"Cleaning Up – The Right Way"

"But you said you could get me a million dollars!" Real words uttered by a real plaintiff in a real lawsuit, upon hearing from her lawyer about the settlement just reached with the defendant oil company for something less than the amount she had in mind. The exclamation was made in a courtroom hall within earshot of those representing the oil company.

Hence, the problem. When does a claim for environmental damage arising from oil-and-gas operations metamorphasize from a complaint about damage to property sought to be repaired into an opportunity to recover a significant amount of money that will never be used on the allegedly injured property?

The issue presented and the resulting discussion in this paper have equal application to environmental claims involving other industries, but this paper deals exclusively with these matters as they arise in the oil-and-gas industry.

The oil-and-gas industry has enjoyed a long and prolific history in Texas, and the role it has played in not only the state's economy, but also in the nation's economy, cannot be overstated. The early days of any one of the dozens of fields discovered in Texas over the past century were full of speculation, excitement, and economic booms that sometimes lasted and sometimes didn't, and ultimately brought unimaginable wealth to countless Texas families for generations.

The scenes of uncontrollable joy when a "gusher" came in from movies like *Giant* and television shows like *The Beverly Hillbillies* captured the social and economic views of that era, which spanned almost three-quarters of a century. Drilling for oil, striking oil, hitting a gusher, oil flowing on the ground, and drilling and production equipment everywhere were all not only acceptable, but quite desirable.

Then, along about the 1970s, there was a convergence of several significant factors that led to a different view of these long-familiar and long-desired circumstances. A sufficient separation between the mineral-interest owners and the surface-interest owners of a given tract of oil-producing property finally reached a point where the mineral owners exclusively enjoyed the benefit of past and present production, while the surface owners were left with the headaches and eyesores of abandoned equipment, scarred land, and less-than-pristine surroundings. Not surprisingly, these circumstances led to a modern wave of lawsuits by landowners, complaining of the cumulative damage caused by decades of production.

While well-intentioned and understandable in many instances, these lawsuits soon became more about the money that could be recovered than the property that could be remediated. Cycles of high-stakes, oilfield-pollution cases occurred in Oklahoma in the 1980s and 1990s; in the Permian Basin of West Texas in the 1990s; in Mississippi during the same time frame up until 2001; and in Louisiana during the same time frame through the present day.

In all of these instances, the concentration of litigation in any given area has typically been the result of individual lawyers, who were in pursuit of promoting this kind of complaint in particular. These cases, for the most part, have usually been resolved through settlement. As a result, much of the activity in this area of practice has occurred beneath the radar screen of reported decisions. Nevertheless, the observations and experiences gleaned from the prosecution, defense, settlement, and post-dismissal behavior of the parties in these cases have provided the basis on which to conclude that, while big money changed hands, little or no action was subsequently taken to address the property

damage that was the subject of the complaint.

In a way, it is not all that surprising and actually is just the current manifestation of a similar practice followed in the oilfield in earlier years. Prior to the modern era where society now places a greater value on environmental protection than industrial production, there were still blowouts, leaks, spills, and damage to property in the oilfield. The general response then, however, was for the oil-company representative to assess the damages caused to the landowner's property and give the landowner the option of repairing the damage or giving the landowner a check in the amount estimated to repair the problem. In other words, the landowner could either have the problem fixed or accept payment in lieu thereof. These payments were called "surface damages." Most of the time, the landowner chose cash; and, most of the time, the landowner never used the cash to fix the damage. The lease files of oil companies are overflowing with records of these surface-damage payments. The theory at the time was that it is the landowner's property, so it is also his decision. The problem developed, however, that all of those historical injuries over time became the basis for a much larger, more extensive lawsuit in later years because the problems that had been left unaddressed had oftentimes progressed into becoming more significant environmental issues. In retrospect, then, the environmental injuries from past events that had gone unaddressed because of a more attractive cash option, later became the basis for much larger lawsuits that were eventually settled for significant sums of money, again none of which was actually applied to repair the property.

Needless to say, having to endure yet a second generation of money spent – but not to fix the problem – has created great frustration among those companies that have found themselves named as the defendants in these lawsuits on property for which they had already paid damages once and from which they had been absent as an operator, oftentimes for decades.

