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LOUISIANA COURT REJECTS LANDOWNER'S HIDDEN TORT EXCEPTION TO THE SUBSEQUENT PURCHASER DOCTRINE

Eagle Pipe and Supply, Inc. v. Amerada Hess Corp., et al, No. 2009-0298 (La. App. 4 Cir. 2/10/10), 2010 WL 487238

The Louisiana Fourth Circuit recently held that the "subsequent purchaser doctrine" applied to bar a party's pre-acquisition property damage claims even though the damage—contamination resulting from Technologically Enhanced Naturally Occurring Radioactive Materials ("TENORM") contamination—was allegedly hidden at the time of purchase. Under the doctrine, a purchaser of immovable property has no right to recover for damage to the property sustained before the sale on the basis that the purchaser is presumed to know the overt condition of the property and to factor it into the purchase price.

In *Eagle*, Eagle Pipe and Supply bought property in Lafayette Parish, Louisiana, in April 1998. From 1981– 1988, the previous owners leased the land to Union Pipe. During that time, Union operated an industrial pipe yard on the land that bought, cleaned, stored and sold used oilfield tubing. Sometime after Eagle bought the property, the Louisiana Department of Environmental Quality ("LDEQ") inspected Eagle's property and determined it was contaminated with TENORM. As a result, the LDEQ cited Eagle for violating TENORM exposure regulations and ordered remediation.

In response, Eagle filed suit against four groups of defendants, including the oil companies that allegedly sold contaminated used oilfield equipment to Union for cleaning and the transporter companies that allegedly transported contaminated pipe to Union's facility on the property. The oil company and transporter defendants moved to dismiss the claims against them on the basis that Louisiana law did not afford Eagle a right to sue them for damages to the land that occurred before Eagle bought the property. The district court agreed and dismissed Eagle's claims.

Eagle appealed, and, in a two to one decision, the Louisiana Court of Appeal for the Fourth Circuit affirmed the dismissal. The majority based its decision on the well-settled rule of Louisiana law that a purchaser of land has no right to sue third parties for damage to property occurring before the purchase unless the right is specifically assigned to the new owner. Under the rule, a general assignment of rights is insufficient to transfer the right to pursue pre-sale damages. In *Eagle*, it was undisputed that the alleged wrongful and damaging activities ceased in 1988, 10 years before Eagle bought the land. And Eagle was not specifically assigned the right pursue claims for pre-sale damages to the property. Therefore, the majority upheld the district court's ruling that Eagle, as a subsequent purchaser, had no right of action against the oil company and transporter defendants.

In reaching its decision, the majority declined Eagle's invitation to recognize a "hidden tort exception" to Louisiana's subsequent purchaser rule. In Eagle's view, Eagle, and only Eagle, had a right and cause of action against the defendants because the cause of action did not accrue until the LDEQ uncovered the contamination after Eagle bought the property. According to Eagle, the damage was hidden and unknown until LDEQ's discovery of it, and Eagle therefore was the damaged party, rather than the previous land owners. Consequently, Eagle argued that the district court had misapplied the subsequent purchaser doctrine, wrongfully allowing the defendants to profit from their tortious conduct simply because they hid it well. The majority rejected Eagle's argument, finding that Eagle lacked legal authority for its position and concluding that controlling Louisiana case law did not acknowledge a hidden tort exception to the subsequent purchaser doctrine.

Judge Paul A. Bonin, in his dissenting opinion, contended that the majority erroneously relied on distinguishable Louisiana case law that applied the subsequent purchaser doctrine only to damage that was overt and obvious at the time of the sale. Here, he argued, the oil company and transportation defendants did not allege Eagle either knew or reasonably should have known that the property was contaminated with TENORM before it bought the property. Therefore, accepting Eagle's allegations as true, Judge Bonin reasoned that the property damage was sustained only after Eagle's purchase of the land. According to Judge Bonin, a landowner's claim for pre-sale property damage accrues only when he learns of the damage, even if the tortious acts that caused the damage occurred long before he bought the land, provided the subsequent purchaser can establish that the pre-sale damages were not overt and obvious at the time of the sale.

–*Wade B. Hammett*

CLIMATE CHANGE LITIGATION WARMING UP

Until recently, state supreme courts were consistently stifling plaintiffs' attempts to bring public nuisance lawsuits against entities for alleged contribution to climate change. The tide shifted, however, in late 2009 when a series of federal court rulings seemed to breathe new life into climate change litigation.

In September 2009, the Second Circuit decided *State of Connecticut v. American Electric Power Co*., 582 F.3d 309 (2nd Cir. 2009). In *American Electric*, the Second Circuit overturned the Southern District of New York's dismissal, and remanded a climate change case to be litigated on the merits. In this lawsuit, the plaintiffs claimed that certain electric power corporations which constituted the "five largest emitters of carbon dioxide in the United States" were contributing to global warming. In a surprising ruling, the Second Circuit held that the plaintiffs had stated a claim under the federal common law of nuisance. The Court additionally held that (1) the district court erred in dismissing the complaints on political question grounds; (2) all of the plaintiffs had standing; and (3) plaintiffs' federal common law nuisance claims were not displaced by federal legislation.

Soon after the Second Circuit decided *American Electric*, the Northern District of California decided *Native Village of Kivalina v. ExxonMobil Corp*., 663 F. Supp. 2d 863, (N.D. Cal. 2009), in which the pendulum seemed to swing back the other way. In this case, the Village of Kivalina, Alaska, filed suit against two dozen energy companies, attempting to recover at least $400 million in damages for public nuisance related to emissions of greenhouse gases that it alleged contributed to global warming and caused the sea level to rise, destroying parts of the village. Defendants moved to dismiss on the grounds that the plaintiffs' claims constituted a non-justiciable political question. On the political question

issue, the Court considered the *American Electric* decision, but ultimately dismissed the lawsuit on the grounds that it raised a political question. The Court also held that the plaintiffs lacked Art. III standing. The *Kivalina* plaintiffs' fate will now likely be in the hands of the Ninth Circuit, as this holding is expected to be appealed. Although this decision seemed to re-affirm the state supreme courts' previous rejection of climate change litigation, a subsequent decision proved that war was far from over.

In October 2009, the Fifth Circuit decided *Comer v. Murphy Oil USA, Inc*., 585 F.3d 855. In this decision, the Fifth Circuit joined the Second Circuit in its treatment of climate change litigation. Fourteen individuals filed a class action lawsuit against insurance, oil, coal, and chemical companies seeking relief for property damages resulting from Hurricane Katrina, alleging that defendants' emissions contributed to climate change and thus magnified adverse weather events, including Hurricane Katrina. The district court dismissed the *Comer* case on constitutional standing and political question grounds. The Fifth Circuit, however, reversed in part, and held that the plaintiff landowners did in fact have Article III standing to bring nuisance, trespass, and negligence claims, and that these claims did not present a nonjusticiable political question.

In February 2010, however, the Fifth Circuit set the *Comer* case to be reheard *en banc* in the near future. Although the outcome of the *Comer* rehearing is unknown, the magnitude that this decision will have on the future of climate change litigation is certain.

It is far from certain whether plaintiffs will ultimately prevail on the merits of these cases in district court. We do know, however, that these rulings have dramatically increased the prospect for successful climate change litigation.

– *Tarak Anada*

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 these issues, contact:

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