BUYER BEWARE: HOW PURCHASERS ARE LEFT HOLDING THE BAG WHEN IT COMES TO PROPERTY DAMAGES UNDER THE SUBSEQUENT PURCHASER DOCTRINE

"*Every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it*"[1]

The words of Louisiana Civil Code article 2315 have been the subject of much interpretation and criticism, but in general, the basic principle remains unchallenged. The article's broad terms govern society's conduct by holding individuals "accountable for . . . [their] actions as they affect fellow members of society."[2] Despite this intention, Louisiana jurisprudence has shown that in some situations, he law permits courts to deviate from the general principle, allowing wrongdoers to avoid accountability for the damage they cause.

I. INTRODUCTION

Although it is clear that the words of article 2315 cannot always be enforced, a deviation from the article's general principle is most difficult to justify when it appears to be based on a technicality.[3] In Louisiana, a wrongdoer may be able to avoid

1. LA. CIV. CODE ANN. art. 2315 (2011).

2. Bethea v. Modern Biomed. Servs., Inc., 97-332, p. 10 (La. App. 3 Cir. 11/19/97); 704 So. 2d 1227, 1233.

3. Louisiana courts and the legislature have recognized this and have sought to remove some of the technicalities that could help an at-fault wrongdoer escape liability. One example is the adoption of *contra non valentem*, which suspends the running of prescription on torts when a cause of action has not been discovered by a would-be plaintiff or was concealed by a wrongdoer. *See* Terrebonne Parish Sch. Bd. v. Mobil Oil Corp., 310 F.3d 870, 885 (5th Cir. 2002) ("The Louisiana Supreme Court has often noted that basic principle of the doctrine (*contra non valentem*) is equity."); Daigle v. McCarthy, 444 F. Supp. 2d 705, 711 (W.D. La. 2006), *aff'd*, 238 F. App'x 1 (5th Cir. 2007) (stating that c*ontra non valentem* suspends the running of the prescriptive period in situations so that an injured party can recover for injuries if a timely action is brought after discovery of the damage); Douglas Nichols, *Contra Non Valentem*, 56 LA. L. REV. 337, 356 (1995) ("Louisiana judges invoke contra non

liability simply because the damage he caused remained hidden long enough for the property to change owners. For many years, this escape from liability, officially termed the Subsequent Purchaser Doctrine, has barred purchasers of land from bringing claims against third parties that damaged the land if the damage occurred prior to the sale.[4] This doctrine has shielded many tortfeasors from liability, leaving the truly injured parties without a remedy. The inequitable and inconsistent effects of this judicially-created doctrine become clear by comparing the following situations.

Situation #1: An individual purchases a tract of land. He pays fair market value, and there are no overt defects in the property. Shortly after the purchase, he discovers that the oil and gas operations of a former lessee of a previous landowner left deposits of hazardous and toxic waste on the property, which renders it both dangerous and useless until the contamination is removed. The purchaser brings a suit against the former lessee for the damages that have resulted from their operations during the lease. The court dismisses the case for no right of action, holding that the right to sue is personal to the owner of the land at the time of the damage.

Situation #2: A company buys a tract of land. It pays fair market value, and there are no overt defects in the property. A few years after the purchase, the company discovers that previous oil-and-gas-related activities by a prior lessee of the former landowner and several related companies had contaminated the land with toxic and radioactive material. As a result, the company is unable to use the land until the contamination is removed and suffers related losses. The company brings a suit against the tortfeasors for the damages to the land that resulted from their operations during their lease. The court finds that the company did have a right to sue the tortfeasors, holding that the right to sue was personal to the party who actually suffered the injury, rather than the party who owned the land at the time of the damage.

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valentem when they feel the alternative is for the legislator to unwillingly reward a fraud.").

4. *See* Bradford v. Richard, 16 So. 487 (La. 1894). For the purposes of this Comment, "third parties" means tortfeasors who are not in the chain of title to the property at issue.

With the exception of a few factual differences, the only real difference in these two situations is the outcome. The first presents the basic facts of *Wagoner v. Chevron USA, Inc.*, decided by the Louisiana Second Circuit Court of Appeal, where the court determined that the subsequent purchaser had no right of action in its suit against the tortfeasor (former lessee) for the damages that occurred prior to the purchase.[5] The second presents the basic facts of *Eagle Pipe & Supply, Inc. v. Amerada Hess Corp.*, decided by the Louisiana Fourth Circuit Court of Appeal, where the court determined that the subsequent purchaser (the company) had a real and actual interest in the matter asserted and rejected the defendants' exceptions of no right of action.[6] The conflicting results are surprising when you consider that these cases present similar issues and were decided within four months of each other.[7] Even more startling are the results themselves, where the tortfeasor in the first situation is essentially immune from suit by the subsequent purchaser who has suffered an array of damages, while the second situation's tortfeasor is held responsible.[8] This unsettling outcome is primarily due to the courts' opposing classifications of the purchaser's rights as real or personal and the identifications of when these labels should be attached. The classification of rights has troubled civilian scholars and attorneys and has led to inconsistent and inequitable results in the application of the Subsequent Purchaser Doctrine.[9]

This Comment focuses on the rights of an injured landowner to recover damages from a tortfeasor under the Subsequent

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5. Wagoner v. Chevron USA Inc., 45,507-CA (La. App. 2 Cir. 11/24/10); 55 So. 3d 12.

