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Trends in Upstream Environmental Litigation:

The Impact of *Corbello* and *Grefer*

G. William Jarman
Pamela R. Mascari

www.keanmiller.com

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§ 1.01 Impact of Recent Louisiana Decisions on Upstream Environmental Litigation

[1] Trend Toward More Litigation

With its tremendous natural resources, Louisiana has historically been an active area for the upstream operations of oil and gas companies, and the continuation of those operations are of vital importance to Louisiana's economy. Recent decisions of Louisiana courts, however, threaten the continued viability of those operations within the state's borders. While no particular trend of legal analysis seems to run through the decisions, the combined effect of the decisions has created a trend toward increased litigation in this area.

[2] The Cases

This paper will primarily focus on three recent decisions regarding liability for damage to property due to upstream operations. The first, *Corbello v. Iowa Production*,[1] involved alleged damage to property caused by the disposal of salt water and other activities in connection with oil and gas exploration and production activities. *Grefer v. Alpha Technical Services, Inc.*, [2] still waiting on appeal, deals with alleged contamination from naturally occurring radioactive material ("NORM"). The third decision, *Terrebonne Parish School Board v. Castex Energy, Inc.,*[3] also pending on appeal, deals primarily with restoration of

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[1]850 So. 2d 686 (La. 2003).

[2]Docket No. 97-15004, Civil District Court for the Parish of Orleans. Pending at Docket No. 2002-CA-1237, Louisiana Fourth Circuit Court of Appeal.

[3]Docket No. 126752, Thirty-Second Judicial District Court for the Parish

oil field canals. These three cases combine to form a treacherous "Louisiana triangle" for those currently or formerly engaged in oil and gas exploration and production activities.

§ 1.02. The *Corbello* Decision

[1] The State of the Law Prior to *Corbello*

Louisiana law on the calculation of property damage awards in cases involving environmental pollution has undergone significant change in recent years. Historically, Louisiana courts have followed three approaches in arriving at property damage valuation: (1) the cost of restoration, if the thing damaged can be adequately repaired, (2) value differential, the difference in value prior to and subsequent to the damage, or (3) the cost of replacement new, less reasonable depreciation, if the value before and after the damage cannot be reasonably determined or if the cost of repair is more than the value.[4] [5] [6]

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of Terrebonne. Pending at Docket No. 2001-CA-2634, Louisiana First Circuit Court of Appeal.

[4]*Mouton v. State*, 525 So. 2d 1136, 1143 (La. App. 1 Cir.) *writ denied*, 526 So. 2d 1112 (La. 1988); *Coleman v. Victor,* 326 So. 2d 344, 347, n. 4 (La. 1976).

[5] As a general matter, one injured through the fault of another is entitled to full indemnification for the damages caused thereby under Louisiana Civil Code article 2315. In such a case, the obligation of the defendant is to indemnify the plaintiff--to put him in the position that he would have occupied if the injury complained of had not been inflicted on him. Consequently, when property is damaged through the legal fault of another, the primary objective is to restore the

Generally, the third method of valuation was used only if the value before and after the damage could not be determined or if the cost of repairs exceeded the value of the property. Further, the courts routinely held that "where land had been rendered useless, the proper measure of damages is the lesser of either the market value of the property and severance damages minus any residual value or the cost of restoration of the property to its condition prior to damage."[7] Thus, if the land was rendered useless and the cost of restoration exceeded the value of the land, the owner of the property was limited to recovery of only the market value of the land.[8]

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property as nearly as possible to the state it was in immediately preceding the damage. Accordingly, the measure of damage is the cost of restoring the property to its former condition. *Coleman,* at 346-347.

[6] *Mouton, supra,* involved a suit by a landowner-lessor against his lessee, an oilfield waste disposal operator, and various of the lessee's customers when wastes migrated to neighboring properties. The plaintiff appealed the lower court's finding that a claim for cleanup was part of a claim for damages. Plaintiff theorized that cleanup should be considered as a separate and independent cause of action. In the context of rejecting that argument, the Louisiana First Circuit Court of Appeal summarized the appropriate quantum analysis in the context of a property damage suit.

[7] *Mouton, supra.*

[8] 525 So. 2d at 1143. *Accord, Ewell v. Petro Processors of Louisiana, Inc.*, 364 So. 2d 604 (La. App. 1 Cir. 1978) *writ denied*, 366 So. 2d 575 (La. 1979).

[2] The *Roman Catholic Church* Decision

In 1993, the Louisiana Supreme Court expressed a new rule, adopting the rule set forth in Section 929 of Restatement (Second) of Torts (1977), which provides that damages should include the difference between the value of the land before and after the harm, or at the owner's election in an appropriate case, the cost of restoration that has been or may be reasonably incurred.[9] The comments to Section 929 provide that the costs of restoration are ordinarily allowable, but the courts will use diminution in value when the cost of restoration is disproportionate to the diminution in value, unless there is a reason personal to the owner for restoring the property to its original condition. In the latter case, damages will include the costs for repairs, even though that amount is greater than the total value of the property.

