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LOUISIANA REMEDIATION STATUTE HELD NOT RETROACTIVE

The United States District Court for the Eastern District of Louisiana ruled recently that the Louisiana remediation statute, La. R.S. 30:2271, et seq., is not retroactive. *Sisters of Mercy Ministries, Inc. v. Vincent Viso*, 2001 U.S. Dist. Lexis 21220 (E.D. La., Dec. 7, 2001, J. Duval).

Plaintiff purchased a site in 1984. In 1999, plaintiff discovered contaminated soil and groundwater while preparing to resell the site to a third party. Plaintiff cleaned up the site and brought a cost recovery action under the Louisiana clean up statute against the prior corporate property owners and several individuals, including the corporate defendants' former plant superintendent, former director of health safety and environment, and former plant manager. The individuals sued, however, had retired from the corporate defendants in the early 1970's, before the Louisiana legislature passed the remediation statute (La. R.S. 30:2276) in 1984.

First, the court held that plaintiff failed to give the requisite statutory notice to the individual defendants before bringing suit. Second, the court found that plaintiffs' mere use of the individuals' job titles was insufficient to establish the individuals' liability as transporters, generators, disposers, owners, or operators under the remediation statute. La. R.S. 30:2276(A) and (G)(3). Further, the court concluded that La. R.S. 30:2276 neither expressly nor impliedly requires retroactive application and that the parties failed to raise any argument that the legislature intended the statute to have retroactive effect. Therefore, the court found that the joinder of the individual defendants was improper.

Similarly, the court found that plaintiff failed to give notice to the individual defendants before filing suit as required under the Louisiana citizen suit provisions (currently La. R.S. 30:2026) and further that the Louisiana citizen suit provisions were not in effect in any event during the individual defendants' employment. Accordingly, because the court refused to give the citizen suit statute retroactive effect and because plaintiff failed to satisfy the citizen suit notice requirement, the court concluded that the plaintiff could not maintain a citizen suit against the individual defendants for their alleged failure to notify the state of unauthorized discharges.

The court additionally dismissed the claims for multiple damages under La. R.S. 30:2276(G)(1) against the corporate defendants because LDEQ did

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not make a demand, file suit, or give other notice to them before the plaintiff filed suit. Likewise, the court granted the corporate defendants' motion to dismiss the claims under the citizen suit statute for failure to give prior notice but afforded plaintiff time to clarify its citizen suit claims against the corporate defendants.

STATUTE EXPANDS LOUISIANA'S AUTHORITY TO ESTABLISH STATE LIEN FOR TANK CLEAN-UPS

La. R.S. 30:2195(F), amended in 2001, authorizes LDEQ to use the Motor Fuels Underground Storage Tank Trust Fund for assessment and remediation of property contaminated by "abandoned" underground storage tanks (USTs). It also authorizes LDEQ, after expending the trust fund monies, to establish a priority lien on the property. LDEQ may deem USTs "abandoned" when they have received motor fuels and: they were not closed nor the site assessed or remediated in accordance with LDEQ's UST regulations; the site constitutes or may constitute a potential danger to the public health or environment, or; the site has no financially responsible owner or operator who can be located, or such person has failed or refused to take action ordered by LDEQ.

After the State uses the trust fund monies, the statute grants the State a priority lien or privilege against immoveable property for the costs expended. Any prior recorded privileges, liens, and encumbrances on the property, however, have priority over the State lien but only to the extent of the fair market value of the property before closure, assessment or remediation. Because of the existence of the contamination, in many instances, the property's value may be considered negligible before LDEQ clean-up. Thus, the State lien is likely to prime most prior privileges, liens, encumbrances or other security interests.

LDEQ's authority to expend trust fund monies could involve clean-ups of pre-1988 tank releases as well as tank systems not timely registered for the trust fund. Currently, LDEQ estimates that there are approximately sixty abandoned UST sites in the State, and LDEQ is discovering and assessing additional sites. LDEQ will likely take action and/or contact owners or operators of abandoned USTs based on the ranking of a site and the availability of trust fund monies.

