Corbello v. Iowa Production – Lessons Learned from Louisiana

by Covert J. "Cove" Geary

This article addresses the landmark 2003 Louisiana Supreme Court decision of *Corbello v. Iowa Production* and subsequent legislation and court decisions and how they may affect potential claims for property damages under existing leases. It also addresses the potential for *Corbello*-type claims in other states, particularly Texas, Oklahoma and Mississippi.[1]

Introduction

In a perfect world, oil and gas operations would leave no discernable traces on the surfaces of the lands where they have been conducted. Unfortunately, however, even the most thorough, conscientious and regulatory-compliant cleanups by operators might not return the surfaces of these lands to their exact pre-exploration conditions. Moreover, operational activities that might have been considered state-of-the-art decades ago are judged in terms of the knowledge, technology and expectations of the present day. Oil and gas companies increasingly face lawsuits brought by surface owners of lands leased for oil and gas exploration seeking compensation for damages that operators allegedly caused to their property. The potential for recovery in such suits depends on the contract language and the states in which they are filed.

In February 2003, the Louisiana Supreme Court sent shock waves throughout the oil and gas industry with its decision in *Corbello v. Iowa Production*, 850 So.2d 686 (La. 2003). In *Corbello*, the court affirmed a $33 million damages award, plus an award of $4 million in attorney's fees, to plaintiff landowners who sued Shell Oil and other defendants for restoration damages pursuant to a surface lease that obliged the lessee to "reasonably restore" the leased premises upon cessation of operations, despite the fact that the land had a fair market value of only $108,000 unpolluted. Moreover, *Corbello* held that the plaintiffs were not obligated to spend the monies awarded to remediate the property.

In its first session following the *Corbello* decision, the Louisiana legislature passed a law that gave Louisiana environmental agencies greater opportunity to intervene in property restoration suits in the oil patch, and which attempted to prevent to some degree future "windfalls" to plaintiffs, by requiring that certain portions of such awards be spent on actually restoring the property.

In the years since, the Louisiana courts have further addressed the extent to which property damages are recoverable. Some of these courts have affirmed large damage awards disproportionate to the value of the properties, while others have limited recovery in remediation claims. For its part, the Louisiana Supreme Court this year has issued two decisions that substantially limit the availability of disproportionate damages where claims are brought in tort, rather than breach of contract, or where the surface lease contains no obligation to restore. On the other hand, recent decisions of Louisiana's appellate courts are more troubling to the industry. The future repercussions of these decisions, and of *Corbello* itself, on Louisiana's oil and gas industry are yet unclear.

This article examines *Corbello* and its progeny in detail, highlighting the rationales for the courts' decisions, and focusing upon the strengths and shortcomings of the anti-windfall legislation. It then looks to Texas, Oklahoma and Mississippi, both with regard to how those states have dealt with restoration damage suits thus far, and to why *Corbello*-type awards appear unlikely in those states.[2]

Louisiana

Corbello v. Iowa Production

In *Corbello*, two leases were at issue: a 1929 oil and gas mineral lease in a large tract known as the "Iowa Field," and a 1961 surface lease covering 120 acres of land within the Iowa Field. Following the expiration of the surface lease, plaintiffs sued the original lessee (Shell), and its sub-lessees, for failure to fulfill a contractual obligation to restore the property to its pre-lease condition. Specifically, the surface lease provided that upon termination, the lessee was obligated to "reasonably restore the premises as nearly as possible"

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to its condition at the start of the lease. *Corbello*, 850 So.2d at 694. Immediately upon termination of the surface lease, the plaintiffs sent Shell a letter alleging that it had failed to maintain the property as required. Subsequently, plaintiffs sued.

The plaintiffs retained an expert who visited the property 13 times, conducted extensive testing including electromagnetic testing, and whose testimony the court found credible. Plaintiffs' expert testified as to the extensive costs of cleaning not only the surface of the land, but also the cost of cleanup to protect against a threat to the aquifer that lay under the property at a depth of approximately 120 to 130 feet and which was the source of the drinking water supply for the City of Lake Charles. He testified that protecting the groundwater would require installation of a groundwater recovery system at a cost of $3 million. Operation of the recovery system and disposal of the contaminated groundwater at a cost of $1.3 million per year for a minimum of five years, and other work necessary to clean up the property and protect the groundwater.

CORBELLO DECISION

The jury awarded plaintiffs $33 million dollars in restoration damages, which included $28 million for injury to the aquifer, plus $5 million in damages to the surface itself. The Louisiana Third Circuit Court of Appeal affirmed the award.

On appeal to the Louisiana Supreme Court, Shell argued that the courts below had erred by granting damages for breach of the contractual obligation to restore that were not reasonably related to the market value of the property. Specifically, Shell argued that no rational lessor or lessee would expect, in entering into such a lease, that the lessee would be required to restore property at a cost roughly 300 times greater than the property's fair market value. Plaintiffs countered that contract constitutes the law between the parties that connect them, and that the language of the contract did not limit Shell's liability for reasonable restoration to the market value of the property.

The Louisiana Supreme Court agreed with the plaintiffs. It observed that Shell was a sophisticated party with vast experience negotiating oil and gas contracts, and bound itself to "reasonably restore." The Court further held that once Shell had so obligated itself, Shell should not be allowed to alter the terms of the contract by limiting its liability to an amount reasonably related to the market value of the property. The court reasoned:

> "to do so would give license to oil companies to perform its operations in any manner, with indifference as to the aftermath of its operations because of the assurance that it would not be responsible for the full cost of restoration. ... In the end, it is the oil companies, not plaintiffs, who would get a windfall."

The court acknowledged that under prior precedent set forth in *Roman Catholic Church v. La. Gas Serv. Co.*, 618 So.2d 874 (La. 1993), in property restoration suits sounding in tort, restoration costs are generally limited by the value of the property unless the plaintiff can show that he has some per-

sonal reason for restoring, or that he likely will restore, the property to its original condition. Nevertheless, the court held that the terms of the contract agreed to by the parties overruled any policy considerations for limiting damages in tort cases. Id. at 694-95.

