

Strict Liability for Ultrahazardous Activities Under Former Civil Code Article 667

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FEBRUARY 14, 2019

Although Louisiana courts routinely decline to find oil and gas defendants strictly liable under the pre-1996 version of Louisiana Civil Code article 667, plaintiffs continue to plead a cause of action under article 667 for alleged property damage caused by oil and gas exploration and production. Like many other landowners in legacy lawsuits, the plaintiffs in *Watson v. Arkoma Development* claimed that defendants were strictly liable for damages caused by contamination to their property before the 1996 amendment of article 667.

The pre-1996 version of article 667 imposes strict liability on proprietors for damage caused by ultrahazardous activities. To constitute an ultrahazardous activity within this context, the activity (1) must relate to an immovable, (2) must cause the injury, and (3) must not require the substandard conduct of a third party to cause the injury. An ultrahazardous activity is thus limited to those activities that cause injury even when conducted with the greatest prudence and care.

The *Watson* plaintiffs specifically alleged that the defendants' predecessors contaminated their property by storing and disposing toxic and hazardous oilfield waste. Although Magistrate Judge Karen L. Hayes of the Western District Court of Louisiana was unconvinced that the defendants engaged in any ultrahazardous activity, the claim survived the defendants' motion to dismiss. In her report and recommendation to presiding Judge Terry A. Doughty, Judge Hayes concluded that the record was not developed enough to make an ultimate determination on the issue and acknowledged that the courts were at odds as to whether the disposal of hazardous waste constitutes ultrahazardous activity.

Plaintiffs relied on *Updike v. Browning-Ferris, Inc.*, which found that the storage of hazardous waste in pits was an ultrahazardous activity. Defendants alternatively relied on *Bartlett v. Browning-Ferris Indust., Chem. Servs. Inc.*, which held that the operation of a hazardous disposal facility was not an ultrahazardous activity because the facility could be safely operated with due care. The Louisiana Third Circuit Court of Appeal in *Bartlett* clearly stated: "In fact, all the

testimony on both sides suggests that a hazardous waste disposal facility, properly operated according to the rules and regulations propounded by the state and federal government, will not cause harm to the residents of the area in which it is situated.”

While this issue has been brought before Louisiana courts numerous times, no other court has found the storage or disposal of hazardous oilfield waste to be an ultrahazardous activity since *Updike*. Nonetheless, plaintiffs in *Watson v. Arkoma Development* will have the opportunity to request the court to revisit the issue and determine whether the storage and disposal of toxic and hazardous oilfield waste qualifies as an ultrahazardous activity.