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Corbello v. Iowa Production and the Implications of Restoration Damages in Louisiana: Drilling Holes in Deep Pockets for Thirty-Three Million Dollars

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INTRODUCTION

In 2003, the Louisiana Supreme Court issued a decision that sent shock waves throughout the legal profession and the oil and gas community—both in Louisiana and the surrounding states. That landmark decision was *Corbello v. Iowa Production.*[1] Before the *Corbello* decision, the oil and gas industry believed that the remedy for damage to property would be similar to the remedy in a tort claim. Therefore, damages would equal the value of the thing, not the cost to rebuild or restore the thing. Such a proposition was thought to be supported by *Roman Catholic Church of the Archdiocese of New Orleans v. Louisiana Gas Service, Company,*[2] where the Louisiana Supreme Court held that the remedy for damage to property in tort claims should be limited to the fair market value of the property, with certain exceptions. Louisiana landowners, on the other hand, believed that the remedy for damage to property was determined by the language in the contract and that the actual value of the property had absolutely no bearing on the amount of damages to be paid. So, if a contract called for restoration of the property, then the property must be restored—no matter what the costs associated with the restoration.

In *Corbello v. Iowa Production,* Shell Oil Company breached a contract provision in a lease to "reasonably restore the land to its original condition."[3] The Court had to determine whether the remedy for breach of the contract should be measured in terms of: 1) the cost to repair; 2) the diminution in value; or 3) the replacement cost minus depreciation.[4] The *Corbello* Court ultimately upheld an award for "cost to repair" the surface of the plaintiff's land and the potential contamination of an aquifer damaged by saltwater injections.[5] The damages amounted to $33 million, a value 300 times greater than the fair market value of the land.[6] Included in the $33 million award, $28 million was awarded for the potential contamination of the aquifer—a public injury.[7] The Louisiana Supreme Court's decision contradicts years of prior jurisprudence and legal commentary concerning not

1. 2002-0826 (La. 2003), 850 So. 2d 686.
2. 618 So. 2d 874 (La. 1993).
3. 850 So. 2d at 686.
4. *Id.* at 694.
5. *Id.* at 696.
6. *Id.*
7. *Id.* at 697.

only the amount of allowable damages, but also the very *raison d'etre* of damages.[8]

The *Corbello* decision is likely to be regarded as momentous, in part, because the ruling implicates multiple areas of law and policy, including the law regarding breach of contract, environmental law, measurement of damages, and the appropriateness of compensating a private party for a public injury. The *Corbello* Court was faced with several opposing policy considerations. A damage award limited to the fair market value or diminution in value of the land might encourage the flagrant breach of contractual "restoration" provisions if such a breach is considered efficient from an economic standpoint. Conversely, an award exceeding the market value and diminution in value of the land would translate into a windfall for the plaintiffs. Furthermore, awarding damages for the speculative nature of the injury might lead oil and gas companies to reconsider doing business in the state due to the increased risk of adverse judgments against them. However, not awarding damages for the possible contamination could lead to under-compensation if the aquifer was actually contaminated. Finally, the allocation of damages to a private party for the aquifer may be more likely to lead to restoration since the regulatory agencies charged with that duty are "understaffed and underfunded . . . to oppose the oil companies."[9] On the other hand, the plaintiffs have no duty to restore the property or the aquifer with the award, unlike the state agencies who have a duty and interest in the public health and the environmental safeness of the property in the state.

This comment addresses the issues set forth in *Corbello*, examining the Court's reasoning in light of civil law doctrine, prior Louisiana case law, and common law approaches. Particular attention is devoted to the appropriate measurement and allocation of damages.[10] Section I presents a comparative analysis of damages awarded under contract and tort theories in Louisiana and common law jurisdictions. In section II, the comment reviews the facts and analysis from the *Corbello* decision and its implications, examining the costs and benefits resulting from the decision. Section III discusses the implications that the *Corbello* decision carries with it, examining the costs and benefits resulting from the decision. It further addresses whether an alternative remedy, such as specific performance, would increase the efficiency and effectiveness from an

8. For an overview on the reason damages exist, see Saul Litvinoff, Obligations § 3.1, in 6 Louisiana Civil Law Treatise (1999).

9. *Corbello*, 850 So. 2d at 701.

10. Due process limitations upon damages are also an important topic concerning *Corbello*, however, they are beyond the scope of this comment.

economic standpoint, thereby enhancing the social wealth and needs of Louisiana. It also suggests that compensating a private party for a public injury, with the mere hope that the party will clean the property, is an insufficient and unreliable method of: 1) protecting the public from the possible harm, 2) compensating the public for its injury, and 3) restoring contaminated land to an acceptable condition. Section IV then reviews both the positive aspects and the underlying flaws of the "Ground Water Remediation" statute,[11] which was passed by the legislature in response to the *Corbello* decision.

Ultimately, this comment recommends that the courts perform a flexible balancing test, weighing the economic and social benefits and disadvantages against each other when determining restoration costs for damage to the surface of land. If the injured landowner may be sufficiently compensated through monetary damages and substitutes are available in the market, then the court should limit damages to the fair market value of the land. Alternatively, where permanent and dangerous environmental damage and potential injury to the public is involved, such as contamination of groundwater, a different approach is warranted. It is the task of the environmental agencies of the state to ensure the safety and well-being of the state and those agencies should be the first to remediate the contamination caused by lessors. However, when the landowners do not seek appropriate relief from the agencies or the agencies fail to adequately remedy the situation, the courts should award specific performance (overseen by the supervision of an appropriate regulatory agency) thereby enforcing the obligation to restore the land and requiring the breaching party to clean up its own mess.[12]

I. BASIC CONTRACT LAW AND RESTORATION DAMAGES: DIMINUTION IN VALUE, COST TO RESTORE, AND FAIR MARKET VALUE

Determining the proper measure of damages has been a recurring issue when an obligor breaches an obligation or defectively performs. While Louisiana law was previously in accord with the laws of her common-law-sister-states with respect to the assessment of damages for breach of contract and tortious conduct, the *Corbello* decision threatens to disrupt that harmony. The following sections provide a brief overview of the historical development of damages and their measurement.

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11. 2003 La. Acts No. 1166, La. R.S. 2015.1: 30 (2003).

12. *See* Robert Fulghum, All I Really Need to Know I Learned in Kindergarten, *cited in* Respondent's brief, *Corbello*, 850 So. 2d 686.

A. The Purpose of Remedies: An Overview of the Common and Civil Law Approaches

In the common and civil law traditions, remedies indemnify an obligee for both breach of contract and tortious conduct.[13] In contract law, remedies encourage the promisee to enter contracts by ensuring that he will be placed in a position similar to the position he would have been in had the contract been performed.[14] Similarly, remedies are awarded to tort victims as compensation for injuries caused to them by the fault of another and operate to restore the plaintiff to the position he occupied before the tort was committed.[15] Whether reading jurisprudence, statutes, or legal commentary, the same language repeatedly appears when discussing damages for both tort and contract law: the plaintiff should be placed in as good of a position as he would have been in had the tort or breach not occurred. In contract terms, this is commonly referred to as the "expectation interest" or the "benefit of the bargain."[16]

In the common law, remedies are not meant to encourage the promisor to keep his promise, nor are they intended to punish the breaching party.[17] Common law courts typically indemnify the injured party by awarding the expectation interest, thereby placing him in as good of a position as he would have occupied had the contract been performed.[18] The expectation interest is the actual value of the completed contract to the obligee, rather than the injured party's "expectation" at the time the parties entered the contract.[19] The common law uses various formulas to quantify the expectation interest.[20] Oftentimes, courts will calculate damages using two or

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13. *See* E. Allan Farnsworth, Farnsworth on Contracts, Second edition § 12.1 (1998); Marcel Planiol, Traite Elementaire de Droit Civil, no. 221 (Louisiana State Law Institute trans., 12th ed. 1939).

14. *See* Farnsworth, *supra* note 13, § 12.1.

15. *See* Frank Maraist & Thomas Galligan, Louisiana Tort Law § 7-1 (1996). "These damages are typically called compensatory damages. Compensatory damages are divided into two groups: special damages and general damages. Special damages are those that must be specially pled and have a 'ready market value.' General damages are inherently speculative in nature and cannot be fixed with mathematical certainty, including pain and suffering, mental anguish, loss of enjoyment of life, and, possibly, future medical expenses and future lost wages." *Id.* § 7-2.

16. *See generally* Philip Bruner & Patrick O'Connor, Bruner and O'Connor on Construction Law § 19 (2002).

17. *See* Farnsworth, *supra* note 13, § 12.1.

18. *See id.*

19. *Id.*

20. Diminution in value calculates damages based on a reduction in market value that is caused by the breach. Restoration costs equals the value that it would cost to actually complete the promised obligation. Courts will also award the loss

more different valuation methods and award whichever results in the least amount of economic waste.[21]

Louisiana's civil law tradition diverges from the common law in its method of restoring the obligee to his original position. The civil law typically prefers to impose specific performance, rather than monetary damages for the failure to perform an obligation.[22] The civil law tradition operates under the fundamental premise that the most effective way to protect a person's expectation interest is not through monetary damages, but, rather, by requiring actual performance.[23] There are, however, certain exceptions to this preference of specific performance. First, civilian jurisdictions typically refuse to impose specific performance for an "obligation to do."[24] This hesitancy is a reaction to the principle that specific performance should not infringe upon an obligor's personal freedom and should not be awarded if there is a more convenient method of restoring the obligee.[25] Second, when specific performance is

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in value minus depreciation.

