

ENVIRONMENTAL & TOXIC TORT UPDATE Winter 2011



ENVIRONMENTAL UPDATES

By Brett F. Willie



Every quarter we provide our readers with an update of select environmental regulatory changes recently proposed and/or adopted by the Louisiana Department of Environmental Quality (“LDEQ”) and the Louisiana Department of Natural Resources

(“LDNR”). These updates are generally helpful as a quick reference resource for those involved with and/or employed by the communities regulated by LDEQ and LDNR and more specifically those involved with the chemical and oil and gas industries. The following are brief descriptions of the proposed and final regulatory changes. The full text of these changes can be viewed at the website for the Louisiana Register by going to: <http://doa.louisiana.gov/osr/reg/register.htm>.

In addition to regulatory updates, we report on toxic tort litigation and judicial decisions which influence related cases in the area of environmental litigation. In this update, we’ll be reporting on the *Eagle Pipe and Supply, Inc. v. Amerada Hess Corp.* case in which the Louisiana Supreme Court issued an opinion reversing the ruling of the 4th Circuit Court of Appeal on rehearing and reinstating that court’s ruling on original hearing, which affirmed the trial court’s granting of the defendants’ exceptions of no right of action. More specifically, the Supreme Court ruled that Louisiana’s

“subsequent purchaser doctrine” was applicable to the plaintiff’s claims.

Regulatory Summaries – October

LDNR – EMERGENCY RULE

Office of Conservation - Statewide Orders No. 29-B and 29-B-a

Extension of Deadline of Drilling and Completion Operation and Safety Requirements (LAC 43:XIX.Chapters 2 and 11)

Source: La. Register for October 2011, p. 2964

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This update is intended for general informational purposes only. The contents contained herein should not be construed as formal legal advice nor the formation of a lawyer/client relationship. The reader is urged to consult his or her personal attorney concerning specific legal questions and/or situations. This is an advertisement.

The following Emergency Rule and reasons therefor are now adopted and promulgated by the Commissioner of Conservation as being necessary to protect the public health, safety and welfare of the people of the State of Louisiana, as well as the environment generally, by extending the effectiveness of the emergency rule it supersedes for drilling and completion operational and safety requirements for wells drilled in search of oil and natural gas at water locations. The following Emergency Rule provides for the extension of the rule allowing more time to complete comprehensive rule amendments.

In light of the Gulf of Mexico Deepwater Horizon oil spill incident in federal waters approximately 50 miles off Louisiana's coast and the threat posed to the natural resources of the State, and the economic livelihood and property of the citizens of the State caused thereby, the Office of Conservation ("Conservation") began a new review of its current drilling and completion operational and safety requirements for wells drilled in search of oil and natural gas at water locations. While the incidents of blowout of Louisiana wells is minimal, occurring at less than three-tenths of one percent of the wells drilled in Louisiana since 1987, the great risk posed by blowouts at water locations to the public health, safety and welfare of the people of the State, as well as the environment generally, necessitated the rule amendments contained herein.

After implementation of the Emergency Rule, Conservation formed an ad hoc committee to further study comprehensive rulemaking in order to promulgate new permanent regulations which ensure increased operational and safety requirements for the drilling or completion of oil and gas wells at water locations within the State.

The Emergency Rule set forth herein after is intended to provide greater protection to the public health, safety and welfare of the people of the State, as well as the environment generally by extending the effectiveness of new operational and safety requirements for the drilling and completion of oil and gas wells at water locations. Following the Gulf of Mexico-Deepwater Horizon oil spill, Conservation investigated the possible expansion of Statewide Orders No. 29-B and 29-B-a requirements relating to well control at water locations. As part of the rule expansion project, Conservation reviewed the well control regulations of the U.S. Department of the Interior's Mineral Management Service or MMS (now named the Bureau of Ocean Energy Management, Regulation and Enforcement). Except



in the instances where it was determined that the MMS provisions were repetitive of other provisions already being incorporated, were duplicative of existing conservation regulations or were not applicable to the situations encountered in Louisiana's waters, all provisions of the MMS regulations concerning well control issues at water locations were by the preceding Emergency Rules, which this rule supersedes, integrated into Conservation's Statewide Orders No. 29-B and 29-B-a. Conservation is currently performing a

comprehensive review of its regulations as it considers future amendments to its operational rules and regulations found in Statewide Order No. 29-B and elsewhere. Specifically, the Emergency Rule extends the effectiveness of a new Chapter within Statewide Order No. 29-B (LAC 43:XIX.Chapter 2) to provide additional rules concerning the drilling and completion of oil and gas wells at water locations, specifically providing for the following: rig movement and reporting requirements, additional requirements for applications to drill, casing program requirements, mandatory diverter systems and blowout preventer requirements, oil and gas well-workover operations, diesel engine safety requirements, and drilling fluid regulations. Further, the Emergency Rule amends Statewide Order No. 29-B-a (LAC 43:XIX.Chapter 11) to provide for and expand upon rules concerning the required use of storm chokes in oil and gas wells at water locations.

Recognizing the potential advantages of expanding the operational and safety requirements for the drilling and completion of oil and gas wells at water locations within the State, it has been determined that failure to establish such requirements in the form of an administrative rule may lead to the existence of an imminent peril to the public health, safety and welfare of the people of the State of Louisiana, as well as the environment generally. By this rule, Conservation extends the effectiveness of the following requirements until such time as final comprehensive rules may be promulgated or 120 days from the effective date of this rule, whichever occurs first.

