THE MIGRATION FROM THE RIG TO THE COURTHOUSE: OIL AND GAS LEGACY LITIGATION IN LOUISIANA

"How do I locate areas where I may successfully litigate for environmental damages?" one asked. The answer: Go to southern Louisiana, "a rich environment of deep pockets" where at least one major oil company could be found to be "on the hook."

Bill Griffin.[1]

I. INTRODUCTION

On June 2, 2014, the Governor of Louisiana signed into law a legislative bill intended to "improve the legal climate in Louisiana and help deter frivolous lawsuits that delay cleanup of land around the state."[2] Act 400 of the 2014 Regular Session of the Louisiana Legislature (the Act)[3] is the most recent development in a decade-long saga of balancing the state's economic interests in promoting the oil and gas industry against the environmental importance of protecting Louisiana's fragile wetlands. To understand the precise need for such legislation, the perplexing nature of Louisiana law prior to its enactment should be

1. *See* Ken Silverstein, *Dirty South: The Foul Legacy of Louisiana Oil*, HARPER'S MAGAZINE, Nov. 2013, at 45, 53 (quoting a "PowerPoint presentation given at a 2006 conference by Bill Griffin, a former petroleum engineer and frequent expert witness for plaintiffs").

2. *Governor Jindal Signs Legacy Lawsuit Bill to Protect Louisiana Land and Improve Legal Climate*, OFFICE OF GOVERNOR BOBBY JINDAL (June 2, 2014), http://www.gov.state.la.us/index.cfm?md=newsroom&tmp= detail&articleID=4558.

3. Act of June 2, 2014, No. 400, *available at* http://www.legis.la.gov/Legis/ViewDocument.aspx?d=913206.

explained.

In Louisiana, disputes over oil and gas pollution and contamination engulf the courts at the state and federal level. Between the infamous BP oil spill in the Gulf of Mexico,[4] the more recent levee board lawsuit against nearly 100 oil and gas companies,[5] and the resultant parish coastal zone lawsuits similarly targeting a plethora of companies,[6] Louisiana is no stranger to high-stakes lawsuits over "Devil's tar."[7] In addition to these controversies, lawsuits characterized as "legacy

4. *See In re* Deepwater Horizon, 739 F.3d 790 (5th Cir. 2014). The Deepwater Horizon, a mobile offshore drilling unit owned by Transocean and leased to BP, exploded on April 20, 2010 approximately forty-one miles off the Louisiana coast and 5,000 feet below the Gulf of Mexico's surface. Vernon Valentine Palmer, *The Great Spill in the Gulf . . . and A Sea of Pure Economic Loss: Reflections on the Boundaries of Civil Liability*, 116 PENN ST. L. REV. 105, 105 (2011). By the time the leaking rig was permanently plugged on July 15, 2010, over 200 million gallons of oil had surged into the Gulf of Mexico, making this oil spill the largest the world had ever seen. *Id.* at 107.

5. On July 24, 2013, the Southeast Louisiana Flood Protection Authority - East filed suit in Orleans Parish Civil District Court, naming ninety-seven oil, gas, and pipeline companies as defendants. *See* Petition for Damages and Injunctive Relief at 1, Bd. of Comm'rs of the Se. La. Flood Prot. Auth. – E. v. Tenn. Gas Pipeline Co. (2013) (No. 13-6911), 2013 WL 3948577. In its petition, the Authority alleged that its job, "monitoring the integrity of Louisiana's coastal lands" so as to "protect[] the people and properties behind the flood walls and levees," became increasingly more difficult as a result of oil and gas companies' destruction of the coastal "buffer zone." *Id.* at 2. Recent legislation that prohibits "state or local government entit[ies]" from filing lawsuits to enforce environmental protection laws ultimately blocked this high stakes lawsuit, which was the focus of politicians, attorneys, and journalists for almost a year. *See* Act of June 6, 2014, No. 544, § 214.36 (to be codified as amended at LA. REV. STAT. ANN. § 49:214.36(O)), *available at* http://www.legis.la.gov/legis/BillInfo.aspx?s=14rs&b=SB469&sbi=y.

6. As of November 12, 2013, Jefferson and Plaquemines Parish had filed a combined twenty-eight lawsuits for alleged violations of coastal permits that affect a total of eighty-eight different companies and name 259 defendants. *Parish Coastal Zone Lawsuits*, LOGA, http://loga.la/resources/parish-coastal-zone-lawsuits/ (last visited Feb. 2, 2014) (on file with author). On December 3, 2013, St. Bernard Parish joined this trend by hiring three law firms to explore the possibility of filing lawsuits against oil and gas companies for "'erosion and saltwater intrusion caused by the dredging of canals.'" Bob Marshall, *St. Bernard Turns to Law Firm Used by Other Parishes Seeking Damages from Drillers*, THE LENS (Dec. 4, 2013), http://thelensnola.org/2013/12/04/st-bernard-parish-explores-suing-oil-and-gas-interests-for-coastal-damage/ (quoting George Cavignac, Chairman of the St. Bernard Parish Council) (on file with author). Unlike the levee board lawsuit, recent legislation will not affect these lawsuits.

7. "Devil's tar" is one of many nicknames for petroleum. *Oil & Gas Dictionary of Historical Terminology*, OIL150.COM, http://www.oil150.com/about-oil/oil-gas-dictionary/ (last visited Nov. 13, 2014).

litigation" have emerged and developed over the last decade. The term "legacy litigation" now refers to hundreds of lawsuits initiated by landowners seeking damages from oil and gas exploration companies for alleged property damage.[8] These actions often arose from oil and gas operations conducted many decades ago, which left behind "an unwanted 'legacy' in the form of actual or alleged contamination."[9]

Before the Act's implementation, the body of law surrounding legacy litigation encouraged landowners to initiate lawsuits,[10] awarded damages contrary to Louisiana's public policy,[11] created a litigious atmosphere markedly different from that of other oil-producing states,[12] and complicated the procedure for remediating actual damage to property.[13] Had no action been taken, Louisiana's economy would have been negatively affected as the oil and gas industry grew weary of these lawsuits. Moreover, the environment would have suffered additional harm in the absence of effective remediation procedures. While it is not clear whether the recent legislation will completely alleviate these concerns, it deserves the opportunity to do so.

This Comment reviews the evolution of legacy litigation in Louisiana state courts, addresses the consequences of maintaining the status quo as it existed before the enactment of the Act, and proposes Louisiana courts' strict compliance with the recent legislation as a means to avoid these negative end results. Part II describes the three landmark cases that introduced legacy litigation, examines the legislature's initial response to the court's decisions, and assesses the more recent cases applying and interpreting the legislation prior to the Act. Part III critiques the law preceding the Act in four ways. First, it analyzes how the state of the law promoted an increase in litigation. Second, Part III reviews the adverse policy implications of excess damage awards previously available to landowners. Third, it evaluates Louisiana's mediocre economic growth rate as compared to that of other oil-producing states in light of major differences in

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

9. *Id.*

10. *See infra* Part III(A).

11. *See infra* Part III(B).

12. *See infra* Part III(C).

13. *See infra* Part III(D).

litigation trends. Finally, Part III discusses the inefficient judicial process required before any actual restoration of property. Lastly, Part IV emphasizes the significance of the Act as a solution that will better protect the oil and gas industry as a vital component of Louisiana's economy, while continuing to maintain the environment and allow landowners ample opportunity to defend their property rights.

II. THE HISTORY OF LEGACY LITIGATION

Although provisions in the Louisiana Mineral Code have long enabled landowners to bring claims for damages caused by oil and gas operations, legacy litigation is a relatively new phenomenon.[14] Until the twenty-first century, "the stakes were small and the judicial attention devoted to the subject was commensurately limited."[15] In 2003, this changed with the landmark decision in *Corbello v. Iowa Production*,[16] the result of which "was a perception that contaminated property was the equivalent of a winning lottery ticket for the landowner."[17] In addition to *Corbello*, unquestionably the most well-known legacy lawsuit in Louisiana, two other cases shaped this area of law prior to a legislative overhaul in 2006.[18]

In the wake of *Corbello* the Louisiana State Legislature enacted the "*Corbello* Act"[19] to ensure that damages recovered for the purpose of remediating usable groundwater contamination

14. Act of July 12, 1974, No. 50, 1974 La. Acts 237 (codified as amended at LA. REV. STAT. ANN. §§ 31:1-31:214).

15. John A. Lovett, *Doctrines of Waste in a Landscape of Waste*, 72 MO. L. REV. 1209, 1236 & n.137 (2007); *see, e.g.*, Edwards v. Jeems Bayou Prod. Co., 507 So. 2d 11, 13-14 (La. Ct. App. 1987) (reducing trial court damage award from $4,375 to $2,175); Broussard v. Waterbury, 346 So. 2d 1342, 1344 (La. Ct. App. 1977) (affirming $9,000 award for restoration damages); Smith v. Schuster, 66 So. 2d 430, 432 (La. Ct. App. 1953) (affirming a damage award for $170); Rohner v. Austral Oil Exploration Co., 104 So. 2d 253, 254-56 (affirming and amending plaintiff's damages to $1,020 in damages).

16. 2002-0826, p. 20 (La. 2/25/03); 850 So. 2d 686, 701 (affirming $33,000,000 award for damages when $28,000,000 of award was for potential aquifer contamination); *see infra* Part II(A)(1).

17. Pitre, *supra* note 8, at 348.

18. *See* Terrebonne Parish Sch. Bd. v. Columbia Gulf Transmission Co., 290 F.3d 303 (5th Cir. 2002); Terrebonne Parish Sch. Bd. v. Castex Energy, Inc., 2004-0968 (La. 1/19/05); 893 So. 2d 789; *see also infra* Part II(A)(2).

19. Act of July 2, 2003, No. 1166, 2003 La. Acts 3511 (codified as amended at LA. REV. STAT. ANN. § 30:2015.1).

would actually be used to remediate.[20] However, the *Corbello* Act did not curtail legacy litigation by discouraging landowners from filing claims as anticipated.[21] Instead, plaintiffs simply expressly excluded claims for contamination or pollution of usable groundwater from their petitions to remove the litigation from the scope of the *Corbello* Act.[22] The limited effect of the legislation served as a precursor to the enactment of Act 312 of the 2006 Regular Session of the Louisiana Legislature (Act 312).[23]

Lawmakers designed Act 312, which required that remediation damages be used for restoring land to its original condition, to protect the public interest in environmental preservation.[24] Since its enactment, the courts have applied Act 312 in a handful of legacy litigation lawsuits.[25] The most recent of these cases, *State v. Louisiana Land and Exploration Company*,[26] clarified that Act 312 did not limit the damages that a landowner may receive to only remediation damages.[27] Unfortunately, the case also left many questions unanswered by creating a complicated process to pursue claims.[28] The remainder of this section discusses *Corbello* and the other significant cases that led to the enactment of Act 312, along with the more recent cases interpreting the Act.

A. THE LANDMARK CASES THAT SHAPED LEGACY LITIGATION

In the early twenty-first century, legacy litigation began to increase dramatically. On top of the "*Corbello* bombshell,"[29] two other cases shaped the development of legacy litigation. All of the cases stressed the importance of the initial contract between the landowner and the oil and gas company in determining who

20. LA. REV. STAT. ANN. § 30:2015.1(B) (Supp. 2014).

21. Pitre, *supra* note 8, at 349.

22. *Id.* ("These lawsuits instead focused on alleged surface damages, often related to the pits once commonly used to contain by-products (primarily also water, which may contain other contaminants) of oil and gas exploration and production activities.").