Shell also argued that the court of appeal had erred by (1) affirming the award even though the plaintiffs had no legal duty to actually use the award to remediate the property, and (2) not requiring the plaintiffs to seek relief from an administrative agency before filing suit. On the first issue, the court concluded that it had no authority to modify a damage award in a breach of contract case to require the money be spent on restoration absent legislation mandating such a result. Id. at 699. On the second issue, the court held that "private landowners in Louisiana have no duty to seek relief from an administrative agency before filing suit against an oil company." Id. at 701. The court recognized that allowing private restoration suits to be brought prior to plaintiffs seeking administrative relief could subject oil companies to multiple exposures if a successful plaintiff failed to restore the land, and other individuals affected by unremediated pollution subsequently filed their own suits. However, the court concluded that requiring plaintiffs to seek administrative relief before filing suit would be unacceptable, because it "would leave only understaffed and underfunded state agencies to oppose the oil companies. In this situation, there [exists] a strong possibility that tl land will remain polluted."

Although *Corbello* involved a surface lease, it has also been held applicable t an oil and gas lease. *Hazelwood Farm, Inc. v. Liberty Oil and Gas Corp.*, 2002-266 (La. App. 3d Cir. 4/2/03), 844 So.2 380, writ denied, 857 So.2d 476 (La. 2003). There, the mineral lessee was ordered to pay $2 million as damages "for restoring the property," despite a jury finding that the value of the prope ty in an uncontaminated state was $304,000, and despite a jury finding th there was no reason to believe that the landowner would actually spend the award restoring the property.

In sum, *Corbello* allowed a plaintiff to bring suit for breach of a contractual obligation to restore without first seeki administrative relief, recover damages enormously disproportionate to the value of the land, and pocket the mon

without ever restoring the property. *Corbello* does indicate, however, albeit arguably in dicta, that the duty to repair the leased premises does not arise until the lease expires. Id. at 703.

The Legislative Response

In the legislative session immediately following *Corbello*, the Louisiana Legislature passed Revised Statute 30:2015.1 (2003 La. Acts No. 1166) to address the problem of windfall awards in property restoration cases. Section 30:2015.1 mandates that in suits alleging contamination of "usable groundwater," as defined by prior Louisiana Department of Environmental Quality ("LDEQ") regulations, the LDEQ and Louisiana Department of Natural Resources ("LDNR") must be notified of the action and given an opportunity to intervene. La. R.S. 30:2015.1(B). If, prior to a final judgment on the merits, the court determines that contamination of usable groundwater exists that poses a threat to public health, the court shall order the responsible party or a court appointed expert to draft a plan for the evaluation and remediation of the contamination, which plan must be commented upon by the LDEQ and LDNR within 60 days of its submission. La. R.S. 30:2015.1(C)(1)-(2). Any remediation damages awarded must be paid into the registry of the court, and the court shall issue orders to ensure that the monies are spent on remediation. La. R.S. 30:2015.1(E)(3). Any monies deposited that are not used on remediation must be returned to the depositor. La. R.S. 30:2015.1 (E)(4).

While this statute addresses the problem of windfall verdicts to some extent, its efficacy is limited by the fact that it only applies in cases involving contamination to "usable groundwater." Damages awarded for cleanup of soil, surface water, or any groundwater that does not qualify as "usable" must still be paid directly to a successful plaintiff, without

any requirement that the monies awarded be used to restore the injured property. Not surprisingly, most suits filed since 30:2015.1 was adopted attempt to circumvent it by specifically disavowing any claims for damages to usable groundwater. Whether such artful pleading will limit the efficacy of the statute is unclear at this time. Also still unknown are how courts will administer the approval of remediation plans in cases where usable groundwater is involved, and the extent to which the LDEQ and LDNR will participate in those cases.

Castex and Other Subsequent Cases

In February of this year, the Louisiana Supreme Court revisited the subject of restoration damages in its decision in *Terrebonne Parish School Board v. Castex Energy, Inc.*, 893 So.2d 789 (La. 2005), this time arriving at a more industry-friendly result. *Castex* involved a mineral lease, with surface rights, that had been executed in 1963 and which had terminated by 1997. At issue in *Castex* was whether a mineral lessee had an implied duty under the "prudent operator" provision of the Louisiana Mineral Code to restore the surface of leased premises absent a contractual obligation to do so, and where the operator had not acted in either a negligent or excessive manner. The court concluded that no such implied duty exists.

The lease in *Castex* granted the lessees rights to conduct all activities incident to exploration and production, including the right to dredge canals as necessary. Unlike the lease in *Corbello*, it contained no clause obliging the lessees to restore the premises to their pre-lease condition upon completion of operations. As part of their operations, defendants had dredged three canals and a slip, which activities resulted in a loss of nearly 28 acres of leased land. Plaintiff alleged that Mineral Code § 122, which obligates a mineral lessee to act as a reasonably prudent operator, also impliedly obligated the defendants to restore the land to its pre-lease conditions by backfilling the canals. The lower courts had found that such a duty existed, and that defendants had a duty to restore in accordance with a methodology furnished by the trial court, irrespective of cost, although costs were estimated to be $1.1 million.

The Supreme Court held that § 122 implied no such duty. Despite the fact that the official comments to the section supported plaintiff's argument, the court found that La. Civil Code arts. 2719-20, from which § 122 is derived, allow for deterioration of the leased premises caused by necessary "wear and tear." The court found that since the lease specifically allowed the lessee to dredge canals, the land had merely been " 'worn' and 'torn' in precisely the manner the parties contemplated," and defendants had no duty to restore. Id. at 800. The court concluded by holding 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 unreasonably or excessively." Id. at 801. Because the plaintiff had presented no evidence that defendants had acted unreasonably or excessively[3] the court reversed the damage award.

