The Impact of SB 667 of 2014:
More Regulatory Cleanups and Less Litigation

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Senate Bill 667 of the 2014 Regular Session of the Louisiana Legislature by Senate Robert Adley ("SB 667")[1] was remarkable not only for what it accomplished in legacy litigation reform, but also for how it was passed. The substance of SB 667 represents another step on the long road to evolve Act 312 of 2006,[2] which was spawned by the 2003 opinion in *Corbello v. Iowa Production*.[3] But the process of drafting and passing the bill differed from previous legislative battles over legacy reform, most of which ended in compromise language after a lengthy battle between the oil and gas industry and the landowner community at large.

Spearheaded by James Justiss of Justiss Oil Company and Roy Martin III of RoyOMartin, SB 667 was collaborative from the outset, with representatives from both the industry and the land owner community working toward the goal of reducing exploitive litigation and encouraging more cleanups, while preserving core landowner

[1] 2014 La. Sess. Law Serv. Act 400 (S.B. 667) (WEST).
[2] Act No. 312 of the 2006 Regular Session of the Louisiana Legislature, La. R.S. 30:29 *et seq*.
[3] 02-08 (La. 2/25/03), 850 So.2d 686, See, Loulan Pitre Jr., *Six Years Later: Louisiana Legacy Lawsuits since Act 312*, 1 LSU J. of Energy L. & Resources (2012).

rights.[4] To that end, SB 667 built on the "limited admission" process created in 2012 by incentivizing operators to make pretrial limited admissions of regulatory responsibility in exchange for a rebuttable presumption of correctness for the "feasible plan" approved or created by the Office of Conservation ("OOC"). In addition, SB 667 sought to clarify the law of damages for legacy claims by codifying exclusive damage categories.

Because care was taken to avoid overreach in the drafting of the original language of SB 667, there was little room for negotiating once the session began. As it turned out, the most contested issue was whether bill's damage provisions were procedural or substantive for purposes of the effective date.[5] Ultimately, legislators agreed that the bill merely codified the law of damages for legacy claims as interpreted from the jurisprudence over the past seven years.[6] In effect, SB 667 sought to reduce the exploitation of claims by eliminating statutory ambiguity, which too often perpetuates litigation and drives up the cost of settlement.

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[4] SB 667 was principally sponsored and advocated by the Louisiana Oil and Gas Association, the Louisiana Mid-Continental Oil and Gas Association, the Louisiana Association of Business and Industry, Justiss Oil Company, RoyOMartin, the Louisiana Landowner Association, and the Louisiana Forestry Association, although many other stakeholders contributed along the way.

[5] The bill tracked the language of Act 312 providing for an effective date that reached all but a limited pool of pending cases that had progressed to an order setting a trial date. Section 3 of Act 400 provides: "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."

[6] See, *Marin V. ExxonMobil Corp.*, 09-2368 (La. 10/19/10), 48 So.3d 234, and *Vermillion Parish School Board v. LL&E Co.*, 12-0884 (La. 1/30/13), 110 So.3d 1038.

Presumption and Jury Charge Following Limited Admission

Under the original version of Act 312, a case was not referred to the OOC for determining a feasible plan until there was a finding of responsibility for environmental damage, which required either an admission by a defendant or a decision on the merits. And even then, the plan "approved or structured" by the OOC was entitled to no special weight when the matter was returned to the trial court for final consideration. Not surprisingly, few cases reached the OOC.

In 2012, this process was changed to allow a defendant in a legacy lawsuit to make a "limited admission" of regulatory responsibility prior to trial, which triggers a pretrial review by the OOC to determine the most feasible plan to achieve applicable regulatory standards.[7] In exchange for the admission, the defendant receives the benefit of a feasible plan to use at trial. The goal was to encourage defendants to move forward with regulatory cleanups during the litigation. Unfortunately, this process proved to be largely unused due to concern that a jury may interpret a limited admission for regulatory responsibility as a full admission for all alleged damages. This concern was compounded by language in the 2013 *LL&E* decision concerning the scope of damages for breach of the implied obligation of a lessee.

SB 667 sought to address the concern plaguing the limited admission process by amending both 30:29 and Article 1563 to provide for "a rebuttable presumption that the

[7] La. C.C.P. art. 1563(A)-(2); La. R.S. 30:29C(1).

plan approved or structured by" the OCC following a limited admission "shall be the most feasible plan to evaluate or remediate to applicable regulatory standards the environmental damage for which responsibility is admitted." Further, if requested by either party, the trial court is required to instruct the jury regarding this presumption. Hence, SB 667 incentivizes a defendant to a make limited admission without fear that such action will be misused in the litigation. As a practical matter, earlier resolution of the regulatory issues and regulatory cleanups will probably facilitate more reasonable settlement of claims that should be settled and more clearly define the battle lines for those that must be tried. Either way, the expense of litigation will be reduced.

Further building on the 2012 legislation, SB 667 amended the preliminary dismissal process created in 2012[8] to allow a successful defendant to recover attorney fees and costs. This provision was intended to discourage plaintiffs from filing "shotgun" claims and forcing companies with no real stake in the case from having to incur the costs of obtaining a preliminary dismissal.

Clarifying the Scope of Damages

Much of the litigation over legacy lawsuits has centered on the issue of whether Act 312 was intended to change the scope of landowner remedies. This issue revolved around the "implied obligation" imposed by Article 122 of the Mineral Code. La. R.S.

[8] La. R.S. 30:29B(6).