23. Act of June 8, 2006, No. 312, 2006 La. Acts 1472 (codified as amended at LA. REV. STAT. ANN. § 30:29).

24. *See* LA. REV. STAT. ANN. § 30:29 (2007 & Supp. 2014).

25. *See infra* Part II(C).

26. 2012-0884 (La. 1/30/13); 110 So. 3d 1038.

27. *Id.* at 1054.

28. *See infra* Part III(D).

29. The phrase "*Corbello* bombshell" was coined by John A. Lovett. *See* Lovett, *supra* note 15, at 1236.

would prevail in court.

1. THE DECISION THAT CHANGED EVERYTHING: *CORBELLO V. IOWA PRODUCTION*

The more recent consequences of legacy litigation all stem back to the results of the Corbello decision. In 1929, the plaintiffs' ancestors granted a mineral lease covering 320 acres of land in Calcasieu Parish to Shell Oil Company, which then assigned the lease to Shell Western E & P (collectively, "Shell").[30] In 1961, the plaintiffs granted to Shell an additional surface lease within the 320-acre mineral lease, covering over 120 acres.[31] After executing the surface lease, Shell built an oil terminal on five acres of the property, which it operated until 1993.[32]

When the surface lease expired in 1991, the landowners sent a letter to inform Shell that it had breached the surface lease by disposing of damaging saltwater on the property and by failing to maintain the property under the terms of the lease.[33] The parties unsuccessfully attempted to resolve these issues for several months, and in 1992 the landowners filed suit against Shell.[34] After the surface lease was terminated, the plaintiffs sought to recover damages for Shell's prolonged presence on the property as a result of contamination, illegal disposal of saltwater on the premises, and failure to restore the leased premises to the original condition.[35] As contended by the plaintiffs, damages included the alleged contamination of an underground aquifer that provided drinking water for the nearby city of Lake Charles.[36]

The evidence did not clearly indicate whether the parties foresaw this type of problem when they initially drafted the terms

30. Corbello v. Iowa Prod., 2002-0826, p. 1 (La. 2/25/03); 850 So. 2d 686, 691.

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.* One other company was named in the initial claim, but this claim was settled. Corbello v. Iowa Prod., 2002-0826, p. 2 (La. 2/25/03); 850 So. 2d 686, 691.

35. *Id.* More simply, the plaintiffs claimed that Shell had committed what is known in the common law as voluntary waste. Lovett, *supra* note 15, at 1237. The waste was considered voluntary, as opposed to permissive, because the damages resulted from Shell's affirmative acts rather than failures to restore existing structures. *Id.* at 1237 n.140.

36. *Corbello*, 850 So. 2d at 697-98.

of the lease.[37] Nonetheless, under the terms of the surface lease, Shell agreed to have some sort of duty to restore the premises, though the ambiguous obligation to "reasonably restore the premises" left the scope of this duty unclear.[38] The plaintiffs relied on this contractual language to assert that the damages to the property constituted a breach of contract, rather than relying on a tort theory.[39] The court accepted this tactical decision and allowed the plaintiffs' claims to escape the tort-imposed damages cap based on the value of the property, a mere $108,000 when fully restored.[40] The court stated that "the contractual terms of a contract, which convey the intentions of the parties, overrule any policy considerations behind such a rule limiting damages."[41]

The result of the case was shocking—the Louisiana Supreme Court affirmed a $33 million restoration damage award and a $4 million attorney fee award despite the relatively insignificant value of the property.[42] In addition, the court did not require the plaintiff landowners to use the award to remediate the property, despite the possibility of contamination to a public aquifer.[43] The court offered some justification for its extreme holding, stating that a limitation on damages based on market value would in effect give oil and gas lessees the ability to operate as they

37. Corbello v. Iowa Prod., 2002-0826, pp. 3-6 (La. 2/25/03); 850 So. 2d 686, 692-93.

38. "Lessee further agrees that upon termination of this lease it will *reasonably* restore the premises as nearly as possible to their present condition." *Id.* at 694 (emphasis added). It should be noted that at the time the lease went into effect in 1961, the Mineral Code had not yet been drafted. *See* Act of July 12, 1974, No. 50, 1974 La. Acts 237 (codified as amended at LA. REV. STAT. ANN. §§ 31:1-31:214).

39. *Corbello*, 850 So. 2d at 694-95. In a previous case involving tortious damage to immovable property, the court held that:

> [I]f the cost of restoring the property in its original condition is disproportionate to the value of the property or economically wasteful, unless there is a reason personal to the owner for restoring the original condition or there is a reason to believe that the plaintiff will, in fact, make the repairs, damages are measured only by the difference between the value of the property before and after the harm.

Id. at 694 (quoting Roman Catholic Church of Archdiocese of New Orleans v. La. Gas Serv. Co., 618 So. 2d 874, 879-80 (La. 1993)).

40. *Id.* at 692.

41. *Id.* at 694-95.

42. Corbello v. Iowa Prod., 2002-0826, pp. 20-21, 36-37 (La. 2/25/03); 850 So. 2d 686, 701, 711.

43. *Id.* at 699. The court rationalized this part of the decision by pointing out that it is common for plaintiffs who recover damages to not be required to use those damages for a specified purpose in the absence of express legislation. *Id.*

pleased with "indifference as to the aftermath."[44] This decision opened a Pandora's Box of litigation in Louisiana.

2. THE IMPORTANCE OF THE INITIAL CONTRACT

Corbello illustrates the principle that the initial contract between landowners and oil and gas companies shapes the battlefield for legacy litigation. This notion is consistent with Louisiana law and promotes the recognized freedom to contract.[45] Two other decisions emphasized this idea and shaped legacy litigation prior to the enactment of Act 312. The first case was *Terrebonne Parish School Board v. Castex Energy, Inc.*[46] In *Castex*, the school board granted an exclusive oil and mineral lease in 1963 that covered a section of freshwater flotant marsh.[47] The lease specifically authorized the lessee to dredge canals for the purpose of oil and gas exploration, yet failed to include any type of restoration clause like that existing in *Corbello*.[48] After the termination of the lease, the school board filed suit in 1999 alleging that the dredging of canals caused the loss of twenty-seven acres of freshwater flotant marsh.[49]

In deciding whether the lessee had an implied duty to restore the surface of land to its pre-lease condition in the absence of a restoration clause, the Louisiana Supreme Court first looked to the Mineral Code.[50] Despite the Mineral Code's requirement of "good faith," its insistence on "a reasonably prudent operator,"[51] and its official comments stating that a restoration duty can be implied under the Louisiana Civil Code

44. Corbello v. Iowa Prod., 2002-0826, p. 9 (La. 2/25/03); 850 So. 2d 686, 695.

45. LA. CIV. CODE ANN. art. 1971 (2008).

46. 2004-0968 (La. 1/19/05); 893 So. 2d 789.

47. *Id.* at 792. "A flotant marsh is one in which a thick mat of vegetation floats on one to two feet of water that covers the land." *Id.* at 792 n.1.

48. *Id.* at 792. The lease was based on a 1948 form circulated by the State of Louisiana Mineral Board. *Id.* at 792 n.2.

49. Terrebonne Parish Sch. Bd. v. Castex Energy, Inc., 2004-0968, p. 4 (La. 1/19/05); 893 So. 2d 789, 793.

50. *Id.* at 796.

51. Terrebonne Parish Sch. Bd. v. Castex Energy, Inc., 2004-0968, p. 10 (La. 1/19/05); 893 So. 2d 789, 796-97 (stating that "[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" (citing LA. REV. STAT ANN. § 31:122 (2000))).

articles on lessee obligations,[52] the court held that the Mineral Code did not adopt such an onerous restoration duty.[53] Instead, the court determined that the restoration obligation imposed on a lessee under the Civil Code allowed for necessary "wear and tear."[54] Furthermore, the court relied on its previous decisions and intermediate appellate court holdings to conclude that the law imposed such a duty only when the lessor could indicate that negligent or unreasonable operations caused the surface injury.[55] Therefore, necessary wear and tear was acceptable in returning the leased property, absent negligent or unreasonable conduct by the lessee.[56]

The second case that shaped legacy litigation preceding *Corbello* was *Terrebonne Parish School Board v. Columbia Gulf Transmission Co.*[57] In *Columbia Gulf*, the school board brought an action against various pipeline companies that owned gas pipelines constructed over the school board's property pursuant to servitude agreements.[58] The school board's claim was based on the pipeline companies' alleged failure to maintain the canals and banks in which the pipelines were constructed.[59] The school board contended that one canal had widened to almost double the limit specified in the original agreement[60] and the other had widened beyond the agreed upon right of way.[61]

52. Terrebonne Parish Sch. Bd. v. Castex Energy, Inc., 2004-0968, p. 10 (La. 1/19/05); 893 So. 2d 789, 797 (discussing LA. REV. STAT. ANN. § 31:122 cmt.). The Louisiana Supreme Court noted that the official comment to § 31:122 relies on LA. CIV. CODE ANN. arts. 2719-20 (2005), and stated that "[i]t is established that the mineral lessee must restore the surface even though the lease contract is silent" but this duty to restore is limited by an "economic balancing process." *Terrebonne Parish Sch. Bd.*, 893 So. 2d at 797.

53. *Terrebonne Parish Sch. Bd.*, 893 So. 2d at 797.

54. *Id.* at 800 (citing LA. CIV. CODE ANN. arts. 2719-2720 (2005)).

55. *Id.* at 797-99.

56. *Id.* at 797-800.

57. 290 F.3d 303 (5th Cir. 2002).

58. *Id.* at 307-08.

59. *Id.* at 309.

60. *Id.* The Koch canal had widened to an average width of seventy feet when the servitude agreement only granted the companies "the right at its election to lay such pipe line or lines in open ditches or canals not to exceed forty feet in width." *Id.* at 308-09.

61. Terrebonne Parish Sch. Bd. v. Columbia Gulf Transmission Co., 290 F.3d 303, 309 (5th Cir. 2002). The Columbia canal had widened to an average width of one hundred thirty-five feet when the servitude agreement specifically stated that "[t]he right of way granted herein shall be 100 feet wide." *Id.* at 308-09.

The United States Court of Appeals for the Fifth Circuit first looked at the servitude agreements[62] and determined that the agreements did not release the servitude holders from damages arising from a failure to maintain the canals and their banks.[63] Rather, the servitude agreement only released the defendants from liability for damages arising from the construction of the pipelines.[64] The court then looked at the servitude agreements to determine whether the parties had contemplated erosion issues or assigned liability for this type of damage to the dominant or servient estate.[65] The court stated that it "[did] not understand the pertinent kind of erosion to have been within the parties' contemplation for release purposes," and "[t]herefore, under Louisiana law, [its] task shift[ed] from plain-wording contract interpretation to application of the Louisiana Civil Code's suppletive rules for immovable property."[66]

Applying the Civil Code, the court noted that ambiguity in servitude agreements must be construed in favor of the servient estate, in this case the school board.[67] In addition, the court pointed out that servitude law in the Civil Code required that the dominant estate owner, here the pipeline companies, not "aggravate" the condition of the servient estate.[68] Using these

62. Terrebonne Parish Sch. Bd. v. Columbia Gulf Transmission Co., 290 F.3d 303, 311 (5th Cir. 2002). "A predial servitude is a charge on a servient estate for the benefit of a dominant estate." LA. CIV. CODE ANN. art. 646 (2008). Or, more simply, "predial servitudes are real rights burdening immovables that the creation of these rights requires the existence of two distinct immovables, belonging to different owners and that these rights are for the benefit of an immovable rather than a person." LA. CIV. CODE ANN. art. 646 cmt. (b) (2008); *see also* LA. CIV. CODE ANN. arts. 646-774 (2008 & Supp. 2014) (defining the law of predial servitudes in Louisiana).