21. *See* Restatement (Second) of Contracts § 348(2) (stating that the owner of damaged property may recover the reasonable cost of completing performance, but only if the cost is "not clearly disproportionate to the probable loss in value." When such is the case, the owner should receive the diminished market value of the thing damaged by the breach.); *see also* Plunk v. Hedrick Concrete Products, Corp., 870 S.W.2d 942 (Mo. App. So. Dist. 1994); Vezina v. Nautilus Pools, Inc., 610 A.2d 1312, 1319 (Conn. App. 1992) (finding that "the cost of rectifying the defendant's omission is so great in comparison to the cost of the purchase of the pool, the proper measure of damages is the diminished value of the pool."); City Anderson, Indiana v. Salling Concrete Corporation, 411 N.E.2d 728 (Ind. App. 1980).

22. *See, e.g.*, La Civ. Code art. 1986. The comments to the article also stipulate that if the obligor fails to perform an obligation to deliver, the court shall grant specific performance to the obligee. *Id.* cmts.; *see also* Mente & Co., Inc. v. Roane Sugars, Inc., 199 La. 686, 6 So. 2d 731 (La. 1942); Oliver v. Home Service Ice Co., 161 So. 766 (La. App. 2d Cir. 1941). Note, however, that if the obligor fails to perform an obligation to do, the decision to grant specific performance lies within the discretion of the court. La. Civ. Code art. 1986. The civil law recognizes the principle that one may not encroach upon the obligor's personal freedom. La. Civ. Code art. 1986 cmt. (c).

23. La. Civ. Code art. 1986. *See also* Litvinoff, *supra* note 8, § 3.3.

24. *See, e.g.*, La. Civ. Code art. 1986; *see also,* Saul Litvinoff, Obligations § 162, *in* 7 Louisiana Civil Law Treatise (1975) (". . . [W]hen specific performance of an obligation requires a personal act of the obligor and he refuses to perform, the obligee cannot be allowed to force him (*manu militari*) to act and must be content with damages as a substitute performance (*execution par equivalent*). The time-honored adage *nemo preacise cogi potest ad factum* (no one can be forced to), which expresses the idea underlying Article 1142 had, very probably, no other meaning.").

25. *See, e.g.*, La. Civ. Code art. 1986; *see also,* Litvinoff, *supra* note 24, § 166 ("According to principle, the court *must* grant specific performance [if the creditor demands specific performance]. This is the normal remedy that conforms strictly to the obligation and should, therefore, prevail over the substitute remedy. Such is

impossible the courts will utilize other remedies.[26] In such a case, the obligor remains bound to make reparation for the obligee's loss caused by his tort or breach.[27] One way the obligor may do this is through the payment of damages, which is defined as a pecuniary compensation and the monetary equivalent for the *loss* sustained by the injured party.[28]

In certain circumstances courts may award "punitive damages" which serve the purpose of punishing the defendant. In common law states, punitive damages may be awarded for intentional torts and reckless or grossly negligent torts. In Louisiana, however, the legislature has severely limited punitive damages.[29] For example, specific statutes allow punitive damages for injuries caused by the reckless disregard of an intoxicated driver[30] or for injuries relating to criminal misconduct against a minor.[31] Common law jurisdictions, on the other hand, occasionally award punitive damages for intentional breach of contract.[32] In Louisiana, however, the only time

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the view expressed by the consensus of French doctrine which looks upon damages as a kind of consolation for the disappointed obligee. The French jurisprudence, however, in a consistent way, allows the courts a large degree of discretion. They may allow only damages to the creditor who seeks specific performance *if they feel that this is the fairest and more opportune compensation under the circumstances.* The *Cour de cassation* is inclined to assert that, in default of voluntary performance by the obligor, damages is the normal remedy, while specific performance under Articles 1143 and 1144 of the Code Napoleon is somewhat abnormal and courts cannot be prevailed upon to grant it. In this approach, courts are justified in not granting specific performance whenever the inconvenience of such forced execution would exceed the advantage, as when the cost of performing in kind is disproportionate to the actual damage caused, or when it is no longer in the creditor's interest, or when it would have a negative effect upon the interest of third parties.").

26. *See* Litvinoff, *supra* note 8, § 3.4.

27. *See* Litvinoff, *supra* note 8, § 3.2.

28. *See* La. Civ. Code art. 1995; *see also* Fogle v. Feazel, 201 La. 899, 10 So. 2d 695, 698 (La. 1942).

29. *See, e.g.,* Billot v. British Petroleum Oil Co., 93-1118 (La. 1994); 645 So. 2d 604, 612; Int'l Harvester Credit Corp. v. Seale, 518 So. 2d 1039, 1041 (La. 1988).

30. La. Civ. Code art. 2315.4.

31. *Id.* art. 2315.7.

32. *See* Kuchta v. Allied Builders Corp., 21 Cal. App. 3d 541, 98 Cal. Rptr. 588 (Cal. 1971) (awarding punitive damages where a builder fraudulently induced a homeowner to construct a patio in violation of local zoning regulations); F.D. Borkholder Co. v. Sandock, 413 N.E. 2d 567 (Ind. 1980) (awarding punitive damages for breach of contract where the builder deliberately deviated from building plans, resulting in latent defects and rendering the structure unsuitable for its intended use.). But see, Kinesoft Development Corp. v. Softbank Holdings Inc., 319 F. Supp. 2d 869 (N.D. Ill. 2001); Metroplex Corp. v. Thompson Industries, Inc., 25 Fed. Appx. 802 (10th Cir. 2002); In re Eurospark Industries, Inc. 288 B.R. 177 (Bankr. E.D. N.Y. 2003); Weber v. Domel, 48 S.W. 3d 435 (Tex. App. Waco

punitive damages may be awarded for breach of contract is if the contract calls for such a remedy.[33]

In sum, damages in Louisiana are not always equivalent to the value of specific performance and are limited to the amount that would restore the obligee to his original position. Because the civilian tradition will not impose undue burden on the obligor when awarding specific performance, the same should hold true for awarding damages. Damages should not exceed the amount necessary to compensate an obligee for his actual loss unless punitive damages are warranted under statute or by contract provisions.

B. Louisiana Law Governing Damages Prior to Corbello v. Iowa Production

1. Articles and Statutes

The articles governing conventional obligations in Louisiana are found in Book III, Chapter 8 of the Louisiana Civil Code and apply to awards for both conventional and tortious obligations.[34] Under these articles, an obligor is liable for damages resulting from his failure to perform an obligation.[35] Furthermore, a contract has the effect of law as between contracting parties, and if the obligor fails to perform the contract, he violates that law.[36] The obligor's failure to perform an obligation gives the obligee the right to demand performance from the obligor when possible.[37] Nonetheless, in certain cases an obligor, through his own fault, may render performance impracticable or useless to the obligee.[38] In such cases, the injured party is entitled to damages measured by the loss sustained and the profit of which he has been deprived.[39]

As stated previously, in Louisiana, specific performance, rather than monetary damages, is the preferred remedy to compensate an injured party.[40] Article 1986 stipulates that "upon an obligor's failure to perform an obligation to deliver a thing, or not to do an act, or to execute an instrument, the court *shall* grant specific performance plus

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2001) for cases where punitive damages were found to be unrecoverable in contract.

33. *See* Chambers v. NASCO, 501 U.S. 32, 111 S. Ct. 2123 (1991) (holding that under Louisiana law, punitive damages cannot be awarded for breach of contract, even if a party acts in bad faith in breaching the agreement.).

34. *See* La. Civ. Code art. 2315 (cross-reference to the articles concerning damages for conventional obligations (La. Civ. Code art. 1995–1999)).

35. *See id.* art. 1994.

36. *Id.* art. 1983.

37. *Id.* art. 1986.

38. *Id.* art. 1986.

39. *Id.* art. 1995.

40. *Id.* art. 1986.

damages for delay if the obligee so demands."[41] If, however, specific performance is impracticable, the court may award damages to the obligee.[42] Upon failure to perform an obligation that has another object, such as an obligation to do, the granting of specific performance is at the court's discretion.[43] The comments emphasize that article 1986 follows the principle that an obligor's personal freedom should not be encroached upon.[44]

Interestingly, a theme of limiting excessive damages is found throughout the Code and related statutory materials. Civil Code article 2298 stipulates that "the amount of compensation due is measured by the extent to which one has been enriched or the other has been impoverished, *whichever is less.*"[45] Article 2304, which is found under the title governing obligations arising without agreement, states that a person who receives an immovable or corporeal movable must restore the thing itself, if it exists.[46] However, it also provides:

> . . . if the thing has been destroyed, damaged, or cannot be returned, a person who received the thing in good faith is bound to restore *its value* if the loss was caused by his fault. A person who received the thing in bad faith is bound to restore *its value* even if the loss was not caused by his fault.[47] The language used in the article 2304 clearly states that if the thing has been damaged, only its "value" need be restored to the owner.[48]

The comments to Civil Code article 2305, which concerns things that have been alienated, explain that damages are either awarded based on the actual value of the thing sold or the sale price of the

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41. *Id.* (emphasis added).

