Legacy Litigation Update—Old and New

Presented by:

Loulan J. Pitre, Jr.

Kelly Hart & Pitre
400 Poydras St.
Suite 1812
New Orleans, LA 70130
loulan.pitre@kellyhart.com

504-522-1812

62nd LSU Mineral Law Institute

Written February 27, 2015 for Presentation on March 20, 2015

I. INTRODUCTION

In the first footnote of its 2010 opinion in *Marin v. Exxon Mobil Corp.*,[1] the Louisiana Supreme Court defined legacy litigation:

> "Legacy litigation" refers to hundreds of cases filed by landowners seeking damages from oil and gas exploration companies for alleged environmental damage in the wake of this Court's decision in Corbello v. Iowa Production, 02-0826 (La. 2/25/03), 850 So. 2d 686. These types of actions are known as "legacy litigation" because they often arise from operations conducted many decades ago, leaving an unwanted "legacy" in the form of actual or alleged contamination. Loulan Pitre, Jr., "Legacy Litigation" and Act 312 of 2006, 20 Tul. Envtl. L.J. 347, 34 (Summer 2007).[2]

I was very proud of this definition because the Supreme Court attributed it to me. Too bad: my definition was wrong.

[1] *Marin v. Exxon Mobil Corp.*, 09-2368, p. 1 n.1 (La. 10/19/10) 48 So. 3d 234, 238 n.1 (citing Loulan Pitre, Jr., *"Legacy Litigation" and Act 312 of 2006*, 20 Tul. Envtl. L.J. 347, 348 (2007)).
[2] *Id.*

The purpose of this paper is to support my presentation at the 62nd LSU Mineral Law Institute, "Legacy Litigation Update." This topic was last presented at the Institute two years ago. This paper will not go into detail on the background of legacy litigation. For that, I refer you to previous articles on the subject, including my 2007 article in the Tulane Environmental Law Journal[3] and my 2012 article in the LSU Journal of Energy Law and Resources.[4] Rather, this paper will survey a number of important developments in the subject matter over the past two years. Given, the scope of a fifty-minute presentation, these developments will be surveyed, not presented in detail.

The most significant development is that legacy litigation is no longer just for landowners. Rather, public entities have joined the party. Prominent and highly controversial legislation has been brought by the Southeast Louisiana Flood Protection Authority-East and the Parishes of Plaquemines and Jefferson. I will call these cases, brought by public entities or derivative of claims by public entities, "New Legacy."

Legacy litigation by landowners—I will call these "Old Legacy"—also continued. Yet more legislation on the subject was enacted in 2014. And we also saw several court decisions affecting legacy litigation.

II. LEGACY LITIGATION UPDATE

A. New Legacy

In the past two years there have been three manifestations of what I call New Legacy:

1. Litigation by the Southeast Louisiana Flood Protection Authority-East;
2. Litigation by the Parishes of Plaquemines and Jefferson; and
3. Coming full circle, litigation by private landowners bringing claims derivative of those brought by the Parishes of Plaquemines and Jefferson.

1. SLFPA-E Litigation

On July 24, 2013, the Board of Commissioners of the Southeast-Louisiana Flood Protection Authority-East ("SLFPA-E") filed a petition in the Civil District Court for the Parish of Orleans.[5] The petition generally asserted that a larger number of defendants conducted oil and gas operations in a so-called "Buffer Zone" east of the Mississippi River and generally east and southeast of the New Orleans metropolitan area.[6] The petition went on to allege that these oil and gas activities contributed to coastal erosion and made the east bank of the New Orleans

---

[3] Loulan Pitre, Jr., *"Legacy Litigation" and Act 312 of 2006*, 20 Tul. Envtl. L.J. 347, 348 (2007).

[4] Loulan Pitre, Jr., *Six Years Later: Louisiana Legacy Lawsuits Since Act 312*, 1 LSU J. Energy L. & Resources, 93 (2012).

[5] *Bd. of Comm'rs of the Se. La. Flood Prot. Auth.-E. v. Tenn. Gas Pipeline Co.,* No. 13-5410, 2015 WL 691348, at *2 (E.D. La. Feb. 13, 2015).