6. Eagle Pipe & Supply, Inc. v. Amerada Hess Corp., 09-0298 (La. App. 4 Cir. 9/8/10); 47 So. 3d 428, *writ granted*, 2010-2289 (La. 2/4/11); 56 So. 3d 982.

7. *Eagle Pipe & Supply* was decided on September 8, 2010, and *Wagoner* was decided on November 24, 2010.

8. Although the subsequent purchaser in many cases involving environmental damage may be entitled to remediation of the property, the purchaser often suffers additional damages resulting from loss of use as well. Whether a subsequent purchaser will have their property remediated or restored under the governing environmental laws is outside the scope of this Comment.

9. The Subsequent Purchaser Doctrine is a judicially-created doctrine that has developed into the rule that a purchaser of land cannot sue for damages occurring prior to the existence of the sale without an express assignment from the seller. *See* Bradford v. Richard, 16 So. 487 (La. 1894).

Purchaser Doctrine. Section II explains the principles and background law necessary for understanding the rights of parties under the Subsequent Purchaser Doctrine. Section III emphasizes the problems with the current doctrine and its recent inconsistent application. Section IV proposes a legislative solution to correct the problems inherent in the judicially-created doctrine and seeks to provide clarity to landowners and judges alike by offering an express exception in the case of hidden damages. Section V concludes by briefly summarizing the potential benefits of the proposed statute.

II. THE CREATION AND EVOLUTION OF THE SUBSEQUENT PURCHASER DOCTRINE

This Section addresses the basic principles relied on in the creation of the Subsequent Purchaser Doctrine, including the distinction between real and personal rights, the rights of parties to a lease, and the warranty against redhibition. These concepts were essential in the cases that created the Subsequent Purchaser Doctrine and have been relied on by subsequent courts in its application.

A. THE DISTINCTION BETWEEN REAL AND PERSONAL RIGHTS

One of the main problems with determining the rights and obligations of parties is the categorization of their rights as "real" or "personal." The reliance on the principles of classification was essential in determining the rights of purchasers for damages caused by a third party that occurred prior to the purchase. Many courts have relied upon the early classification of these rights as personal to the owner at the time of the damage; thus, classification remains pertinent in the evaluation of the Subsequent Purchaser Doctrine.[10]

The distinction between real and personal rights is one that is necessary, but it is often left unexplained in judicial opinions and pronouncements of the law. In fact, although the terms are used in both the Louisiana Code of Civil Procedure and the Louisiana Civil Code, the legislature has never defined them.[11]

10. *See* Clark v. J.L. Warner & Co., 6 La. Ann. 408 (La. 1851); Bradford v. Richard, 16 So. 487 (La. 1894).

11. YIANNOPOULOS, LOUISIANA CIVIL LAW TREATISE 387 (West 2001). *See*, *e.g.*, LA. CIV. CODE ANN. arts. 478, 812, 1281, 3153, 3280, 3338, 3535-36 (2011). *See also*

In the absence of clear guidance from the legislature, many Louisiana courts and jurists have offered their own definitions of real rights. In *Reagan v. Murphy*, the Louisiana Supreme Court sought to clarify the difference between real and personal rights by stating the following:

> [T]he term "real right" under civil law is synonymous with proprietary interest, both of which refer to a species of ownership. Ownership defines the relation of man to things and may, therefore, be declared against the world. A personal right, on the other hand, defines man's relationship to man and refers merely to an obligation one owes to another which may be declared only against the obligor.[12]

Judicial interpretation has been helpful in determining what rights should be classified as real and personal, but the distinction remains uncertain in some situations.

To further complicate things, the line between real and personal rights is often blurred, even after the label has been established.[13] One of the most common examples is the contract of lease.[14] Courts have traditionally regarded the contract of lease as establishing only personal rights.[15] With much criticism of this established label, some scholars and courts have suggested that it is more appropriate to classify these rights as either entirely real or part real and part personal, hybrid rights. Despite criticism, the rights arising from a contract of lease continue to be classified as personal rights. However, the ability of a lessee to assert his rights under the lease against a lessor's successor in title, when appropriate steps have been taken, shows that the rights derived from the contract are not strictly personal between the original lessor and the original lessee.[16]

B. RIGHTS "ARISING FROM" CONTRACTS OF LEASE

The classification of rights is particularly important when

LA. CODE CIV. PROC. ANN. arts. 696, 3651-56, 3658-64 (2011).