42. *Id.* art. 1986; *see also* Litvinoff, *supra* note 8, at § 3.1. ("Oftentimes, however, it is not possible to constrain an obligor to perform. That may be so as a matter of fact, as when, through his conduct, an obligor has made his performance impossible, or has rendered it worthless to the obligee. . . . When that is the case, the obligee's interest can be satisfied only by means of his receiving an equivalent for the performance that he expected.").

43. La. Civ. Code art. 1986.

44. *Id.* art. 1986 cmt. (c).

45. *Id.* art. 2298 (emphasis added); *see also id.* art. 2298 cmt. (b) ("A person is enriched within the meaning of this article when his patrimonial assets increase or his liabilities diminish. Correspondingly, a person is impoverished when his patrimonial assets diminish or his liabilities increase. There must be a causal connection, whether direct or indirect, between a person's enrichment and another person's impoverishment.").

46. *Id.* art. 2304 ("When the thing not owned is an immovable or a corporeal movable, the person who received it is bound to restore the thing itself, if it exists.").

47. *Id.* art. 2304 (emphasis added).

48. *Id.* art. 2403.

thing, depending on whether the person was in good or bad faith.[49] If the thing was sold in bad faith and the value is higher than the price of the thing sold, then the damages awarded should be commensurate to the value of thing sold.[50] Each of these articles illustrates the legislative intention to limit the damages to a certain degree: enrichment, diminution in value, or fair market value. Only in certain limited instances has the legislature indicated a willingness to award damages exceeding market value. For example, if a person trespasses on another's land and cuts down timber, a combination of criminal acts, treble damages are awarded.[51] Likewise, articles 137–141 of the Louisiana Mineral Code limit the remedy for breach of a promise to pay mineral royalties to an amount equal to double the royalty due.[52] Even in these articles, which allow the courts to award damages exceeding the market value of the land, a limitation on the damages is still present. An analysis of Louisiana statutes demonstrates an overwhelming preference for limiting the measure of damages to principles of enrichment, diminution in value, and fair market value. The interpretation and application of these statutory principles has been the task of Louisiana courts.

2. Prior Jurisprudence

Until recently, Louisiana jurisprudence has supported the notion that damages compensate the obligee for losses sustained due to breach of contract. In *Fogle v. Feazel*,[53] the Louisiana Supreme Court recognized the parallels existing between damages flowing from tortious conduct and breaches of conventional obligations. The Court in *Fogle* found that "the word damages is defined as meaning pecuniary compensation, recompense or satisfaction for an injury

49. *See, e.g., id.* art. 2305 and comments.

50. *Id.* art. 2305 cmt. (d) (citing 7 Marcel Planiol & Georges Ripert, Traite Practique de Droit Civil Francais, Obligations, 33 (2d ed. 1954) ("If he sold the thing, being in good faith, he must make restitution of the price of the sale only (Art. 1380). If he was in bad faith, he owes the actual value of the thing, if that value is higher than the price of the sale. If he made a donation, being in good faith, he owes nothing; if he was in bad faith, he owes the value of thing.").

51. La. R.S. 3:4278.1 (1992).

52. *See generally* La. R.S. 31:137–141 (1992) ("If the lessee pays the royalties due in response to the required notice, the remedy of dissolution shall be unavailable unless it be found that the original failure to pay was fraudulent. The court may award as damages double the amount of royalties due, interest on that sum from the date due, and a reasonable attorney's fee, provided the original failure to pay royalties was either fraudulent or willful and without reasonable grounds. In all other cases, such as mere oversight or neglect, damages shall be limited to interest on the royalties computed from the date due, and a reasonable attorney's fee if such interest is not paid within thirty days of written demand therefor.").

53. Fogle v. Feazel, 201 La. 899, 10 So. 2d 695 (La. 1942).

sustained."[54] In dictum, the Court linked the violation of contract rights and obligations, stating that an award of "damages" was monetary compensation equivalent to the loss sustained by the injured party in *either* situation.[55]

Louisiana has generally employed three methods to calculate the amount of damages for damaged property: 1) the cost to restore, if the thing can be adequately repaired; 2) the difference in the value of the thing before and after the damage; and 3) the cost to replace the thing, less reasonable depreciation, if the value before and after the damage cannot be reasonably determined or if the cost of repairs exceeds the value of the thing damaged.[56] The Louisiana Supreme Court denied writ in *Matherne v. Terrebonne,*[57] which held that if land is 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 to restore the property to its original condition.[58] In *Ewell v. Petro Processors of Louisiana, Inc.,* a case specifically dealing with the restoration of land contaminated by toxic industrial waste, the first circuit court of appeal held that the owners were only entitled to the diminution in value of the land.[59] The court found that the measurement of damages should be determined on a case-by-case basis.[60] The court proposed that the following factors should be examined: "[T]he extent of damage, the use to which the property may be put; the extent of economic loss, both as to value and income; and the cost of and practicability of

54. *Id.* at 910, 10 So. 2d at 698 (citing Words and Phrases, Permanent Edition).

55. *See id.* ("Damages as used in discussing liability for violation of contract rights and *obligations* is but another word for compensation, an equivalent in money for loss sustained by the complaining party by reason of violation of such right or obligation.") (emphasis added).

56. Carter v. Gulf States Utilities Company, 454 So. 2d 817 (1984) (The First Circuit Court of Appeal remanded the trial court's decision awarding the cost of restoration to determine the value of the house before and after the accident); *see also* Peak v. Cantey, 302 So. 2d 335 (La. App. 1st Cir. 1974); Roshong v. Travelers Insurance Company, 281 So. 2d 785 (La. App. 3rd Cir. 1973); Aetna Insurance Company v. Palao, 263 So. 2d 394 (La. App. 4th Cir. 1972); Granger v. Boullion, 220 So. 2d 764 (La. App. 1st Cir. 1969); Taylor v. Allstate Insurance Company, 205 So. 2d 807 (La. App. 1st Cir. 1967); Keating v. Boyce Machinery Corp., 196 So. 2d 623 (La. App. 1st Cir. 1967); *see also* Maraist & Galligan, *supra* note 15, § 7-2(f). *But see* Fite v. Miller, 290 So. 2d 285 (La. 1940) (when the defendants breached a contract to drill an oil well, the Court awarded the plaintiffs the cost to drill the well—the actual cost of performance.).

57. Matherne v. Terrebonne Parish Police Jury, 462 So. 2d 274 (La. App. 1st Cir. 1984), *writ denied,* 463 So. 2d 1321 (La. 1985).

58. *Id.* at 279.

59. 364 So. 2d 604, 609 (La. App. 1st Cir. 1978), *writ denied,* 366 So. 2d 575 (La. 1979).

60. *Id.*

restoration."[61] Following the theory that tort damages and contract damages essentially serve the same purpose, the most consistent approach would be to follow a method such as *Ewell* and allow the landowner to recover damages, thereby placing him a position similar to the position he would have been in if the tort had not occurred or the contract had not been breached.

The courts in Louisiana have dealt with the measurement of damages not only in tort cases, but also in breach of contract cases. In cases arising under a breach of contract theory, the courts have also demonstrated a preference for limiting damages to the fair market value of the thing damaged. *Nippert v. Baton Rouge Railcar Services, Inc.*[62] involved a defendant who breached a contract to repair several of the plaintiff's passenger railcars. The plaintiff filed suit alleging failure to properly restore the cars and failure to protect the cars from exposure to weather conditions. The court reduced the trial court's decision, which awarded $795,647 to the plaintiffs. The first circuit court of appeal opined that if the cost to restore the thing exceeds the value of the thing damaged, "then damages will be the cost of replacing the items less reasonable depreciation."[63] The court also reasoned that damages should operate to place the obligee in the position he would have occupied if had the breach not occurred, "*not in a better position.*"[64] The result that the first circuit reached in this case supports the purpose of damages by limiting them to the value of the thing—not only for claims involving tort, but also those involving breach of contract. Such a principle also ensures that the obligee is not unjustly enriched and is not entitled to a windfall. Such a principle ensures that the purpose of damages is served.

Roman Catholic Church v. Louisiana Gas Service Company[65] recently affected the measurement of damages under Louisiana tort law and supports the principle of examining the economic effects of damage awards. The Roman Catholic Church sued a gas company for damage caused by a fire due to the company's negligence. The sole issue before the Louisiana Supreme Court was whether the lower courts erred by limiting the damages to replacement cost less depreciation, rather than full restoration damages for cost to repair the property. The Department of Housing and Urban Development (HUD) acquired an apartment complex in Marrero, Louisiana for $3,300,000 in December of 1976. In 1977, the Roman Catholic Church of the Archdiocese of Louisiana contracted with HUD to

61. Ewell v. Petro Processors of Louisiana, Inc., 364 So. 2d 604 (La. App. 1st Cir. 1978), *writ denied*, 366 So. 2d 575 (La. 1979).
62. 526 So. 2d 824 (La. App. 1st Cir.), *writ denied* 530 So. 2d 84 (La. 1988).
63. *Id.* at 827.
64. *Id.* (emphasis added).
65. 618 So. 2d 874 (1993).

manage the apartment complex, and from 1977 to 1980 the complex underwent substantial renovations costing approximately $3 million.[66] The complex provided federally subsidized housing for 200 low-income families. The Church managed the complex for five years and then consented to purchase it without a public bid for $1.7 million.[67] The contract was made under the condition that the Church would continue to provide housing to low-income families for fifteen years; otherwise, the property reverted to HUD.[68] In 1983, just over two years after the Church's purchase, the natural gas regulating equipment malfunctioned resulting in a fire. The fire only affected one of the thirteen building units.