Protection of the public and our environment therefore requires the Commissioner of Conservation to extend the following rules in order to assure that drilling and completion of oil and gas wells at water locations within the State are undertaken in accordance with all reasonable care

and protection to the health, safety of the public, oil and gas personnel and the environment generally. The Emergency Rule, Amendment to Statewide Order No. 29-B (LAC 43:XIX.Chapter 2) and Statewide Order No. 29-B-a (LAC 43:XIX.Chapter 11) (“Emergency Rule”) set forth herein after are adopted and extended by Conservation.

The Emergency Rule signed by the Commissioner and effective May 12, 2011 is hereby rescinded and replaced by the following Emergency Rule.

The effective date of this Emergency Rule will be September 23, 2011. The Emergency Rule herein adopted as a part thereof, shall remain effective for a period of not less than 120 days hereafter, or until the adoption of the final version of an amendment to Statewide Order No. 29-B and Statewide Order No. 29-B-a as noted herein, whichever occurs first.

LDNR – FINAL RULE

Office of Conservation Hydraulic Fracture Stimulation Operations (LAC 43:XIX.118)

Source: La. Register for October 2011, p. 3064

The Louisiana Office of Conservation hereby amends LAC 43:XIX Subpart 1 (Statewide Order No. 29-B) Chapter 1 General Provisions.

The recent development of the Haynesville Shale in North Louisiana is made possible through the use of multi-stage hydraulic fracture stimulation technology. This technology involves the introduction of large amounts of fluids under very high pressure into a well to create fractures in the rock which then allow oil and/or gas to flow into the wellbore. The intense development of the Haynesville Shale in Louisiana and other shale resources across the United States has created a large amount of public interest in the hydraulic

fracturing process and its potential effect on the environment.

In addition, in November 2010, a review of Conservation policies and regulations associated with the hydraulic fracturing process was conducted by the non-profit, multi-stakeholder organization, STRONGER, Inc. to assess the effectiveness and adequacy of current regulations. Their report, finalized in March 2011, recommended some of the changes included in this amendment.

As a result of the aforementioned conditions, this Rule was drafted by staff of Conservation using portions of the hydraulic fracturing regulations recently promulgated in the State of Arkansas and statutes recently passed in Texas as models.

The Rule requires that a work permit be obtained from the Conservation prior to initiating hydraulic fracture stimulation operations on a well. Following completion of hydraulic fracturing operations, information on fracturing fluid composition and volumes are to be reported to Conservation or to a publicly accessible registry.

The intent of the Rule is to provide transparency to ensure that hydraulic fracturing operations are conducted in a manner which is protective of the public health and the environment and to collect technical information on the hydraulic fracturing operations conducted in Louisiana.

Regulatory Summaries – November

LDNR – FINAL RULE

Office of Conservation – Fees

(LAC 43:XIX.701, 703, 705, and 707)

Source: La. Register for November 2011, p. 3271

The Office of Conservation amends LAC 43:XIX.701, 703, and 707 (Statewide Order No. 29-R) in accordance with the provisions of the Administrative Procedure Act, R.S. 49:950 et seq. The action will adopt Statewide Order No. 29-R-11/12 (LAC 43:XIX, Subpart 2, Chapter 7), which establishes the annual Office of Conservation Fee Schedule for the collection of application, production, and regulatory fees, and will replace the existing Statewide Order No. 29-R-10/11.

Application Fees:

Application Fees	Amount
Application for Substitute Unit Well	\$252
Application for Public Hearings	\$755
Application for Multiple Completion	\$126
Application for Commingle	\$252
Application for Automatic Custody Transfer	\$252
Application for Noncommercial Injection Well	\$252
Application for Commercial Class I Injection Well	\$1,264
Application for Commercial Class I Injection Well (Additional Wells)	\$631
Application for Commercial Class II Injection Well	\$631
Application for Commercial Class II Injection Well (Additional Wells)	\$314
Application for Permit to Drill – Minerals: 0’ – 3,000’ (6 months)	\$126
Application for Permit to Drill – Minerals: 3,001’ – 10,000’ (6 months)	\$631
Application for Permit to Drill – Minerals: 10,001’ +(6 months)	\$1,264
Drill Minerals Deeper (> 3,000’) (6 months)	\$504
Drill Minerals Deeper (> 10,000’) (6 months)	\$632
Application for Permit to Drill - Minerals: 0' - 3,000' (1 year)	\$252
Application for Permit to Drill -	\$1,262

Application Fees	Amount
Minerals: 3,001' - 10,000' (1 year)	
Application for Permit to Drill - Minerals: 10,001' + (1 year)	\$2,528
Drill Minerals Deeper (> 3,000') (1 year)	\$1,008
Drill Minerals Deeper (> 10,000') (1 year)	\$1,264
Application to Amend Permit to Drill – Minerals	\$126
Application to Amend Permit to Drill – Injection or Other	\$126
Application for Surface Mining Exploration Permit	\$65
Application for Surface Mining Development Operations Permit	\$94
Application for Surface Mining Permit	\$2,212
Application to Process Form R-4	\$36
Application to Reinstate Suspended Form R-4	\$65
Application for Emergency Clearance Form R-4	\$65
Application for Site Clearance	\$600

Regulatory Fees:

Operators of each permitted Type A facility are required to pay an annual Regulatory Fee of \$6,798 per facility.

Operators of each permitted Type B facility are required to pay an annual Regulatory Fee of \$3,399 per facility.