63. Terrebonne Parish Sch. Bd. v. Columbia Gulf Transmission Co., 290 F.3d 303, 311-12 (5th Cir. 2002).

64. *Id.* at 312.

65. *Id.* at 313-14.

66. *Id.* at 315. The court explained that, when issues are not expressly contracted for, Louisiana's default property rules and relevant case law are applied. *Id.*

67. Terrebonne Parish Sch. Bd. v. Columbia Gulf Transmission Co., 290 F.3d 303, 315-16 & n.30 (5th Cir. 2002) (stating that "[d]oubt as to the existence, extent, or manner of exercise of a predial servitude shall be resolved in favor of the servient estate" (citing LA. CIV. CODE ANN. art. 730 (2008))).

68. *Id.* at 316 & n.32 (stating that "[r]ights that are necessary for the use of a servitude are acquired at the time the servitude is established" and "[t]hey are to be exercised in a way least inconvenient for the servient estate" (citing LA. CIV. CODE ANN. art. 743 (2008))); LA. CIV. CODE ANN. art. 745 (2008) ("The owner of the dominant estate . . . may deposit materials to be used for the works and the debris that may result, under the obligation of causing the least possible damage . . . .").

default rules, the court held that the owner of a pipeline servitude had a duty not to aggravate the condition of the servient estate, in the absence of express language to the contrary in the servitude agreement, by allowing the pipeline canal dredged pursuant to the servitude agreement to widen beyond the specified width of the canal or of the servitude itself.[69] This decision imposed an obligation on the dominant estate owner to incorporate explicit waivers of liability for erosion damage to coastal marshlands.[70]

To properly understand the state of the law prior to the introduction of Act 312, *Corbello*, *Castex*, and *Columbia Gulf* should be analyzed collectively. *Corbello* indicated that if a restoration clause was present, damages for restoration were not limited by the value of the property and could result in enormous awards paid to the landowners.[71] If no restoration clause was present, *Castex* stated that a mineral lessee must only restore the surface of the land to its pre-lease condition if the damage was caused by negligent or unreasonable operations.[72] Finally, in a case like *Columbia Gulf* where the parties neither specifically authorized any type of surface-altering activity nor contracted for the lessee to restore the surface, a lessee could still have a duty not to aggravate the condition of the property when that property consisted of fragile coastal wetlands.[73] One idea remains constant throughout these cases—the importance of the initial contract.

B. THE INTRODUCTION OF ACT 312 TO PROTECT PUBLIC INTEREST IN THE ENVIRONMENT BY OVERSEEING THE REMEDIATION PROCESS

After *Corbello*, there was widespread concern that landowners could sue for damages significantly in excess of the uncontaminated value of the land, with no legal obligation to

69. Terrebonne Parish Sch. Bd. v. Columbia Gulf Transmission Co., 290 F.3d 303, 316-17 (5th Cir. 2002); Lovett, *supra* note 15, at 1244.

70. Lovett, *supra* note 15, at 1245.

71. Corbello v. Iowa Prod., 2002-0826, pp. 20, 36 (La. 2/25/03); 850 So. 2d 686, 701, 711.

72. Terrebonne Parish Sch. Bd. v. Castex Energy, Inc., 2004-0968, pp. 11-16 (La. 1/19/05); 893 So. 2d 789, 797-800.

73. It should be noted that this is not the exact holding of *Terrebonne Parish Sch. Bd. v. Columbia Gulf Transmission Co.*, 290 F.3d 303 (5th Cir. 2002), as that case was narrowly applied to the owner of a servitude agreement, not a mineral lessee.

spend any award on remediation.[74] The legislature responded by enacting the *Corbello* Act in 2003.[75] The *Corbello* Act's purpose was to force landowners recovering remediation damages for contaminated groundwater to use these damages to remediate,[76] unlike in *Corbello* where the plaintiffs were not required to use any of the $33 million damage award to remediate the contaminated aquifer.[77]

As previously discussed, the *Corbello* Act did not effectively discourage landowners from filing legacy litigation claims; rather, landowners simply began to file petitions that expressly excluded claims for contamination or pollution to usable ground water.[78] This new wave of lawsuits focused on alleged surface damages, usually related to storage pits that were used to hold byproducts of oil and gas production activities.[79] In effect, a landowner who recovered damages under any theory other than polluted groundwater was not legally obligated to use remediation damages to restore the property. The *Corbello* Act was therefore limited in its application and served as a precursor to the enactment of Act 312 three years later.[80]

The purpose of Act 312 was to extend the scope of the *Corbello* Act and protect the public interest in the environment by ensuring that damages recovered from oilfield operations would actually be used to remediate the environmental damage.[81] Act 312 imposed six major litigation requirements.[82] First, it required plaintiffs to give timely notice of the litigation to the state of Louisiana through the Department of Natural Resources

74. Pitre, *supra* note 8, at 348.

75. Act of July 2, 2003, No. 1166, 2003 La. Acts 3511 (codified as amended at LA. REV. STAT. ANN. § 30:2015.1).

76. LA. REV. STAT. ANN. § 30:2015.1(B) (Supp. 2014).

77. Corbello v. Iowa Prod., 2002-0826, p. 17 (La. 2/25/03); 850 So. 2d 686, 699.

78. Pitre, *supra* note 8, at 349.

79. *Id.*

80. *See* Act of June 8, 2006, No. 312, 2006 La. Acts 1472 (codified as amended at LA. REV. STAT. ANN. § 30:29). It should be noted that the "*Corbello* Act" was not repealed. While Act 312 covered all oilfield contamination claims including those for polluted groundwater, non-oilfield usable ground water claims remained subject to the "*Corbello* Act." Pitre, *supra* note 8, at 351.

81. "Environmental damage" is defined as "any actual or potential impact, damage, or injury to environmental media caused by contamination arising from activities associated with oilfield sites or exploration and production sites." LA. REV. STAT. ANN. § 30:29(I)(1) (2007 & Supp. 2014).

82. Pitre, *supra* note 8, at 350-51 (citing LA. REV. STAT. ANN. §30:29).

(LDNR), the Commissioner of Conservation, and the Attorney General.[83] Second, the Act stayed litigation until thirty days after the plaintiff filed a certified mail return receipt proving compliance with the notice requirement.[84] Third, Act 312 allowed the LDNR or the Attorney General, in accordance with their individual constitutional and statutory authorities, to intervene in the litigation.[85]

The fourth component of Act 312 was the development of a remediation plan. If at any time during the proceeding a party was found liable for environmental damage, the court would require the legally responsible party or parties to develop a plan to remedy the contaminated property "to applicable regulatory standards."[86] Then, the Office of Conservation within the DNR would review this plan, along with the comments of any party and the feedback obtained through a public hearing.[87] Within sixty days of the hearing's conclusion, the department would determine "the most feasible plan to evaluate or remediate the environmental damage and protect the health, safety, and welfare of the people."[88]

Fifth, Act 312 stipulated that after a plan was developed, the district court and the Office of Conservation would oversee its

83. LA. REV. STAT. ANN. § 30:29(B)(1) (2007 & Supp. 2014). At the time Act 312 was enacted, lawmakers intended it to apply to pending cases as well as future litigation. In pending cases, Act 312 required notice within sixty days following the effective date of the act. Act of June 8, 2006, No. 312, 2006 La. Acts 1472, 1483 (codified as amended at LA. REV. STAT. ANN. § 30:29). The Act did not apply to cases that had been settled, cases that had a "final and definitive" judgment on the merits, or "any case in which the court on or before March 27, 2006, [had] issued or signed an order setting the case for trial, regardless of whether such trial setting [was] continued." LA. REV. STAT. ANN. § 30:29(K) (2007 & Supp. 2014); Act of June 8, 2006, No. 312, 2006 La. Acts 1472, 1483 (codified as amended at LA. REV. STAT. ANN. § 30:29).

84. LA. REV. STAT. ANN. § 30:29(B)(1) (2007 & Supp. 2014).

85. *Id.* § 30:29(B)(2).

86. *Id.* § 30:29(C)(1).

87. Pitre, *supra* note 8, at 352-53.

88. LA. REV. STAT. ANN. § 30:29(C)(2)(a) (2007 & Supp. 2014). "Feasible Plan" is defined as "the most reasonable plan which addresses environmental damage in conformity with the requirements of Louisiana Constitution Article IX, Section 1 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." LA. REV. STAT. ANN. §30:29(I)(3) (2007 & Supp. 2014).

implementation.[89] A plan would not be adopted if a party proved by a preponderance of the evidence an alternative plan's feasibility.[90] If a party appealed the district court's determination, it would be subject to de novo review and would be heard with preference on an expedited basis.[91] The appellate court would then have the power to either affirm or adopt a plan it found more reasonable.[92] In implementing the plan, the legally responsible party or parties would fund the remediation expenses by paying the damages into the registry of the court.[93] The court and the LDNR would retain oversight of the plan's implementation.[94] Finally, the Act permitted the landowner bringing the suit and the state of Louisiana to recover attorney and expert fees from those found liable for the damage.[95]

The enactment of Act 312 sought to remedy the principal concern created by *Corbello*: the need for legislation that required damages recovered from oilfield operations be used to remediate the environmental damage at issue. It did not, however, completely invalidate the jurisprudential guidance for determining liability that was provided by *Corbello*, *Columbia Gulf*, and *Castex*. For this reason, the state of the law became increasingly complicated and judicial interpretation was needed to establish the full scope of Act 312.

C. THE RECENT CASES: THE DETERMINATION THAT ACT 312 DID NOT LIMIT LANDOWNERS' CLAIMS FOR DAMAGES

After the enactment of Act 312, a flood of new lawsuits for damages caused by oil and gas exploration and production companies surfaced. These cases helped refine the state of legacy litigation, but also illustrated the potentially harmful and often complex nature of these lawsuits. Nonetheless, the judicial gloss on Act 312 was fundamental to understanding the state of the law.

89. Pitre, *supra* note 8, at 353.
90. LA. REV. STAT. ANN. § 30:29(C)(5) (2007 & Supp. 2014).
91. *Id.* § 30:29(C)(6)(b).
92. *Id.* § 30:29(C)(6)(c).
93. *Id.* § 30:29(D)(1).
94. LA. REV. STAT. ANN. § 30:29(F) (2007).
95. *Id.* § 30:29(E).

1. THE DUTY TO REMEDIATE UNDER ACT 312: *MARIN V. EXXON MOBIL CORPORATION*[96]

Marin was one of the first cases after the enactment of Act 312 to clarify the applicable law in legacy lawsuits. This suit involved two pieces of property located in St. Mary Parish owned by two separate plaintiffs, the "Marin plaintiffs" and the "Breaux plaintiffs."[97] Exxon Mobil Corporation (Exxon) and its predecessors[98] conducted oil and gas exploration, as well as production and transportation activities, on the property for many decades.[99] While Exxon operated under the leases, it allowed for waste byproducts of the oil and gas extraction from the wells, "produced water," to be discharged from unlined holding pits into nearby waterways.[100] As early as 1958, there was some evidence that the contamination in the pit areas affected the sugarcane crop on the property.[101] It was not until 2003, however, that the plaintiffs hired an environmental expert to assess the property damage.[102] Based on these findings, the plaintiffs filed suit against Exxon asserting claims for remediation of the groundwater and soil, along with other damages arising out of Exxon's activities.[103]

The Louisiana Supreme Court's holding in this case can be divided into four main parts, three of which will be discussed

96. 2009-2368 (La. 10/19/10); 48 So. 3d 234.