The Louisiana Supreme Court looked to several sources regarding the allowable recovery for the plaintiffs, including the Louisiana Constitution, common law authority on damages, and Louisiana case law. The Court cited article I, § 4 of the Louisiana Constitution, which states that an owner should be compensated "to the full extent of his loss and place the owner in as good a position pecuniarily as [he] enjoyed prior to the taking."[69] The Court stated that when a plaintiff's property is damaged unlawfully by a tortfeasor, "[h]e should be compensated at least as fully as when his property is damaged by the state for a public purpose pursuant to the owner's obligation of citizenship to the community."[70] Ultimately, the Court relied on a comment from the Restatement Second of Torts, the Civil Code, and state property damage principles (all of which foster the same goal) and found that courts should ordinarily award the cost of restoration.[71] The Court further explained that when the cost to restore the land to its original state is disproportionate to the diminution in value, the courts should use diminution in value unless the owner has a personal reason for restoring the property to its original condition.[72] The Court concluded that when a person's property sustains damage due to the fault of another, he may recover either the cost to restore or the difference in value between the property before and after the damage occurred. However, the Court qualified the choice, holding that only diminution in value should be awarded to the landowner if the cost of restoring the property to its original position is "disproportionate to the value of the property or

66. *Id.* at 875.
67. *Id.*
68. *Id.*
69. *Id.* at 876 (quoting State v. Bitterwolf, 415 So. 2d 196, 199 (La. 1982).
70. *Id.*
71. Restatement (Second) of Torts § 929, cmt. b ("Even in the absence of value arising from personal use, the reasonable cost of replacing the land in its original position is ordinarily allowable as the measure of recovery.").
72. *Roman Catholic Church*, 618 So. 2d at 878.

economically wasteful."[73] The Court stipulated two exceptions to this rule: 1) if there was a reason personal to the owner for restoring the property, or 2) if the there existed sufficient reason to believe that the plaintiff would in fact restore the property.[74]

Under the facts of the case, the Court found that the plaintiffs in *Church* were entitled to recover the full amount of restoration damages. The Roman Catholic Church's mission to house underprivileged families was its personal reason for restoring the property to its original condition.[75] The Court further opined that the cost of restoration would neither be disproportionate to the value of the property, nor economically wasteful, since the original cost of the building, coupled with the renovations, exceeded the cost to restore the building.[76] The Court essentially imposed a reasonableness standard, which applies even where the exceptions exist.

In *Roy O. Martin Lumber Co. v. Pan American Petroleum Corporation,*[77] the third circuit court of appeal considered the economic efficiency of restoring the leased property. The court held that the landowner was entitled to monetary damages for damage to the leased land, but that the oil and gas lessee was *not* required to pay for the cost of completely restoring the property surrounding six abandoned wells to its original condition. The court observed that a total restoration of the land would entail filling of all the ruts, slush pits, mud pits, and trenches, regardless of whether it was economically prudent. The court could find no reason why such measures should take place because it could not "believe that the parties intended such reparation to be done when the contract was entered into."[78]

Another recent case that mirrors the issues in *Corbello* is *Magnolia Coal Terminal v. Phillips Oil Co.,*[79] in which the Louisiana Supreme Court recognized that a mineral lessee's duty to restore the leased premises was limited by a standard of reasonableness. The Court applied Mineral Code article 122[80] to hold that "[t]he implied obligation of the mineral lessee to restore the surface is limited by a

73. *Id.* at 879 (emphasis added).
74. *Id.*
75. *Id.* at 880
76. *Id.* (The complex was acquired by the HUD for $3.3 million, renovated for $3 million and sold to the Archdiocese for $1.7 million. The Court found that since the value of the apartment complex far exceeded the cost to restore it the award was not economically wasteful.).
77. 177 So. 2d 153 (La. App. 3d Cir. 1965).
78. *Id.* at 158.
79. 576 So. 2d 475 (La. 1991).
80. La. R.S. 31:122 (2003).

standard of reasonableness."[81] While the lease in *Magnolia Coal* involved an implied obligation to restore the land, that duty was limited by reasonableness—just as the contractual language in *Corbello*.[82] Since all mineral leases are subject to an implied condition to restore, the *Corbello* Court's decision will have relevance to the thousands of mineral leases in Louisiana and will result in massive restoration costs, regardless of the property's market value.

The courts in Louisiana have clearly been concerned with limiting damages based on economic factors for obligations arising without agreement (torts) and also for conventional obligations. Like the legislature, courts have concluded that damages should restore the obligee to his original condition, which can be done by awarding the fair market value of the thing. While Louisiana typically prefers the civil law method of specific performance, it will refuse to award the remedy if it would result in an undue burden on the plaintiff.[83] Likewise, the monetary damages should not impose an undue burden on the obligor and outweigh the benefits received by the obligee.

C. Common Law Methods: Cost to Restore, Diminution in Value, and the Disproportionate Test

1. Restatement of Contracts: The Clearly Disproportionate Rule

The common law theory of damages has traditionally found that an award of damages for destruction or contamination to property should not be disproportionate to the diminution in value. This principle is seen in the Restatement (Second) of Contracts, which states that if the owner fails to show an individualized loss in value with sufficient certainty, the owner may instead recover the reasonable cost of completed performance, but only if that cost is "not clearly disproportionate to the probable loss in value."[84] This means that when restoration costs clearly exceed the loss in value, the owner should receive the diminution in market value. The comment to section 348 explicitly rejects the First Restatement's use of the term "economic waste" as misleading because an owner who receives

81. *Magnolia Coal Terminal*, 576 So. 2d at 483.

82. Corbello v. Iowa Production, 2002 -0826 (La. 2003), 850 So. 2d 686, 695.

83. Litvinoff, *supra* note 24, § 171 ("Indeed, either on common-law grounds such as the need of protracted supervision, or civil law grounds such as impossibility or impracticability of performance in specific for, the fact is that both systems refuse specific performance whenever the inconvenience of enforcing it is out of proportion to the damage sustained by the obligee.").

84. Restatement (Second) of Contracts § 348(2).

more in damages than the actual "loss in value" ordinarily will not use the money to perform the repairs.[85] Nonetheless, the courts continue to principally inquire whether the cost of completion would constitute an inefficient use of resources resulting in economic waste.[86]

2. Jacob & Youngs v. Kent: *The Development of the Clearly Disproportionate Rule*

Justice Benjamin Cardozo paved the path for the measurement of damages in *Jacobs & Youngs v. Kent*.[87] Jacob & Youngs, Inc. agreed to construct a residence for the defendant. The agreement stipulated that all pipes for the plumbing should be a "standard pipe of Reading Manufacture."[88] Jacob & Youngs, Inc. completed the house, but installed pipe made from factories other than Reading. The defendant demanded that the plumbing be reinstalled to specifications; however, to do so would entail demolition at a large expense. Justice Cardozo stated, "We must weigh the purpose to be served, the desire to be gratified, the excuse for deviation from the letter, the cruelty of enforced adherence. Then only can we tell whether literal fulfillment is to be implied by law as a condition."[89] The court looked to the motive behind the party's breach, determining whether the failure to perform was intentional or unintentional. It also aimed to determine whether the condition breached was at the heart of the contract. The court's final conclusion ordered the diminution in value rather than the cost to complete, holding that the owner is entitled to restoration damages unless the cost to restore is disproportionate to the benefit achieved. The case is the quintessential example of a court's refusal to commit economic waste, even where the injured party expressly contracted for a particular duty. Nonetheless, the court did not fail to address other concerns and issues involved in the breach of contract, creating a flexible test that took social policies into consideration.[90]

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85. Carol Chomsky, *Of Spoil Pits and Swimming Pools: Reconsidering the Measure of Damages for Construction Contracts*, 75 Minn. L. Rev. 1445, 1452–53 (1991).

86. *Id.* at 1460.

87. 129 N.E. 889 (N.Y. 1921).

88. *Id.*

89. *Id.*

90. The court looked at the reasons the party breached the contract and what benefit the breaching party received. It also inquired into the principle reasons the party entered the contract. In *Jacobs and Young, Inc.* the homeowner desired a specific type of pipe in his house to suit his personal preferences. However, since the pipe used was substantially the same, the court found the breach to be not as reprehensible as if the builder would have selected a lower grade pipe, and therefore making a higher profit. Had that been the case, the court may have found the

3. *The Ongoing Struggle between* Groves *and* Peevyhouse

The common law has struggled for years with the tension created by two seminal cases concerning remedies for breach of contract: *Groves v. John Wunder Company*[91] and *Peevyhouse v. Garland Coal and Mining Company.*[92] Subsequent case law and commentaries have praised and criticized both *Groves* and *Peevyhouse* for their diametric decisions. The two cases demonstrate the alternative damages awarded for expectation interest: cost to restore versus diminution in value.[93]

In *Groves v. John Wunder, Company*, the plaintiff agreed to lease its land to the defendant for seven years.[94] The defendant agreed to remove sand and gravel from the property and leave the property "at a uniform grade, substantially the same as the grade now existing at the roadway . . . and on said premises."[95] John Wunder Company *deliberately* breached the contract, removing only "the richest and best gravel" from the property and leaving the property "broken, rugged and uneven."[96] Groves sued John Wunder Company for the damage to his land and failure to fulfill the terms of the contract. The lower court found that 288,495 cubic yards of material would have to be excavated and deposited elsewhere to return the land to the proper grade, costing $60,000.[97] The restoration process would increase the reasonable value of the property to only $12,160 (approximately *five* times less than the cost to restore).[98] The trial court awarded the plaintiffs approximately $15,000—the difference between the market

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builder's acts to be malicious and awarded more damages. Compare to *Corbello*, in which the landowners entered the contract to make a profit. It is hard to believe that the obligation to restore the property was at the heart of the contract—especially when since such a provision is a standard clauses in mineral leases. Mineral leases are entered with the hope that minerals will be found and produced, resulting in royalties to the lessee and lessor, alike. That is the objective at the heart of the contract.