The Louisiana Supreme Court stated it this way:

> [A]s a general rule of thumb, when a person sustains property damage due to the fault of another, he is entitled to recover damages including the cost of restoration that has been or may be reasonably incurred, or, at his election, the difference between the value of the property before and after the harm. <u>If, however, the cost of restoring the property in its original condition is disproportionate to the value of</u>

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[9] *Roman Catholic Church of Archdiocese of New Orleans v. Louisiana Gas Service Co.*, 618 So. 2d 874 (La. 1993).

> the property or economically wasteful, unless there is a reason personal to the owner for restoring the original condition or there is a reason to believe that the plaintiff will, in fact, make the repairs, damages are measured only by the difference between the value of the property before and after the harm.[10]

Stated differently, under *Roman Catholic Church*, Louisiana property damage claims based on fault were to be handled in the following manner:

a. Generally, the injured party is entitled to recover damages including the cost of restoration that has been or may reasonably be incurred.

b. However, at his option, the injured party may obtain the difference in value of the property before and after the harm.

c. If the cost of restoring the property to its original condition is disproportionate to the value of the property or economically wasteful, property damages are measured only by the difference between the value of the property before and after the harm, unless:

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[10] *Id.,* at 879-880 (emphasis added).

i. There is a reason personal to the owner for restoring the property to its original condition, or

ii. There is reason to believe the plaintiff has, or will, in fact make the repairs.

In *Roman Catholic Church*, the Louisiana Supreme Court awarded the Archdiocese the full cost of restoration of its low-income housing apartment complex, as the award met the above-described standards. The court held that the reason personal to the Archdiocese for its restoration was the Archdiocese's object to acquire and maintain the facility to provide housing for its low-income parishioners and the fact that the Archdiocese's ownership was conditioned upon the removal of the complex from commerce and provision of housing for two hundred poor families for a 15-year period. The court also noted that the Archdiocese was clearly entitled to recover the full cost of restoration because it had, in fact, made the repairs by replacing the building to its original condition.[11] The court stressed that in choosing between the cost of repair measure and some other measure of damages, it is important to know how the property is used and what interest in it is asserted, so that the measure can be adopted that will afford compensation for any legitimate use that the owner makes of his property.[12]

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[11] *Id.*, at 880.

[12] *Id.*

[3] Cases Applying *Roman Catholic Church* Methodology

[a] Instances Where Parties Were Juridical Strangers

Other courts applied *Roman Catholic Church* in awarding property damages. In *Mossy Motors, Inc. v. Sewerage and Water Board of City of New Orleans*,[13] a car dealership's showroom and offices were damaged by a public construction project. The dealership was held to be entitled to the cost of restoration, which was essentially the cost to rebuild and replace prior existing buildings, since its business was "personal to the Mossy family," as it had operated its family business at the same location for three generations.[14]

In *Massie v. Cenac Towing Co., Inc.*,[15] a tug boat company was held liable for $30,500 in costs to restore 50 linear feet of levee damaged when a tugboat landed on the levee, even though per acre value of affected land was only $364. The landowner, a Georgia resident, was held to have a personal reason for restoration in that he had a hunting lodge on the property and breach of the levee would allow saltwater intrusion to a portion of property used for rice and crawfish farming.[16]

[b] In Breach of Contract Cases

Other courts began to use the *Roman Catholic Church* analysis to support property damage awards in instances where a contract existed between the

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[13] 753 So. 2d 269 (La. App. 4 Cir.), writ denied 749 So. 2d 638 (La. 1999).

[14] *Id.*, at 279.

[15] 796 So. 2d 14 (La. App. 5 Cir. 2002).

[16] *Id.*, at 18.

landowner and the defendant. For example, in *Abramson v. Florida Gas Transmission Co.,*[17] a property owner's claims for property damage caused by natural gas pipeline reconditioning was held to be limited to the difference between the value of the properties before and after the alleged harm by the contractor; the property owners were held not to be entitled to remediation damages. The approximate value of the properties was only $95,000, while remediation damages were estimated to reach $2.7 million. Furthermore, plaintiffs had no reason personal to them requiring restoration of property to original condition.[18]

In *St. Martin v. Mobil Exploration & Producing U.S., Inc.*,[19] plaintiffs purchased a 7,000 acre tract of property in coastal Louisiana for $245.00 per acre in 1992. Shortly thereafter, they sold all but a 2,400 acre tract to the Nature Conservancy for their approximate purchase price and donated $140,000 to the conservancy in support of a marsh wildlife refuge. In 1995, the landowners filed suit against two oil companies claiming that gaps in the spoil banks along canals dredged by the oil companies had allowed water to flow into and out of the marsh, causing erosion of the interior marsh. Plaintiffs made claims under the canal servitude agreements, the mineral lease, and tort theories.