[6] *Id.* at *1.

metropolitan area more vulnerable to severe weather and flooding.[7] The primary actions complained of was the dredging of canals, along with other activities.[8]

The petition asserted six causes of action: negligence, strict liability, natural servitude of drain, public nuisance, private nuisance, and breach of contract—third party beneficiary.[9] Plaintiff prayed for both damages and injunctive relief in the form of restoration activities.[10] While couching the claims as state law claims, the petition specifically asserted that the defendants' activities and violated federal law and regulations in three specific areas: the Rivers and Harbors Act of 1899, under which the Army Corp of Engineers regulates navigation and flood control; the Clean Water Act of 1972, regulating the dredging and maintenance of canals, and the Coastal Zone Management Act of 1972.[11]

A defendant removed the case to federal court, and the plaintiff moved to remand.[12] The federal court denied remand, finding that federal question jurisdiction existed in the case pursuant to an exception to the "well-pleaded complaint" rule.[13] Thus, even though the claims were brought under state law, the court found that federal issues were necessarily raised, actually disputed, substantial and capable of resolution without disrupting the federal-state balance approved by Congress.[14]

While the motion to remand was pending, there were initiatives elsewhere designed to halt the litigation. The Louisiana Oil and Gas Association ("LOGA") commenced litigation in the Nineteenth Judicial District Court for the Parish of East Baton Rouge challenging the efficacy of the Attorney General's approval of the SLFPA-E's hiring of special counsel for this litigation.[15] The district court upheld the hiring.[16] More dramatically, Governor Jindal supported litigation intended to remove the SLFPA-E's authority to bring the litigation, which ultimately resulted in the passage of Act 544 of the 2014 Regular Session of the Louisiana Legislature.[17] The Judge in the case ruled that Act 544 did not apply to the SLFPA-E and that it was unconstitutional,[18] and similar arguments were made to the federal court in the SLFPA-E litigation.[19]

---

[7] *Id.*
[8] *Id.* at *1-*2.
[9] *Id.* at *2.
[10] *Id.*
[11] *Id.*
[12] *Id.*
[13] *Id.*
[14] *Id.* at *2-*3.
[15] *The La. Oil & Gas Ass'n, Inc. v. Honorable James D. "Buddy" Caldwell, in his capacity as Attorney Gen. of the State of La.*, No. 626798 "D", 19th JDC, East Baton Rouge Parish, Louisiana.
[16] *Id.*
[17] Act of June 6, 2014, No. 544, 2014 La. Sess. Law. Serv. Act 544 (S.B. 469)(West) (codified as amended at La. Rev. Stat. Ann. § 49:214.36(O) (2014)).
[18] *The La. Oil & Gas Ass'n, Inc. v. Honorable James D. "Buddy" Caldwell, in his capacity as Attorney Gen. of the State of La.*, No. 626798 "D", 19th JDC, East Baton Rouge Parish, Louisiana.
[19] *Bd. of Comm'rs of the Se. La. Flood Prot. Auth.-E. v. Tenn. Gas Pipeline Co.,* No. 13-5410, Doc. 389-1 (E.D. La. Aug. 6, 2014).

The federal district court, however, on February 13, 2015 dismissed all of the SLFPA-E's claims with prejudice without reaching any of the arguments based on Act 544.[20] Instead, the court granted defendants' motion to dismiss for failure to state a claim under Rule 12(b)(6).[21] The court found that the duties imposed upon defendants under the federal statues cited by plaintiff do not extend to the protection or benefit of the SLFPA-E.[22] Therefore, the court found that a Louisiana duty-risk analysis negated any possible liability under negligence[23] or strict liability.[24] The court then agreed with the defendants that a claims based on a natural servitude of drain could not be supported under the circumstances.[25] The court dismissed the public and private nuisance claims on the basis that a "neighbor" relationship did not exist.[26] And finally, the court held that the SLFPA-E was not a contractual third-party beneficiary of any permits issues to the defendants.[27] On February 20, 2015, counsel for the SLFPA-E filed a notice of appeal of this decision to the United States Fifth Circuit Court of Appeal.[28]

2. Parish Litigation

On or about November 8 and 11, 2013, the Parish of Plaquemines and the Parish of Jefferson filed a total of 28 separate lawsuits.[29] Each of these lawsuits named multiple defendants alleged to have conducted oil and gas operations in an "Operational Area" consisting of one or more oil and gas fields.[30] Other than the oil and gas fields and defendants named, however, the allegations of each petition were essentially identical.[31] The claims were asserted based on the Louisiana State and Local Coastal Resources Management Act of 1978, La. R.S. § 49:214.21 et seq. (the "CZM Laws" or "SLCRMA") and related regulations and orders.[32] The CZM Laws generally require a Coastal Use Permit ("CUP") before engaging in certain uses in the defined Coastal Zone.[33] The CZM Laws distinguish between uses of state concern and uses of local concern.[34] Although oil and gas activities are designated as issues of state concern, these lawsuits allege that the parishes have the right to enforce the CZM Laws with respect to issues of