The legal argument that reflects the oil companies' attempt to get a handle on this problem is known as the "primary jurisdiction" doctrine. The doctrine provides that, where different forums have potential jurisdiction over a complaint, one forum has "primary" jurisdiction over the other and should be shown deference. In the context of environmental complaints arising from oil-and-gas operations, that typically means that the choice is between the state district court and the state agency responsible for regulating the oil-and-gas industry or the state agency responsible for environmental protection.

In countless cases in which I have been involved over the years, this argument that the court case should be "stayed," pending an investigation and decision by the appropriate state agency, has been valiantly raised but almost without exception rejected by the courts. In many cases, part of the explanation for the courts' rejection of this defense has been due to the lack of clarity in a state's law that any forum has been given priority over this kind of complaint. Part of the explanation is also that every state has an "open courts" provision in its constitution, and judges are quite protective of this right for their citizens. And, quite frankly, many judges are reluctant to surrender jurisdiction over a matter to a state agency.

In very few instances, to my personal knowledge, have courts actually been willing to entertain the "primary jurisdiction" argument and concede even "concurrent" jurisdiction with a state agency. "Concurrent jurisdiction" means these complaints might be permitted to proceed in court at the same time that they are being investigated by the state agency. Not surprisingly, having one complaint proceed on two different fronts was not quite the scenario most oil companies considered

preferable; instead of having to defend against the lawsuit in court, an oil company would be defending against the complaint both in court and before the state agency.

In addition to the complication of having to defend against a complaint on two different fronts, an oil company would also have to confront the very real possibility of a double-recovery by the landowner against the oil company. Whether by settlement or a favorable judgment at trial, a defendant-oil company might have to pay a considerable amount of money in damages based on the cost of remediation and other types of damages and then also have to pay to implement remediation measures in response to orders by the state agency.

This dilemma repeated itself in case after case without any signs of relief. State law did not require a plaintiff-landowner to use any damages awarded to remediate his property. Typically, the cost to remediate the problems complained of greatly exceeded the value of the property and frequently was argued by plaintiffs' counsel to be in the hundreds of thousands, if not millions, of dollars. The lawyers for the landowners were compensated on a contingency-fee basis, so the larger the dollar figure in damages, the larger the payday for the lawyers. The bottom line was a situation that promoted transfers of large amounts of money but required no actual remediation of an environmental problem. And, then, arguments in favor of prioritizing the repair of environmental damage over the redistribution of wealth began to get traction.

Mississippi

The instrument of policy change in Mississippi came in the form of a lawsuit involving allegations of groundwater contamination and the presence of "NORM" ("naturally-occurring radioactive material").[1]

[1] *Chevron U.S.A., Inc. v. Alcus Smith and Kay Smith*, 844 So. 2d 1145 (Miss. 2002)

The case involved an elderly couple who owned a 55-acre tract in the Brookhaven oil field but who lived in Wisconsin. The couple alleged that decades of oilfield operations on and around their property had contaminated their soil and groundwater.

After a six-week trial, the jury returned a verdict for $2,349,275 in actual damages but was deadlocked on the punitive-damage claim. Both sides appealed various points of error. As in other past pollution cases, the defendant Chevron included a point of error asserting primary jurisdiction, but it was hardly the focus of the appeal.

Surprisingly, however, the Mississippi Supreme Court reversed the judgment based on the primary-jurisdiction argument. The Court observed that the state's current policy of not requiring a plaintiff to use the damages recovered for the environmental injury complained of was not doing anything to repair old oil fields. Consequently, in the *Alcus Smith* decision, the Mississippi Supreme Court clearly stated that the law would now require any aggrieved landowner to take his complaint to the Mississippi Oil & Gas Board and allow the state agency to investigate and remediate the problem first, before the landowner would then be able to file suit in district court.