Operators of record of permitted non-commercial Class II injection/disposal wells are required to pay \$689 per well.

Operators of record of permitted Class III and storage wells are required to pay \$689 per well.

Class 1 Well Fees:

Operators of permitted Class I wells are required to pay \$10,958 per well.

Production Fees:

Tier	Annual Production (Barrel Oil Equivalent)	Fee per Well
Tier 1	0	\$16
Tier 2	1 - 5,000	\$87
Tier 3	5,001 - 15,000	\$248
Tier 4	15,001 - 30,000	\$414
Tier 5	30,001 - 60,000	\$653
Tier 6	60,001 - 110,000	\$905
Tier 7	110,001 - 9,999,999	\$1,120

Jurisprudential Summaries

Eagle Pipe and Supply, Inc. v. Amerada Hess Corporation, et al.

Louisiana Supreme Court Reverses Fourth Circuit Ruling on Rehearing and Issues Opinion on the General Applicability of the Subsequent Purchaser Doctrine to Plaintiff's Claims

On October 25, 2011, the Louisiana Supreme Court rendered its long-anticipated opinion in the *Eagle Pipe* case and on the applicability of the subsequent purchaser doctrine to the Plaintiff's claims. In a split vote, the Court reversed the ruling of the Fourth Circuit Court of Appeal on rehearing and reinstated that court's ruling on original hearing, effectively affirming the trial court's decision granting the Defendants' exceptions of no right of action. The Court had granted writs to determine whether, in the absence of any express assignment or subrogation of rights against third parties, the subsequent purchaser of property had a right to sue a third party for damage to that property that was

not readily apparent at the time of sale and which had been inflicted before the sale of the property.

In rendering its opinion, the Supreme Court undertook an analysis of the basic principles of Louisiana property and obligations law, and how those principles led to the development of the “subsequent purchaser doctrine.” Following a comprehensive review of the law and available jurisprudence, the Court concluded that the subsequent purchaser doctrine was applicable to the Plaintiff’s claims and found that the “fundamental principles of Louisiana property law” would not permit the Plaintiff in this case to sue a third party for the damage inflicted on its property prior to purchase.



Background

This case arose from Plaintiff’s purchase of an industrial pipe yard in 1998. Union Pipe, now defunct, allegedly leased the property from the prior owners from 1981 to 1988, and operated an industrial pipe yard that bought, cleaned, inspected, handled, stored and sold used oilfield pipe. At some point after the Plaintiff purchased the property, the Louisiana Department of Environmental Quality (“LDEQ”) determined that the property was contaminated with Technologically Enhanced Naturally Occurring Radioactive Materials (“TENORM”). LDEQ found the Plaintiff in violation

of TENORM exposure regulations and allegedly ordered remediation of the property. After receiving LDEQ’s Notice of Violation, the Plaintiff filed suit against various groups of Defendants, including the previous landowners and the oil and transport companies it claimed “either sold or tendered to Union Pipe used oil field equipment for cleaning or maintenance, which at all pertinent times contained hazardous, toxic and carcinogenic radioactive materials.” Among the various exceptions heard by the trial court, the Defendants’ exception of no right of action was ultimately granted, dismissing the Plaintiff’s claims with prejudice.

Eagle Pipe appealed the trial court’s ruling. The Fourth Circuit Court of Appeal originally held that the sales contract between Eagle Pipe and the sellers of the property did not assign to the Plaintiff the previous owners’ rights to seek relief for the alleged contamination. In addition, the Court held that the Plaintiff was not a third-party beneficiary of the oil companies’ contracts with the previous owners’ tenant. The Plaintiff’s application for a rehearing was granted and following oral argument, the Court of Appeal reversed itself, holding that the Plaintiff, Eagle Pipe, was the party that had suffered the injury and, as such, it enjoyed a right of action in this matter.

The Louisiana Supreme Court granted writs to determine the applicability of the subsequent purchaser doctrine to the Plaintiff’s claims in this matter. The Defendants in this case argued that any damage that occurred to the property in question was inflicted long before the property was sold to the Plaintiff and that there was no assignment or subrogation of the previous owners’ rights against any alleged tortfeasors. Eagle Pipe argued that the subsequent purchaser doctrine was inapplicable in this case because the property damage was

unknown and not readily apparent at the time of sale.

Analysis of the Subsequent Purchaser Doctrine

The subsequent purchaser doctrine is based on the general rule in Louisiana jurisprudence, which states that a property owner has no actual right or interest in recovering from a third party for damage to that property that was inflicted prior to its purchase unless there was a clear assignment or subrogation of that right from the owner of the property at the time the damage was inflicted. The Court immediately undertook a comprehensive examination and analysis of this rule by reviewing the “property law precepts” that have supported the rule “over more than a hundred years of jurisprudence.”

First, the Court examined the fundamental principles of Louisiana property law and specifically the real rights that a person may have in property. The Court pointed out that, under Louisiana law, a person can have various rights in things. Those rights include: ownership, personal and predial servitudes and other such rights as allowed by law. The Court initially examined the right of ownership and how it was distinguishable from other real rights in that it confers “the power of disposing of [a] thing, by consuming it, by physically destroying it and by transforming its substance,” whereas the other real rights only authorize “those in whom they are vested to enjoy the thing of another in a more or less complete manner, but always with the obligation of preserving the substance.”

