 rather than remediation determined under a different standard.¹⁶⁷ However, the majority left open the possibility that the additional steps might be greater than the DNR’s determination of remediation costs.

IV. RECOMMENDATION: REVISE LOUISIANA REVISED STATUTES SECTION 30:29

There is a need in Louisiana to guarantee that the state’s environment is protected and that landowners are sufficiently compensated. Well-written legislation has the ability to fill this need; however, the current state of section 30:29 falls short. Given that section 30:29 was drafted ambiguously and members of the Louisiana Supreme Court have opposing interpretations of its meaning, the best solution is to amend the current law and provide much needed clarity concerning awards for remediation.¹⁶⁸ Such a revision would more accurately reflect the Legislature’s intent, standardize courts’ interpretations of section 30:29, and prevent windfalls.

Since the statute is merely procedural and no further environmental goal is accomplished by prohibiting a claim under the theory of implied obligations, the language of the statute should expressly state that the statute’s procedure does not affect a landowner recovering in excess of DNR’s damages based on any private claim, including under the lessee’s implied obligation to restore the land. Additionally, this option gives the fact-finder its rightful chance to evaluate wear and tear.

163. See *State v. La. Land & Exploration Co.*, 110 So. 3d 1038, 1053 (La. 2013).

164. See *M.J. Farms, Ltd. v. Exxon Mobil Corp.*, 998 So. 2d 16, 40 (La. 2008) (Johnson, J., concurring).

165. See *Terrebonne Parish Sch. Bd. v. Castex Energy, Inc.*, 893 So. 2d 789, 801 (La. 2005); *Louisiana Land*, 110 So. 3d at 1057–58.

166. *Louisiana Land*, 110 So. 3d at 1057–58.

167. See *Marin v. Exxon Mobil Corp.*, 48 So. 3d 234, 260 (La. 2010).

168. See *supra* Parts II.B, D.

Only two sections need to be amended: sections 30:29(D) and 30:29(H). The interplay between these two sections was directly responsible for the outcome in *Louisiana Land* and also represented a strong point of contention between the majority and the dissent.¹⁶⁹ Section 30:29(D)(1), with the proposed changes underlined, should read as follows:

Whether or not the department or the attorney general intervenes, and except as provided in Subsection H of this Section, all damages or payments in any civil action as determined under this Section to fund the statutorily required most feasible plan, including interest thereon, awarded for the evaluation or remediation of environmental damage shall be paid exclusively into the registry of the court in an interest-bearing account with the interest accruing to the account for clean up.¹⁷⁰

Additionally, section 30:29(H), with the proposed changes underlined and struck through, should be amended to read as follows:

This Section shall not preclude an owner of land from pursuing a judicial remedy or receiving a judicial award for private claims suffered as a result of environmental damage, except as otherwise provided in this Section. Such private claims may include those asserted under an implied obligation. Nor shall it 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 or by any other private claim. Any award granted in connection with the judgment for additional remediation is not required to be paid into the registry of the court. This Section shall not be interpreted to create any cause of action ~~or to impose additional implied obligations under the mineral code or arising out of a mineral lease~~.¹⁷¹

An amendment incorporating these simple changes would clarify the statute and eliminate the contrary interpretations between the majority and the dissent. The change in section 30:29(D) clarifies that when a fact-finder's determination of damages is different than DNR's determination, the only damages that must be

169. See generally *Louisiana Land*, 110 So. 3d at 1038; see *supra* Part II.

170. See LA. REV. STAT. ANN. § 30:29(D)(1) (Supp. 2014).

171. *Id.* § 30:29(H).

deposited into the registry of the court are those determined by DNR. The plaintiff is entitled to directly receive the rest. The changes in section 30:29(H) support the majority's holding in *Louisiana Land* in permitting a plaintiff to receive excess damages based on an implied obligation. Additionally, these changes do not interrupt prior jurisprudence; they simply reaffirm the rule of *Louisiana Land* that excess remediation damages can be recovered in the absence of an express contractual provision. Finally, revising the statute accomplishes two very important goals: (1) the revision renders the statute clear and unambiguous, in contrast to its prior version; and (2) the revision provides courts with a mechanism to ensure that plaintiffs will remediate their land to the extent necessary to protect the environment.

CONCLUSION

The Legislature first attempted to reconcile the competing public interests of holding oil companies accountable for environmental damage while preventing plaintiffs from receiving windfalls in 2006 by enacting Act 312, now Louisiana Revised Statutes section 30:29.¹⁷² Despite the Legislature's efforts to clarify legacy litigation, the statute falls short. Since its passage, courts have struggled with how to interpret the statute.¹⁷³ The Louisiana Supreme Court's latest conflicting interpretations in *Louisiana Land* reveal the need for the Legislature to step in once again.¹⁷⁴

The Legislature's intent in passing the statute was centered on protecting Louisiana's environment.¹⁷⁵ Thus, any revision to section 30:29 should further this intent. Limiting a plaintiff's remediation damages to those found under section 30:29, as suggested by the dissent in *Louisiana Land*, does not further any environmental purpose.¹⁷⁶ In fact, limiting a plaintiff's damages could actually have a negative environmental effect. The less damages a plaintiff receives, the less money that can be used to remediate the land. In actuality, such a limitation disturbs the fact-finder's responsibility in evaluating normal wear and tear.¹⁷⁷

On the other hand, permitting a plaintiff to recover in excess of the remediation damages found under section 30:29 does not disturb

172. See generally *id.* § 30:29.

173. See discussion *supra* Parts I–II.

174. See discussion *supra* Part II.

175. See LA. REV. STAT. ANN. § 30:29(A) (Supp. 2014).

176. *State v. La. Land & Exploration Co.*, 110 So. 3d 1038, 1063 (La. 2013) (Victory, J., dissenting).

177. See discussion *supra* Part III.A.2.

the fact-finder's duty.¹⁷⁸ The trier of fact can still evaluate wear and tear and thereby come to the conclusion that the plaintiff's remediation damages are greater than those determined by DNR under the statute.¹⁷⁹ By revising the statute to explicitly make clear that a plaintiff can recover excess remediation damages under any private claim, including implied obligations, the statute's public policies are preserved. The environment will still be protected in legacy litigation cases and plaintiff-landowners' substantive rights will not be jeopardized.¹⁸⁰ Ultimately, this proposed revision serves to protect the public from environmental damage by holding oil and gas exploration and production companies accountable for their actions, while also ensuring that plaintiff-landowners do, in fact, remediate their land.

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178. See discussion *supra* Part III.A.2.

179. See discussion *supra* Part III.A.2.

180. See discussion *supra* Part IV.

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