Although the plaintiffs were not allowed to recover for marsh loss sustained prior to their purchase of the property, the court found that forty acres of

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[17]909 F.Supp. 410 (E.D. La. 1995).

[18]*Id.*, at 420.

[19]1999 WL 5671 (E.D. La.), *aff'd* 224 F.3d 402 (5th Cir. (La.) 2000).

the marsh had been damaged post-purchase and, of that amount, the oil companies were responsible for twenty-four acres of damage. (The court's allocation of "cause" was xixty percent oil companies and 40 percent natural causes.) The judge found plaintiffs' proposed restoration plans, however, to be excessive (refilling the entire marsh) and ordered additional briefing on the issue. The court eventually awarded the plaintiffs $240,000, or $10,000 an acre, for the restoration of their property.[20] Defendants appealed on several issues, including the reasonableness of the damage award under *Roman Catholic Church*.

The defendants argued that a $10,000 per acre award for property with a market value of $245 was unreasonable. The United States Fifth Circuit Court of Appeal recognized that *Roman Catholic Church* allowed restoration damages to exceed the property's value only where there was "a reason personal to the owner for restoring the original condition or there is a reason to believe that plaintiff will, in fact, make the repairs."[21] However, the court found that the plaintiffs had demonstrated a genuine interest in the health of the marsh by donating labor and resources to the cause. In addition, the plaintiffs lived adjacent to the marsh in question, had used it for recreational purposes, and had been involved in other marsh restoration projects. Defendants also argued that plaintiffs' commercial motives for buying the property should not be rewarded, but the court found that the plaintiffs demonstrated "a strong personal interest in the marsh and the possibility of an additional commercial interest does not foreclose damages under

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[20]*St. Martin*, 1999 WL 5671, at *1-2.

[21]*St. Martin,* 202 F.3d at 410.

Roman Catholic Church."[22]

After the recent decision of *Corbello*, however, it is no longer necessary to demonstrate "a strong personal interest" in the property since, according to the Louisiana Supreme Court, a *Roman Catholic Church* analysis is no longer appropriate in breach of contract cases.

[4] *Corbello*: Elimination of Reasonable Restraints on Property Damage Awards

[a] Facts of *Corbello*

The *Corbello*[23] case involved the issue of restoration of portions of a 320-acre tract of land in the Iowa Field in Calcasieu Parish which was subject to both a mineral lease (1929) and a surface lease (1961). The surface lease contained a standard industry lease stipulation requiring the lessee to "reasonably restore the premises as nearly as possible to their present condition." The 320 acre tract had a total real estate market value of $108,000. After expiration of the surface lease, the landowners brought suit against their lessee to recover the cost of restoring the property to its original condition, seeking restoration damages for trespass for use of the surface after the surface lease expired, for allegedly unauthorized disposal of saltwater on the leased premises, and for the alleged poor condition of the land.

[b] Action of the Lower Courts

Following a two and one-half week jury trial, the plaintiffs were awarded $33 million to restore their property, $28 million of which was for remediation of

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[22]*St. Martin* at n. 11.

[23]*Corbello v. Iowa Production*, 2002-0826 (La. 2/25/03), 850 So.2d 686.

the Chicot aquifer, an award to a private citizen for a public harm. The Louisiana Third Circuit Court of Appeal affirmed all damages despite its inconsistency with the property's market value and, in so doing, extended the use of the *Roman Catholic Church* analysis to a situation where the lease agreement between the parties required only a "reasonable" restoration. The landowners had also asserted a tort claim, but it was not the focus of the Third Circuit's opinion.

[c] Action of the Louisiana Supreme Court

When the Louisiana Supreme Court granted writs to consider the *Corbello* matter, many in the oil and gas industry were encouraged by the development. However, instead of correcting the inequities of the lower courts by limiting damages under a standard of reasonableness, the Louisiana Supreme Court affirmed the damage award and held 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."[24] In affirming an award that was over 300 times the value of the property at issue, the Court put to rest the issue of whether or not a *Roman Catholic Church* analysis was appropriate in a breach of contract case. The Court concluded that "damages to immovable property under a breach of contract claim should not be governed by the rule enunciated in *Church*. We find that the contractual terms of a contract which convey the intentions of the parties, overrule any policy considerations behind such a rule limiting damages in tort cases."[25]

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[24]*Corbello* at 693.

[25]*Corbello* at 694-95.