The Court next undertook an examination of the principles of Louisiana obligations law. In doing so, the Court noted that property law and the law of obligations are generally two distinct branches of Louisiana civil law. However, because the appellate court had held on rehearing that certain principles of the law of obligations were applicable to the

questions of property law at issue in this case, an examination of these principles was necessary.

Obligations, the Court noted, arise from contracts and other declarations of will. As an example, the Court described the seller’s obligation in a contract of sale to deliver the thing sold and to warrant ownership and peaceful possession to the buyer. In addition, the seller is required to warrant the absence of hidden defects in the thing sold. In what became an important issue in this case, Louisiana law distinguishes between overt defects and covert or hidden defects in a thing sold. When defects that were initially hidden are later discovered, the Court explained, the law of obligations provides the buyer with the right to sue for rescission of the sale or reduction of the purchase price. By contrast, a seller owes no warranty for defects in a thing that were known to or should have been discovered by a reasonably prudent purchaser; the law of obligations provides no remedy to such a buyer.

Continuing its analysis of the applicability of the law of obligations to questions of property law, the Court examined the different classes of obligations: those that are strictly personal and whose performance may only be enforced by the obligee, those that are heritable or enforceable by successors of the obligee or against successors of the obligor, and those that are real or duties which are correlative to a real right. The Court focused on real obligations, pointing out that “a real obligation does not exist in the absence of a real right,” and that they both attach to a thing. This is in contrast to personal rights, which are defined as the legal rights one person has against another to demand the performance of an obligation. This was an important distinction in the Court’s analysis. The Court noted that in contrast to a real right, “which can be asserted against the world,” personal rights are effective only between the parties. These were the key principles of obligations law as applied to

questions of property law, which were at issue in this case, specifically that: 1) real rights and real obligations pass to a subsequent purchaser of a thing sold without stipulation to that effect; and by contrast, 2) personal rights may not be asserted by another in the absence of assignment or subrogation.

Development of the Subsequent Purchaser Doctrine – Jurisprudential History

The Court next undertook a comprehensive examination and analysis of the cases which have shaped the development of the “subsequent purchaser doctrine.” In the first case, the Court examined its 1851 opinion in *Clark v. J.L. Warner Co., et al.*, 6 La. Ann. 408 (1851). In *Clark*, the purchaser of certain property had sued the owner of the adjoining property for damages which were inflicted prior to the Plaintiff’s purchase. The Court held that, with respect to damage inflicted before purchase, general tort principles required that each of the previous owners of the damaged property had a right to recover only for the property damage that occurred while the property belonged to each specific owner. The Court described those rights as personal property. The Court found that this personal right was not transferred to the Plaintiff in *Clark* and, as such, he did not have the right to assert a claim for damages that occurred before he acquired the property.

In the instant case, the Plaintiff, Eagle Pipe, pointed out, and the appellate court agreed on rehearing, that certain language in the 1851 *Clark* opinion supported its argument that it acquired a right of action in this case. Eagle Pipe argued that the language in question, referring to the party that suffered the damage and the reduced purchase price, supported its assertion that it was the only party to suffer damage in this case because the previous owners were not obligated to accept a reduced purchase price for the apparently damaged

property. That assertion, Eagle Pipe argued, in conjunction with the remedies provided by C.C. art 2315 relative to damaged parties, gave Eagle Pipe a right of action to sue for damages in this case. The Supreme Court disagreed, pointing out that “[t]he language in *Clark*, understood in context and giving effect to subsequent portions of the opinion, as well as principles of property law and obligations law, shows that such an interpretation is unsound.” The



Court’s analysis in *Clark* as well as the present case concluded that the principles of Louisiana law provide that when property is damaged through another’s actions, a personal right to demand repair arises and rests with the owner of the damaged property against the tortfeasor. As the Court stated, “[t]his personal right of the property owner arises because his real rights in the ownership of the property have been disturbed—his use, enjoyment or disposal of the property” and that personal right must be assigned or subrogated if it is to pass to the purchaser with the sale. Without such assignment or subrogation, that personal right remains with the purchaser despite the fact that he or she no longer owns the property.

To further examine the development of the subsequent purchaser doctrine, the Supreme Court undertook an extensive review of several other early cases which more fully described and which

ultimately provided the framework for the modern interpretation of the rule. These cases included *Payne v. James*, 42 La. Ann. 230, 234, 7 So. 457, 458 (1890); *Matthews v. Alsworth*, 45 La. Ann. 465, 12 So. 518 (1893); *Bradford v. Richard*, 46 La. Ann. 1530, 16 So. 487 (1894); *McCutchen v. Texas & P.Ry.Co.*, 118 La. 436, 43 So. 42 (1907); *Taylor v. New Orleans Terminal Co.*, 126 La. 420, 52 So. 562 (1910), and *Gumbel v. New Orleans Terminal Co.*, 197 La. 439, 1 So.2d 686 (1941).

Prados v. South Central Bell

The Court next undertook an examination and analysis of *Prados v. South Central Bell Tel. Co.*, 329 So.2d 744 (1975). The *Prados* case involved a tract of property on which the Defendant, South Central Bell, through a series of leases, had been granted the right to construct and subsequently remove various improvements on the lessor's property. At the time, upon expiration of a lease, lessees were required to return the leased property to its owner in its original condition. Upon expiration of its lease, South Central Bell did not remove the improvements it had made to the lessor's property and the then owner/lessor made no request that they do so. Shortly afterwards, the property was sold to a new owner who later demanded that Bell remove the improvements. Bell refused and the new owner had the improvements removed at his own cost. He filed suit against Bell shortly thereafter seeking recovery of the money he had paid to remove the improvements and restore the property to its original condition.