More recently, in May 2005, the Louisiana Supreme Court decided *Hornsby v. Guilliot d/b/a Bayou Jack Logging*, No. 2004-C-1297, 2005 Westlaw 105888 (La. 05/06/05), in which it reinforced that absent strong proof of a plaintiff's personal ties to injured land, the plaintiff may not recover damages in tort that exceed the fair market value of the property. Plaintiff landowners sued defendant Bayou Jack Logging ("Bayou Jack") for cutting down timber on their lands without their permission. Plaintiffs claimed, among other things that defendant was liable in negligence.[4] The plaintiffs' trees had been located on land worth roughly $46,000. The cost of fully restoring the property to its pre-damage condition was estimated to be $378,000.

The trial court held that plaintiffs were entitled to restoration damages, despite the fact that they far exceeded the value of the property. While the trial court acknowledged that under Roman Catholic Church, supra, plaintiffs are ordinarily not entitled to recover for surface damages in excess of the value of the damaged property, it found that full restoration damages were recoverable under a recognized exception to that general rule. That exception applies when plaintiffs can prove that they had personal reasons that made restoration of the property likely. The trial court credited the testimony of the plaintiffs, who said they planned to build homes and a camp on the property at issue, and that they planned to pass the property on to their decedents. The court of appeal affirmed.

The Supreme Court reversed, holding that the district court clearly erred in finding that the evidence showed that the lands at issue were sufficiently personal to the Plaintiffs to justify the award. The Supreme Court noted that the only evidence in the record that the Plaintiffs intended to build on the land was their testimony to that effect, and that the Plaintiffs presented no "tangible proof or documentation to support their intent." Hornsby, 2005 Westlaw 105888. The plaintiffs had used the land primarily for cattle grazing for almost 10 years, had not added utilities or built any structures on the land, and had no homestead exemption on the law.

There was only their self-serving testimony about their plans to live on the land at some uncertain future date. The Court concluded:

> We do not find that plaintiffs' self-serving testimony of their inchoate intent to develop the land at some undetermined future point is sufficient to justify recovery of restoration costs in excess of the actual market value of the land and the trees cut. Consequently, we find that the district court's reliance on

Roman Catholic in awarding plaintiffs restoration costs exceeding the market value of the land and trees under the principles of general tort law was in error.

Instead of restoration damages, the Supreme Court found that the appropriate award, pursuant to Louisiana statutes pertaining to unauthorized deforestation, was three times the market value of the trees cut, or roughly $68,000.[5]

Taken together, *Castex* and *Hornsby* mark a recent trend in Louisiana Supreme Court jurisprudence significantly limiting the ability of plaintiffs to recover for surface damages to land in the absence of a contractual obligation to restore. As encouraging as this trend may be for the oil and gas industry, only time will tell how pronounced it will ultimately become.

The Supreme Court's commitment to limiting damages in such situations will be tested as it decides whether to grant writs in two pending cases. First, in *Grefer v. Alpha Technical, et al.*, 2002-CA-1237, 2005 Westlaw 896416 (La. App. 4th Cir. 3/31/05), plaintiff landowners sued their lessee (an oil pipe cleaning company) and Exxon (which supplied the pipes for cleaning), for contaminating their land with naturally occurring radioactive material ("NORM"). Even though the contaminated property had a market value of approximately $1.5 million, the jury had awarded $145,000 in general damages, $56 million in property restoration damages, and $1 billion in punitive damages. On appeal, the Fourth Circuit affirmed the restoration award of $56 million.[6] In support of its holding, the court noted that one of the landowners, himself a judge, testified that the property had been in his family since 1875 and that it could not be sold in its contaminated condition without exposing plaintiffs to potential future liability. The court concluded that the plaintiffs had sufficiently proven, in satisfaction of Roman Catholic Church, supra, "both personal and economic reasons for wanting to restore their property to its original condition," and that damages in excess of the property's value were therefore appropriate. Thus, the court found that the landowners had personal interests in cleaning up the property, and also that they also intended to actually clean up the property for economic reasons. Significantly, the court observed that a cleanup based upon the Louisiana DEQ standards would cost in the range of $46,000. The court upheld the jury damage award that was not based upon Louisiana's regulatory agency's property cleanup standards, but which instead was based principally upon the testimony of plaintiff's expert, a health physicist, relying on exposure standards adopted by the NRC and the EPA. It is also significant as a landmark case in which restoration damages far exceeding the value of the land were awarded as tort damages, as opposed to being awarded as contract damages in Corbello. Rehearing was denied by the Fourth Circuit in mid-May. Whether the Louisiana Supreme Court will grant writs remains to be seen.

Second, in *Doré Energy Corp. v. Carter-Langham, Inc., et al.*, Ca 04-1373, CW 04-1202, CW 04-1233, CW 05-6, 2004 Westlaw 1027927 (La. App. 3rd Cir. 5/4/05), the court allowed a restoration suit to go forward notwithstanding the fact that operations on a part of the property are ongoing. In *Doré*, the Louisiana Third Circuit Court of Appeal concluded that even though the lease had not terminated, the landowner could sue the operator and prior operators seeking restoration under two circumstances: (1) where the landowner alleged that the operator had negligently failed in its duty to maintain the leased land as a reasonably prudent operator as required under § 122 of the Louisiana Mineral Code, or (2) where the operations on that part of the leased premises had been completed. One would argue that the *Doré* opinion is a landmark opinion in both instances. First, one would argue that the Third Circuit's decision created a new cause of action in finding that the landowner could sue on the obligation to "maintain the leased premises" as a reasonably prudent operator. In essence, without expressly saying so, the Third Circuit's decision has created a new cause of action. Second, the Court's conclusion that an oil and gas mineral lessee's obligation to restore the leased premises arises not at lease expiration but "upon completion of operations," was a landmark decision. Writs are pending before the Louisiana Supreme Court.