97. *Id.* at 239.

98. Exxon's predecessors included W.S. Mackey (Mackey) and Humble Oil and Refining Company (Humble). *Id.* at 239 n.3.

99. In 1936, Marin granted a mineral lease to Mackey (the Marin Lease). Humble later acquired the lease and, in 1941, the land owners granted Humble a surface lease (the Surface Lease) on part of the property so that a canal and a landing for coastal operations could be constructed. In 1977 and 1978, the Breauxs purchased property near the Marin's property, which was subject to a mineral lease granted in 1937 by Canal Bank and Trust Company to Humble (the CBT Lease). Exxon acquired the Marin, Surface, and CBT Leases. *Id.* at 239.

100. Marin v. Exxon Mobil Corp., 2009-2368, p. 3 (La. 10/19/10); 48 So. 3d 234, 240. It should be noted that storing contaminants accumulated throughout the production process was the industry practice and custom at the time Exxon was using this system. *Id.*

101. Marin v. Exxon Mobil Corp., 2009-2368, p. 3 (La. 10/19/10); 48 So. 3d 234, 240.

102. *Id.* at 240-41.

103. *Id.* at 241. Plaintiffs filed this lawsuit approximately nine months after the *Corbello* decision. *Id.* at 240-41.

below. First, the court determined that the plaintiffs' tort claims had prescribed.[104] Reversing the holdings of the courts below, the court stated that prescription did not begin to run at the time the plaintiffs received expert data indicating contamination or consequently had full knowledge of the damage.[105] The court explained that prescription instead began to run once the plaintiff acquired sufficient information, which, if pursued, would put the plaintiff on notice that further investigation was necessary, and that this investigation would lead to knowledge that there was contamination.[106] Based on this rule, the court found that the plaintiffs had constructive knowledge of apparent damage at least by 1995 and should have investigated further at that time.[107] The court also rejected the plaintiffs' argument that the damage was the result of a continuing tort so as to bar the prescriptive period from running; and instead held that the prescriptive period began to run once the pits were closed.[108] Finally, because the plaintiffs' tort claims had prescribed, they were not entitled to recover punitive damages.[109]

The second part of the court's holding indicated that certain claims for remediation based upon the breach of a mineral lease did not expire while the lease was in effect because some of a lessee's obligations to restore only arise at the termination of a lease.[110] Because the Marin Lease and the Surface Lease were still in effect, these breach of lease claims had not prescribed and the Marin's claims for damages were not barred.[111] In contrast, the CBT Lease expired before the suit was filed,[112] the action had prescribed on its face, and the Breauxs were aware of the damages for over ten years, making it nearly impossible for the Breauxs to successfully litigate their claim.[113]

In the third and arguably most important part of its decision, the Louisiana Supreme Court held that, in the absence of an

104. Marin v. Exxon Mobil Corp., 2009-2368, p. 29 (La. 10/19/10); 48 So. 3d 234, 255.

105. *Id.* at 245-46.

106. *Id.* at 246.

107. *Id.* at 250.

108. *Marin*, 48 So. 3d at 255.

109. *Id.* at 256.

110. *Id.*

111. *Id.*

112. *See supra* note 99 (defining CBT Lease).

113. *Marin*, 48 So. 3d at 256.

express restoration clause, a leased property with excess wear and tear as a result of contamination required a lessor to restore a property to applicable regulatory standards.[114] Because the trial court found that Exxon conducted its operations unreasonably or excessively, the court held that Exxon had a duty to remediate the contamination under the prudent operator standard of the Mineral Code, as well as under the Civil Code, as illustrated by *Castex*.[115] This duty to remediate only required Exxon to correct the contamination and restore the property to applicable regulatory standards, and not to the property's pre-lease condition.[116] The court justified this under the recently implemented Act 312, stating that "[t]he goal of the new legislation [was] not 'perfect restoration.'"[117]

The final effect of *Marin* was to establish when prescriptive periods began to run in oilfield contamination claims and to verify the remediation duty under Act 312. Although the Louisiana Supreme Court originally granted writ to consider the impact of the subsequent purchaser doctrine in this case, the court found that prescription issues made such an analysis unnecessary.[118] A year after the decision in *Marin*, *Eagle Pipe and Supply, Inc. v. Amerada Hess Corp.* presented the court with an opportunity to assess the subsequent purchaser doctrine.[119] In *Eagle Pipe*, the court explained that the subsequent purchaser doctrine applied in legacy litigation and a landowner "has no right or actual interest in recovering from a third party for damage which was inflicted on the property before his purchase, in the absence of an assignment or subrogation of the rights belonging to the owner of

114. Marin v. Exxon Mobil Corp., 2009-2368, p. 37 (La. 10/19/10); 48 So. 3d 234, 259.

115. *Id.* at 259-60 (citing Terrebonne Parish Sch. Bd. v. Castex Energy, 2004-0968, pp. 10-16 (La. 1/19/05); 893 So. 2d 789, 796-800; LA. REV. STAT. ANN. § 31:122 (2000); LA. CIV. CODE ANN. arts. 2719-2720 (2005)); *see also supra* Part II(A)(2).

116. Marin v. Exxon Mobil Corp., 2009-2368, p. 38 (La. 10/19/10); 48 So. 3d 234, 260.

117. *Id.* (citing LA. REV. STAT. ANN. § 30:29 *et seq.* (2007 & Supp. 2014)). In the last part of its decision the court denied the plaintiffs' claims for groundwater remediation because the trial court found that the water did not meet the standard for being considered "usable groundwater" under the "*Corbello* Act." *Id.* at 261 (citing LA. REV. STAT. ANN. § 30:2015.1(J)(1) (2007 & Supp. 2014)). In addition, the court stated that "it seem[ed] illogical to award the landowner money to remediate unusable groundwater, with no oversight by the [LDNR], when the statute enacted to classify and protect groundwater [did] not require a cleanup." *Id.*

118. *Id.* at 238-39, 256 n.18.

119. 2010-2267 (La. 10/25/11); 79 So. 3d 246.

the property when the damage was inflicted."[120] Both *Marin* and *Eagle Pipe* appeared to clarify specific restrictions on landowners' abilities to recover to alleviate the sting *Corbello* left behind.

2. THE AVAILABILITY OF ADDITIONAL REMEDIATION DAMAGES FOR LANDOWNERS NOT PROVIDED FOR UNDER ACT 312: *STATE V. LOUISIANA LAND AND EXPLORATION COMPANY*[121]

While Act 312, *Marin*, and *Eagle Pipe* all seemed to impose limitations on legacy lawsuits brought by landowners, the most recent lawsuit in this category derailed this trend. In this case, the State of Louisiana and the Vermilion Parish School Board (the School Board) brought suit for damages and remediation of property in Vermilion Parish.[122] The School Board claimed that oil and gas exploration and production companies polluted the land's soil, surface waters, and ground waters pursuant to an oil, gas, and mineral lease granted in 1935 and a surface lease created in 1994.[123] The School Board alleged multiple causes of action, including negligence, strict liability, unjust enrichment, trespass, breach of contract, and violations of the Mineral Code and the Civil Code.[124] The defendants filed a motion for partial summary judgment, stating that the School Board could not seek damages in excess of those found necessary for the remediation plan mandated under Act 312.[125] Because Act 312 did not allow for excess remediation damages in the absence of an express contractual provision, and the gas and mineral lease provided no such provision, the defendants argued that "Act 312 acted as a substantive cap on remediation damages resulting from a tort or the implied restoration obligation of a mineral lease."[126] The Louisiana Supreme Court ultimately held that this proposition

120. Eagle Pipe & Supply, Inc. v. Amerada Hess Corp., 2010-2267, p. 8 (La. 10/25/11); 79 So. 3d 246, 256-57.

121. 2012-0884 (La. 1/30/13); 110 So. 3d 1038.

122. *Id.* at 1040.

123. *Id.* At the time of the Louisiana Supreme Court's review, the defendants consisted of Union Oil Company of California, Union Exploration Partners, Carrollton Resources, L.L.C., Chevron USA Inc., and Chevron Midcontinent, L.P. *Id.* at 1041. The court previously dismissed many defendants without prejudice, including Louisiana Land and Exploration Company, Peak Operating Company, Phoenix Oil & Gas Corporation, Inexco Oil Company, SWEPI LP, Louisiana Onshore Properties LLC, and El Paso E & P Company, L.P. *Id.* at 1041 n.2.

124. State v. La. Land & Exploration Co., 2012-0884, p. 2 (La. 1/30/13); 110 So. 3d 1038, 1040.

125. *Id.* at 1042.

126. *Id.*

was incorrect and remanded the case.[127]

After a thorough analysis of the statute, the court held that "[t]he only change accomplished by Act 312 [was] how the damages to remediate property [were] spent."[128] In this way, according to the court, Act 312 did not cap substantive damages to those required under the remediation plan because it did not affect other private contractual and legal rights.[129] In drawing this conclusion, the court referenced Subsection H of Act 312, which specifically stated that the statute did 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 . . . ."[130] Additionally, the statute did not "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 provision."[131] Therefore, although Act 312 prevented landowners from directly recovering the damages to fund the feasible plan for remediation, the court decided that it did not prevent the landowner from recovering excess remediation damages pursuant to an express contract provision.[132]

The Louisiana Supreme Court also indicated its views on the assessment of surface restoration liability. First, the court stated that the duty to remediate oilfield contamination arose under the prudent operator standard of the Mineral Code as indicated by *Castex* and also under the Civil Code.[133] This duty, as established by *Castex*, did not arise if the damage was normal wear and tear and the lessee did not operate unreasonably or excessively.[134] To define wear and tear in a case, the court found it "useful to

127. State v. La. Land & Exploration Co., 2012-0884, p. 30 (La. 1/30/13); 110 So. 3d 1038, 1059.

128. *Id.* at 1049.

129. *Id.* ("The procedure described under the Act does not interfere with private rights, whether they arise contractually or by law. 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.").

130. *Id.* at 1053 (quoting LA. REV. STAT. ANN. § 30:29(H) (2007 & Supp. 2014)).

131. State v. La. Land & Exploration Co., 2012-0884, pp. 21-22 (La. 1/30/13); 110 So. 3d 1038, 1053 (quoting LA. REV. STAT. ANN. § 30:29(H) (2007 & Supp. 2014)).

132. *Id.* at 1054.

133. *Id.* at 1057.