The trial court and court of appeal both held in favor of the new owner finding that he had a right of recovery against Bell for the cost of removing the improvements and restoring the property to its pre-lease condition. The appellate court re-examined its findings and found that, in error, it had considered the matter as though the sale of the property had occurred during the term of the lease,

not following expiration of the lease. As a result, the appellate court determined that "the question of liability must be resolved in the light of the rules governing the assignment and subrogation of rights." Specifically, the *Prados* court determined that it first needed to determine whether the previous owner's rights, which had arisen from Bell's obligations under the lease, were personal rather than real. Secondly, the Court recognized that it needed to determine whether the former owner/lessor had expressly assigned or subrogated his personal right to the new owner. The *Prados* court quickly determined that the previous owner's rights were personal in nature. The analysis next focused on whether those rights had been assigned or subrogated to the new owner. The act of sale was then examined and found to lack any express (or tacit) assignment to the new owner of the seller's personal right to sue his former lessee, Bell, for damages. That right was not transferred to the new owner in the act of sale.

As the Supreme Court pointed out in the present case, the *Prados* court could have concluded its analysis at that point but chose instead to discuss the issue of accessory rights, specifically whether a purchaser is presumed to buy the accessory rights to the property purchased while not obtaining the personal rights of the seller which had been acquired before the sale in the absence of an express subrogation. The *Eagle Pipe* court undertook its analysis of accessory rights after both the Plaintiff and appellate court on rehearing interpreted specific language in the *Prados* case as effectively stating that the subsequent purchaser doctrine applies only when damage is apparent and when a purchaser has been afforded the opportunity to negotiate a lower sales price due to the damage present. Addressing accessory rights and referring to the *Matthews* case, the *Prados* court stated: "The general principle, we think, is that a buyer is presumed to know the overt

condition of the property and to take that condition into account in agreeing to a sales price.”

In the present case, the Court found that both Eagle Pipe and the appellate court on rehearing had misinterpreted that statement. According to the Court herein, the *Prados* statement relied upon by Eagle Pipe and the appellate court on rehearing was “merely a part of the court’s discussion of accessory rights in a sale of property under an existing lease, the subject matter of discussion.” After examining the issue of accessory rights, the *Prados* court reaffirmed that the personal rights belonging to the previous owner which had arisen under the lease were not transferred to the new owner upon his purchase of the property.



Post-Prados Jurisprudence

The Court next undertook a review of three cases it had decided in the wake of *Prados* including: *St. Jude Medical Office Bldg, Ltd. Partnership v. City Glass and Mirror, Inc.*, 619 So. 2d 529 (1993), *Hopewell, inc. v. Mobil Oil Co.*, 2000-3280 (La. 2/9/01), 784 So. 2d 653 and *Marin v. Exxon Mobil Corp.*, 2009-2368 (La. 10/19/10), 48 So. 3d 234.

In *St. Jude*, the Supreme Court effectively reaffirmed the general rule that a subsequent purchaser cannot recover from a third party for property damage inflicted prior to the sale. In that

case, a property owner/mortgagor filed suit against its contractor and others for alleged construction defects. The owner subsequently defaulted on its mortgage and the mortgagee ultimately seized the property at issue. After seizing the property, the mortgagee purchased the property at a judicial sale and petitioned to intervene in the previous owner’s suit against the contractors as the new owner. The new owner relied on the Supreme Court’s opinion in *Aizpura v. Crane Pool Co., Inc.* 449 So. 2d 471 (La. 1984), successfully arguing in the lower courts that it was subrogated to the implied warranty of materials and workmanship in a building contract as a subsequent purchaser and was allowed to enforce a contract made by a previous owner. Upon review, the Supreme Court held that the new owner’s authority was based on a law that had since been repealed. The underlying obligation from the original contracts was found to be a personal right in the property that was not transferred to the new owner when it seized and subsequently purchased the property at judicial sale.

The Court next looked at the *Hopewell* case, which involved a purchase of property that had allegedly been damaged by oil and gas operations previously conducted on the property. In evaluating that decision, the Court in this case addressed the fact that it had been cited as authority by both the lower courts and the Court of Appeal in this case for the proposition that *Prados* was limited to “actions for damages by a subsequent purchaser against a former lessee for damages arising out of violations of a lease, and where the damage to the property is apparent.”

In *Hopewell*, the subsequent purchaser/Plaintiff filed suit against Mobil and the previous owners seeking damages. Mobil filed an exception of no right of action arguing that the right to recover for any alleged damage was a personal right belonging to the owners of the property when the damage

occurred and that the right was not transferred when the property was sold to Hopewell. The trial court denied Mobil's exception, but the appellate court reversed, specifically finding that the Supreme Court's decision in *Prados* was controlling. The Supreme Court granted writs and issued a short *per curiam* opinion reversing the appellate court and reinstating the trial court's denial of the Defendants' exception of no right of action.

The Court evaluated the lower courts' reliance on *Hopewell* and concluded that the lower courts had misinterpreted "the very limited nature of the *Hopewell* ruling due, admittedly, to the abbreviated nature of the *per curiam*." According to the Court, "*Hopewell* was never intended to repudiate the central holding in *Prados*, or to limit that holding to damage claims against former lessees or where the damage to property is apparent."