[d] Important Practical Issue of Public Concern Ignored

Although the Court resolved the issue regarding the applicability and relevancy of the market value of property when determining an award of damages, the Court otherwise ignored an important issue exposed in *Corbello*. Specifically, in cases where a private litigant is awarded monetary damages for a public harm, i.e. damage to groundwater, how can the public be assured that the money will be used to rectify the public harm?[26]

[5] Legislative Response to *Corbello*

In response to the *Corbello* decision and the potential that a private litigant could be awarded a sum for restoration/remediation of groundwater and choose not to use the money for that purpose, Act. No. 1166 was passed during the 2003 Louisiana legislative session. Louisiana Revised Statute 30:2015.1 now requires the Louisiana Department of Natural Resources (LDNR) and the Louisiana Department of Environmental Quality (LDEQ) to be notified in the event that any judicial demand includes a claim to recover damages for the evaluation and remediation of any contamination or pollution that is alleged to impact or threaten usable groundwater and provides those agencies a right of action to intervene in such a proceeding.[27] Among other protections, the statute requires the submittal of plan(s) for the evaluation of remediation of the contamination of usable groundwater and the review of such plans by LDNR and DEQ and requires

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[26] Groundwater is the property of the State of Louisiana. *Adams v. Grigsby*, 152 So. 2d 619, 622-624 (La. App. 2 Cir. 1963).

[27] La. R.S. 30:2015.1(B).

adoption of an approved plan.[28] The Act further prohibits a court from adopting a plan for remediation without first providing LDNR or LDEQ an opportunity to provide input with respect to the plan.[29]

Furthermore, and most importantly, the new statute requires that funds awarded for groundwater contamination be placed "exclusively in the registry of the court" to ensure that the public's groundwater is actually remediated or restored. The district court shall retain jurisdiction over remediation funds deposited in the registry of the court until the evaluation and remediation are completed, and, at that time, order any funds remaining in the registry to be returned to the depositor.[30] The Act is intended to be interpretive, remedial and procedural and applicable to all cases filed after August 1, 1993.

[6] Decisions Rendered Post-*Corbello*

[a] Hazelwood Farm, Inc. v. Liberty Oil & Gas Corp.

The *Corbello* decision has been final for less than a year, so there are very few cases implementing its holding. One case that has followed the *Corbello* analysis in the context of upstream litigation is *Hazelwood Farm, Inc. v. Liberty Oil & Gas Corp.*[31] In *Hazelwood Farm*, the plaintiff landowner presented claims in contract and tort against the defendant oil company for alleged damages due to operations on the property. In the contract claim arising from an alleged bad faith

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[28]La. R.S. 30:2015.1(C).

[29]La. R.S. 30:2015.1(D).

[30]La. R.S. 30:2015.1(E).

[31]844 So. 2d 380 (La. App. 3 Cir. 2003).

breach of a 1926 oil and gas lease, the plaintiff was awarded $2 million. On the tort claim, the jury found 60% third party fault (a subsequent operator) and determined that there was no reason to believe the plaintiff would restore the land and there was no reason personal to the plaintiff for such restoration. The jury concluded that the maximum value the plaintiff could recover in tort could not exceed $304,000, the value placed on the property by the jury. Plaintiff was required to select his amount of recovery under the multiple theories raised so, of course, the contract award of $2 million was selected. Relying on *Corbello* and a provision in the lease which provided that the defendant "was responsible for all damages caused by [its] operations," the Third Circuit affirmed the verdict in its entirety since an award based on a breach of contract "need not be tethered to the value of the property."[32]

[b] *Simoneaux v. Amoco Production Company*

Most recently, *Simoneaux v. Amoco Production Company*[33] was decided by the Louisiana First Circuit Court of Appeal. In *Simoneaux*, landowners brought suit claiming property damages allegedly caused by exploration and production activities between 1957 and 1995. Landowners complained that the property was contaminated with NORM and sought damages for restoration/remediation of the property and fear of cancer, as well as punitive damages. Restoration/remediation plans proposed by plaintiffs' experts were in the tens of millions, while defendants' experts testified that the amount necessary

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[32]*Hazelwood*, at 387, *citing Corbello*.

[33]860 So. 2d 560 (La. App. 1 Cir. 2003).

for the cleanup was $375,000 for restoration/remediation damages. Following a two-week jury trial, the jury found that some remediation was warranted and awarded $375,000 in that regard—the exact amount suggested by defendants' experts. Plaintiffs filed a motion for a judgment notwithstanding the verdict. The judge granted plaintiffs' motion and increased the damage award to $12,970,440.

The Louisiana First Circuit Court of Appeal reversed the trial court's decision to overturn the jury's damage award and reinstated the jury verdict. The Court stated that "[w]hile there may have been some minor inconsistencies in the jury's liability determinations, the trial judge was required, in order to overturn the jury's damage verdict, to find that a reasonable jury could not have awarded plaintiffs the sum of $375,000.00. The evidence established, however, that this finding was entirely reasonable. . . ."[34] The court further reasoned that the defense experts refuted the plaintiffs' expert testimony, and that the jury weighed the evidence and chose to accept the credibility of the defense's witnesses. The court held that, "[b]ecause a reasonable jury could clearly have found that only one site required remediation and the cost of that cleanup was $375,000.00, the judge was not empowered to substitute his own evaluation of the evidence to overturn the damage award."[35]

Although *Simoneaux* was decided in the immediate context of *Corbello* and involved related upstream environmental issues, the First Circuit was able to reach its decision without much reliance on or consideration of *Corbello*. So,

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[34]*Id.*, at *23.