The Court wrote:

> *The regulatory scheme promulgated by the Legislature and the Oil and Gas Board is designed to protect the citizens of Mississippi from pollution resulting from oil and gas drilling operations. Pollution resulting from operations like Chevron affects the entire population of Mississippi, and any citizen has an interest in seeing that violations of statutes and regulations are enforced. Thus, pollution clean up operations have been deemed the responsibility of*

the Oil and Gas Board. The Board possesses a specialized knowledge of the dangers presented by oil and gas exploration and drilling, and its collective expertise in such areas as the proper disposal methods for radioactive waste is the best asset available in developing an effective disposal plan for the NORM in the Brookhaven field. The Board is more suited than the average juror to understand the broad scope of the regulations and the factual scenarios presented by each case of environmental pollution.[2]

And then, almost as if the Court had finally experienced an epiphany on this point, the Court realized:

Since no court can order the plaintiffs in this case to expend the award on decontaminating the property, the outcome allowed by the trial court does nothing to protect the citizens of Mississippi from the dangers of NORM contamination. Nor will this Court allow a windfall to the plaintiffs who obviously have no intention of cleaning up their property since they have refused all such offers of cleanup.[3]

Interestingly, in a concurring opinion, the justice on the Court recognized as being perhaps the one most inclined to be sympathetic to landowners in this kind of case also rightly observed:

I agree that the Smiths have no obligation to remediate the property and that it would be economic folly for them to spend the $2.3 million award for restoration to increase the property value to $55,000. I also agree with the majority that the Smiths may be unjustly enriched if the general verdict is allowed to stand and they pocket the money awarded for damages since they have the option to pursue cleanup through the Board.[4]

Perhaps not so surprisingly to those of us who have practiced in this area for a while, the plaintiffs' lawyers did not like that decision, and that kind of lawsuit in Mississippi has now all but vanished.

Louisiana

Louisiana has been plagued with these cases for some time. But, unlike Mississippi, Louisiana appellate courts have actually exacerbated the problem.

In 2003, the Louisiana Supreme Court handed down a decision in *Corbello v. Iowa Production*,[5] which opened the floodgates of potentially significant liability for oil companies. Up until *Corbello*, Louisiana law on the measure of damages in property cases had remained, in general terms, diminished value – with the exception of the loaded language contained in the Court's 1993 decision in *Roman Catholic Church of Archdiocese of New Orleans v. Louisiana Gas Service Co.*, 618 So. 2d 874 (La. 1993), which provided the opportunity to recover beyond diminished value if there is a "reason personal to the owner" or there is a "reason to believe that the plaintiff will, in fact, make the repairs."[6]

Corbello removed the *Roman Catholic Church* condition from contract cases altogether. The surface lease between the plaintiff-landowner and defendant-oil companies provided that the lessee would "reasonably restore the premises as nearly as possible to their

[2] *Id.* at 1148
[3] *Id.*
[4] *Id.* at 1150
[5] *Corbello v. Iowa Production*, 850 So. 2d 686 (La. 2003)
[6] *Roman Catholic Church* at 879-880

present condition." The 320-acre tract had a market value of $108,000. At trial, the jury awarded $33 million to restore the property. The Louisiana Supreme Court affirmed the award, holding that "the damage award for a breach of contract obligation to reasonably restore property need not be tethered to the market value of the property."[7]

In 2001, a case alleging NORM contamination went to trial against Exxon in state district court in New Orleans.[8] The jury awarded $56 million in actual damages and an incredible $1 billion in punitive damages. This mind-boggling verdict was handed down, even though there was no allegation of death, disease, or physical injury; it was all because of alleged damage to real property. But even that was based on the "representation" that the really serious contamination was buried beneath the surface of the property. Although the Court of Appeals reduced the punitive-damage portion of the award to a mere $112 million, the result was still eye-popping and immediately spawned a prolific second-generation of related suits. Needless to say, the problems of an explosion in litigation and excessive jury awards were wreaking havoc among the oil-company members of the industrial core of the state's economy.

In response, the Louisiana state legislature has passed two laws designed to provide at least some relief for the substantial problems created by the recent caselaw.

In response to the *Corbello* decision and the inability to require the plaintiff to actually use the $33 million jury award to protect and remediate the affected groundwater, the Louisiana legislature enacted Act 1166 in 2003.[9] That statute requires that the Louisiana Department of Natural Resources (LDNR) and the Louisiana Department of Environmental Quality (LDEQ) be notified whenever any lawsuit includes a claim for damages relating to groundwater contamination. The objective is to involve the state agencies in any dispute involving groundwater contamination, so that they can participate in the review and approval of any remediation plan. The statute also requires that any damages awarded for the remediation of any groundwater contamination be placed in the court's registry and used only for that purpose.