134. *Id.*

consider the character of the specific rights granted in the lease" to assess whether the parties had contemplated such damage.[135] If the damage exceeded normal wear and tear, as the court determined it had in this particular case, liability would be established.[136]

After establishing liability, a court would then determine how much remediation should be afforded to the landowners.[137] If the contract contained an express provision, as in *Corbello*, the contract would establish the remediation damages due.[138] However, if the contract contained no provision and no tort claims applied, *Marin* stated that the remediation owed to the landowner was the amount required under Act 312 or, correspondingly, the amount the court found it would take to remediate to regulatory standards.[139] Because *Marin* did not concern tort claims,[140] it was possible that additional damages would be recoverable in the presence of tort claims. *Louisiana Land* was unclear as to how restoration might be governed in this scenario but stated that a lessee still had a duty to act as a reasonably prudent operator under the Mineral Code.[141] Louisiana Land did not address what amount of remediation the Mineral Code actually required, but did confirm that, while remediation must occur under Act 312, the statute did not limit damages.[142]

III. THE CONSEQUENCES OF LEGACY LITIGATION

Legacy litigation, as developed through the previously discussed statutes and cases, was accompanied by a variety of consequences. While many of these consequences were speculative, countless problems had already arisen prior to the Act. This section discusses how the law preceding the Act promoted a multitude of negative externalities, including but not

135. State v. La. Land & Exploration Co., 2012-0884, p. 27 (La. 1/30/13); 110 So. 3d 1038, 1057 (citing Terrebonne Parish Sch. Bd. v. Castex Energy, 2004-0968, p. 16 (La. 1/19/05); 893 So. 2d 789, 800).

136. *Id.* at 1057.

137. *See id.* at 1057-58.

138. *Id.* at 1048 (citing Corbello v. Iowa Prod., 2002-0826, pp. 6-7 (La. 2/25/03); 850 So. 2d 686, 694).

139. *Id.* at 1057-58 (citing Marin v. Exxon Mobil Corp., 2009-2368, pp. 7-8 (La. 10/19/10); 48 So. 3d 234, 242-43).

140. *Marin*, 48 So. 3d at 255 (stating that tort claims had prescribed).

141. *La. Land*, 110 So. 3d at 1046 (citing LA. REV. STAT. ANN. § 31:122 (2000)).

142. *Id.* at 1049.

limited to: encouraging the filing of lawsuits, allowing for excessive damage awards for landowners, placing immense burdens on oil and gas companies, and prolonging inefficient processes to remediate property damage.

A. A WIN-WIN SITUATION FOR LANDOWNERS

One of the more concerning aspects of the *Louisiana Land* decision was the perceived retreat in progress since *Corbello*. While *Louisiana Land* did not negate Act 312's required remediation under statute, it did reinstate the idea that landowners could recover damages that would not be required to go toward remediation.[143] Although it is unlikely that damages as excessive as those in *Corbello* would be awarded in addition to those required under Act 312's feasible plan,[144] the result was the same—an incentive for landowners to file suit.

As the court in *Corbello* hinted, there may be a sound policy argument for causing oil and gas exploration and production companies to be more conscious of their activity in their quest for "liquid gold."[145] However, allowing landowners to recover remediation damages when they are not legally bound to use them for remediation seems to ignore the fact that landowners have already profited largely under mineral leases.[146] Instead, the holding in *Louisiana Land* essentially encourages property owners, already heavily compensated under mineral leases, to

143. *Compare* State v. La. Land & Exploration Co., 2012-0884, p. 16 (La. 1/30/13); 110 So. 3d 1038, 1049 (holding that Act 312 did "not interfere with private rights" nor did it "prohibit the award of remediation damages for more than the amount necessary to fund the statutorily mandated feasible plan"), *with* Corbello v. Iowa Prod., 2002-0826, pp. 16-17, 20 (La. 2/25/03); 850 So. 2d 686, 699, 701 (holding that plaintiffs could recover $33,000,000 as a restoration damage award but were not legally bound to spend the award on remediation).

144. *See Corbello*, 850 So. 2d at 701 (affirming $33,000,000 in damages); *see also supra* note 88 (defining "feasible plan").

145. *Corbello*, 850 So. 2d at 695 (stating that a limitation on damages would give oil and gas lessees the ability to operate as they desired with "indifference as to the aftermath").

146. *See, e.g.*, Ark. Natural Gas Co. v. Sartor, 78 F.2d 924, 926 (5th Cir. 1935) (stating that a mineral lease in Richland Parish, Louisiana was executed "for a consideration of $17,500 cash and a royalty of one-eighth of the value of the gas produced and sold from the premises"); Freeland v. Sun Oil Co., 184 F. Supp. 754, 755 (W.D. La. 1959), *aff'd*, 277 F.2d 154 (5th Cir. 1960) (stating that lessors will receive one-eighth of the value of the oil and gas produced at the well in Acadia Parish, Louisiana); Shell Oil Co. v. Williams, Inc., 428 So. 2d 798, 800 (La. 1983) (stating that landowner was entitled to receive from the lessee "one-eighth (1/8) of the value thereof, calculated at the market rate prevailing at the well").

sue for additional compensation when their property ceases to produce.[147] For a landowner, there would be nothing to lose in this situation due to the prominence of contingency fee arrangements in the realm of property damage litigation and the authorized recovery of attorney fees under Act 312.[148] Consequently, a landowner could initiate a lawsuit without the fear of losing his or her case and thereafter having to pay attorney fees.[149] Moreover, there remained an abundance of plaintiff attorneys anxious to represent these landowners.[150] This is not to say that *every* legacy litigation suit is or was frivolous. Such an extreme conclusion is unsupported by the previously discussed cases, all of which concerned actual damage to property.[151]

Still, as of February 1, 2012, a total of 271 Act 312 lawsuits had been filed in Louisiana since the Act's inception in 2006, and this number increased significantly each year.[152] With such a dramatic increase in this type of lawsuit in the wake of *Corbello* and even subsequent to Act 312, one begins to wonder why such a pattern emerged. Were landowners and plaintiffs' attorneys seizing an opportunity in the midst of an advantageous playing field or were damages to property only then becoming apparent at unprecedented levels? Although it is impossible to conclusively answer this question, the effect was the same—a "judicial hellhole" for oil and gas exploration and production companies with inefficient procedures for actual remediation.[153]

147. "Products" are "derived from a thing as a result of diminution of its substance . . . ." LA. CIV. CODE ANN. art. 488 (2010).

148. LA. REV. STAT. ANN. § 30:29(E) (2007).

149. "A fee may be contingent on the outcome of the matter for which the service is rendered." LA. RULES OF PROF'L CONDUCT R. 1.5(c) (2011).

150. In a 2006 conference given by a former petroleum engineer and frequent expert witness for plaintiffs, the opening slide presented a picture of a lottery ticket and the presentation explained that, to successfully litigate for environmental damages, one should "[g]o to southern Louisiana, a rich environment of deep pockets where at least one major oil company could be found to be 'on the hook." *See* Silverstein, *supra* note 1, at 53 (internal quotations omitted).

151. *See supra* Part II.

152. J. Blake Canfield, La. Office of Conservation, *Report to the House Committee on Natural Resources and Environment and Senate Committee on Natural Resources as Requested in House Concurrent Resolution 167, 2011 Regular Legislative Session* (Feb. 1, 2012), *available at* http://www.scribd.com/doc/82935877/DNR-Report-to-House-and-Senate-NR (on file with author).

153. *Judicial Hellholes 2013|2014*, THE AMERICAN TORT REFORM FOUNDATION 11-15 (2013), http://www.judicialhellholes.org/wp-content/uploads/2013/12/JudicialHellholes-2013.pdf (on file with author) (ranking

B. DAMAGE AWARDS RESEMBLING PUNITIVE AWARDS

The holding in *Louisiana Land* also seemingly contradicted Louisiana policy. "The settled law of Louisiana is that vindictive, punitive or exemplary damages are not allowed in civil cases unless specifically provided for; in the absence of such a specific provision only compensatory damages may be recovered."[154] Although *Louisiana Land* did not explicitly state that punitive damages could be recovered in the context of legacy litigation, the law implied such a meaning in light of Act 312's primary purpose.

While *Marin* essentially held that property must be remedied to regulatory standards under Act 312,[155] *Louisiana Land* did not limit damages to this amount, even in the absence of an express contractual provision.[156] *Louisiana Land* stated that Act 312 did "not interfere with private rights, whether they [arose] contractually or by law."[157] Although the court logically reaffirmed the power of the initial contract by concluding that parties have the freedom to contract to a higher regulatory standard to allow for recovery of additional damages, *Louisiana Land* went a step too far. *Louisiana Land* permitted a landowner to recover amounts not within the scope of Act 312 or the parties' contract. Though the court did not refer to these damages as punitive, these additional awards effectively punished the oil and gas company. If a landowner brought a lawsuit for remediation to property and Act 312 governed the remediation, any additional amount not accounted for in the parties' contract could not possibly be compensatory. This is because Act 312 *was* compensatory in and of itself.

Therefore, any amount awarded outside of Act 312 or the

Louisiana second on its list of worst states for defendants to litigate in for the 2013-2014 year).

154. Post v. Rodrigue, 205 So. 2d 67, 70 (La. Ct. App. 1967) (citing Terry v. Butler, 123 So. 2d 865 (La. 1960); Spearman v. Toye Bros. Auto & Taxicab Co., 114 So. 591 (La. 1927); Janssen Catering Co. v. Abadie, 102 So. 428 (La. 1924); Trenchard v. Cent. Laundry Co., 98 So. 558 (La. 1923); Dunson v. Baker, 80 So. 238 (La. 1918); Vincent v. Morgan's La. & T.R. & S.S. Co., 74 So. 541 (La. 1917); Fitzpatrick v. Daily States Pub. Co., 20 So. 173 (La. 1896); Universal C.I.T. Credit Corp. v. Jones, 47 So. 2d 359 (La. Ct. App. 1950); Le Bleu v. Vacuum Oil Co., 132 So. 233 (La. Ct. App. 1931)).

155. Marin v. Exxon Mobil Corp., 2009-2368, pp. 7-8 (La. 10/19/10); 48 So. 3d 234, 242-43.

156. State v. La. Land & Exploration Co., 2012-0884, pp. 16-17 (La. 1/30/13); 110 So. 3d 1038, 1049-50.

157. *Id.* at 1049.

terms of the contract, whether under a theory of contract or tort, served a purpose other than compensating for property damage. Though it may not have been punitive in the traditional sense, *Louisiana Land* allowed landowners to recover a windfall on top of having their property remediated to regulatory standards or the standard contracted for. For this reason, the jurisprudence prior to the Act seemed contrary to Louisiana's policy of rejecting punitive damages in civil lawsuits.

C. ECONOMIC TRENDS IN LOUISIANA AS COMPARED TO OTHER OIL-PRODUCING STATES

In addition to the aforementioned policy reasons suggesting the need for change, a variety of economic and environmental rationales also supported the passage of the Act. In Louisiana, legacy lawsuits existed for nearly a decade before remediation began.[158] Oil and gas exploration and production companies had to pay for representation for the entirety of this time, whereas a landowner might not have needed to compensate an attorney until the case was settled, if ever. Undoubtedly, the importance of landowners' rights is deeply rooted in Louisiana legal tradition.[159] However, these lawsuits placed excessive burdens on oil and gas production companies. Such lengthy litigation, with the potential for enormous damage awards, may have been one factor contributing to the decline of the oil and gas industry in Louisiana, particularly because these lawsuits remain unparalleled in other oil-producing states.[160]

1. UNIMPRESSIVE GROWTH IN LOUISIANA

While existing data does not suggest a causal connection between legacy litigation and the economy, a comparison of Louisiana with other oil-producing states exhibits interesting results. Since 2000, the total amount of oil and gas rigs in the United States increased by 123.5% through 2013.[161] Excluding Louisiana from this figure, the rig count actually increased by

158. *See infra* Part III(D).

159. *See, e.g.*, LA. REV. STAT. ANN. § 14:63 (2007 & Supp. 2014) (addressing criminal trespass).

160. *See infra* Part III(C)(2).