---

[20] *Bd. of Comm'rs of the Se. La. Flood Prot. Auth.-E. v. Tenn. Gas Pipeline Co.,* No. 13-5410, 2015 WL 691348 (E.D. La. Feb. 13, 2015).
[21] *Id.* at *14.
[22] *Id.* at *7-*9.
[23] *Id.*
[24] *Id.* at * 9-*10.
[25] *Id.* at *10-*12.
[26] *Id.* at *12-*13.
[27] *Id.* at *13-*14.
[28] *Bd. of Comm'rs of the Se. La. Flood Prot. Auth.-E. v. Tenn. Gas Pipeline Co.,* No. 13-5410, Doc. 531 (E.D. La. Feb. 20, 2015).
[29] See, e.g., *Parish of Plaquemines v. Total Petrochemical & Ref. USA, Inc.*, No. 13-06693, Doc. 87 (E.D. La. Dec. 2, 2014); *see also* cases listed at www.loga.la.
[30] *Id.* at 2-3.
[31] *See* records of cases cited at www.loga.la.
[32] See, e.g., *Parish of Plaquemines v. Total Petrochemical & Ref. USA, Inc.*, No. 13-06693, Doc. 87 at p. 2 (E.D. La. 12/02/14); *see also* cases listed at www.loga.la..
[33] La. Rev. Stat. § 49:214.30.
[34] La. Rev. Stat. § 49:214.25.

state concern,[35] even though the state, not the parishes, has the exclusive right to grant permits regarding issues of state concern.[36] The petitions generally allege permit violations in connection with canals and waste pits.[37]

Defendants removed each of the 28 cases, alleging diversity jurisdiction and several bases for federal question jurisdiction.[38] On December 1, 2014, Judge Zainey rejected all of the bases for federal court jurisdiction and remanded the case in *The Parish of Plaquemines versus Total Petrochemical & Refining USA, Inc., et al.*, Civil Action No. 13-6693, Section "A" (2), United States District Court, Eastern District of Louisiana.[39] Remand has also been ordered in several of the other cases, while in most of the cases the motions to remand remain pending.[40] None of the federal courts has yet denied remand.[41]

The government of Plaquemines Parish, meanwhile, may be re-considering the litigation. On February 26, 2015, the Plaquemines Council is considering a resolution instructing their attorneys to "temporarily cease and desist working on the legal action currently pending under the Coastal Zone Management Act" and "to provide a comprehensive update status update and full accounting of costs and fees incurred to date in this matter."[42]

3. Landowner Litigation Derivative of Parish Litigation

At least four actions have been filed in which private landowners claims that their land has been damaged by the violations alleged in the Parish litigation.[43] Based on these "findings" by the Parishes, these lawsuits assert claims in negligence, strict liability, public nuisance, private nuisance, and breach of contract—third party beneficiary and seek damages as well as injunctive relief in the form of restoration activities, as well as attorney fees and other relief.[44] These cases have been removed to federal court,[45] with motions to remand to be readily expected, and no other action thus far.

---

[35] See, e.g., *Parish of Plaquemines v. Total Petrochemical & Ref. USA, Inc.*, No. 13-06693, Doc. 87 (E.D. La. Dec. 2, 2014); *see also* cases listed at www.loga.la.
[36] La. Rev. Stat. § 49:214.30(A)(1).
[37] See, e.g., *Parish of Plaquemines v. Total Petrochemical & Ref. USA, Inc.*, No. 13-06693, Doc. 87 (E.D. La. Dec. 2, 2014); *see also* cases listed at www.loga.la.
[38] *Id.* at 3-4.
[39] *Id.* at 6-53.
[40] *See* records of cases cited at www.loga.la.
[41] *Id.*
[42] *See* www.plaquemines.la.
[43] *Borne v. Chevron U.S.A. Holdings Inc.*, No. 744-218 "M", 24th JDC, Jefferson Parish, Louisiana; *Easterling v. Hilcorp Energy*, No. 61,798 "B", 25th JDC, Plaquemines Parish, Louisiana; *Bernstein v. Atl. Richfield Co.*, No. 744-226 "M", 24th JDC, Jefferson Parish, Louisiana; *Defelice Land Co. v. ConocoPhillips Co.*, No. 61-926 "A", 25th JDC, Plaquemines Parish, Louisiana.
[44] *Id.*
[45] *Id.*