[35]*Id.*, at *24.

while *Simoneaux* does not lend much in the way of distinguishing *Corbello* from a legal perspective, it does show that a reasonable jury can arrive at a reasonable verdict.

The *Simoneaux* decision is not yet final as plaintiffs have sought review by the Louisiana Supreme Court.

[7] Going Forward and Dealing with *Corbello*

[a] Plaintiffs' Perspective

From the perspective of the plaintiffs' bar, the *Corbello* decision reflects "a resounding defeat to the oil field industry."[36] In fact, the plaintiffs' bar now has license to argue for exorbitant damages since, after all,"[d]amages are not limited to, or even related to, the market value of the damaged land."[37] And, although plaintiffs' attorneys generally acknowledge that Article 122 of the Mineral Code requires a "reasonableness" approach be applied to the restoration process, the general thought is that "[w]hile there may be some sort of 'balancing process' required that would slightly distinguish the two scenarios, the issue would still go before the jury for a determination and the result would most probably resemble *Corbello*."[38] In light of *Corbello*, this type of litigation has become more attractive to the plaintiffs' bar and will undoubtedly continue. Very recently, several new lawsuits have been filed by large landowners claiming *Corbello*-like

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[36]Duggan F. Ellis, "CORBELLO v. IOWA PRODUCTION: A Contract is a Contract, 51 La.B.J. 98, (August/September 2003).

[37]*Id.*

[38]*Id.,* at 99. But see *Simoneaux v. Amoco Production*, supra.

damages.

[b] Defendants' Perspective

The *Corbello* decision is admittedly a setback for the oil and gas industry as it offers no protection from runaway juries. Nonetheless, *Corbello* does not take away a defendant's valid affirmative defenses nor does it preclude reasonableness from otherwise carrying the day. Decisions like *Simoneaux*, supra, demonstrate that Louisiana juries can be reasonable.

In addition, *Corbello* may be distinguishable in a given dispute based on the specific language of the particular agreement at issue. On a going forward basis, specificity with respect to restoration obligations in mineral leases and other upstream agreements is critical. Finally, from a strategic standpoint, the tone of the *Corbello* decision coupled with the defendants success in the lower courts in *Simoneaux* demonstrate the importance of reasonable and comprehensive alternative remediation or restoration plans.

§ 1.03. The *Grefer* Decision

[1] Verdict Brings NORM Issues Front and Center

The much-publicized decision of the Civil District Court for the Parish of Orleans in *Grefer v. Alpha Technical Services, Inc.*[39] caught the attention of even the most casual observer of upstream litigation trends. With a multimillion dollar compensatory award and a billion dollar punitive award on the table, the question on everyone's mind is, "Can that verdict stand?"

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[39]Docket No. 97-15004, Civil District Court for the Parish of Orleans. Pending at Docket No. 2002-CA-1237, Louisiana Fourth Circuit Court of Appeal.

[2] Facts of *Grefer*

In the *Grefer* case, retired Louisiana Judge Joseph Grefer and his three siblings claimed that ExxonMobil Corporation ("Exxon"), a number of other oil and gas companies, and Intercoastal Tubular Services, Inc. ("ITCO") were responsible for the contamination of their land with naturally occurring radioactive material ("NORM"). The property in question, which had been owned by the Grefer family for over 100 years, was located adjacent to the Harvey Canal in Harvey, Louisiana, a heavily industrialized area. The Grefers had leased the property to ITCO, an oilfield services contractor which cleaned and refurbished drilling tubing, casing and other oil and gas production equipment. ITCO had contracted with Exxon to clean and refurbish its tubing and other equipment. It was estimated that ITCO had handled over 180,000 tons of pipe per year for Exxon. ITCO went out of business in 1987.

Plaintiffs alleged that the NORM (including Radium-226 and Radium-228), which accumulated inside production tubing in the form of scale, had been dislodged from the inside of the tubing during the cleaning process. Plaintiffs alleged that millions of pounds of scale dust, all allegedly containing radioactive material, was deposited on the property and buried over the years. Plaintiffs contended that Exxon and other oil and gas companies, individually and through trade associations, had known since the 1950's that oil wells generated radioactive materials and that these materials accumulated as scale in the pipes.

The plaintiffs sought $56 million to clean up the property. Exxon contended that there was no substantial contamination warranting such an award.

Exxon's position was that out of the 1.4 million square feet of property, less than 8/10 of 1% was contaminated with NORM that exceeded background levels. Exxon further contended that even the contamination which exceeded background levels did not pose a threat to human health.

Exxon conducted an extensive survey of the property at a cost of over $330,000, which substantiated Exxon's claim of limited contamination. The Exxon survey consisted of over 1,000 bore holes on the property. According to Exxon there were only five small patches of land which needed remediation and that remediation could be accomplished for $46,000.