Finally, the Court examined its holding in the *Marin* case in which it considered the same question presented in this case, regarding "whether a subsequent purchaser has the right to sue for property damages that occurred before he purchased the property, particularly where the damage was not overt." Because the right to sue in that case had prescribed, however, the *Marin* court never considered the issue. As a result, writs were granted in the present case to consider the question once and for all.

Examination and Analyses

Following its evaluation of the general principles of obligations law, their applicability to questions of property law and the jurisprudential development of the subsequent purchaser doctrine, the Court undertook an analysis of the law as it affects the issues raised in *Eagle Pipe* and concluded that the subsequent purchaser doctrine applies not only to instances where the damage to property is apparent but also to situations where the damage is

not readily apparent. Echoing its prior decisions on the issue, the Court again held that the property owner at the time damages occur enjoys a personal right of action against the tortfeasor for disturbing his real right in the property.

When the damage is apparent, the personal right to sue for those damages belongs to the owner of the property at the time the right arises. That personal right resides with the property owner both during his ownership of the property and following his disposal of the property, "as it is assumed the apparent damage would result in a loss of value to the property which would be reflected in the sale price."

The Court held that, where the damage is not readily apparent and the property is later sold, the law provides the subsequent purchaser has the right to seek rescission of the sale or a reduction in the sale price. Echoing its decision in *Clark*, the Court stated that where the damage to property is apparent, the law does not provide the subsequent purchaser the chance to profit from the damaged property by allowing him to both negotiate a low purchase price and obtain the right to seek damages from the tortfeasor(s) responsible for the damage. The Court found the same to be true with the sale of property with damage that is not apparent. The law does not provide the subsequent purchaser with both the right to rescind the sale or negotiate a reduction of the sale price and the right to sue for the damage inflicted on the property. The Court stated, "[i]nstead, whether damage to the property is apparent or not, the personal nature of the right of the landowner at that time does not change, and remains with the landowner, unless the right is explicitly assigned or subrogated to another."

Finally, cognizant of potential discovery and prescription problems, which might arise in certain

factual situations under its analysis of these issues, the Court noted that the rules governing those procedural mechanisms are legislative in nature and that it could not supply a right of action through jurisprudence in the absence of legislative intent to provide such rights. Likewise, the Court addressed the apparent criticisms of the Louisiana Department of Environmental Quality's remedial action procedures and stated that those matters too are best addressed by the legislature and not by jurisprudence.

Review of the Court of Appeal Opinion on Rehearing

The Court next turned to an analysis of the appellate court's opinion on rehearing. The Court pointed out that on original hearing, the appellate court cited the general rule for its holding that Eagle Pipe, as a subsequent purchaser of the damaged property, had no right of action under tort principles and that the act of sale did not include an express assignment of the previous owners' personal right to sue for the damage. Furthermore, the Court noted that, on original hearing, the appellate court had correctly interpreted *Hopewell*.

On rehearing, the appellate court vacated its opinion on original hearing and rendered a new opinion, the reasoning for which the Supreme Court characterized as "fundamentally unsound." The Court highlighted three of the appellate court's findings which it found were flawed, including:

Interpretation of the Brief *per curiam* in *Hopewell*:
The appellate court on rehearing incorrectly found that *Hopewell* changed the law by limiting *Prados* to fact situations where subsequent purchasers file actions against former lessees arising out of terminated leases. Additionally, the court of appeal incorrectly relied on the "general principle" as discussed in *Prados* relative to accessory rights, as authority to find that the subsequent purchaser

doctrine did not apply to situations where the damage to property was not readily apparent at the time of sale;



Focus on the Concept of Injury as Opposed to an Analysis under the Principles of Louisiana Property Law: Additionally, the appellate court failed to thoroughly read the Supreme Court's holding in *Clark*, which made clear that all succeeding owners of damaged property had a right of action to sue for those damages that occurred while he/she owned the property; that those rights were personal in nature as opposed to real and that those rights remained with each owner unless assigned; and finally,

Confusion of the Right to Bring an Action with a Cause of Action: Among its findings on rehearing, the appellate court held that the manifestation of damages caused by the Defendants constituted "an injury giving rise to a legitimate cause of action..." when the issue before the Court was whether the Plaintiff had a right to bring suit for the damages inflicted on the property prior to its acquisition of the property.

Plaintiff's Allegations: Tort Claims and Contract Claims

The Court next turned its attention to whether Eagle Pipe belonged to the class of persons to

whom the law grants the causes of action alleged in its Petition for Damages. In making that determination, the Court noted that the causes of action asserted by Eagle Pipe fell into two categories: tort claims and contract claims.

Tort Claims

Eagle Pipe argued that it had a right of action based on its status as the injured owner of property damaged by the Defendants' operations. Referring to Eagle Pipe's assertions that the distinction between real and personal rights is irrelevant to its right of action in this case, the Court concluded that its analysis of the issue revealed that the "distinction is at the very core of Louisiana property laws which resolve this dispute." The Court again repeated what its earlier opinions on the issue had stated, that an injury to property must be understood as damage to real rights in the property and any tortfeasor who causes damage to a real right in property owes an obligation to the owner of that right. "This relationship arises as a matter of law and provides to the owner of the real right a personal right to sue the tortfeasor for damages." The Court noted again that in the absence of an assignment or subrogation of that personal right the subsequent purchaser cannot recover from third parties for damage inflicted on the property prior to the sale. As such, the Court held that Eagle Pipe could assert no right of action for any damages inflicted on the property prior to its acquisition of the property.