B. Old Legacy

1. Legislation

In 2014, Act No. 400 of the Louisiana Legislature[46] once again[47] amended La. R.S. 30:29,[48] which was first enacted in Act No. 312 of the 2006 Regular Session of the Louisiana Legislature[49] and is still commonly known as Act 312. Act No. 400 amended La. R.S. 30:39 prospectively[50] in the following respects:

- Providing in La. R.S. 30:29(B)(6) that parties dismissed as a result of a preliminary hearing shall be entitled to receive an award of reasonable attorney fees and costs after they have received a judgment of dismissal with prejudice following a non-appealable judgment on the claims asserted by the party against whom the preliminary dismissal was granted.[51]

- The following language was added to La. R.S. 30:29(C)(2) regarding limited admissions of liability: "In all cases in which a party makes a limited admission of liability under the provisions of the Code of Civil Procedure Art. 1563, there shall be a rebuttable presumption that the plan approved or structured by the department, 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. For cases tried by a jury, the court shall instruct the jury regarding this presumption if so requested by a party."[52]

- Language was amended in La. R.S. 30:29(H)(1) to clarify procedure with respect to awards with respect to additional remediation in excess of the requirements of the feasible plans adopted by the court.[53]

---

[46] Act of June 2, 2014, No. 400, 2014 La. Sess. Law. Serv. 736 (West) (codified as amended at La. Rev. Stat. Ann. § 30:29 (2014); La. Code Civ. Proc. art. 1563)).

[47] *See* Act of June 12, 2012, No. 754, 2012 La. Acts. 3072 (codified as amended at La. Code Civ. Proc. Ann. arts. 1552, 1563 (2014); Act of June 12, 2012, No. 779, 2012 La. Acts. 3149 (codified as amended at La. Rev. Stat. Ann. § 30:29 (2014).

[48] La. Rev. Stat. Ann. § 30:29.

[49] Act of June 8, 2006, No. 312, 2006 La. Acts 1472 (codified as amended at La. Rev. Stat. Ann. §§ 30:29, :29.1, :82, :89.1, :2015.1 (2014).

[50] Act No. 400 provides at Section 3: "The provisions of this Act shall not apply to any case in which the court, on or before May 15, 2014, has issued or signed an order setting the case for trial, regardless of whether such trial setting is continued." Act of June 2, 2014, No. 400, 2014 La. Sess. Law. Serv. 736 (West).

[51] Act of June 2, 2014, No. 400, 2014 La. Sess. Law. Serv. 736 (West) (codified as amended at La. Rev. Stat. Ann. § 30:29 (2014).

[52] *Id.*

[53] *Id.*

- "Contamination" has been defined in La. R.S. 30:29(I)(1) to 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."[54]

- La. R.S. 30:29(M) has been added, providing that in an action governed by La. R.S. 30:29, damages may be awarded only for the following:

  (1) The cost of funding the feasible plan adopted by the court.

  (2) The cost of additional remediation only if required by an express contractual provision providing for remediation to original condition or to some other specific remediation standard.

  (3) The cost of evaluating, correcting or repairing environmental damage upon a showing that such damage was caused by 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, provided that such damage is not duplicative of damages awarded under Paragraphs (1) or (2) of this Subsection.

  (4) The cost of non-remediation damages.

  However, these provisions shall not be construed to alter the traditional burden of proof or to imply the existence or extent of damages in any action, nor shall it affect an award of reasonable attorney fees or costs La. R.S. 30:29.[55]

- Code of Civil Procedure Article 1563 has been amended to provide that in the case of a limited admission of responsibility under La. R.S. 30:29, there shall be a rebuttable presumption that the plan approved or structured by the department, after consultation with the Department of Environmental Quality as appropriate, shall be the most feasible plan to evaluate or remediate the environmental damage under the applicable regulatory standards pursuant to the provisions of R.S. 30:29. For cases tried by a jury, the court shall instruct the jury regarding this presumption if requested by a party.[56]

2. Cases

a. Excess Damages: *Savoie*

Savoie v. Richard[57] dealt with an appeal of a judgment against Shell Oil Company and SWEPI LP (collectively "Shell") awarding plaintiffs $34 million in damages for remediation of their land to state regulations and $18 million to remediate the property to comply with the