In response to the seemingly endless increase in lawsuits filed against oil companies for the cumulative effects of historical pollution at what have come to be known as "legacy" sites, the Louisiana legislature enacted Act 312 in 2006.[10] Again, the objective of this legislation is to require any damages awarded in a lawsuit alleging environmental injury from oil-and-gas operations to be used for the actual remediation of that injury. Unlike Act 1166, Act 312 is not limited to groundwater contamination but encompasses "any actual or potential impact... caused by contamination resulting from activities associated with oilfield sites or exploration and production sites." La.R.S. 30:29(I)(1). Whenever a lawsuit including such a claim is filed, notice must also be provided to the LDNR and the Louisiana Attorney General's office. Any remediation plan must be submitted to, and reviewed by, the LDNR. Any money associated with the implementation of the plan must be deposited into the court's registry and can be used only for that purpose.

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[7] *Corbello* at 693.

[8] *Grefer v. Alpha Technical, et al.*, 901 So. 2d 1117 (La. Ct. App. 1995), *cert. denied* 925 So. 2d 1248 (La. 2006); 05-1670 ___ S.Ct.___, 2007 WL559870 (2/26/2007)

[9] Codified as La.R.S. 30:2015.1

[10] Codified as La.R.S. 30:29

Texas

In Texas, all has been generally quiet on the pollution-litigation front in recent years. But it could be that it is merely a calm between storms. In the late 1980s and 1990s, there was a spate of significant pollution cases involving larger ranches located in the Permian Basin of West Texas. Many of those cases settled for substantial amounts of money on the fear that a reported decision resulting from a trial and appeal could change state law for the worse.

The current Texas caselaw provides that the measure of damages in a case where property has been injured from pollution is limited to the diminution in value of the property caused by the injury.[11] So, in other words, if a landowner has a 1000-acre ranch worth $200/acre, even if the entire ranch has been rendered completely worthless, the most a landowner could recover under that category of damage would be $200,000.

But with the advances in remediation technology that have been made, even though remediation might technically be feasible, it still might cost many times more than the value of the property to implement that remediation.

As a result, these lawsuits alleged that the new measure of damages should be the cost of remediation because that is what would be required to make the plaintiff whole. Even though these cases were typically not tried and appealed, their settlements were almost always influenced by the knowledge and representation of remediation costs. Although that particular wave of litigation in Texas has subsided for the moment, with the level of activity on the upswing next door in Louisiana and the ever-present creative skills of the entrepreneurial plaintiff's lawyer, it is only a matter of time before the next wave hits.

In anticipation of the inevitable next wave, and inspired by the policy changes achieved in Mississippi, I introduced legislation in the Texas House of Representatives in 2005 designed to begin a dialogue that might lead to a clearly-stated primary-jurisdiction doctrine in Texas.[12] In short, the bill would have required a landowner complaining of an environmental injury arising from oil-and-gas operations to take his complaint first to the Railroad Commission to be investigated and remediated, if appropriate. Only after this administrative remedy has been exhausted could the landowner then file suit in district court.

Opposition came from many directions – and sometimes from unexpected quarters. Of course, the ranchers and large-property owners were opposed because they were concerned that this would simply be a way to stall any response by the oil companies to their complaints. Some private-property rights advocates, however, were also opposed because they saw it as an encroachment on their constitutional rights to defend their property against the government. Plaintiffs' lawyers were opposed because it would take the "big money" potential out of their practice. And conservatives skeptical towards government opposed it because they had an inherent lack of trust in the Railroad Commission and its ability to handle this delegation of responsibility. Industry was even initially lukewarm towards the idea because diminished value is still – at least in theory – the law of the state, and this policy change would create the likelihood of having to spend more money to remediate a problem.

So, even though all of the folks who claim that fixing the environment is paramount should have lined up behind a bill designed to do just that, there was substantial opposition to the initiative.

[11] *Kraft v. Langford*, 565 S.W. 2d 223 (Tex. 1978)

[12] 79R-HB 2881 (Texas State Legislature)

Nevertheless, the concept remains relevant, and similar bills will likely return in the future for more debate and consideration.

The primary-jurisdiction doctrine is just a lawyer's way of saying that we should address the problem in kind, rather than in dollars. Unquestionably, it undermines the speculation and big payday potential of pollution litigation. But, in deciding the better policy, one need only ask the objective. There is only one policy where the objective is to fix the problem. In Mississippi, they have already figured that out. In Louisiana, they are in the process of trying to figure it out. Should Texas still be uncertain about the right way to clean up?

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