The Court next addressed Eagle Pipe's argument that it was asserting its own right of action for the property damage to the extent the damage at issue was continuing. It referred to its 1999 holding in *Crump v. Sabine River Authority*, 1998-2326, p. 7, (La. 6/29/99), 737 So. 2d at 728, which states that a continuing tort requires the operating cause of the damage or injury be continuous and one which results in continuous damages. Citing its decision in

Hogg v. Chevron USA, Inc., 2009-2632, p. 16 (La. 7/6/10), 45 So. 3d 991, 1003, the Court found that the operating cause of the damages in the instant matter was the tender of contaminated pipe and other oilfield equipment to the former property owners' lessee, Union Pipe. Eagle Pipe made no allegations in its Petition for Damages that there have been continuing or ongoing unlawful acts. As the Court pointed out, the alleged tortuous acts ceased in 1988 and, citing *Crump*, the Court found that the injury claimed was simply the continuing ill effects from the original torts - the delivery of contaminated pipe and equipment to the property. The subsequent purchaser's discovery of the continuing ill effects did not "give rise to a new discrete right of action in tort."

Likewise, the Court cited its conclusion in *McCutcheon*, in finding that the law does not extend any right of action to the Plaintiff under trespass because entry was made onto the property with the permission of the owner at the time the injury occurred notwithstanding the fact that any right to sue for trespass would lie with that previous owner, not the subsequent purchaser.



Contract Claims

Upon determining that Eagle Pipe had no right to assert a claim for property damage that occurred prior to its purchase of the property in the absence

of an assignment or subrogation, the Court next examined the act of sale to determine if, in fact, the previous owners expressly assigned their right to sue for damages to Eagle Pipe. Upon review of the act of sale, the Court determined that the pertinent portions of the contract were substantially similar to those found at issue in *Prados*. The portions of the sales contract between Eagle Pipe and the previous owners were found to contain no express assignment or subrogation of the sellers' personal rights to sue for damages. As such, the Court held that Eagle Pipe had no right of action based on an assignment of the previous owners' personal rights.

Finally, Eagle Pipe had argued that Union Pipe, the previous owners' tenant, and the oil company Defendants entered into contracts, obligations or agreements that provided for recovery of damages inflicted on the property. However, the Court held that these alleged contracts could not create any real obligations correlative and incidental to any real rights that transferred with the property because Union Pipe, as a lessee of the property, possessed no real rights in the property. Those rights were personal and belonged to the previous owners.

Conclusion

Based upon its analysis of the principles of Louisiana obligations law as they pertain to questions of property law and based upon its review of the jurisprudence used to develop the subsequent purchaser doctrine, the Louisiana Supreme Court determined that Eagle Pipe was not in the class of persons to whom the law grants the causes of action alleged in its Petition. The Court found that the right of action asserted by Eagle Pipe was a personal right attached to real obligations that were not transferred with the damaged property when it was sold to Eagle Pipe. Additionally, the Court determined that those personal rights belonging to the previous owners were not assigned to Eagle

Pipe in the act of sale and, as such, those rights remained with the previous owners.

In so finding, the Court noted that the law has provided Eagle Pipe with certain remedies. Those include: 1) a contractual remedy - the right to sue for rescission of the sale or a reduction of the purchase price; and 2) the right to seek remediation - a legal remedy provided by the legislature. In addressing these remedies provided by the law, the Court noted that the law is "not required to provide Eagle Pipe with every possible remedy."

Based upon its conclusions, the Court reversed the Court of Appeal's ruling on rehearing and reinstated its ruling on original hearing that had affirmed the trial court's judgment granting the Defendants' exceptions of no right of action.

On November 8, 2011, Plaintiff applied for rehearing to the Supreme Court, which was denied on January 13, 2012.

TOXIC TORT UPDATES

By Kevin J. Webb and
Shannon C. Burr



Legislation has been introduced this year in an effort to address problems often faced by the defense in toxic tort litigation, especially with matters pertaining to civil procedure. Described below is the committee hearing on the issue and the studies currently being undertaken to address the

problem faced by defendants. Because these issues are important to us and to our clients, we will continue to monitor these efforts and provide updates on their status.

Government Accountability Office Releases Findings about Administration of Asbestos Bankruptcy Trusts



Government Accountability Office Finds Information Regarding Individual Claimants Is Not Available to the Public without Subpoena or Claimant Consent

As we reported in our Fall 2011 Environmental & Toxic Tort Update, the United States House Judiciary Committee requested in April, 2010 that the Government Accountability Office (“GAO”) conduct a study of Asbestos Trusts formed pursuant

to Chapter 11, §524(g) of the United States Bankruptcy Code. These trusts, established to pay claims for exposure to asbestos in the wake of bankruptcies filed by asbestos companies, have been criticized by asbestos defendants for failing to disclose information about the claims they have paid. The GAO was asked to examine numerous aspects of the administration and payment of claims under the trusts as well as the availability of information to the public and outside parties. Since the publication of our Fall update, the GAO has released its study with the following offered as a summary of the findings.