91. Groves v. John Wunder Co., 286 N.W. 235 (Minn. 1939).

92. Peevyhouse v. Garland Coal and Mining, Co., 382 P.2d 109 (Okla. 1962); *see also,* Judith L. Maute, *Peevyhouse v. Garland Coal & Mining Co. Revisited: The Ballad of Willie and Lucille,* 89 Nw. U.L. Rev. 1341 (1995) (for an extensive comment of *Peevyhouse*).

93. See Johnson v. Bovee, 574 P.2d 513 (Colo. App. 1978), for a discussion that contract price should be a ceiling. But see Southern Painting Co. v. United States, 222 F.2d 431(10th Cir. 1955), for a discussion that contract price should not be a ceiling.

94. *Groves*, 286 N.W. 235.

95. *Id.* at 238.

96. *Id.*

97. *Id.* at 236.

98. *Id.* Compare to *Corbello* in which restoration damages were approximately 300 times the market value of the property.

value of the land when the contract was made and the condition of the land if John Wunder Company would have fulfilled the contract. The plaintiffs appealed the decision, and the appellate court held that if a party willfully fails to perform under a contract, the other party will be entitled to damages equal to the reasonable cost of having the performance carried out and not the difference in value resulting from the failure to perform.[99] The court steadfastly maintained that in a deliberate and willful breach of contract, the value of the land should have nothing to do with damages awarded. The court found that the plaintiff would not be unjustly or unconscionably enriched by forcing the defendant, John Wunder Company, to provide what it had already promised and received payment for.[100]

Peevyhouse v. Garland Coal Mining presents the polar opposite conclusion to the decision found in *Groves v. John Wunder.*[101] The Peevyhouses leased their land to the Garland Coal Mining Company for strip mining, with the condition that Garland would perform specific restorative and remedial work on the land once the lease ended. Garland refused to perform the restoration, which would have cost approximately $29,000 and increased the value of the property by only $300.[102] The Oklahoma Supreme Court explained that ordinarily the measure of damages in breach of contract is the reasonable cost of performance of the work.[103] However, if the economic benefit gained by a lessor from the full performance is grossly disproportionate to the cost to complete, the lessor's recovery is limited to diminution in value to the property caused by the non-performance.[104] Unlike the duty to restore terminology used in *Corbello,* the duty to restore the land in *Groves* did, in fact, appear to be a term that the plaintiff's actually bargained for.[105] Furthermore, while *Peevyhouse* completely contradicted the decision in *Groves*, common law jurisdictions typically award either the diminution in value or the cost to restore, whichever is less.

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99. *Id.* at 238.

100. *Id.* (In a dissenting opinion by Justice Julius Olson, to which Justice Holt concurred, it was urged that the diminished value rule be applied when there was insufficient evidence showing that the completed product was to satisfy the personal taste of the promisee and denied that the willfulness of breach should affect the measure of damages.)

101. Peevyhouse v. Garland Coal and Mining, Co., 382 P.2d 109 (Okla. 1962); *Groves*, 286 N.W. 235.

102. *Peevyhouse*, 382 P.2d at 112.

103. *Id.* at 110.

104. *Id.*

105. *Id.* at 111.

4. Subsequent Case Law in Common Law Jurisdictions

The trend in most states has been to limit the damages awarded for destruction to property, based on the diminution in value, depreciation, or fair market value of the land. Indiana courts have refused to award repairs that would result in damages exceeding the economic benefit that such repairs confer. An Indiana appellate court rejected a measurement of damages based on cost to repair for $22,700 where a measurement for $1,942.50 based on the "loss in value" to the land was available, even though the larger award would have placed the plaintiffs in a position closer to the position that they would have been in had the contract been fulfilled.[106] In a later case involving a breach of contract to complete the filling of land, costing approximately $600,000 and making the value of the land approximately $180,000, the court of appeals in *City of Anderson, Indiana, v. Salling Concrete Corporation* stated that "rather than have the benefit of some $180,000 in cash, [defendant] would have the benefit of $180,000 in land value by making the City of Anderson literally bury nearly $600,000 in cash in Salling's land. That would be economic waste."[107] The court ultimately concluded that the trial court did not err in awarding diminution in value of the fair market value of the land.[108]

In Missouri, the law is much the same and refuses to allow the cost for restoration where it results in either excessive damages or a value greater than the depreciation in value.[109] The courts limit the award to the deprecation in the market value of the land unless the cost to repair would be *less* than the deprecation in value.[110] In New Hampshire, a court recognized that sometimes it is economically wasteful to place the party in the same position that they would have enjoyed had the contract been fully performed.[111]

Oklahoma law specifically addresses damages for land and groundwater which has been contaminated by oilfield operations by statute.[112] Property owners may recover either the cost to restore or the diminution in value for property, whichever is less.[113] The courts

106. Irving v. Ort, 128 Ind. App. 225, 146 N.E.2d 107 (Ind. App. 1958).

107. City of Anderson, Indiana v. Salling Concrete Corporation, 411 N.E.2d 728, 734 (Ind. App. 1980).

108. *Id.*

109. *See, e.g.,*Dimick v. Noonan, 242 S.W.2d 599 (Mo. 1951); Robinson v. Moark Consolidating Mining Co., 163 S.W. 885 (Mo. App. 1914); Thompson v. Granite Bitumibous Paving Co, 203 S.W. 496, 498 (Mo. App. 1918).

110. *See, e.g.,Dimick*, 242 S.W.2d 599; *Robinson*, 163 S.W. 885; *Thompson*, 203 S.W. at 498.

111. Emery v. Caldonia Sand & Gravel Co., 347 A. 2d 929, 933 (N.H. 1977).

112. Okla. Stat. tit. 52, § 318 (Supp. 1982).

113. *See, e.g.,* Schneberger v. Apache Corp. 890 P.2d 847 (Okla. 1994).

will defer to the Oklahoma Corporation Commission, the responsible regulatory agency, for damaged groundwater in Oklahoma if the property owner requests restoration damages, "but in no event will the surface estate owner collect damages in excess of the fair market value of the land."[114] Texas courts, following the common law tradition, also cap damages at the fair market value of the land.[115]

Finally, the Supreme Court of Mississippi recently reversed a $2.3 million restoration damages award for the clean-up of an oilfield because the plaintiffs did not exhaust their administrative remedies before seeking relief in the courts.[116] The conclusion reached in Mississippi has several benefits. For instance, since landowners are forced to seek relief with an administrative agency, it is more likely that the contaminated land will actually be restored. The result in Mississippi is a more efficient and effective way of ensuring that property in the state is unpolluted, as opposed to the result in Louisiana where the *Corbello* Court gave $33 million to a landowner with the hope that the plaintiffs will use it to restore the land.[117] Given the choice, it is likely that most landowners would decide to invest the $33 million elsewhere and purchase a similar piece of property that is uncontaminated. The state agencies, on the other hand, have an interest in protecting the public and the property of the state.[118] Therefore, by directing the landowners to state or federal agencies, a satisfactory conclusion is reached for all parties involved—the landowners are restored their property, the lessees pay restoration costs as determined by environmental specialists, the state's property is clean, and the public is protected.

II. *CORBELLO V. IOWA PRODUCTION*: THE THIRTY-THREE MILLION DOLLAR DECISION

Corbello v. Iowa Production[119] is one of the most recent cases in Louisiana dealing with restoration damages. While bearing factual resemblances to many prior cases involving damaged property and,

114. *See* Gary Linn Evans, *Texas Landowners Strike Water–Surface Estate Remediation and Legislatively enhanced Liability in the Oil Patch–A Proposal For Optimum Protection of Groundwater Resources from Oil and Gas Exploration and Production in Texas*, 37 S. Tex. L. Rev. 477, 478 (1996).

115. *See, e.g.*, B.A. Mortgage Co., Inc. and Metro Development, Inc., v. Lawrence E. McCullough, 590 S.W. 2d 955 (Tx. App. 1979).

116. Chevron U.S.A., Inc. v. Smith, 844 So. 2d 1145 (Miss. 2002).

117. 2002-0826 (La. 2003), 850 So. 2d 686.

118. *See* Simoneaux v. Amoco Prod. Co., 2002-1050 (La. App. 1st Cir. 2003) (upholding the *Corbello* decision and finding that a private landowners have no duty to seek relief from an administrative agency prior to filing suit against an oil company).