161. On January 7, 2000, the total rig count was 786. On December 27, 2013, it was 1,757. *See North America Rotary Rig Count (Jan 2000 – Current)*, BAKER HUGHES, http://phx.corporate-ir.net/phoenix.zhtml?c=79687&p=irol-reportsother (last visited May 6, 2014).

165.3%,[162] highlighting that Louisiana has not experienced growth at a rate comparable to other oil-producing states. In this same time period, the total number of rigs in Louisiana actually decreased by 32.5%, while the number of onshore rigs decreased by 12.3%.[163] Although many have attempted to rationalize this decrease in drilling activity, such a dramatic change is not easily explained.

David Dismukes, a professor at Louisiana State University, believes this change was the result of legacy litigation.[164] Although Dismukes admits that many factors contribute to the decrease in Louisiana drilling,[165] he argues that one of the primary concerns for oil and gas companies is the "strong perception that Louisiana is a litigious state that subjects producers (past and current) to what many would consider significant legal obstacles."[166] Despite the fact that Dismukes's study is hotly contested,[167] his fears are not completely baseless.

Other members of the academic community pointed to separate reasons for the decrease in drilling. University of

162. On January 7, 2000, the total rig count, excluding Louisiana, was 620. On December 27, 2013, it was 1,645. *See North America Rotary Rig Count*, *supra* note 161.

163. On January 7, 2000, the total rig count in Louisiana was 166. On December 27, 2013, it was 112. The total onshore rig count in Louisiana was sixty-five in 2000 and fifty-seven in 2013. *See id.*

164. *See* David E. Dismukes, *The Impact of Legacy Lawsuits on Conventional Oil and Gas Drilling in Louisiana*, LSU CENTER FOR ENERGY STUDIES (Feb. 28, 2012), http://www.enrg.lsu.edu/files/images/presentations/2012/DISMUKES_LEGACY_RPT_02-28-12_FINAL.pdf (on file with author). The research provided in the report approximates that, from 2000 to 2008, legacy lawsuits have directly resulted in "a loss of some 1,200 new [oil and gas] wells," which equates to "$6.8 billion dollars in lost Louisiana drilling investments." *Id.* at 5, 62. Dismukes argues that this decrease in drilling has single-handedly led to the diminution in almost $10.5 billion in economic output, the loss of over 30,000 oil and gas related employment positions, and the cut of over $1.5 billion in earnings for those involved in the oil and gas industry. *Id.* Dismukes's report does not, however, reveal the effects of legacy litigation subsequent to 2008 but merely conveys that these types of lawsuits continue to increase annually. Dismukes, *supra*, at 11.

165. Dismukes, *supra* note 164, at 3. "The factors contributing to this difficult environment include a challenging physical environment, . . . a number of permitting and regulatory requirements, [and] increasing drilling costs . . . ." *Id.*

166. *Id.* at 3 (discussing "legacy lawsuits" in Louisiana).

167. *See* Patrick Flanagan, *Big Oil's Behind-the-Scenes Role in LSU's 'Legacy Lawsuit' Study*, IND REPORTER (Mar. 19, 2014), http://www.theind.com/news/indreporter/16784-big-oil-s-behind-the-scenes-role-in-lsu-s-legacy-lawsuit-study (on file with author) (stating that Dismukes was subpoenaed to give a deposition on his study on April 3, 2012).

Oregon professors Ed Whitelaw and Bryce Ward mentioned the effect that Hurricanes Katrina and Rita had on drilling in Louisiana.[168] Such colossal events would indisputably be reflected in Louisiana's economic growth. Similarly, Robert Gramling, a retired University of Louisiana Lafayette professor, pointed out that oil is a finite resource, therefore "there is less drilling because there is less oil."[169] Gramling explained that the rig count had decreased because of a decrease in oil since drilling began in 1907 and not because there were more legacy lawsuits.[170]

Regardless of the explanation, fewer oilrigs in Louisiana mean fewer jobs in the oil and gas industry. Though there was a slight increase in employment in the industry since 2004,[171] the growth pales in comparison to that of other oil-producing states. As indicated by the Federal Reserve Bank of St. Louis, the number of employees in oil and gas extraction in Louisiana had increased only 14.6% just three months prior to the Act.[172] In contrast, employment in the oil and gas industry had increased by 81% in Alaska,[173] by 66.4% in Texas,[174] and by 55.2% in California during the same timeframe.[175]

As stated previously, it is unlikely that legacy litigation was

168. *See* Patrick Flanagan, *Author of Disputed 'Legacy Lawsuits' Study Speaking in BR Tuesday*, IND REPORTER (Mar. 17, 2014), http://www.theind.com/news/indreporter/16758-a-critique-of-the-dismukes-study (on file with author) (discussing Whitelaw and Ward's criticism of Dismukes).

169. *Id.*

170. *Id.*

171. *All Employees: Mining: Oil and Gas Extraction in Louisiana*, FEDERAL RESERVE BANK OF ST. LOUIS, http://research.stlouisfed.org/fred2/series/SMU22000001021100001 (last visited May 6, 2014).

172. In January 2004, there were approximately 8,900 individuals employed and in March 2014, there were approximately 10,200. *Id.*

173. In January 2004, there were approximately 7,900 individuals employed and in March 2014, there were approximately 14,300. *All Employees: Mining: Oil & Gas Extraction, Well Drilling, and support Activities in Alaska*, FEDERAL RESERVE BANK OF ST. LOUIS, http://research.stlouisfed.org/fred2/series/SMU02000001021001301 (last visited May 6, 2014).

174. In January 2004, there were approximately 60,700 individuals employed and in March 2014, there were approximately 101,000. *Mining: Oil and Gas Extraction Payroll Employment in Texas*, FEDERAL RESERVE BANK OF ST. LOUIS, http://research.stlouisfed.org/fred2/series/TX10211000M175FRBDAL (last visited May 6, 2014).

175. In January 2004, there were approximately 6,700 individuals employed and in March 2014, there were approximately 10,400. *All Employees: Mining: Oil and Gas Extraction in California*, FEDERAL RESERVE BANK OF ST. LOUIS, http://research.stlouisfed.org/fred2/series/SMU06000001021100001 (last visited May 6, 2014).

the only factor contributing to these trends. Nonetheless, a survey taken in 2012 indicated that "[m]ore than one out of every two barrels of crude pumped from Louisiana's oilfields [were] produced by a lawsuit defendant company."[176] This adds up to over 1,500 companies that were involved in these lawsuits.[177] At this point, there were very few oil and gas companies in Louisiana that had not been subjected to a legacy lawsuit. Perhaps this did not faze all oil and gas companies, but it is undisputed that numerous oil and gas companies decided to cut back or eliminate their business in Louisiana in response to so many legal consequences.[178] Regardless of whether legacy litigation was the primary cause of the decrease in the rig count and the lackluster growth in oil and gas employment, these lawsuits certainly did not help improve these statistics.

2. LEGACY LITIGATION IS UNHEARD OF IN OTHER STATES

Perhaps the most shocking aspect of legacy litigation remains its complete nonexistence in other oil-producing states. Whereas hundreds of these lawsuits have been filed in Louisiana, "[i]n Texas, Mississippi, and other neighboring states, the term 'legacy lawsuit' is virtually unknown."[179] Louisiana gained a national reputation for being a litigious state and a judicial hellhole[180] largely due to this "unique brand of lawsuit."[181] Unfortunately, it is not entirely clear why this became the case in Louisiana but not in other oil-producing states.

For example, Texas law is not wholly dissimilar from Louisiana law as it existed prior to the Act, except that it has no

176. *Judicial Hellholes 2011|2012*, THE AMERICAN TORT REFORM FOUNDATION 32 (2011), http://www.judicialhellholes.org/wp-content/uploads/2011/12/Judicial-Hellholes-2011.pdf (on file with author).

177. *Id.*

178. Dismukes, *supra* note 164, at 17.

179. Stephen Waguespack, *President's View: A Compromised Legacy*, LOUISIANA ASSOCIATION OF BUSINESS AND INDUSTRY (Apr. 6, 2014), http://labi.org/issues/presidents-view/presidents-view-a-compromised-legacy.

180. *See Judicial Hellholes 2013|2014*, *supra* note 153. Louisiana took second place for states "where judges in civil cases systematically apply laws and court procedures in an unfair and unbalanced manner." *Judicial Hellholes 2013|2014*, *supra* note 153, at 2. According to the American Tort Reform Foundation, the state "rockets up the Judicial Hellholes list after the state's high court gave new life to abusive 'legacy lawsuits' that threaten the state's onshore oil and gas production." *Id.* at 3.

181. Waguespack, *supra* note 179.

express statutory law. Texas case law holds that, in the absence of an express contractual provision in the oil and gas lease, a lessee has no implied duty to restore property after drilling operations have been terminated and the premises abandoned.[182] The lessee has the right to use the land "as is reasonably necessary to comply with the terms of the lease contract and to carry out the purposes and intentions of the parties."[183] As in Louisiana, however, an oil and gas lessee may not "use either the surface or the subsurface in a negligent manner so as to damage the landowner."[184] The Texas supreme court has stated that contamination or pollution is not in itself proof that negligence has occurred, and a plaintiff must "allege and prove some specific acts of negligence" to be successful.[185]

Therefore, in Texas, an oil and gas lessee must exercise ordinary care.[186] Ordinary care requires "a degree of vigilance, attention, and skill in proportion to the probabilities of danger."[187] In the case of an oil and gas pipeline operator, for example, ordinary care should be exercised to prevent the discharge of oil and gas that might harm others.[188] Basically, "[t]he care required is commensurate with the oil's harm potential."[189]

Again, this rule is not entirely distinct from Louisiana jurisprudence under *Corbello* and *Castex*,[190] except that Texas has no functional equivalent to Act 312.[191] For this reason, it is difficult to determine why Louisiana became such a litigious state. Perhaps, in Louisiana, negligence was easier to prove than in Texas, where damaged property does not automatically equate to negligence.[192] This could have been the result of the Louisiana Supreme Court's language in *Castex*, where it concluded that

182. Warren Petroleum Corp. v. Monzingo, 304 S.W.2d 362, 362-63 (Tex. 1957).

183. Brown v. Lundell, 344 S.W.2d 863, 865 (Tex. 1961).

184. *Id.*

185. *Id.* at 870.

186. Scurlock Oil Co. v. Roberts, 370 S.W.2d 755, 757 (Tex. Civ. App. 1963).

187. *Id.*

188. *Id.*

189. *Id.*

190. *See supra* Part II(A).

191. Because Act 312 is purely procedural and not evidentiary, it does not have the effect of changing the law as established by *Corbello* and *Castex*, other than to require remediation through the LDNR.

192. Brown v. Lundell, 344 S.W.2d 863, 870 (Tex. 1961).

necessary wear and tear was acceptable in returning the leased property, absent negligent or unreasonable conduct by the lessee.[193] By creating a standard that holds wear and tear tolerable, the court implied that anything exceeding this benchmark amounted to negligence. If this implication stood, a plaintiff in Louisiana would have had a much easier time proving negligence than a plaintiff in Texas.