Other recent cases have also addressed the availability of restoration damages in significant ways. In *Simoneaux v. Amoco Production Co.*, 860 So.2d 560 (La. App. 1st Cir. 2003), writ denied, 871 So.2d 348 (La. 2004), a non-operating working interest owner was held liable with the operator for restoration damages. The Court of Appeal also held that where the jury had awarded "only" $375,000 in damages, the trial court had been wrong to "substitute its judgment" for that of the jury and award $13 million instead. Also, in January 2005, a federal judge in Louisiana held that a plaintiff landowner who did not purchase the property until after the alleged contamination had taken place, and after the lease was terminated, had no standing to sue for restoration. See *Frank C. Minvielle, L.L.C. v. IMC Global Operations, Inc.*, Civ. A. No. 03-1908 (W.D. La., Lafayette-Opelousas Division, 10/19/04 & 1/12/05). The court relied on Louisiana law holding that damages for breach of contract or lease of property are "personal rights" that do not transfer with title to the land, absent a special assignment of rights to the buyer. Since there was no assignment of rights to the buyer at the time of the transfer, the buyer did not acquire those rights.

Legislation Pending in 2005

As of this writing, the Louisiana legislature has two pending bills that are significant.

First, pending is a bill that would rewrite the "prudent operator" provision contained in § 122 of the Louisiana

Mineral Code, and a related provision. The proposed change would expressly provide that a mineral lessee is obligated to the lessor and the surface owner, "insofar as practicable, to restore the surface to its original condition at the earliest reasonable time after termination of operations on the leased property, or any portion thereof." It also provides that a civil action may be brought 90 days after notice has been received by the mineral lessee of the failure to restore, and that a lessee who fails to perform this obligation is liable for costs and attorney's fees.

This proposal is being promoted by the plaintiff in the *Doré Energy* case, and could essentially legislate the result that the Louisiana Third Circuit Court of Appeal has decided (pending writs to the Louisiana Supreme Court). It would change the law in that:

- The obligation to restore would not arise after all operations on the lease terminate, but would arise on a production site-by-production site basis.

- It would legislate the contract language in the *Corbello* case, creating the affirmative obligation to restore, without any provision for "wear and tear" or other foreseeable use of the property. Arguably, it could create a strict liability standard.

- It would provide for costs and attorney's fees.

The second pending bill of interest is a provision to expand the "groundwater bill" passed in the wake of *Corbello* in 2003. Although lengthy and arguably confusing, it would expand the post-*Corbello* statute to apply not only the "usable groundwater" but also to "coastal wetland areas." Mr. Doré, who has also promoted this bill in the legislature, claims that further limits a landowner's ability to keep his damages as a windfall profit instead of using them to remediate the land.

As of this writing, the fate of these bills is uncertain.

Louisiana law regarding restoration obligations, as well as the operator's potential damage exposure pursuant to such obligations, has evolved dramatically since the *Corbello* decision was issued in 2003. In the next few years, one can anticipate that the legal landscape relevant to such issues will continue to evolve. Until then, lessees whose leases contain affirmative obligations to restore may be subject to restoration damage awards far in excess of the value of the leased property, while operators sued either in tort or under contracts containing no express obligations to restore will be less likely to be held liable for such damages.

Texas

Texas is a far less plaintiff-friendly forum than Louisiana for recovery of restoration damages, particularly with regard to recoveries in excess of the fair market value of the property. However, the large awards for restoration damages in Louisiana appear to have helped fuel similar suits in Texas. In *North Ridge Corp. v. Walraven*, *infra*, for example, plaintiffs repeatedly cited to the Louisiana Supreme Court's Roman Catholic Church opinion, to support their argument that restoration damages in excess of the injured property's fair market value are recoverable.

Nevertheless, by consistently limiting restoration damages to market value as a matter of law, regardless of whether the injuries to the land are deemed "temporary" or "permanent," Texas courts have ensured that excessive awards will be available only when a plaintiff can pr he is entitled to punitive damages due the operator's willful and wanton cont mination of the property.

Surface Damage Agreements

In Texas, surface owners and operator often avoid potential lawsuits for restoı tion damages by addressing surface dam ages ahead of time in either the oil and gas lease or through a separate surface damage agreement prior to commencement of operations. Parties to such agreements may agree that the lessee will pay the surface owner specified fees for drilling wells, constructing new roads, installing pipelines or power lines, digging and using salt water disposal sites, etc. The surface owner may also require the lessee to maintain minimum buffers, such as between its operations and other structures on the land, or to install and maintain adequate fencing or cattle guards if the leased land is also used for ranching. Many such agreements and leases also contain clauses obligating the operator to restore the surface of the lands used or affected, in accordance with all applicable laws and regulations, to as near its original condition "as is reasonably practical" upon completion of operations. Some even stipulate that the operator must pay the market value of any crops or vegetation damaged by its operations, regardless of whether the damage is caused by reasonable use of the land. Texas courts have recognized the enforceability of such contractual agreements. See, e.g. *Humble Oil & Refining Co. v. Williams*, 420 S.W.2d 133, 134-35 (Tex. 1967). By reaching agreement on the front end, surface owners and operators may significantly reduce the possibility of a future suit for surface damages.

Bases for Claims

If a suit for surface damages is filed, however, the owner will usually allege that the operator was either (1) negligent or (2) unreasonable in its use of the leased lands.[7] Claims will often be principally based on one of these two grounds because, under Texas common law, parties entering into a lease form two separate "estates": a "dominant" estate in favor of the lessee, and a "servient" estate in favor of the lessor. See *Tarrant County Water Control & Improvement Dist. v. Haupt, Inc.*, 854 S.W.2d 909, 911 (Tex. 1993). As possessor of the dominant estate, the operator has rights not only to explore the land and extract oil and gas, but also to perform all activities reasonably necessary to accomplish these activities. The mere fact of damage to the surface of the land does not mean the operator has acted negligently or unreasonably. See *H.B. Taylor v. Brigham Oil & Gas, L.P.*, No. 07-00-0225-CV, 2002 Westlaw 58423, at *2 (Tex. App. – Amarillo 1/16/02)(citing *Ball v. Dillard*, 602 S.W.2d 521, 523 (Tex. 1980)). Rather, an owner seeking compensation for surface damage must prove either (1) that the operator failed to use reasonable care in conducting its exploration and extraction activities, or (2) under what is known as the "accommodation doctrine,"[8] that the operator could have accomplished its ends through reasonable alternative means without damaging the land. See, *Tarrant*, 854 S.W.2d at 911. If the land is susceptible to use in only one manner, then the operator may pursue that use regardless of the extent to which it damages the surface.