119. 2002-0826 (La. 2003), 850 So. 2d 686.

specifically, *Roman Catholic Church,*[120] the Louisiana Supreme Court distinguished damages for tortious acts and breaches of contract. The Court held that contracts should be held to the four corners doctrine and that the cost to restore, rather than diminution in value, should be the appropriate measurement for damage to property in breach of contract cases.

A. Factual Background

In 1929, the plaintiffs in *Corbello* entered into a mineral lease with the defendant, Shell Oil Company. The lease covered 320 acres in Calcasieu Parish, known as Iowa Field. In 1961, Shell entered into a surface lease with the plaintiffs for 120 acres, which was included in the original mineral lease. Shell operated the lease until 1985, at which point Shell transferred the interest to Rosewood Resources, Incorporated. Subsequently, Shell built an oil terminal on the leased land and operated the terminal until 1993. The 1929 lease authorized Shell to dispose of saltwater produced on the plaintiff's land and had no clause obligating Shell to restore the land.[121] The lease generated over $19 million in royalties, an eighth payable to the plaintiffs.[122] The 1961 surface lease stipulated that Shell would "reasonably restore the premises as nearly as possible to their present condition."[123] The 1961 surface lease expired on May 10,1991, and on May 9, 1991, the plaintiffs sent Shell a letter notifying Shell that it had breached the lease by disposing of saltwater on the property and failing to abide by the terms of the lease.

During the lease, Shell disposed of 501.6 million barrels of saltwater on the plaintiff's property. Approximately 332 million barrels of the total amount disposed of were produced from the plaintiff's property, in accordance with the mineral lease.[124] Of the remaining 169.6 million barrels, only 1.6 million barrels were not produced from Shell's leases on Iowa Field. These barrels were admittedly disposed of by the defendant due to the negligence of Shell employees.[125] The disposal of 500 million of the barrels, or

120. 618 So. 2d 874 (La. 1993).

121. *See* Leger v. Petroleum Engineers, Inc., 499 So. 2d 953, 955–56 (La. App. 3rd Cir. 1986) (holding that the right to dispose of saltwater is impliedly granted in a mineral lease).

122. Shell Oil Company's Original Brief on the Merits, *Corbello*, 850 So. 2d 686.

123. *Corbello*, 850 So. 2d at 694.

124. Shell's Writ Application, *Corbello*, 850 So. 2d 686.

125. Petitioner's Original Brief on the Merits, *Corbello*, 850 So. 2d 686. Note the similarity to *Jacob & Youngs v. Kent.* Cardozo explicitly stated that the defendant's omission of the correct pipe was the result of "oversight and inattention

99.96% of the saltwater disposed of on the plaintiff's property, was authorized.[126]

The plaintiffs and Shell attempted to resolve the issue for about sixteen or seventeen months, at which point the plaintiffs filed suit against Shell. The plaintiffs sought damages for unauthorized disposal of saltwater, trespass of property after expiration of the lease, and failure to maintain the property in the condition provided for in the lease.

B. The Majority Opinion

Ultimately, the Louisiana Supreme Court upheld the trial court decision awarding $33 million in restoration damages for the property which was valued at $108,000 in its decontaminated state.[127] The Court distinguished the facts of *Corbello* from *Roman Catholic Church,* noting that the two parties entered into a contract which expressly stipulated that the land should be reasonably restored to its original condition.[128] The Court concluded that the agreement should be strictly held to the four corners doctrine and ordered damages for cost to restore.[129] The award created a windfall to the plaintiff in the sense that the damages rose to 300 times the market value of the property. Of the $33 million awarded for restoration of the land, the Court awarded $28 million for a *public harm* due to the threat of contamination to an aquifer.[130] The Court acknowledged that the plaintiffs may never decontaminate the aquifer, leaving the public harm unaltered.[131] The Court felt, however, that the state's "understaffed" and "underfunded" regulatory agencies might also fail to repair the potential damage caused to the aquifer.[132]

C. The Dissent

In his dissent, Justice Victory recognized that, "The jury was clearly wrong in determining that $33 million was a 'reasonable' amount of money to restore a piece of property worth $108,000."[133] The majority, on the other hand, failed to adequately address what the

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of the plaintiff's subcontractor." Jacob & Youngs, Inc. v. Kent, 129 N.E. 889 (N.Y. 1921).

126. Original Brief on the Merits on Behalf of Shell at 3, *Corbello,* 850 So. 2d 686.

127. *Corbello*, 850 So. 2d at 692–93.

128. *Id.* at 695.

129. *Id.*

130. *Id.* at 699.

131. *Id.* at 701.

132. *Id.* at 711.

133. *Id.* (Victory, J., dissenting).

word "reasonably" meant in the contract, leaving a significant gap in its analysis. Justice Victory also opined that the landowners should be forced to use the $28 million awarded for the contamination of the aquifer should be used for remediation since it was a public drinking water supply.[134]

III. ANALYSIS

A. *Interpreting the Contractual Term "Reasonably Restore"*

Justice Oliver Wendell Holmes once said, "A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it was used."[135] The *Corbello* decision certainly brings new meaning to the word "reasonably." While reasonably is typically defined as "moderate,"[136] the Louisiana Supreme Court found that $33 million was reasonable for restoring land damaged by salt water, which is worth only $108,000 in its *decontaminated* state.[137] Louisiana Civil Code article 2046 states that "[w]hen the words of a contract are clear and explicit and lead to no absurd consequences, no further interpretation may be made in search of the parties' intent."[138] The interpretation of the words "reasonably restored" was decided by the Louisiana Supreme Court to mean complete restoration—no matter what the cost. The oil and gas industry argues that this conclusion leads to immoderate and absurd consequences.

The Court's analysis provides little explanation for its conclusion that $33 million was reasonable for a breach of contract. In the opinion, Justice Johnson stated that,

> 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 . . . The measure of damages in breach of contract cases is governed by the four corners of the contract. In this case, Shell, a sophisticated company with vast experience in negotiating oil and gas contracts, bound itself by contract to 'reasonably restore plaintiff's property as near as possible to its original condition.' Shell must not be allowed to now alter the terms of this contract by limiting its liability to an

134. *Id.* (Victory, J., dissenting).
135. Towne v. Eisner, 245 U.S. 418, 425, 38 S. Ct. 158, 159 (1918).
136. Black's Dictionary 712 (7th ed. 1999).
137. *Corbello*, 850 So. 2d at 692.
138. La. Civ. Code art. 2046.

> amount reasonably or rationally limited to the market value of the property."[139]

The Court seems to interpret the contract term to reasonably restore the land as a stipulated damages clause. In fact, the term is simply another contractual duty agreed upon by the parties. Failure to fulfill that term is a breach of an obligation, not a stipulated damages clause if that obligation is not fulfilled. If such was the case, the term would be worded to the effect of "if this contract is breached, then lessors shall recover the full restoration cost of the land." But the contract was not stated in such a fashion.

In measuring the damages equal to the cost of restoration, the Court, in effect, awarded the *value* of specific performance with inadequate consideration of the economic or social factors involved.[140] Damages do not always equal the value of specific performance. Damages make the plaintiff whole. To accomplish that goal does not mean that the plaintiff must receive the cost of specific performance. Furthermore, the word "reasonably" in the contract certainly provides a limitation on the contract term.[141] While the Court accused Shell of attempting to "alter" the contract in its favor, the Court itself alters the contract by reading the word "reasonably" *out* of the contract.[142] The Court acknowledged that the word existed and that it was a term that Shell relied on,[143] but failed to address the meaning or purpose of the word as used in the contract. The dissent, however, did find the word "reasonably" to be an important word in the contract and criticized the majority opinion for its failure to recognize its importance.[144]

B. Contrasting Policies: Avoiding Windfalls vs. Deterring Industry Malfeasance

As noted previously, the *Corbello* case presented a difficult situation for the Louisiana Supreme Court. If the Court limited damages to the fair market value of the land or diminution in value, it would have been criticized for allowing oil and gas companies to contaminate land. The companies could easily calculate their loss

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139. *Corbello*, 850 So. 2d at 695.

140. *See* Rohner v. Austral Oil Exploration Co., 104 So. 2d 253, 258 (La. App. 3d Cir. 1958) (which indicates an economic balancing process to limit the duty to restore. The court refused to award damages for failure to restore land to complete fertility, noting that the use of land was reasonable and the loss of fertility was not due to negligence, *cited in* La. R.S. 31:122, cmt.).

141. *Corbello*, 850 So. 2d at 695.

142. *Id.*

143. *Id.* at 692.

144. *Id.* at 711 (Victory, J., dissenting).

before entering the contract by determining the fair market value of the land, as well as the profit that could be derived from the oil extracted; thereafter, the companies could calculate whether the transaction would be a profitable one before entering into the mineral lease. Thus, many would argue that such a conclusion encourages breach of contract, so long as that breach of is efficient. However, by not limiting the measure of damages, the Court granted the landowners a tremendous windfall. Furthermore, the conclusion led to the possibility that the land and aquifer would not be remediated.