Mississippi is more similar to Louisiana because it implemented a statutory scheme to manage claims for oil and gas contamination to property;[194] however, like Texas, Mississippi does not experience a surplus of lawsuits on the subject matter. This is because Mississippi requires plaintiffs to exhaust administrative remedies through the Mississippi Oil and Gas Board prior to using the courts for resolution of the dispute.[195] Therefore, in cases where there is damage to property due to oil and gas operations, "plaintiffs must seek restoration from the Mississippi Oil and Gas Board before a court can properly assess the appropriate measure of damages."[196] The Mississippi Supreme Court stated that this "administrative remedy is adequate and should . . . [be] exhausted prior to filing a private suit."[197]

In this way, Mississippi courts rarely adjudicate cases where there is damage to property due to oil and gas production and exploration. The Mississippi Oil and Gas Board "has jurisdiction and authority over all persons and property necessary to enforce its regulations."[198] Under the terms of the statute, "Any interested person shall have the right to have the board call a hearing for the purpose of taking action in respect to any matter

193. Terrebonne Parish Sch. Bd. v. Castex Energy, Inc., 2004-0968, pp. 11-16 (La. 1/19/05); 893 So. 2d 789, 797-800.

194. *See* MISS. CODE. ANN. §§ 53-1-17 to 53-1-101 (2003 & Supp. 2014).

195. State v. Beebe, 687 So. 2d 702, 704 (Miss. 1996) (holding that administrative remedies must be exhausted prior to filing suit); NCAA v. Gillard, 352 So. 2d 1072, 1082-83 (Miss. 1977) (holding the same); Everitt v. Lovitt, 192 So. 2d 422, 426 (Miss. 1966) (holding the same); Davis v. Barr, 157 So. 2d 505, 507 (Miss. 1963) (holding the same); *see also* MISS. CODE. ANN. § 53-1-17(1) (2003) (stating that the Mississippi Oil and Gas Board "shall have jurisdiction and authority over all persons and property necessary to enforce effectively the provisions of this chapter and all other laws relating to the conservation of oil and gas").

196. Chevron U.S.A., Inc. v. Smith, 844 So. 2d 1145, 1148 (Miss. 2002) (relying on Donald v. Amoco Prod. Co., 735 So. 2d 161, 177 (Miss. 1999)).

197. *Donald*, 735 So. 2d at 177.

198. *Id.* at 176 (citing MISS. CODE. ANN. § 53-1-17(1) (2003)).

within the jurisdiction of the board . . . ."[199] Although the decisions of the Mississippi Oil and Gas Board are appealable to the courts, the board has the power to assess damages and enforce penalties.[200]

Consequently, in Mississippi, the Oil and Gas Board performs the role that is designated to Louisiana courts. As a result, Mississippi courts will not adjudicate these types of claims unless they are appealed from the Mississippi Oil and Gas Board. It is likely this mechanism that prevents the Mississippi courts from experiencing oversaturation with oil and gas litigation. Although Louisiana's Act 312 seemed to be an attempt to imitate this procedural tool, it did not achieve this goal.

As previously stated, there is no obvious explanation for the development of Louisiana's litigious climate. The stark contrast between the number of lawsuits in Louisiana as compared with the number in other oil-producing states could be the result of judicial bias, political views, or even the expansion of the industry over time. Regardless of the reason, Louisiana's jurisprudence needed to be amended to mirror that of similarly situated states, which are currently experiencing economic growth in the oil and gas industry.[201]

D. ENVIRONMENTAL CONSEQUENCES RESULTING FROM THE INEFFECTIVE PROCEDURES UNDER ACT 312

Thus far, this analysis has focused primarily on the potential economic effects of unreformed legacy litigation. This is not the only detrimental consequence of Act 312 and the jurisprudence surrounding it, however—inadequate remediation procedures also prolonged environmental contamination. In addition to becoming progressively more common, legacy lawsuits were extremely tedious and exhausted judicial resources for extensive periods of time, prior to any remediation actually taking place. Prior to the Act, suits usually endured for many years and the courts historically made it difficult for oil and gas production and exploration companies to avoid the litigation process.[202] Accordingly, in the absence of reform, the environment continued to suffer due to delayed remediation.

199. *See* MISS. CODE. ANN. § 53-1-29 (2003).

200. *See* MISS. CODE. ANN. § 53-1-47 (2003 & Supp. 2014).

201. *See supra* Part III(C)(1).

202. *See infra* Part III(D)(2).

1. LENGTHY AND COMPLEX LITIGATION PREVENTS REMEDIATION

Legacy lawsuits were immensely time consuming. In *Marin*, the plaintiffs filed suit on November 26, 2003.[203] On September 19, 2007, the 16th Judicial District Court in St. Mary Parish rendered a judgment in favor of the plaintiffs.[204] The plaintiffs filed a motion for a new trial, contesting some of the trial court's calculations and the classification of groundwater on the property.[205] The court rendered a new judgment on December 21, 2007, again in favor of the plaintiffs.[206] The defendants then appealed, and the court of appeals affirmed the trial court's holding in part and reversed it in part on September 30, 2009.[207] The Louisiana Supreme Court consolidated writ applications and granted review on February 26, 2010.[208] On October 19, 2010, almost seven years after plaintiffs filed the suit, the Louisiana Supreme Court affirmed the appellate court's holding in part, reversed it in part, and remanded the case to the trial court.[209]

Similarly, in *Louisiana Land*, the plaintiffs filed suit on September 2, 2004.[210] During the course of this lawsuit, plaintiffs named twelve defendant oil companies, although many were dismissed.[211] After the case moved through discovery, the 15th Judicial District Court in Vermillion Parish granted partial summary judgment in favor of one of the oil companies.[212] The School Board appealed and the Court of Appeal reversed and remanded.[213] The Louisiana Supreme Court then granted one of

203. Marin v. Exxon Mobil Corp., 2009-2368, p. 5 (La. 10/19/10); 48 So. 3d 234, 241.

204. Marin v. Exxon Mobil Corp., No. 2008-1724, 2009 WL 7004332, at *2 (La. App. 1 Cir. Sept. 30, 2009).

205. *Id.*

206. *Id.*

207. *Id.* at *1.

208. Marin v. Exxon Mobil Corp., 2009-2368 (La. 2/26/10); 28 So. 3d 262.

209. Marin v. Exxon Mobil Corp., 2009-2368, p. 42 (La. 10/19/10); 48 So. 3d 234, 262.

210. State v. La. Land & Exploration Co., 2012-0884, p. 4 (La. 1/30/13); 110 So. 3d 1038, 1042.

211. *Id.* at 1041 & n.2.

212. *Id.* at 1044.

213. *See* State v. La. Land & Exploration Co., 2010-1341, p. 8 (La. App. 3 Cir. 2/1/12); 85 So. 3d 158, 163.

the defendant's writs to determine the correct interpretation of Act 312 and whether one of the parties should be dismissed from the suit.[214] It was not until January 30, 2013 that the court issued its opinion and remanded the case to the trial court.[215] When the court released this decision, almost eight and a half years had elapsed.

These cases were not outliers; lengthy litigation was the norm in legacy lawsuits where actual damage had occurred.[216] Although drawn-out litigation is not unheard of in civil suits concerning property damage, it was especially harmful in the context of contamination of Louisiana's fragile coastal wetlands.[217] To prevent the erosion of Louisiana's unique coastland, remediation should not have been postponed any longer than was absolutely necessary.[218]

2. DEFENDANTS' INABILITY TO ADMIT FAULT UNDER ACT 312 FURTHER DELAYS REMEDIATION

Another issue seen in *Louisiana Land* was the inability of defendants to escape litigation by admitting fault under Act 312.[219] This weakness in the law was realized when two of the defendants, Union Oil Company of California and Union Exploration Partners (collectively, "Unocal"), claimed to be responsible for the environmental damage to the property in question to have the case referred to the LDNR for remediation.[220] Under Act 312, a party that conceded liability by admitting "environmental damage" was permitted to develop a

214. *See* State v. La. Land & Exploration Co., 2012-0884 (La. 6/15/12); 92 So. 3d 340, 341 (granting writ to Chevron USA Inc. and Chevron Midcontinent, L.P. (collectively, "Chevron")).

215. State v. La. Land & Exploration Co., 2012-0884, p. 30 (La. 1/30/13); 110 So. 3d 1038, 1059.

216. *See* Corbello v. Iowa Prod., 2002-0826 (La. 2/25/03); 850 So. 2d 686 (lasting almost nine years).

217. "The swamps and marshes of coastal Louisiana are among the Nation's most fragile and valuable wetlands, vital not only to recreational and agricultural interests but also the State's more than $1 billion per year seafood industry." *Louisiana Coastal Wetlands: A Resource At Risk*, UNITED STATES GEOLOGICAL SURVEY, http://pubs.usgs.gov/fs/la-wetlands/ (last visited May 7, 2014) (internal quotation omitted).

218. *Id.* ("[A]t the present net rate of wetlands loss, Louisiana will have lost this crucial habitat in about 200 years.").

219. State v. La. Land & Exploration Co., 2012-0884, p. 3 (La. 1/30/13); 110 So. 3d 1038, 1041.

220. *Id.*

plan for remediation through the process provided by the statute.[221] However, the court denied Unocal's motion to have the case referred to the LDNR.[222] When the appellate court denied the writ, it determined that "a reasonable time under the statute within which the trial court should order the Unocal defendants to submit a remediation plan to the LDNR would be some time *after* liability and damages issues have been resolved regarding all of the defendants."[223] Consequently, the court forced Unocal to remain a party to the litigation despite having already come forward to admit liability, delaying remediation until after it decided the case.

This decision ultimately signified that a defendant in a legacy lawsuit had no way to escape the litigation process. A defendant would be trapped in tedious and resource-consuming litigation whether it admitted or denied responsibility for the property damage. As a result, culpable defendants had no incentive to come forward to proceed with remediation under Act 312 because the result would be the same regardless. In addition, although Act 312 originally seemed to allow for a defendant to admit responsibility for remediation under the statute without admitting additional liability,[224] plaintiffs' attorneys historically persuaded judges "that admission of responsibility for environmental damage require[d] admission of civil liability for private damage claims . . . ."[225] As a result, defendants would not admit liability at all, excessively postponing remediation.[226]

This flawed system did not go unnoticed, however. In 2012, advocates for oil and gas production companies proposed legislative bills that would permit defendants to admit liability for remediation purposes without conceding responsibility for additional damages.[227] By doing so, remediation would not be

221. *See* LA. REV. STAT. ANN. § 30:29(C) (2007 & Supp. 2014).

222. *La. Land*, 110 So. 3d at 1041-42 (discussing the denial of defendants' writ).

223. *Id.* (emphasis in original).

224. Loulan Pitre, Jr., *Six Years Later: Louisiana Legacy Lawsuits since Act 312*, 1 LSU J. ENERGY L. & RESOURCES 93, 107 & n.103 (2012), *available at* http://digitalcommons.law.lsu.edu/jelr/vol1/iss1/10 (on file with author) ("[T]he statute can be read to allow the issue of damages to be tried separately from the issue of liability for remediation." (citing Brownell Land Co. v. Oxy USA Inc., 538 F. Supp. 2d 954, 958 (E.D. La. 2007))).

225. *Id.* at 107-08.

226. *Id.* at 108.

227. *Id.* at 112.

"delayed for years" and plaintiffs would be unable to "argue before the jury that the property ha[d] not been cleaned up—a point that was considered by many to be quite effective."[228] Unsurprisingly, advocates of plaintiffs' and landowners' rights did not support such a proposal and developed their own suggestions for legislative amendment.[229] On May 16, 2012, the two camps reached a compromise and it became effective August 1, 2012.[230] The compromise was not to be applied to cases that had already set the date for trial prior to or on May 15, 2012, even if the actual trial occurred after this time.[231] The 2012 legislation addressed the previously discussed shortcoming in the law and served "to facilitate expedited remediation of actual contamination as may be necessary to protect the public safety."[232]

Although lawmakers designed the 2012 legislation to promote efficient remediation and less complex adjudication, its success was never actually discernible as a result of Act 400's recent implementation. Nonetheless, the Act presents a more refined system that recognizes the importance of both Louisiana's ecosystem and economy. This policy effectively balances protection of the environment with stimulation of the oil and gas industry.