Preceding trial, all producer defendants but Exxon settled. There were extensive pre-trial proceedings, and Exxon sought, unsuccessfully, to limit damages to the value of the property.

[3] The *Grefer* Verdict

Following five weeks of trial and one and a half days of deliberation, on May 22, 2001, the Orleans Parish jury awarded the Grefers $56 million for restoration of the property, $145,000 in general damages, plus $1 billion in punitive damages. Post-trial motions for relief from the verdict were denied. The case is now on appeal to the Louisiana Fourth Circuit Court of Appeal. Oral arguments were heard on September 4, 2003.

[4] Quantum Issues Under Close Scrutiny

The Louisiana Fourth Circuit Court of Appeal is faced with the task of reviewing two excessive awards. First, the $56 million award for restoration of the property far exceeded the value of the industrial property at issue. But, after

Corbello, will that matter? Or, will Louisiana courts restore sense of reasonableness to compensatory damage awards.

More likely to be addressed by the Fourth Circuit is the $1 billion punitive damage award. In light of the United States Supreme Court's decision in *State Farm Mutual Automobile Ins. Co. v. Campbell*[40], it is unlikely that the $1 billion dollar punitive damage award will survive Due Process scrutiny. While the Court in *Campbell* refused to impose a bright-line ratio on an acceptable award of punitive damages, the court did note that "few awards that exceed a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process."[41]

Of course, with the compensatory damages at issue in *Grefer*, a reduction based on a *Campbell* analysis could still result in an enormous punitive damage award. A real concern is that a preoccupation by the Court with the issue of punitive damages may serve to detract from an extensive review and careful consideration of the underlying compensatory damage award.

[5] NORM Suits Abound in Louisiana

Not surprisingly, the *Grefer* decision has generated quite a bit of interest from the plaintiffs' bar. No less than two dozen *Grefer*-like NORM contamination suits, some with multiple plaintiffs, are currently pending in Orleans Parish.[42]

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[40]538 U.S. 408, 123 S.Ct. 1513 (2003).

[41]123 S.Ct. at 1524.

[42]The matters, all pending in the Civil District Court for the Parish of

§ 1.04. The *Castex Energy* Decision

[1] Canals, Erosion and Litigation

While the *Corbello* and *Grefer* decisions have led to increased activity and interest from the Louisiana plaintiffs' bar with respect to suits involving damage to land, there is a matter currently pending before the Louisiana First Circuit Court of Appeal dealing with the issue of wetlands loss that has the focus of industry and landowners alike —*Terrebonne Parish School Board v. Castex Energy, Inc.*[43]

Orleans, include: *Rathborne Properties, L.L.C. vs. Exxon Mobil Corporation, et al.*, No. 2001-12081, Div. "N"; *Benoit, et al. vs. Intracoastal Tubular Services, Inc., et al.,* No. 2001-21094, Div. "B"; *C.M. Thibodaux Company, Ltd. v. Exxon Mobil Corporation, et al.*, No. 2001-16872, Div. "K"; *Castell, et al. vs. Exxon Mobil Corporation, et al.*, CDC No. 2002-12334, Div. "A"; *In Re: Harvey TERM,* No. 2001-8708, Div. "D" (includes 12 consolidated suits); *Adams, et al. v. Chevron USA, Inc., et al.*, No. 2002-19308, Div. "D"; *Lester, et al. v. Exxon Mobil Corporation, et al.*, No. 2002-19657, Div. "N"; *Vercher v. Intracoastal Tubular Services, Inc., et al.*, No. 1995-15159, Div. "M"; *Grefer, et al v. Travelers Insurance Company, et al.*, 24th JDC No. 572-152, Div. "G"; *Stevens, et al v. Chevron U.S.A., Inc., et al.*, No. 2002-7324, Div. "B"; *Bailey, et al. v. Exxon Mobil Corporation, et al.*, No. 2003-14235, Div. "B"; *Bulot, et al. v. Intracoastal Tubular Services, Inc., et al.*, No. 1997-06170, Div. "D".

[43]Docket No. 126752, Thirty-Second Judicial District Court for the Parish of Terrebonne. Pending at Docket No. 2001-CA-2634, Louisiana First Circuit Court of Appeal.

With both camps unhappy with the trial court's decision as it stands, the much-awaited decision will be critical in determining whether or not a flood of wetlands loss cases will further erode the oil and gas industry's ability to prosper in Louisiana.

[2] Coastal Erosion Issues, Generally

The issue of coastal erosion in Louisiana is a huge concern for the State of Louisiana. In fact, it is estimated that since 1956, Louisiana wetlands have shrunk by more than 1,500 square miles, an area roughly one and a half times the size of Rhode Island.[44] A number of factors have combined to cause the erosion, some of which include the natural subsidence of the land coupled with a rise in sea level, an increased salinity table, the restriction of the Mississippi River from changing course, a recent and large population of marsh-eating nutrias, as well as the presence of man-made canals along the coast. While people may disagree about the extent to which each of these factors have contributed to Louisiana's coastal erosion problems, the oil and gas industry is in the unfortunate predicament of arguably being the only one of these "targets" with the ability to be named in lawsuits. As the public awareness of the erosion problem in Louisiana continues to rise, the oil and gas industry becomes more and more vulnerable to lawsuits claiming that oil field canals have contributed to coastal erosion.