The purpose of remedies is to restore the injured party to the position that they were in before the harmful event occurred, whether it be in tort or breach of contract. Assume a creditor lends a debtor one thousand dollars. When repayment on the loan becomes due, the debtor pays X one thousand dollars rather than the creditor. The debtor still owes the creditor one thousand dollars, and the creditor is still deficient one thousand dollars. This is the same situation created by the Court in *Corbello*—the creditor being the public, the debtor being Shell, and X being the plaintiffs. Even though Shell no longer has its "one thousand dollars," the public is not compensated for its loss. In this case, it might even be argued that the public's injury is greater than the plaintiff's, since the public health is put in danger—not simply a financial injury. Therefore, when the Court awarded $28 million in damages to the plaintiffs in *Corbello* for the potential contamination of the *public* aquifer, they failed to adequately consider: 1) whether an injury existed, and 2) who was injured, and 3) whether the injured party could be restored.[145] Obviously, the public is not protected or remedied by the Court's decision since only one small group of individuals received damages to compensate for the possible injury to many. There is no indication that the plaintiffs would decontaminate the public aquifer, nor are they required to do so; there is no duty for them to perform remediation.[146] It seems that the legislature and the proper regulatory body are the appropriate entities to conserve and enhance

145. In Louisiana, groundwater is a "water of the state," and a landowner does not own the water below his property. *See* Adams v. Grigsby, 152 So. 2d 619, 622–24 (La. App. 2d Cir. 1963). Therefore, contamination of drinking water is a public harm, not a private harm.

146. *See* Litvinoff, supra note 8, § 3.4 ("[The obligee] is free, however, to do just as he pleases with the money awarded to him in damages. He is not bound to use that money for any repairs to things that have been damaged, or to restore any situation to its original state, or to buy a new thing to replace the one lost because of the obligor's fault."); *see also* Everett v. Phillips Petroleum Co., 218 La. 835, 51 So. 2d 879 (1951); Savoy v. Tidewater Oil Co., 218 F. Supp. 607 (W.D. La. 1963). After the *Corbello* decision the Louisiana legislature enacted a statute requiring the property owner to restore the land with the awarded damages, but only for certain types of groundwater. *See* La. R.S. 3:4278.1 (1992).

environmental resources, not a landowner who owes no obligation to the public.

At first glance, the most efficient method of remedying the plaintiff for damaged property is to look for substitutes in the market. For example, assume property equivalent in value to property contaminated in a breach of contract is available for a purchase price lower than the cost to restore the damaged land. The court could order the obligor to pay the obligee the purchase price of the uncontaminated land. In such a case, the obligee is returned to a position similar to the position he would have enjoyed if the obligation had actually been performed. In the case of *Corbello,* the Court could have ordered Shell to pay $108,000 rather than $33 million, leaving the economy an extra $32,892,200. While Shell does not in and of itself represent the economy in its totality, Shell's position as an economic entity allows it to affect other parts of the economy by redistributing $32,892,200 more efficiently and effectively than the plaintiffs in *Corbello.* For example, Shell creates thousands of employment opportunities, an extremely important factor in the economy and social well-being of the state and country. Furthermore, the oil and gas that Shell produces provides fuel for automobiles, heaters, steam boilers, trains, and jet planes. In turn, each of these uses helps to create more employment opportunities in other industries.[147] Furthermore, the result of *Corbello* not only affects Shell and its decisions to take risks in Louisiana, but it also affects the decisions of every other oil and gas company doing business in the state. Therefore, when one applies the economic benefits that Shell provides, those benefits must be multiplied by the benefits created by Exxon-Mobile, Chevron, Texaco and every other oil and gas company doing business in Louisiana, for they too are now faced with the extra risk factor created in *Corbello.*

Even though this economic analysis is beneficial, it is not without problems. First, while awarding the plaintiff the market value of substitutes appears to be an economically efficient conclusion, in some instances, the plaintiff may not be fully compensated for the loss sustained, as set forth in *Roman Catholic Church.*[148] Oftentimes, people have personal attachments to land. In such a case, the plaintiff

147. For example, the fuel provided by oil and gas companies fuels jet planes, which provides employment opportunities for pilots, flight attendants, air traffic controllers. Airlines, in turn create a more mobile society allowing for more frequent travel and hence creating a larger tourism and travel industry. With an increase in travel, there is a greater need for hotels, restaurants, and tourist attractions, thereby creating a demand for more goods and services which results in the creation of more jobs. These examples are virtually endless.

148. Roman Catholic Church v. Louisiana Gas Service Company, 618 So. 2d 874 (La. 1993).

suffers not only a pecuniary loss, but also a non-pecuniary loss. No piece of property, no matter how close in pecuniary value, may return the plaintiff to the position that he occupied before the breach.

Secondly, economics does not rely only on currency and present day figures. The economy also suffers when it loses valuable resources. The future value of the land, as well as environmental damage, contribute to the status of the economy. So, while the economy gains $32,892,200, it also loses certain uses of the property—valuable uses which could have been exploited and utilized for years to come.[149] For example, the land may not be able to produce certain vegetation in certain areas, limiting its agricultural value. However, one must also keep in mind other uses for the property, which are not affected by the saltwater contamination, such as the development of real estate.

The decision could likely result in a stifled oil and gas industry. The oil and gas industry is a major segment of Louisiana's economy[150] and losing it would be devastating to the state's economy. The *Corbello* decision may cause many oil and gas companies, as well as potential lessees, to have reservations about conducting business in Louisiana, fearing payment of exorbitant damages for contamination and even *possible* contamination. These damages could include contamination caused by a previous lessee or merely contamination that is unrealized. The current economic status of Louisiana depends on the oil and gas industry. The industry provides jobs and wealth to the state.[151] The fact that *Corbello* could affect companies' decisions to engage in contracts and do business in Louisiana threatens the status and security that Louisiana now holds in the oil and gas industry and its economy in general.

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149. It should be noted that there is no indication that these values were lost in regard to the property in *Corbello*.

150. *See* Loren C. Scott, The Energy Sector: A Giant Economic Engine For the Louisiana Economy 1-2 (Study for Louisiana Mid-Continent Oil and Gas Association, 1996) ("Louisiana is the nation's number three producer of oil, producing over 1.1 million barrels a day in 1995. The U.S. is even more reliant on Louisiana as a source of natural gas . . . over one-fourth of the nation's natural gas comes from Louisiana . . . Louisiana ranks number two among the 50 states in petroleum refining capacity.")

151. *See* Loren, *supra* note 149, at 5–7 ("In 1995, there were 60,602 covered workers employed in the oil and gas extraction, refining, and pipeline industries . . . . Employment in oil and gas extraction is by far the largest component of the energy workforce with 44,144 covered workers or about three-fourths of the total . . . . What is more remarkable is the impact of these three industries on the incomes of Louisiana citizens . . . these three industries [oil and gas extraction, refining, and pipelines] generated over $2.7 billion in covered wages for Louisiana in households in 1995. These three industries, through their direct effects alone, generated 6.6 percent of the total covered wages earned in Louisiana in 1995.").

Furthermore, the *Corbello* decision will lead to landowners and lessors, with pre-*Corbello* leases, rushing to the courts to claim their damages for harm that might be caused to their land, arguing that their lessees have not "reasonably restored" the land.[152] As stated earlier in this comment, every mineral lease contains an implied duty to restore the property to its original condition.[153] Since this is true, then any person or company who leased land from a landowner is left wondering if their fate includes the payment of millions of dollars. It will be interesting to see whether the courts interpret damages for the implied duty to reasonably restore property as they have interpreted damages for the explicit duty to "reasonably restore."[154]

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152. *See* Germany v. Texaco, Inc., No. 101,175, Div. E, 16th Judicial District Court, Iberia Parish; J. Pauline Duhe v. Texaco, Inc., No. 101,227, Div. E, 16th District, Iberia Parish; *see also* Gravolet v. Fair Grounds Corp., 2003-0392, 878 So. 2d 900, (La. App. 4th Cir. 2004) & Simoneaux v. Amoco Production Corp., 2002-1050 (La. App. 1st Cir. 2003), 860 So. 2d 560 (both cases decided after *Corbello* and involving damage to leased property.) *Gravolet* did not involve contamination of property. Nonetheless, the court upheld the rule from *Corbello.* The parties in *Gravolet* stipulated in a lease for the use of a restaurant that the landlord could require that the building be "replaced in its *original condition* upon the termination or expiration of [the] lease." *Gravolet*, 878 So. 2d at 904. (emphasis added). Upholding *Corbello*, the court found that the plaintiff's were entitled to full restoration costs and that the damages should not be limited to fair market value. *Id.* In *Simoneaux,* a case closely resembling the facts of *Corbello*, the court upheld *Corbello* in concluding that it was not required to defer primary jurisdiction to the Louisiana Office of Conservation. Further, the jury awarded the plaintiffs $375,000 for cost to repair salt damage to one of seven well sites that the plaintiffs contended was contaminated. The trial judge overturned the jury's verdict and found that contamination existed at all seven sites. Due to this conclusion, the trial judge adopted the plaintiffs' experts' remediation plan and awarded the plaintiff's over $12 million in damages for property valued at $71,500. The court found that the judge in the case erred and that the jury could have reasonably found that only one site required remediation and could reasonably rely on the defendants' experts for the cost of that remediation. *Simoneaux*, 860 So. 2d at 574.