IV. THE POSSIBLE SOLUTION: LEGISLATIVE REFORM OF LEGACY LITIGATION UNDER ACT 400

Prior to the Act, legislation and judicial decisions in the field of legacy litigation incentivized landowners to bring lawsuits, awarded damages contrary to Louisiana policy, discouraged economic growth comparable to other oil-producing states, and

228. Pitre, *supra* note 224, at 112.

229. *Id.* at 112-13.

230. *Id.* at 113 & n.132 ("The compromise consisted [partly] of Act No. 754 (House Bill 618) . . . [which] provides for a preference for services by companies domiciled in Louisiana relative to a public bid process."). In addition to Act No. 754, the compromise was also comprised of "Act No. 779 (Senate Bill 555) . . . [which] provide[d] for remediation of oilfield sites and exploration and production sites." *Id.*

231. *Id.* at 113. In addition, the legislation "specifically provides that LDNR does not maintain primary jurisdiction." *Id.*

232. Pitre, *supra* note 224, at 113, 117. "[T]he package also create[d] two other very novel procedures: the option for a preliminary hearing that could result in parties obtaining a preliminary . . . dismissal without prejudice, and a one-year suspension of prescription established when plaintiffs file a 'notice of intent to investigate.'" *Id.* at 113-14.

complicated the procedure for remediating actual damage to property. Although the ultimate consequences of legacy litigation remain unclear, the oil and gas industry in Louisiana would likely have struggled if such a pattern had continued. Moreover, the lawsuits hindered remediation, thus threatening Louisiana's unique ecosystem.

Both the economic and environmental implications of unreformed legacy litigation were significant. Consequently, any change in the law had to consider the importance of protecting Louisiana's ecosystem and allowing landowners to remediate their property when drilling operations inflicted damage. However, available remedies needed to be more equitable so as to avoid discouraging future (and ongoing) business ventures. The law could not allow oil and gas companies to take advantage of landowners, but it also needed to avoid landowners exploiting oil and gas companies. The Act seeks to strike a balance between these two extremes.

A. DISCOURAGING FRIVOLOUS LAWSUITS

First, the legislation amends the statutory text of Act 312 to discourage frivolously filed lawsuits. Under the revised statute, when a party is dismissed with prejudice following a preliminary hearing, the defending party "shall be entitled to recover from the party who asserted the claim an award of reasonable attorney fees and costs, as may be determined by the court."[233] In this way, parties that file baseless claims are subject to an enforceable penalty to encourage only those individuals who believe they have a legitimate claim for property damage to file suit.

This amendment does not prevent landowners from compelling oil and gas companies to restore their property when damage has occurred but merely deters landowners from filing suit when uncertain as to their actual claims. While it is impossible to predict the precise decrease in lawsuits that will occur as a result of the amendment, it will certainly lead to less lawsuits being filed. The amendment does this by forcing plaintiffs to give claims considerable thought before filing suit. This added language should limit litigation-based remedies to individuals with legitimate claims.

233. Act of June 2, 2014, No. 400 (to be codified as amended at LA. REV. STAT. ANN. § 30:29; LA. CODE CIV. PROC. ANN. art. 1563), *available at* http://www.legis.la.gov/Legis/ViewDocument.aspx?d=913206.

B. LIMITING RECOVERABLE DAMAGES

The legislation also discourages lawsuits motivated by any objective other than actual remediation to property. It does this by eliminating a portion of Subsection H of Act 312, relied on by the court in *Louisiana Land* to award damages in excess of those needed to remedy to regulatory standards.[234] Specifically, the legislation removes part of the statute that stated that it did not "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 provision."[235] The legislation also amends part of Subsection H, adding that "[a]ny award granted in connection with the judgment for additional remediation in excess of the requirements of the feasible plan adopted by the court is not required to be paid into the registry of the court."[236] Finally, the legislation adds that damages awarded are "governed by the provisions of Subsection M of this Section."[237]

Correspondingly, the legislation adds Subsection M to the statute, which defines the specific remediation damages plaintiffs are entitled to. First, landowners with property damage are entitled to "[t]he cost of funding the feasible plan adopted by the court." [238] Second, landowners may receive "[t]he cost of additional remediation . . . if required by an express contractual provision providing for remediation to original condition or to some other specific remediation standard."[239] This provision effectively eliminates the discretion of the court to award damages to remediate the property to the original condition in the absence of an express provision. Third, a landowner may receive "[t]he cost of evaluating, correcting or repairing environmental damage upon a showing that such damage was caused by

234. *See* State v. La. Land & Exploration Co., 2012-0884, pp. 21-22 (La. 1/30/13); 110 So. 3d 1038, 1053.

235. Act of June 2, 2014, No. 400, § 30:29(H)(1) (to be codified as amended at LA. REV. STAT. ANN. § 30:29(H)(1)), *available at* http://www.legis.la.gov/Legis/ViewDocument.aspx?d=913206.

236. *Id.*

237. *Id.* § 30:29(H)(2) (to be codified as amended at LA. REV. STAT. ANN. § 30:29(H)(2)).

238. *Id.* § 30:29(M)(1) (to be codified as amended at LA. REV. STAT. ANN. § 30:29(M)(1)).

239. *Id.* § 30:29(M)(2) (to be codified as amended at LA. REV. STAT. ANN. § 30:29(M)(2)).

unreasonable or excessive operations based on rules, regulations, lease terms and implied lease obligations arising by operation of law, or standards applicable at the time of the activity complained of," as long as damages are "not duplicative" of damages recovered under other parts of the Subsection.[240] Finally, the Subsection allows for "[t]he cost of nonremediation damages[,]" for example, damages to crops and livestock.[241]

By specifically limiting and defining recoverable damages, the amendment serves to dissuade landowners from filing suit when motivated to do so for any reason other than actual remediation or direct loss to crops or livestock. While the amendment undoubtedly narrows the damages recoverable under *Louisiana Land*, it does so to provide a more equitable approach. Furthermore, landowners may still receive an additional amount when a contractual provision allowing for a higher level of remediation than that provided for under Act 312 is present.[242] Although it is unclear whether this will decrease the number of legacy lawsuits, it will ensure that landowners bringing suit are inspired to do so by one objective—restoration of their property.

C. ESTABLISHING A PRESUMPTION THAT THE PLAN APPROVED BY THE LDNR IS THE MOST FEASIBLE

The last major change accomplished by the Act is the addition of a rebuttable presumption regarding the feasible plan approved by the LDNR.[243] The legislature adds to Act 312, stating that when "a party makes a limited admission of liability" under the similarly amended Code of Civil Procedure, "there shall be a rebuttable presumption that the plan approved or structured

240. Act of June 2, 2014, No. 400, § 30:29(M)(3) (to be codified as amended at LA. REV. STAT. ANN. § 30:29(M)(3)), *available at* http://www.legis.la.gov/Legis/ViewDocument.aspx?d=913206.

241. *Id.* § 30:29(M)(4) (to be codified as amended at LA. REV. STAT. ANN. § 30:29(M)(4)).

242. *See* Marin v. Exxon Mobil Corp., 2009-2368, pp. 36-37 (La. 10/19/10); 48 So. 3d 234, 259 (explaining that Act 312 requires remediating property to applicable regulatory standards).

243. The bill also added the definition of "contamination," stating that it "shall mean the introduction or presence of substances or contaminants into a usable groundwater aquifer, an underground source of drinking water (USDW) or soil in such quantities as to render them unsuitable for their reasonably intended purposes." Act of June 2, 2014, No. 400, § 30:29(I)(1) (to be codified as amended at LA. REV. STAT. ANN. § 30:29(I)(1)), *available at* http://www.legis.la.gov/Legis/ViewDocument.aspx?d=913206.

by the [LDNR], after consultation with the Department of Environmental Quality as appropriate, shall be the most feasible plan to evaluate or remediate to applicable regulatory standards the environmental damage for which responsibility is admitted."[244] The amendment also allows for jury instruction regarding this law, if a party to the lawsuit requests it.[245]

By creating a rebuttable presumption that the plan approved by the LDNR is the most feasible, the amendment allows for faster remediation of property. Because there will now be less opportunity for the parties to debate feasibility, remediation of the property will begin much sooner, so as to prevent further deterioration of Louisiana's fragile wetlands and coast. Hopefully, this amendment will also lead to more efficient litigation, minimizing burdens on the parties associated with funding these lawsuits.

D. THE BENEFITS OF ACT 400

With the implementation of these amendments, oil and gas companies should be able to operate with the assurance that they may be held liable for remediation of property if they actually cause damage but nothing more unless expressly stated within contractual provisions. Landowners desiring restoration as specific performance will not be barred from recovery. Additionally, with private damages no longer applicable in the absence of contractual provisions, oil and gas companies will no longer fear "that admission of responsibility for environmental damage" will amount to "admission of civil liability for private damage claims."[246] As a result, oil and gas companies will likely be more inclined to admit environmental damage as provided by Act 312 so as to proceed with remediation.[247] Such an effect will benefit Louisiana's environment.

The Act exemplifies the most succinct method for resolving

244. Act of June 2, 2014, No. 400, § 30:29(C)(2)(c) (to be codified as amended at LA. REV. STAT. ANN. § 30:29(C)(2)(c)), *available at* http://www.legis.la.gov/Legis/ViewDocument.aspx?d=913206; *id.* art. 1563(A)(2) (to be codified as amended at LA. CODE CIV. PROC. ANN. art. 1563(A)(2)).

245. *Id.* § 30:29(C)(2)(c) (to be codified as amended at LA. REV. STAT. ANN. § 30:29(C)(2)(c)).

246. Pitre, *supra* note 224, at 107-08.

247. Act of June 2, 2014, No. 400, § 30:29(C) (to be codified as amended at LA. REV. STAT. ANN. § 30:29(C)), *available at* http://www.legis.la.gov/Legis/ViewDocument.aspx?d=913206.

the previously recognized shortcomings in the law surrounding legacy litigation. Additionally, the Act provides a compromise—it protects Louisiana's unique natural ecosystems by encouraging prompt restoration and remediation of actual damage, while simultaneously establishing a transparent law that may enrich the economy by providing an atmosphere friendlier to oil and gas companies. In this way, the economy and the environment should both prosper. These benefits, however, can only occur if the courts strictly adhere to the provisions of Act 400 as written.

V. CONCLUSION

Over the last decade, Louisiana has seen the emergence and development of legacy litigation. In its former state, the body of law surrounding this litigation was detrimental to the economy because it discouraged the growth of the oil and gas industry in Louisiana. It did this by encouraging landowners to initiate lawsuits and promoting lengthy and inefficient litigation with excessive damages. In addition to harming the state of Louisiana's oil and gas industry, legacy litigation hurt the environment and wasted state resources by postponing remediation of property with drawn-out litigation. To combat this crisis, the legislature implemented Act 400 to create a more evenhanded body of law that values both the environment and the economy. While the ultimate effects of the added legislation are still unknown, the courts should stringently administer Act 400 so that it may have sufficient occasion to improve the state of oil and gas legacy litigation. The Act deserves support because Louisiana's economic and environmental stability may very well depend on the effective resolution of legacy litigation issues.

Kaki J. Johnson