[3] Use of Canals in Coastal Areas for Exploration and Production and Resulting Litigation

For decades, Louisiana's marshy coastline has been a fertile ground for oil

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[44]U.S. Geological Survey, News Release, June 30, 1997.

and gas exploration and production. Because of the marshy terrain, operators have been required to, and expected to, dredge canals in the marsh in order to fully develop and explore their lessor's property. Development of the property is, of course, an obligation of a mineral lessee.[45] As a result of the decades of exploration in the area, which was profitable to both industry and landowners, the Louisiana coast is traversed with miles and miles of oil field canals. Ostensibly driven by concerns for the coastal environment, several landowners over the last few years have begun to file suits seeking the cost of restoring their property to its original, pre-canal condition. To accomplish this goal, experts for plaintiff landowners have developed plans for "backfilling" the canals, at enormous costs despite the nominal market value of the acreage, and despite the fact the coastal erosion continues, making any backfilling of canals, at best, a temporary "fix."

Of course, backfilling was never contemplated by the parties at the time of the dredging or in the relevant mineral leases or servitude (right-of-way) agreements. Nonetheless, the high level of public awareness and concern for the Louisiana coastline coupled with the sentiment expressed by the Louisiana Supreme Court in *Corbello* that a "damage award need not be tethered to the

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[45]The Louisiana Supreme Court summarized the mineral lessee's obligation of development as follows: "The law of this state is well settled that the main consideration of a mineral lease is the development of the lease premises for minerals and that the lessee must develop with reasonable diligence or give up the contract." *Carter v. Arkansas Louisiana Gas Co.*, 36 So.2d 26, 28 (La. 1948). *See also*, La. R.S. 31:122.

value of the property," makes suits for restoration of wetlands an issue of major concern for the oil and gas industry.

[4] The Cases

[a] *St. Martin*: An Early Decision

One of the early suits in this area was filed in 1995. In *St. Martin v. Mobil Exploration & Producing U.S., Inc.*,[46] discussed above, the court awarded $10,000 an acre for the backfilling of canals on property located in coastal Louisiana valued at $245.00 per acre.

[b] *Castex Energy*: A Compromise Approach Leaves Both Sides Unhappy

In *Terrebonne Parish School Board v. Castex Energy, Inc., et al.,*[47] the Terrebonne Parish School Board, as the trustee and mineral lessor of a Section 16 tract in Terrebonne Parish, brought suit against certain mineral lessees. The School Board claimed that the mineral lessees were obligated to backfill oil field access canals dredged during the mineral lease. All of the land loss claimed was direct loss from canal dredging, and there was no claim for any damage or loss to the surrounding marsh caused indirectly by canals.

The School Board's claim arose out of a 1963 lease to Shell Oil Company. The Defendants, Castex Energy, Inc. ("Castex"), Samson Resources Company and Samson Hydrocarbons Company (collectively, "Samson"), and Bois D'Arc Operating Corporation ("Bois D'Arc") were Shell's successors in interest. Through various

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[46] 1999 WL 5671 (E.D. La.), aff'd 224 F.3d 402 (5th Cir. (La.) 2000).

[47] Docket No. 2001-CA-2634 (La. 1st Cir. Ct. of App.).

assignments, they became operating working interest owners in the lease. The granting clause of the lease expressly granted the mineral lessee the right to dredge canals, and there was no provision imposing an express obligation to restore upon the mineral lessee. Thus, the School Board's claim was for alleged breach of the obligation of a prudent operator to restore the surface of the leased premises to the extent reasonably practicable under Article 122 of the Louisiana Mineral Code.[48]

The trial court held that because suit was filed within 10 years of the expiration of the lease, the claim, based upon the "implied obligation" to restore imposed by Mineral Code Article 122 had not prescribed. On the merits, the trial court held:

> Based upon the 1963 lease, the mineral code and in particular Section 122, and the obligations imposed on the mineral lessees thereof, the value of this wetland and/or marshes, the recoveries by the oil and gas companies from these type of operations, it is fair and reasonable for the mineral lessee to be obligated to backfill these canals as long as prescription has not prevented or interrupted the enforcement of this obligation.[49]

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[48] La. R.S. 31:122. Some of the canals at issue were dredged before the effective date of the adoption of the Louisiana Mineral Code (January 1, 1975).