31:122. Well prior to Act 312, the law was settled that a lessee must return property to the lessor in its original condition less "ordinary wear and tear," unless the lease provides otherwise. In addition, the lessee has an implied obligation to refrain from acting unreasonably or excessively and is responsible for damage caused by such conduct.[9]

Plaintiffs argued that language of Act 312 reserving the right of an owner of land to assert "private claims" preserved claims for excess remediation based on breach of the implied obligation.[10] Defendants countered that Act 312 limited remediation damages to the cost of the feasible plan (regulatory) plus any excess cleanup that may be required by an express contractual provision; in other words, that Act 312 effectively eliminated the "implied obligation" theory in legacy lawsuits.

In 2010 the Louisiana Supreme Court squarely addressed the issue in *Marin v. ExxonMobil*. In an opinion written by Justice Victory, the court held that the implied obligation theory continues to be a viable cause of action, but is not itself a standard for excess remediation. According to *Marin,* the plaintiff carries the burden of proving that additional damages were caused by unreasonable and excessive operations and that to be independently compensable, such damage must be in addition to the harm remedied

[9] See *Terrebonne Parish School Board v. Castex Energy, Inc.*, 04-0968 (La. 1/19/05), 893 So.2d 798; La. C.C. articles 2623, 2686, 2687, 2692.
[10] La. R.S. 30:29H.

by the feasible plan cleanup. According to the court:

> In our view, the duty to remediate oilfield containment exists under the prudent operator standard of the Mineral Code by virtue of our holding in *Castex* and it certainly exists under the Civil Code. The holding in *Castex* merely recognized that in absence of unreasonableness or excessiveness, the lessee has the duty to restore the surface minus normal wear and tear. Where the lessee has operated unreasonably or excessively, as in this case, the lessee has additional obligations, e.g., the obligation to correct the damage due to the unreasonable or excessive operations.[11]

Although that obligation was breached in *Marin*, the court found that the award for damages to achieve the feasible plan remedied all harm proven by the plaintiff to have been caused by unreasonable and excessive operations. Stated differently, breach of the implied obligation did not result in an award for additional damages over and above the regulatory cleanup.

This issue was obliquely re-visited in the *LL&E* decision in 2013 in the context of a summary judgment review. Citing *Marin*, the court reiterated that Act 312 does not restrict private claims. However, on the issue of the implied obligations, the court described its holding in *Castex* without mention of a causation standard: "After reviewing the jurisprudence and the applicable provisions of the Civil Code, we (in *Castex*) held that, 'in the absence of an express lease provision, Mineral Code article 122 does not impose an implied duty to restore the surface to its original, pre-lease condition absent proof that the lessee has exercised his rights under the lease

[11] 48 So.3d at 260.

unreasonably or excessively."[12] Unlike *Marin*, which made clear that an award of damages for breach of the implied obligation required proof that such conduct caused environmental harm distinct from the harm remedied by the feasible plan cleanup, the language in *LL&E* essentially returned the battle line to its pre-*Marin* position as plaintiffs pointed to *LL&E* to support demands for excess remediation damages based solely on allegations of unreasonable and excessive operations. This dilemma was the target of SB 667's reform.

SB 667 added subsection M to R.S. 30:29, making clear that in a legacy lawsuit governed under Act 312 "damages may be awarded only for the following:

> (1) The cost of funding the remediation 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.
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> (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.
>
> The provisions of this Subsection 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 under this Section."

[12] 110 So.3d at 1047. Justice Victory dissented from what he perceived as the unnecessary use of a summary judgment review to blur the bright lines drawn in *Marin*.

La. R.S. 30:29M.

This provision effectively codifies the Supreme Court's decision in *Marin*. Its passage closes a long and expensive chapter in the history of legacy litigation and moves the debate, once and for all, beyond the question of how Act 312 harmonizes with the provisions of the Civil Code and the Mineral Code relating to damages. No doubt, there will be much litigation concerning the application of specific facts to the provisions of R.S. 30:29M. But by eliminating a core legal contest in all legacy lawsuits and by providing clear standards for remedies, SB 667 serves its goal of reducing exploitive claims, while preserving core landowner rights.

In a final piece of form that bears upon the issue of damages, SB 667 defined the term "contamination" within Act 312 as "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." This definition was needed because the existing definition of "environmental damage" relied upon the term "contamination," which itself was undefined.[13] Noticeably, this definition does not include *unusable*

[13] La. R.S. 30:29I defines "Environmental damage" as "any actual or potential impact, damage, or injury to environmental media caused by contamination resulting …."

groundwater, which is not governed by the Groundwater Act.[14] Thus, the definition of contamination effectively removes unusable groundwater from the definition of environmental damage. As pointed out by representatives of OOC, this definition is consistent with Order 29B. Further, because OOC is required to approve or structure a feasible plan to comply with all "relevant and applicable standards and regulations promulgated by a state agency,"[15] remediation will be accomplished to achieve all applicable DEQ standards relating to groundwater. Hence, SB 667's definition of contamination will simply prevent *excess* remediation claims based on alleged environmental harm to unusable groundwater. Although the viability of such a claim was doubtful in any event, as noted in *Marin,* by defining contamination, SB 667 furthers the goal of reducing litigation by clarifying the scope of Act 312.

[14] As explained in *Marin*: "The Groundwater Act applies to 'usable groundwater.' La. R.S. 30:2015.1 J(1). In order to qualify as usable groundwater, the groundwater must be classified as a Class II aquifer. 'Usable' groundwater is defined as a Groundwater Classification I (an aquifer that is a primary drinking water source or is directly connected with a drinking water source) or a Groundwater Classification II (an aquifer that is an agricultural supply, domestic supply, or any other supply source). La. R.S. 30:2015.1 J(1); La. Dep't of Envtl. Quality RECAP Regulations § 2.10 at 49–51 (Oct. 20, 2003). A Groundwater Classification III aquifer is an aquifer with a maximum sustainable yield of less than 800 gallons per day and is considered non-usable." 48 So.3d at 261.

[15] La. R.S. 30:29I(4).