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LOUISIANA SUPREME COURT HOLDS THAT ABANDONMENT STATUTE DOES NOT APPLY TO LDEQ'S OLD ENFORCEMENT ORDER THAT RESPONDENT FAILED TO ADMINISTRATIVELY APPEAL

Rejecting the contention that LDEQ abandoned a 1991 compliance order under the abandonment statute, La. R.S. 30:2050.9, the Louisiana Supreme Court ruled recently that LDEQ could seek to judicially enforce its old order. *LDEQ v. Rottman*, 2001 La. Lexis 3094 (2001). In 1991, LDEQ issued a compliance order to the respondent. Although the respondent failed to administratively appeal the order, LDEQ waited until 1999 to seek judicial enforcement of it. The respondent argued that the abandonment statute, which requires that LDEQ take steps to obtain a final enforcement action within two years of issuing an order, applied to LDEQ's court action. Disagreeing, the Louisiana Supreme Court concluded that, when the respondent failed to administratively appeal the compliance order within thirty days of its issuance, it became final. Because the compliance order became final based on the respondent's failure to appeal, the abandonment statute, enacted in 1996, did not apply to the order. Thus, the court concluded that, when LDEQ attempted to seek judicial enforcement of the order, it was simply taking steps to judicially enforce a final judgment, notwithstanding the length of time involved.

This case does not address older timely appealed compliance orders that LDEQ did not take steps to finalize during the administrative hearing process. There are many old cases currently pending before the Division of Administrative Law, and LDEQ may not have taken the appropriate steps to finalize some of them. To determine whether the abandonment statute applies to an old order requires a case-by-case analysis, focusing on what constitutes a "step" by LDEQ to finalize an enforcement action.

FREEPORT-MCMORAN WINS DISMISSAL OF INTERNATIONAL ENVIRONMENTAL CLAIMS IN FEDERAL AND STATE ACTIONS

United States corporations, including Texaco, Chevron, Mobil, Unocal, Freeport-McMoRan Copper & Gold, and others, in recent years have come un-

der heavy attack for alleged environmental and human rights abuses involving foreign operations. Freeport is the only company to date to achieve the dismissal of all claims in both State and federal court.

On April 29, 1996, Tom Beanal, a tribal leader of the Amungme tribe of Papua (formerly Irian Jaya), Indonesia, filed suit in the United States District Court for the Eastern District of Louisiana against New Orleans based Freeport-McMoRan Copper & Gold Inc. (Freeport) for claims arising out of Freeport's Indonesian subsidiary's mining operations in Papua. Filed as a putative class action, the lawsuit asserted claims for international environmental violations, human rights violations, and even "cultural genocide," principally under two federal statutes, the Alien Tort Claim Act and the Torture Victim Protection Act. In response, Freeport filed a motion to dismiss on the basis that the lawsuit failed, as a matter of law, to sufficiently state the claims asserted. Challenging the environmental claims, Freeport argued that no cognizable "international environmental law" existed that could give rise to claims arising from operations and effects occurring wholly within the borders of a sovereign foreign nation. The federal district court agreed, dismissing the international environmental law claims as well as the claims alleging "cultural genocide." In a later ruling, the district court dismissed the federal human rights violations and remaining claims as well. Beanal appealed the judgments dismissing his case to the United States Fifth Circuit Court of Appeals.

Agreeing with Freeport that Beanal's environmental allegations failed to state a claim, the Fifth Circuit found that, based on "a thorough survey of various international law principles, treaties and declarations," plaintiff "failed to show . . . that Freeport's mining activities constitute environmental torts or abuses under international law." The sources cited by the plaintiff, the Court of Appeals observed, "are not universally accepted" and are "abstract" and "devoid of . . . discernible standards and regulations to identify practices that constitute international environmental abuses or torts." Further, the Fifth Circuit warned that "federal courts should exercise extreme caution when adjudicating environmental claims under international law to ensure that environmental policies of the United States do not displace environmental policies of other governments. . . ." *Beanal v. Freeport-McMoRan, Inc., et al*, 197 F.3d 161, 45 Fed. R. Serv.3d 404, 30 Envtl. L. Rep. 20, 231 (5th Cir. La.), November 29, 1999 (No. 98-30235).

While the Beanal case was pending in federal court, another member of the Amungme tribe, Yosepha Alomang, brought a parallel proceeding in a Louisiana State court. On June 19, 1996, Alomang filed the state court action on behalf of herself and all similarly situated indigenous people of Irian Jaya,

initially making carbon-copy allegations to those made by Beanal in the federal court action. Alomang, however, asserted the claims solely under Louisiana state law, including Louisiana environmental laws. Like the federal court, the trial court dismissed Alomang's claims, which the Louisiana Fourth Circuit Court of Appeal affirmed on February 20, 2002. *Alomang v. Freeport-McMoRan, Inc., et al*, 2000-2099 (La. App. 4th Cir. 2/20/02), 2002 WL 321902 (La. App. 4th Cir. Feb. 20, 2002) (No. 2000-CA-2099). The Fourth Circuit agreed with the trial court's finding that the fourth version of Alomang's Petition failed to state a cause of action and alleged insufficient facts to support a claim against United States based Freeport for actions of its Indonesian based subsidiary. Although the dismissal, as affirmed on appeal, turned on Alomang's failure to adequately plead derivative liability, and not on an environmental law issue, an earlier Fourth Circuit opinion in the case did in fact assume as correct Freeport's position that Louisiana courts lack subject matter jurisdiction over foreign environmental violations as a class. *Alomang v. Freeport-McMoRan, Inc., et al*, 97-1349 (La. App. 4th Cir. 3/4/98), 718 So.2d 971 (La. App. 4th Cir. Mar. 04, 1998) (No. 97-CA-1349). While assuming that a Louisiana court lacks power to adjudicate foreign environmental violations, the Fourth Circuit had at that time reversed the trial court's earlier dismissal and remanded the action to the trial court on the basis that the trial court failed to consider subject matter jurisdiction over "personal injury" claims. After remand, the trial court ultimately dismissed the action as discussed above.