153. *See* La. R.S. 31:122 (2000) ("A mineral lessee is not under a fiduciary obligation to his lessor, but he is bound to perform the contract in good faith and to develop and operate the property leased as a reasonably prudent operator for the mutual benefit of himself and his lessor. Parties may stipulate what shall constitute reasonably prudent conduct on the part of the lessee.").

154. Subsequent to the writing of this comment, the Louisiana Supreme Court held 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 unreasonable or excessively." *See* Terrebonne Parish Sch. Bd. v. Castex Energy, Inc., 2004-0968 (La. 2005), 2005 WL 106482. The decision was an important one for oil and gas companies and mineral lessees in Louisiana. However, it raises the concern that some mineral leases created prior to the *Corbello* case may have expressly stated the Mineral Code article 122 implied duty in their contracts—knowing that they would be bound by such a duty whether it was in the contract or not. After *Corbello*, however, the lessee will be bound by the stricter

C. Certainty of Damages

The *Corbello* decision also opens doors for plaintiffs concerning the certainty of damages. Generally, two conditions must exist to award damages for the failure to perform an obligation. First, the obligee must actually sustain damage, and second, the nonperformance of the obligation must be imputable to the obligor.[155] An obligee has the burden of proving that the injuries caused by the obligor's fault are certain and not merely theoretical.[156] A mere possibility that damages might result from the obligor's fault is not sufficient to recover damages.[157] In order to recover damages a plaintiff must prove that the loss he sustained was due to the obligor's failure to perform a contractual obligation. The loss must be "certain, that is real or actual, rather than merely conjectural."[158] The Louisiana Supreme Court addressed this issue on rehearing *Corbello*.[159] The defendants, relying on testimony given by the plaintiff's expert, argued that the testimony presented at the trial level failed to rise to the required level of substantiality. During trial, the witness testified that due to the depth of the aquifer and the nature of the clay, the "contamination *may travel into the aquifer*."[160] The witness also stated that Shell's expert agreed in his deposition that it "was possible the drinking source might be contaminated."[161]

While the plaintiffs should be entitled to recovery of damages through *indemnification* if the aquifer is *actually* contaminated and only if they are required to pay for that damage, they should not be able to recover for the mere possibility that the aquifer may be contaminated. The plaintiffs in *Corbello* provided little evidence proving certainty of contamination, and the Court admitted that the damage was only possible. And yet, the Louisiana Supreme Court found the evidence substantial enough to award the plaintiffs $28

"restoration cost" rule rather than the rule established by *Castex*. The question becomes: Is that actually what the parties intended to contract for?

155. *See* La. Civ. Code art. 1994 ("An obligor is liable for the damages caused by his failure to perform a conventional obligation. A failure to perform results from nonperformance, defective performance, or delay in performance.").

156. Litvinoff, *supra* note 8, § 4.8.

157. *See* Coco v. Richland Gen. Contractors, Inc., 411 So. 2d 1260 (La. App. 3d Cir. 1982); Young v. Dep't of Hospitals, 365 So. 2d 848 (La. App. 3d Cir. 1978).

158. Litvinoff, *supra* note 8, § 4.8.

159. Corbello v. Iowa Production, 2002 -0826 (La. 2003), 850 So. 2d 686, *reh'g granted*.

160. *Id.* at 715.

161. *Id.*

million for the possible contamination of the public aquifer.[162] Furthermore, assuming that the contamination to the aquifer is certain, then the appropriate party to receive the full sum of damages should not be the plaintiffs. The contamination was that of a *public* aquifer, and it should be the *public* that receives appropriate damages for that contamination or any injury they incur therefrom.

IV. GROUND WATER REMEDIATION STATUTE: THE ANSWER TO THE WINDFALL?

In 2003 the Louisiana legislature passed the "Ground Water Remediation Statute"[163] to cure the problems caused by the *Corbello* decision. The statute allows regulatory agencies, such as the Department of Environmental Quality, to intervene in the proceedings and requires the damages for remediation of contamination or pollution to be paid into the registry of the court. The statute also requires any money received for restoration for groundwater remediation to be placed in a fund for the restoration efforts. The statute partly cures the windfall aspect created by *Corbello,* but only as it applies to landowners claiming damages for contamination of certain types of groundwater.

Lawsuits recently filed in New Iberia in the Avery Island/ Weeks Island Fields and in the Iberia Field have been careful to avoid claiming the particular class of groundwater that falls under the statute in their briefs.[164] The careful drafting by attorneys allows landowners to continue to receive damages far in excess of the fair market value, resulting in more windfalls not cured by the statute.[165] The statute also fails to consider the possibility of a balancing test

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162. Note that the plaintiffs in *Corbello* have no duty to perform any remediation work on the chicot aquifer, leaving the public safety possibly at harm. *Id.*

163. 2003 La. Acts No. 1166, La. R.S. 2015.1: 30 (2003).

164. *See* Germany v. Texaco, Inc., No. 101,175, Div. E, 16th Judicial District Court, Iberia Parish; J. Pauline Duhe v. Texaco, Inc., et al, No. 101,227, Div. E, 16th District, Iberia Parish.

165. *See* Duhe, No. 101,227, Div. E., 16th District, Iberia Parish, at 11 ("Further, Plaintiff herein does not make any judicial demand or claim for the recovery of damages for the evaluation and remediation of any contamination or pollution that impacts or threatens to impact "usable ground water," as such term is defined in La. R.S. 30:2015.1J.(1), as amended by Louisiana Act No.1166 of 2003. The provisions of La. R.S. 30:2015.1 do not apply to this action."); *see also Germany*,No. 101,175, Div. E, 16th Judicial District Court, Iberia Parish ("Further, plaintiffs herein do not make any judicial demand or claim for the recovery of damages for the evaluation and remediation of any contamination or pollution that impacts or threatens to impact "usable ground water,"as such term is defined in La. R.S. 30:2015.1J.(1), as amended by Louisiana Act No. 1166 of 2003.").

to weigh the costs and benefits of cleanup. Putting a price on human safety and environmental contamination may seem impossible, but when excessive costs yield minimal benefits, restoration damages are unreasonable.

V. RECOMMENDATION

There is a need to ensure that landowners are adequately compensated, the state's land is kept environmentally clean, the public remains safe, and the economy of Louisiana continues to thrive. The best way to accomplish all of these goals is to require landowners to seek relief with the appropriate regulatory agency, such as the Department of Natural Resources. There is a great need in Louisiana for the legislature to draft a statute requiring landowners to seek such relief first. If they feel the relief granted is not adequate, then they should turn to the courts. Requiring landowners to seek relief administratively is the most effective process for achieving an environmentally clean state, restoring landowners their land, and making lessees pay reasonable sums of money to clean the land.

If the issue reaches the courts after administrative relief has been sought, certain rules should be followed. When a plaintiff requests damages for a breach of contract resulting in a pecuniary loss to an individual, the contamination to land, and a potentially dangerous situation for the public, the court should determine whether monetary damages, limited to the fair market value of the land, can adequately restore the plaintiff, the public, and the land. The court should determine the possibility for substitutes in the marketplace available to the landowner, the extent of injury to the public, and the seriousness of contamination of the land. It should also look to the breaching party's reason for breaching the contract and whether or not the condition breached was at the heart of the contract. Where the landowner can be indemnified through monetary damages limited to the fair market value, that is the maximum award he or she should receive. Normally, capping the value of the land should be adequate to place the landowner in the position he occupied prior to the breach, so that he receives the benefit of the bargain.

If monetary damages are insufficient, for any of these reasons, the court should award specific performance, overseen by a proper regulatory agency. First and foremost, an order for specific performance, in fact, returns the obligee almost perfectly to the original position. Second, specific performance ensures public safety. Finally, specific performance returns the land to an uncontaminated state, rather than allowing Louisiana to suffer the

consequences of contamination as the case might be if landowners are left with the decision to restore the land or not.

CONCLUSION

Whether in a common law or a civil law jurisdiction, damages return the obligee to the position that he would have been in had the tort not been committed, or had the contract not been breached. Where there is no non-pecuniary interest, damages should, at the most, equal the value of the thing and unless punitive, damages do not punish the obligor. Damages compensate the obligee for injury actually suffered. They do not compensate one person for another's injury. When, in Louisiana, the courts choose not to impose specific performance, the basic principles of damages should be applied.

The legislature has the duty of protecting the public, and the environmental regulatory authorities hold the position of enforcing the legislative directive. There is a need for the legislature and the regulatory agencies in Louisiana to ensure the public safety and to clean up environmentally damaged sites. When the courts do not order specific performance, these are the proper authorities to impose corrective measures.

On February 25, 2003, the plaintiffs walked away from the Louisiana Supreme Court, to say the least, overjoyed with the Court's decision—for their right to a $33 million jackpot had been solidified. They could purchase a piece of land equivalent to the original land and still have $32,892,000 to spare. Whether the plaintiffs decide to use the money to actually restore the land or invest in a plane ticket to Las Vegas, the Louisiana Supreme Court's decision allowed an enormous windfall. Shell, the public, and the state of Louisiana pay for that windfall. Shell was forced to pay inordinate damages for a contract to "reasonably restore" land. The public was forced to pay, not with money, but potentially with its safety. And the state of Louisiana pays economically with the possibility that less companies will enter into leases in Louisiana. While the conclusion of the Louisiana Supreme Court is not without its benefits—encouraging fulfillment of obligations—the costs appear to tip the scale.

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