Since 1988, about 60 trusts, with approximately \$36.8 billion in total assets, have been established to pay claims arising out of exposure to asbestos. These trusts paid approximately \$17.5 billion for roughly 3.3 million claims from 1988 through 2010, with \$3 billion paid to 475,000 claimants in 2010. The GAO analyzed the trust agreements for 44 of the 60 trusts and analyzed the distribution procedures for 52 of the 60 trusts as well as financial reports for 47 of the trusts. In addition, U.S. Bankruptcy Court judges, trustees and general counsel or directors for 11 of the trusts were interviewed by the GAO in conducting its study. The report shows that the trusts closely guard information about individual claimants. Of the 52 trusts whose distribution procedures were studied, 64% (33 trusts) include statements in the distribution procedures that protect the claimants’ confidentiality, often providing that the claimants’ individual information will only be disclosed pursuant to a valid subpoena or with the permission of the claimant. While most of the trusts publish information about the total number of claims received and paid for annual public review, information such as an individual’s exposure to asbestos is not available to the public. The GAO reviewed annual financial reports for 2009 and 2010 for 47 trusts. Only one of these 47 trusts

included claimant names and the amounts paid to individual claimants in its report.

A proposal to reform the system is currently before the Judicial Conference of the United States, but has not yet been adopted. We will continue to keep you updated as this issue develops in the coming months.

LABOR AND EMPLOYMENT LAW CORNER

By Gerald "Jerry" J. Huffman, Jr.

While most of the laws and regulations in the environmental and toxic substance arena focus on business obligations, an employer's ability to comply with regulatory and legal mandates often depends on the actions of its employees. In some situations, employers are required to ensure that employees perform their jobs in an environmentally safe manner. In other contexts, employers must set up protocols and procedures to periodically test the health conditions of employees who deal with hazardous substances or who are subject to stressful environments, such as areas with high noise levels or concentrations of particular substances. Most of the federal and state statutes also contain provisions protecting employees who refuse to do their jobs in violation of the law, report a violation internally or who provide such information to the government agencies responsible for enforcing the law. In this section, we will summarize recent developments in such labor and employment law matters of interest to the environmental community.



NLRB Marches on to Increase Union Representation in the Private Workforce

As reported in our last update, the members comprising a majority of the National Labor Relations Board ("Board") (all appointed by President Obama) have sought to increase the percentage of private sector employees represented by unions. First, the Board has ordered that, effective January 31, 2012, all employers subject to the National Labor Relations Act ("Act") (which is almost every American business) must post a specified notice viewable by all employees advising them of their rights under the Act to organize and form unions. Second, the new Board majority is in the process of promulgating new regulations that will tilt the playing field more in favor of unions in organizing campaigns and union representation elections.

On December 21, 2011, by a 2-1 vote, the Board approved a final rule adopting several controversial amendments to its procedures for conducting representation elections. Currently, Board rules specify that a union can file a petition for the Board to conduct an election if thirty (30) percent of the employees in the group, or "unit," to be represented have expressed a desire for union representation. Typically, unions only file such petitions when they have at least fifty (50) percent support. In the time between receipt of the petition and the election, employers and unions engage in a campaign to secure the unit employees' votes. Unions have long asserted that employer efforts to win representation elections would be impaired if the time between the filing of the petition and the election were shortened.

Prior to an election being held, however, the employer can challenge the description of the unit of employees to be represented on the basis,

among other things, that it is over or under inclusive of all employees with a similar “community of interest.” In such cases, an administrative hearing is conducted, the parties file briefs and a decision (which can be appealed to the full Board) is issued by a Board administrative law judge. Once this issue is settled, the Board schedules an election. While this is going on, of course, the employer can continue his campaign to convince employees to vote “No,” i.e. against union recognition.

The New Rules:

- Restrict pre-election hearings to resolving only whether a “question of representation” exists (i.e., whether a petition has been filed in a unit appropriate for collective bargaining). In other words, with limited exceptions, disputes concerning voter eligibility (e.g., whether an employee is an ineligible supervisor) would be resolved, if necessary, after an election.
- Give a hearing officer authority to limit evidence introduced at a pre-election hearing to evidence that is relevant to a genuine issue of material fact on whether a question of representation exists.
- Empower hearing officers to determine if and when a party may file a post-hearing brief.
- Eliminate the right of parties, prior to an election, to seek Board review of a regional director's pre-election rulings and require that such review be sought in a post-election request. With the elimination of that right of appeal, language would also be removed from the rules providing that regional directors normally should not schedule an election until at least 25 days after directing an election to

provide the Board time to rule on a request for review.

- Clarify the standard for seeking special permission to appeal to the Board (i.e., requiring a showing of extraordinary circumstances on an issue that would otherwise evade review).
- Make Board review of a regional director's or judge's resolution of post-election disputes discretionary after both stipulated and directed elections.

The purpose of all of these rule changes is stated to be the elimination of unnecessary litigation before a representation election can be held. In reality, the practical effect would be to allow an organizing union more preference with respect to the employees it chooses to represent and also greatly shorten the time between the filing of the petition and the holding of the election. For example, under a recent Board decision issued by the same majority, it is clear that the Board will permit the establishment of smaller units -- such as units that consist of only one department, or perhaps even one job classification - rather than the traditional preference for “wall to wall” units. So, if a union can find a small group of alienated employees within a company, the new proposed rules will make it easier for it to represent them, and them only, in collective bargaining.

These new rules, just as in the case of the required notice posting, are sure to be challenged in court. Further, on November 30, 2011, the House of Representatives, voted 235-188 in favor of the Workforce Democracy and Fairness Act (“Fairness Act”), which is designed to stifle the union election rule changes proposed by the Board. While the Fairness Act is highly unlikely to be enacted as long as Democrats control the Senate, the ability of a

union to gain a foothold through a small unit that is difficult to challenge under the new rules is something all employers need to understand.

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