Freeport was represented in these actions by Jones Walker. For more information, contact John Reynolds (582-8336) or Rick Schroeder (582-8280).

FIFTH CIRCUIT HOLDS CONTRACTORS CRIMINALLY LIABLE FOR ILLEGAL STORAGE OF HAZARDOUS WASTE

Recently, the Fifth Circuit affirmed criminal convictions against a contractor and subcontractor, including their officials, for illegally storing hazardous waste on a construction site. United States v. Sims, 277 F.3d 734 (5th Cir. 2001). At the site, prior owners had apparently stored and forgotten about two cylinders of methyl bromide in a storage building. After purchasing the site for a grocery store operation, the new owner hired contractors to prepare the site. During their preparations, the contractors discovered the discarded cylinders. Rather than notifying state officials or properly disposing of the cylinders, the contractors moved the cylinders from the storage building to an open area at the site. Although they discussed hiring a consultant to help dispose of the

waste, they did not follow up or notify the authorities of their discovery. A contractor employee then took the cylinders off-site and delivered them to his relatives, who mistook them for propane cylinders. Using the cylinders at home, the relatives released the poisonous fumes, resulting in one relative's death and another's illness.

The Fifth Circuit concluded that the defendants "knowingly" stored hazardous waste without a permit. Because the cylinders had previously been discarded by a prior owner (the generator) years ago, the contractors were not "generators" and thus did not qualify for the small quantity generator exemption from storage requirements for hazardous waste. Further, the cylinders, marked as poisonous, contained methyl bromide, a poison that the EPA and LDEQ lists as a hazardous waste when discarded. Although the defendants at one time intended to dispose of the cylinders rather than to use them, they did nothing for three weeks, leading to the removal of the cylinders from the site.

The individual defendants received five years probation and small fines, while the companies received a larger criminal fine.

This case illustrates that parties to a construction contract that calls for site preparation should specify their hazardous waste duties in writing to safeguard against accidents and liability. It is a common occurrence to find waste at construction sites or in newly leased premises. By setting forth contractually the parties' respective obligations to contact agencies, obtain provisional generator numbers from LDEQ, or dispose of waste upon acquiring knowledge from label examination, testing or the like that chemicals stored at the site may be hazardous waste, parties can avoid the risks posed by hazardous waste and prevent their exposure to civil and criminal liability.

# # #

The following practice group members contributed to this issue:

Stan Millan
Alida Hainkel
Rick Schroeder
Michael Chernekoff

Please contact your Jones Walker's Environmental Toxic Tort Practice Group contact for additional information on or copies of any of the cited matters.

Remember that these legal principles may change and vary widely in their application to specific factual circumstances. You should consult with counsel about your individual circumstances. For further information regarding this E*Zine or this practice group, please contact:

Michael A. Chernekoff
Jones Walker
201 St. Charles Ave., 50th Fl.
New Orleans, LA 70170-5100
ph. 504.582.8264
fax 504.589.8264
email mchernekoff@joneswalker.com

Environmental and Toxic Torts Practice Group

MICHAEL A. CHERNEKOFF
FRANK C. ALLEN, JR.
MICHELE CROSBY
MADELEINE FISCHER
LEON GARY, JR.
JOHN G. GOMILA
ALIDA C. HAINKEL
HARRY S. HARDIN, III
PAULINE F. HARDIN
GRADY S. HURLEY
WILLIAM J. JOYCE
TARA KEBODEAUX
ROBERT T. LEMON
STANLEY A. MILLAN
THOMAS M. NOSEWICZ
JOSEPH S. PIACUN
JOHN C. REYNOLDS
ROBERT W. SCHEFFY
M. RICHARD SCHROEDER
WILLIAM L. SCHUETTE
JAMES L. SELMAN
PAT VETERS
OLIVIA SMITH TOMLINSON
JUDITH V. WINDHORST
JAMES E. WRIGHT, III

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