Measure of Damages — Temporary vs. Permanent Injury

If a plaintiff can prove a claim for surface damages to its land, the measure of the award depends upon whether the court categorizes the injury as temporary or permanent. As the Texas Supreme Court stated in *Kraft v. Langford*, 565 S.W.2d 223 (Tex. 1978):

> The character of an injury as either permanent or temporary is determined by its continuum. Permanent injuries are those which are constant and continuous, not intermittent or recurrent. Temporary injuries are those which are not continuous but are 'sporadic and contingent upon some irregular force such as rain. . . . The concepts of temporary and permanent injuries are mutually exclusive and damages for both may not be recovered in the same action.

The *Kraft* court further stated that permanent injuries are "normally measured as the difference in the value of the property before and after the injury," while the proper measure of temporary damages is "the amount of 'damages which have accrued during the continuance of the injury covered by the period for which the action is brought.'" Put another way, the proper measure of temporary damages "is the cost of restoration [of the land] to its condition immediately

preceding the injury." *Mieth v. Ranchquest*, No. 01-02-00461-CV, 2005 Westlaw 615594, at *4 (Tex. App. – Houston 3/17/05). However, the diminution in fair market value becomes the measure of damages for temporary injuries where the cost of restoration exceeds the diminution in fair market value.[9] See Id; *North Ridge Corp. v. Walraven*, 957 S.W. 2d 116 (Tex. App. – Eastland 1997) (reversing jury award of $509,000 for remediation of one acre when the entire 100-acre tract had fair market value of under $100,000). Thus, in the absence of punitive damages[10] the damages cannot exceed the diminution in the fair market value of the land. *Corbello*-type damages therefore do not appear possible.

While differentiating between permanent and temporary injuries may be highly fact-dependent, the distinction can be crucial. For example, in *Mieth*, supra, the landowners sued the former operators for surface damages caused by discharges of drilling fluids, fuel, oil, saltwater and other wastes. The jury found the former operators liable for the alleged damages. However, the jury found that while the reasonable and necessary cost of remediation was $200,000, the fair market value of the land had not been diminished as a result of the pollution. The trial court held that the injuries to the land were permanent in nature as a matter of law, and looking to the reduction of the fair market value as the appropriate measure of damages, awarded the plaintiffs nothing.

On appeal, the Houston Court of Appeals agreed that the injury was permanent, finding that the "evidence showed that the ground was so injured as to impair the productivity of the soil and that the injury had been constant since 1996." The court thus held that the costs of remediation were "immaterial" to the proper damage award. In examining the record further, the court found that there was significant disagreement as to the extent to which the fair market value of the land had been reduced. Because the landowners had not established that reduction as a matter of law, the Court of Appeals affirmed the judgment below.

Similarly, the Eastland Court of Appeals recently reversed a $2,110,000 jury verdict for surface damages on the ground that restoration of the land in question was not "economically feasible," and that the plaintiffs had not established a reduction in the fair market value of their property. In *Primrose Operating Co., Inc. v. Senn*, No. 11-03-00131-CV, 2005 Westlaw 729963 (Tex. App. – Eastland 3/31/05), the plaintiff landowners sued an operator for polluting approximately 10 acres of a roughly 3,000-acre leased tract, which was itself located on plaintiffs' 23,013-acre ranch. Plaintiffs had purchased the ranch in 1997 for $3,164,000, despite their knowing that scale oil and gas operations had been active on the leased site since 1939. At trial, plaintiffs' restoration expert testified that the cost of remediating the 10 polluted acres would be $2,110,000. Two real estate appraisers also testified on behalf of the plaintiffs that the fair market value of the land had accordingly been reduced by at least as much.

The expert for the defense opined that fair market value of the ranch to be $4,025,000. He opined that the fair market value had not been reduced at all by the alleged pollution because the ranch continued to thrive, and because the market for similar ranches reflected that there was no stigma attached to the oil field activity. Indeed, on cross-examination, one of the plaintiffs' experts acknowledged that environmental pollution does not necessarily impact the marketability of real estate. The jury awarded the plaintiffs $2,110,000.

The Eastland Court of Appeals reversed, holding that regardless of whether the injuries to the land were temporary or permanent, the jury award based upon the costs of restoring the land was not "economically feasible." Thus, the court found that the proper measure of damages was the reduction in the ranch's fair market value. The court went on to discount the testimony of plaintiffs' experts regarding fair market value reduction, both because it was based wholly on restoration costs, which were an improper measure of damages, and because it did not take into account the fact that extensive oilfield operations had already been conducted on the property at the time that the plaintiffs purchased it "as is." The court stated that while it did not condone the operator's failure to properly clean the sites, the plaintiffs had not presented any competent evidence that their ranch had diminished in value. The court rendered judgment that the plaintiffs "take nothing" from the operator.

As these cases indicate, Texas appellate courts have proven far more likely to deny restoration damages than courts in Louisiana. Even in *Mieth*, supra, where the court of appeals could have remanded to the trial court for a determination of the diminished market value of the land, the court declined to do so, instead placing the burden upon the plaintiffs to prove the diminishment as a matter of law on appeal. At this stage, Texas courts appear unlikely to render a *Corbello*-type decision.