---

[54] *Id.*
[55] *Id.*
[56] *Id.*
[57] 13-1370 (La. App. 3 Cir. 4/2/14), 137 So. 3d 78, *reh'g denied* (La. App. 3 Cir. 4/21/14), *writ denied* 152 So. 3d 880 (La. 11/14/14).

applicable mineral leases.[58] After the jury verdict the matter had proceeded to the Louisiana Department of Natural Resources in accordance with Act 312, and the DNR adopted a remediation plan that would cost approximately an estimated $4 million.[59] The district court adopted this plan held that $4 million would be deposited in the registry of the court to fund remediation, and that the remaining $30 million found by the jury for remediation to state regulations would be paid to the plaintiffs, in addition to the other $18 million.[60]

While the Third Circuit found that the jury instructions were confusing, it did not overturn the jury's verdict.[61] However, the court of appeal amended the judgment entered by the court, finding that "the remedy for remediation to state regulatory standards is no longer a private monetary award, but rather specific performance of the remediation to those state standards that serve the public interest."[62] The plaintiffs could have but did not submit their own plan to contest the $4 million plan.[63] Thus, the court of appeal reasoned, Act 312 required that the amount of the jury's verdict for remediation to state regulations in excess of the amount necessary to do so would be returned to the responsible party.[64] The court of appeal required that the entire $34 million be deposited in the registry of the court until the remediation was complete, but at that time any remaining money should be returned to Shell.[65] The court of appeal, upheld, however, the judgment in favor of plaintiffs for $18 million in "excess damages," finding that the jury found that the mineral lease required a more expensive remediation than state regulations.[66] The Louisiana Supreme court denied writs.[67]

b. Subsequent Purchaser: *Pierce* and *Global Marketing*

Pierce v. Atlantic Richfield Co.[68] involves application of the "subsequent purchaser" doctrine.[69] The children of Mr. Pierce, who had passed away in 1998, had obtained the property by judgment of possession in 1998 and had sold it to one of the defendants in 2011.[70] Thus, the Pierce Children no longer owned the waste dump site for which they sought damages.[71] The court of appeal, on *de novo* review, found that the doctrine of confusion applied when the property was sold to one of the defendants who allegedly contaminated the property.[72] Additionally, because the judgment of possession contained no specific assignment or subrogation of a personal action to bring a property damage claims related to the properties, the

---

58 *Id.* at 80-81.
59 *Id.* at 81.
60 *Id.* at 81-82.
61 *Id.* at 83.
62 *Id.* at 86.
63 *Id.*
64 *Id.* at 87.
65 *Id.*
66 *Id.* at 90.
67 152 So. 3d 880 (La. 11/14/14).
68 13-1103, 2014 WL 1047061 (La. App. 3 Cir. 3/19/14), writ granted, 152 So. 3d 162 (La. 11/7/14).
69 *Id.*
70 *Id.* at *1.
71 *Id.* at *6.
72 *Id.* at *7.

court held that the Pierce children did not acquire a personal right to sue for damages that allegedly occurred before their ownership.[73] The Louisiana Supreme Court has granted writs in this case,[74] and the result will be closely watched.

Global Mktg. Solutions v. Blue Mill Farms, Inc.[75] also involves the subsequent purchaser doctrine.[76] The plaintiff had purchased the property at issue by act of cash sale in 2005.[77] The plaintiff alleged that it discovered contamination after purchasing the land.[78] The defendants moved for summary judgment based on the subsequent purchaser doctrine.[79] The court of appeal found that Eagle Pipe was correctly applied by the district court in granting the motion for summary judgment dismissing all of plaintiff's clams.[80] The plaintiff argued that the were asserting real rights and obligations under Louisiana Civil Code Article 667, but the Court of Appeal found that a lease, including a mineral lease, does not convey any real right or title to the property leases, but only a personal right.[81] These personal rights are not transferred to a successor by particular title without a clear stipulation to that effect.[82] The Court of Appeal also rejected the plaintiff's arguments based on continuing tort, third-party beneficiary, and *Magnolia Coal*.[83] The Court of Appeal affirmed the district court's grant of summary judgment dismissing all of plaintiff's claims.[84]

---

73 *Id.*
74 152 So. 3d 162 (La. 11/7/14).
75 2013-2132 (La. App. 1 Cir. 9/19/14), 153 So. 3d 1209.
76 *Id.*
77 *Id.* at 1211.
78 *Id.*
79 *Id.* at 1211-12.
80 *Id.* at 1215.
81 *Id*
82 *Id.*
83 *Id.* at 1216-17.
84 *Id.* at 1218.