[49] *Terrebone Parish School Board v. Castex Energy, Inc., et al*, No. 126752, Div. A (32nd Judicial District Court, June 18, 2001), Transcript of

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> . . .The Court is satisfied that this obligation to restore the wetland and/or marshes is a reasonable standard, in light of the rich reward of the oil industry and the fragile state of the wetland and marshes of this parish and this state.[50]

The trial court reasoned that "because of the very nature of the wetlands as affected by the oil, gas and mineral operations," it felt "compelled to fashion a judgment that might be considered unique under the current state of our jurisprudence . . . ." The court further noted that there was little jurisprudence to guide it in what it felt was its "duty" and "mission" in the case.[51]

Because the trial court believed that restoration was what must be done in the case, it fashioned a unique remedy. It awarded the sum of $1,100,000, the sum it believed necessary to restore the canals. Foreshadowing La. R.S. 30:2015.1, discussed *supra*, the judge ordered that the judgment amount be deposited into the registry of the court. It was further ordered that the restoration costs not exceed that sum, and that any portion of the funds not used in the restoration project be returned to the Defendants. A special master was appointed to oversee the restoration project, obtain all necessary permits, and contract with a dredging company and all other

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Judgment and Reasons for Judgment, pp. 9-10.

[50] *Id.*, at p. 14.

[51] *Id.*

parties necessary to implement the restoration project. Sums were allocated out of the $1,100,000 award to pay the special master to oversee the project and obtain permits, plans and specifications ($150,000) and for personnel to oversee the actual construction work ($90,000). Although the trial court held that it will be up to the special master to present an appropriate plan for the backfilling of canals, the court did recommend a preferred and alternative course of action. The trial court judgment further provided that if the special master felt it was not feasible to construct the project within the sum of $1,100,000, the Court will file a rule to show cause against both sides to determine the appropriate disposition of the funds.

Because both the plaintiff and the defendants filed suspensive appeals to the First Circuit Court of Appeal, the appointment of the special master will not take place until the final disposition of the case through the appellate system. The special master will have three months to report back to the trial court, and assuming that he agrees with the feasibility of the project, he will have two years in which to complete the project.

The Defendants have raised as error on appeal that (1) they had no contractual or implied duty to restore the surface or backfill the canals; (2) the award of $1,100,000 for restoring 47.74 acres was grossly disproportionate to the fair market value of the property; (3) the one year prescriptive period rather than the ten-year prescriptive period applies to the claim for breach of the obligation to restore the surface of the leased premises under Article 122 of the Mineral Code; and (4) the judgment should have directed the School Board itself, not a Special Master to undertake the task of restoration.

In its appeal, the Terrebonne Parish School Board has claimed that the trial court erred in (1) appointing a special master; and (2) including a remittitur clause and not awarding a sum certain.

Because this case has implications for the oil and gas industry as a whole, the American Petroleum Institute, Louisiana Mid-Continent Oil and Gas Association and Louisiana Independent Oil and Gas Association filed a joint *amicus curiae* brief. The *Amicus* group's position on the issues raised by the case are:

1. The mineral lease does not create an obligation to backfill canals because (a) there is no express obligation to restore the property in the lease and (b) the law existing at the time the contract was entered into provided only that a lessee was liable for injuries and losses sustained through his "fault."
2. Article 122 of the Mineral Code does not create an obligation to backfill canals because by expressly allowing canal dredging, the parties, consistent with Article 122, stipulated that canal dredging constitutes reasonably prudent conduct.
3. The trial court's decision to apply the provisions of Article 122 retroactively is an unconstitutional violation of the Impairment of Contracts Clauses of the Louisiana and/or United State Constitutions.
4. The obligation to restore under Article 122 is limited by a reasonableness standard requiring an economic balancing test, weighing the cost of perfect restoration against the value of the use to which the land is being put.

5. The trial court's award of the full cost of perfect restoration is all out of proportion to the value of the property and contrary to law, relying upon *Roman Catholic Church of the Archdiocese of New Orleans v. Louisiana Gas Service Co.,* 618 so.2d 874 (La. 1993).[52]

The *Castex* case is currently pending in the Louisiana First Circuit Court of Appeal.

§ 1.05. Conclusion

Recent decisions of Louisiana courts have generally not been favorable to those engaged in upstream activities. Despite efforts in recent years to improve the image of the oil and gas industry, decisions like *Corbello* and *Grefer* evidence a generally negative perception of oil and gas companies by the Louisiana public. Unless and until the Louisiana judicial system or legislature does something to calm the waters that have been stirred by these recent decisions, the trend in Louisiana upstream environmental litigation is simply that more litigation is on the horizon. In the meantime, companies with operations in Louisiana may want to be proactive in adopting a strategy for evaluating former oil field sites and dealing with canal issues. Also, taking a higher profile in wetlands restoration projects and other environmental projects may get the attention of potential jurors.

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[52] Subsequent to the filing of the *Amicus Curiae* Brief, the Supreme Court rendered its decision in *Corbello v. Iowa Production*, 2002-0826 (La. 2/25/03), 2003 WL 536727 (in an action for breach of a contractual obligation to provide reasonable restoration, damages are not "tethered" to the value of the property).