Standing to Sue

At least one Texas court has held that plaintiffs do not have standing to bring claims for damages that occurred before they owned the property absent an assignment of those claims by the individual that owned the land at the time the damage occurred. In *Exxon Corp. v. Pluff*, 94 S.W.3d 22 (Tex. App.-Tyler 2002, pet. denied), the surface owner sued Exxon for damages related to fixtures that Exxon had abandoned on the property after ceasing operations. After Exxon plugged and abandoned the wells on the lease in 1984, it removed some of its equipment, but not all, leaving concrete, some pipes and other materials. The abandoned fixtures were still on the land when the plaintiff purchased the land in 1992. Plaintiff sued claiming

unreasonable use, violation of lease covenants, negligence, "common law duty to restore" and requested punitive damages. The jury awarded plaintiff $30,000 in damages.

The Tyler Court of Appeals reversed, stating the plaintiff lacked standing because the right to bring an action for injury to land is a personal right, and thus belonged to the owner of the surface at the time of the injury. Absent assignment of the claim, the court held that the plaintiff could not sue. The court also stated that there is no "common law duty" to restore land upon termination of the lease, beyond the duty to refrain from negligent or unreasonable use of the land, and that the lessee's right to remove fixtures after termination of the lease did not create a duty to do so.

Texas Railroad Commission

The Texas Legislature has not passed any statutes that directly address the issue of surface damages. Rather, it has vested the Texas Railroad Commission (TRC) generally with enforcing and overseeing the administration of regulations relating to oil and gas exploration and drilling operations. Tex. Nat. Resources Code § 91.101. Any surface owner may bring an action before the TRC seeking to enforce state regulations to prevent or remediate property contamination.

The Amarillo Court of Appeals has ruled, however, that a landowner need not seek relief before the TRC, nor even wait until a complaint that has already been filed with the TRC be decided, prior to filing a claim for surface damages in court. See *In re Apache Corp.*, 61 S.W.3d 432 (Tex. App. – Amarillo 2001). In *Apache*, a surface owner who had already filed an action with the TRC alleging that Apache had polluted subsurface water aquifers on the leased premises, subsequently filed suit in state court seeking damages for the same alleged contamination. The TRC had not yet adjudicated the complaint before it before the plaintiff filed his court case. Apache argued that the TRC had exclusive jurisdiction over the claims, and that the plaintiff's court case should therefore be dismissed. The trial court denied Apache's motion.

Reviewing the decision on mandamus, the Court of Appeals affirmed. It cited as support Texas Natural Resources Code § 85.321, which provides that an owner "may sue for and recover damages and have any other relief to which he may be entitled at law or equity." The court also cited Texas Natural Resource Code § 85.322, which states that no TRC Code sections "shall impair or abridge or delay a cause of action for damages or other relief that an owner of land . . . may have or assert against any party violating any rule or order of the [TRC] . . . ." Reading these sections in conjunction with the applicable sections of the state Water Code, the court concluded "that the legislature has yet to grant exclusive jurisdiction to the TRC over disputes concerning the abatement of water contamination caused by oil and gas production."[1] While the court's ruling is limited to water contamination claims, the same logic would almost certainly apply to all sorts of oil and gas contamination claims.

Oklahoma

Oklahoma is similar to Texas in that damages to land are classified as either temporary or permanent, but in either event damages are limited to the reduction in the land's fair market value. Oklahoma differs from Texas, however, by virtue of the Surface Damages Act ("SDA"), 52 Ok. St. §318.2 et seq., which attempts to balance the conflicting interests of surface owners and mineral lessees by establishing a mechanism for determining, and requiring advance payment of, damages which will result from operations.

Oklahoma Law Prior to the Surface Damages Act

Prior to the 1982 passage of the SDA, in the absence of a contractual provision in the lease providing otherwise, an oil and gas operator was liable for surface damage only if the damage resulted from wanton or negligent operations, or if the operations affected more than a reasonably necessary area. See *Houck v. Hold Oil Corp.*, 867 P.2d 451, 456 (Ok. 1993). "In other words, the operator would not be liable for surface damage resulting from the 'reasonable' use of the surface which was necessary to the oil and gas operations." The proper measure of damages depended upon whether the injury was "abatable" (i.e. temporary) or permanent. *Schneberger v. Apache Corp.*, 890 P.2d 847, 849 (Ok. 1994). Recoveries for permanent damages were measured by the difference between the fair market value of the property immediately before and immediately after the injury, while temporary damages were measured by the cost of repairs. Repair and restoration costs, however, could not exceed the diminution of the land's value.

While the standard of liability was changed by passage of the SDA, the measure of damages post-SDA remains, at a maximum, the diminution in the value of the land caused by the drilling operations. Id. at 853. This measure of damages applies regardless of whether the landowner recovers in a negligence claim, or for a breach of a lease containing a restoration obligation. See id. at 852, (relying, *inter alia*, on property damage cases sounding in tort to determine proper measure of damages for breach of contractual obligation to restore).[12]

To determine the diminution in value, a judge or jury may generally consider the following factors:

1. the location or site of the drilling operations;
2. the quality and value of the land used or disturbed by said drilling operations;
3. incidental features resulting from said drilling operations which may affect convenient use and further enjoyment;
4. inconvenience suffered in actual use of the land by operator;
5. whether the damages, if any, are temporary or permanent in nature;
6. changes in physical condition of the tract;
7. irregularity of shape and reduction, or denial of access;
8. the destruction, if any, of native grasses, and/or growing crops, if any, cased by drilling operations.

Surface Damages Act

In 1982, Oklahoma's Legislature passed the SDA in an effort to balance the rights of a mineral lessee to explore and drill with

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Correction:

In the July/August issue of the *Landman*, it was incorrectly published that John Atwood transferred from TMR to KCS. The correct transfer was Ron Tuminello, CPL, as noted in this issue's Member Transfers.

the rights of a surface owner to be timely compensated for damages to the surface of the leased property. Under the SDA, before entering the leased premises to conduct operations, the mineral lessee must accomplish two tasks. First, the lessee must file with the Secretary of State a bond, letter of credit, cash or a certificate of deposit in the amount of $25,000 to cover potential surface damages caused by the future operation. §318.4(A).

Second, the lessee must give the surface owner written notice of his intent to drill, describing the proposed location and the approximate date that the lessee proposes to commence operations. § 318.3. The operator and owner are obliged to enter into good faith negotiations to agree upon the amount of surface damage that is likely to occur as a result of the proposed operations. If the parties agree on the amount of damages in a signed contract, the operator may enter the site and begin operations. §318.5(A).[13] If the parties cannot agree on the amount of damages, the operator must petition the district court in the county in which the proposed site is located for an appointment of appraisers. § 318.5 (A). Once the operator has petitioned for appraisal, he may enter the site and begin operations.

Within 20 days following the filing of a petition for appraisal, the operator and surface owner must each select an appraiser. §318.5(C). The two appraisers selected then choose a third. Within 30 days of the date of their appointment, the appraisers must inspect the property, and then submit a single written report to the clerk of court setting forth their estimate of the amount of damage that will result from the proposed operations. Either party may file exceptions to the report, or demand a jury trial, if they do not agree with the report's conclusions. §318.5(E). Either party may additionally appeal the outcome of any hearing on exceptions or jury trial. § 318.6. Throughout the time where exceptions are pending, or a trial or an appeal are ongoing, an operator may continue operations so long as he has deposited sufficient funds to cover the contested damage estimate with the Secretary of State. See § 318.5(A), §318.5(F), and § 318.6. Any operator that willfully or knowingly fails to post the required security, or who fails to either notify the surface owner o seek appraisal, if necessary, before entering the leased premises is liable to the surface owner for treble damages. §318.9.

By requiring parties to reach an early agreement on restoration damages or, alternatively, to resort to appraisal or even court proceedings, the SDA makes subsequent surface damage suits substantially less likely to occur. However, the SDA does not bar a landowner from nevertheless bringing a tort action for pollution damages, or for an alleged breach of a contractual agreement arrived at pursuant to the SDA. Indeed, the Supreme Court of Oklahoma has held that when a party files suit contesting an appraisal under the SDA, the surface owner may, as part of the same suit, file a separate claim for tort damages. See *Ward Petroleum Corp. v. Stewart*, 64 P.3d 1113 (Ok. 2003). The court mandated, however, that SDA and tort claims have to be tried on separate procedural tracks, since SDA suits are "special proceedings" that follow expedited condemnation procedures. Id. at 1116. In such a case, the damages recoverable under either claim would still be limited to the diminution in the fair market value of the property. The sources of proof of those damages, however, would be distinct. In any event, by requiring that parties comply with the SDA, and by limiting the damages recoverable to the diminution in fair market value, Oklahoma has ensured that *Corbello*-type windfalls likely will not occur.

Mississippi

In Mississippi, landowners are required under a 2002 Mississippi Supreme Court case to exhaust their administrative remedies before the state's Oil and Gas Board before filing suit. By requiring such administrative exhaustion, the Supreme Court of Mississippi appears to have imposed a formidable roadblock to *Corbello*-type windfall damage awards. However, in cases decided earlier this year, the court has issued decisions that raise questions as to whether plaintiffs might overcome this hurdle through artful pleading.

The Chevron Decision

In *Chevron, U.S.A., Inc. v. Smith*, 844 So.2d 1145 (Miss. 2002), Mississippi's Supreme Court held that landowners cannot sue for damages to restore property allegedly polluted by oil and gas operations without first seeking relief through the state's Oil and Gas Board. In *Chevron*, the defendant appealed a $2.3 million jury award that was based upon estimates for restoring land that was contaminated by defendant's oil operations. Plaintiffs had previously rebuffed defendant's offers to clean the site.

The Mississippi Supreme Court held that the trial court had erred in allowing the case to go to trial, because the plaintiffs had failed to seek administrative relief from the Board before filing suit. The court reasoned that the legislature had created the Board to protect the general public from dangers inherent in the production of oil and gas, and that parties are therefore required to seek administrative relief before turning to the courts. In particular, the court noted that the "Board possesses specialized knowledge of the dangers presented by oil and gas exploration and drilling" and that it 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." Id. at 1148.

The court also clearly sought to prevent litigants from exploiting the legal system to obtain restoration damages which would not be spent on cleanup. Recognizing that "no court can order the plaintiffs in this case to expend the award on decontaminating the property," the court refused to "allow a windfall to plaintiffs who obviously have no intention of cleaning up their property since they have refused all such offers of cleanup." This principle did not seem to bother the Louisiana court in *Corbello*. The Board, the court reasoned on the other hand, can order and supervise restoration of polluted lands and ensure that any contamination will be eradicated.

Subsequent Decisions

While *Chevron* was certainly good news for operators, more recent decisions of the Mississippi Supreme Court arguably call into question the extent of its protections. In two cases decided earlier this year, the court distinguished *Chevron*. See *Georgia-Pacific Corp., Inc. v. Mooney*, No. 2002-IA-01990-SCT, 2005 Westlaw 246654 (Miss. 2/3/05) and *Howard v. Totalfina E &P USA, Inc.*, 899 So.2d 882 (Miss. 03/03/05). In both cases, plaintiffs brought claims based on trespass, nuisance, negligence and regulatory violations, among others, alleging that the defendants had deposited pollution illegally on their lands. *Georgia-Pacific* centered around wood wastes, while *Howard* concerned oil field wastes that had purportedly been transported from other locations and dumped illegally. In both cases, the court concluded that while plaintiffs' claims based on regulatory violations were premature due to their failure to exhaust administrative remedies, their common law tort claims were not necessarily premature.

In *Howard*, in particular, the trial court had dismissed plaintiff's claims altogether, citing *Chevron* for support. The Mississippi Supreme Court reversed, stating that while generally a plaintiff must exhaust available administrative remedies, the exhaustion doctrine does not apply where an adequate administrative remedy is not available. *Howard*, 899 So.2d at 888. The court concluded that following the dismissal of the claim based upon regulatory violations, "the only claims that remain are those based on common law, over which this Court finds that the board has no authority."

Despite this language, *Howard* can be distinguished in a number of ways from *Chevron*, and therefore may ultimately pose no real threat to *Chevron's* exhaustion requirements. For example, the *Howard* court justified its holding, in part, because the property was issue is used as a dump, and was not subject to a mineral lease. Since no oil and gas exploration and production was conducted on the land, the court concluded that the board did not have jurisdiction. Id. at 886. Moreover, the court found that *Howard* involved commercial waste disposal, whereas the wastes at issue in *Chevron* "resulted from the normal activities in producing oil and gas." The court found, therefore, that the *Chevron* disposal "is distinct from the case at bar and falls clearly under the authority of the Board," whereas the "Board's authority does not extend to the regulation of commercial disposal of waste products...." Id. at 886-87. A substantial argument thus exists that *Howard* has no application to claims for surface damages to oil field sites.

Nevertheless, *Howard's* broadly worded rejection of the Board's authority over "common law claims," *Howard*, 899 So.2d at 888, coupled with the fact that *Chevron* does not make clear whether any of the plaintiff's claims were based in common law tort,[14] leave open the possibility that the Mississippi Supreme Court would countenance a claim based upon, for example, trespass for intentional disposal by an operator of oilfield wastes in a location of the leased premises far removed from its operations. While such a result seems unlikely, only time will tell whether it will come to pass.

Conclusion

The *Corbello* decision exposed Louisiana mineral lessees operating under leases containing restoration obligations to considerable potential damage awards. However, it seems unlikely that similar decisions will be issued in Texas, Oklahoma or Mississippi. Whether through jurisprudence or legislation, those states have considerably limited recoveries available in suits seeking restoration damages. The full extent to which Louisiana's unique legal landscape will inhibit oil and gas operations in the state will only become apparent with the passage of time.

Endnotes

[1] *Eric Whitaker, an associate in the New Orleans office of Jones Walker, played an extensive role in researching and drafting this article. Additional assistance was provided by Boyd Bryan in Jones Walker's Baton Rouge office, and Jane Romanov in Jones Walker's Houston office. For further reading, see the following articles written by Boyd Bryan: From Corbello to Castex: The Mineral Lessee's Obligation to Restore in Louisiana, 50 Landman No. 2, March/April 2005; and for a discussion of the broad spectrum of environmental issues that a purchaser of oil and gas property may confront, Managing Environmental Liability when Acquiring Oil and Gas Properties, 49 Landman No. 5, September/October 2004.*

[2] *The author is licensed to practice law in Louisiana only, and this survey of states' laws is not intended to be construed as legal advice on a specific matter.*

[3] In reaching this conclusion, the court noted that defendants had complied with all relevant regulations of the Louisiana Commissioner of Conservation, and that their decision not to backfill the canals was entirely consistent with industry custom.

[4] Bayou Jack admitted that it had inadvertently crossed a property line, and had cut down and removed the trees without Plaintiffs' consent.

[5] La. R.S. 3:4178.1, a statute that addresses trespass damages for cutting trees without the owner's consent, states that the offender is liable for three times the market value of the trees.

[6] The court also addressed the punitive damages, and concluded that a two to one ratio of punitive damages to actual damages was appropriate. Thus, the court awarded punitive damages of twice the actual damages, for total punitives of "only" $112,290,000.

[7] Claims for "unreasonable use" are commonly brought as nuisance or trespass claims. See, e.g. Mitchell Energy Corp. v. Bartlett, 958 S.W.2d 430 (Tex. App. – Ft. Worth 1997); North Ridge Corp. v. Walraven, 957 S.W.2d 116 (Tex. App. – Eastland 1997).

[8] As first articulated by the Texas Supreme Court in Getty Oil Co. v. Jones, 470 S.W.2d 618, 622 (Tex. 1971), the "accommodation" or "alternative means" doctrine states: Where there is an existing use by the surface owner which would otherwise be precluded or impaired, and where under established practices in the industry there are alternatives available to the lessee whereby the minerals can be recovered, the rules of reasonable usage of the surface may require the adoption of an alternative by the lessee.

[9] Courts sometimes justify this limitation on damages by invoking a concept of "economic feasibility." See e.g. Primrose Operating Co. v. Senn, No. 11-03-00131-CV, 2005 Westlaw 729963, at *4 (Tex. App. – Eastland 3/31/05).

[10] Punitive or exemplary damages may be awarded only if a plaintiff proves that a defendant committed fraud, or acted with malice or gross negligence. See Tex. Civ. Prac. & Rem. Code § 41.003(a); Oryx Energy Co. v. Shelton, 942 S.W.2d 637, 642 (Tex. App. – Tyler 1996).

[11] The court also rejected Apache's argument that the TRC had primary jurisdiction over plaintiff's claims, noting that the claims were "inherently judicial" in nature. Id. at 436.

[12] The court did note, however, that parties are "free to specify in the contract what the measure of damages would be in the event of a breach." Id. at 854. Presumably, parties to a lease may agree that the lessee will pay full restoration costs even if they exceed the fair market value of the property.

[13] If the parties agree that the surface damages will be greater than $25,000, the operator must immediately post additional security with the Secretary of State. § 318.4(D).

[14] The Chevron court characterized plaintiff's claims as "seeking cleanup of oil production byproducts." Notably, however, in its brief in support of petition for writs submitted to the United States Supreme Court, which were denied, plaintiff alleged that the Chevron decision held that "a landowner is not permitted to prosecute a civil action to recover damages caused by radioactive oilfield contamination unless he has first exhausted his administrative remedies. . . ." Plaintiff's Petition for Writ of Certiorari to the Supreme Court of Mississippi, 2003 Westlaw 22428750, at 10.

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