12. Reagan v. Murphy, 105 So. 2d 210, 214 (La. 1958).

13. YIANNOPOULOS, *supra* note 11, at 389.

14. *Id.*

15. *Id. See also* Thomas J.R. Stadnik, *The Doctrinal Origins of the Juridical Nature of Lease in the Civil Law*, 54 TUL. L. REV. 1094 (1980).

16. YIANNOPOULOS , *supra* note 11, at 389.

dealing with leases because of Louisiana's recordation doctrine and the potential rights and obligations of third-party purchasers of leased or previously leased property.[17] This distinction became very important as courts sought to classify the rights of subsequent purchasers of property in relation to the former lessee and his actions.

The view that a contract of lease establishes only personal rights is a traditional civilian concept.[18] Unlike the common law jurisdictions that treat "leasehold interests as property rights or real rights," Louisiana law has maintained the view that "a lease is a contract that produces only personal rights and obligations."[19] This categorization is derived from the Roman law contract of letting and hiring, *locatio conductio*.[20] The rights obtained therein could only be enforced in personam; thus the underlying obligation was considered personal. Once the owner sold the leased property, the lessee was ejected by the purchaser.[21] The purchaser's ownership right was considered a real right, or *ius in re*.[22] The distinction was originally regarded as procedural, but continues to have substantive implications.[23] Today, the classification of a right as real or personal determines whether the right must be recorded, if it can be transferred to another party with the transfer of property without express subrogation, and which parties can enforce the right in question.

The strict allegiance to the classification of lease rights as personal can create problems when rights "arising from" a lease are confused with rights that happen to arise during the term of a lease but exist outside of the contractual context.[24] This problem

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17. Stadnik, *supra* note 15.

18. YIANNOPOULOS, *supra* note 11, at 435. *See also* Stadnik, *supra* note 15.

19. Lee Hargrave, *Public Records & Property Rights*, *Ruminations on the Law: 1995-1996*, 56 LA. L. REV. 535, 543 (1996).

20. Stadnik, *supra* note 15, at 1095.

21. *Id.* at 1096. This concept was referred to as *emptio tollit locatum*—the sale breaks hire. Reinhard Zimmermann, *Relationships Among Roman Law, Common Law, and Modern Civil Law*, *Roman-Dutch Jurisprudence and its Contribution to European Private Law*, 66 TUL. L. REV. 1706, 1704 (1992).

22. Stadnik, *supra* note 15, at 1096.

23. *Id.* at 1095.

24. For example, a right to sue a lessee for failure to pay rent arises out of the contractual obligations and rights of the lease, but a lessee injured due to a slip and fall accident on the leased property would have a claim in tort, not arising out of the contract of lease.

is most apparent in the treatment of purchasers of immovable property previously subject to a lease and damaged by the former lessee prior to its purchase. In Louisiana, some courts have taken the approach that the right to sue the former lessee for the property damage is strictly personal to the former lessor due to the pre-existing contractual relationship.[25] However, other courts have deemed this right to be distinct from rights arising from a lessee's activities as a *lessee qua lessee*, such as a right for breach of lease obligations.[26] Overall, the logical approach seems to be one that looks at all of the facts and circumstances to determine whether the right being asserted is actually one that arises from a lease or whether the right could have resulted outside of the contractual relationship. If the latter is true, reliance on the traditional principles of lease is unwarranted.

C. THE SUBSEQUENT PURCHASER DOCTRINE, EXPIRED LEASES, AND HIDDEN DAMAGES

The Subsequent Purchaser Doctrine is a judicially-created doctrine that provides the general rule that a purchaser cannot recover from a third-party for damage inflicted prior to the sale.[27] The rationale behind this rule is that the general classification principles establish that the right to assert a claim due to property damage is a personal right attributed to the "owner of the land at the time of the alleged damages."[28] It has been interpreted to mean that a subsequent purchaser has no right of action[29] in these situations unless there has been a specific

25. *See* Prados v. S. Cent. Bell Tel. Co., 329 So. 2d 744, 749 (La. 1976).

26. Eagle Pipe & Supply, Inc. v. Amerada Hess Corp., 09-0298, p. 10 (La. App. 4 Cir. 9/8/10); 47 So. 3d 428, 440, *writ granted*, 2010-2289, (La. 2/4/11); 56 So. 3d 982.

27. Wagoner v. Chevron USA Inc., 45,507, p. 9 (La. App. 2 Cir. 11/24/10); 55 So. 3d 12, 22-23 (citing St. Jude Med. Office Bldg. v. City Glass & Mirror, Inc., 619 So. 2d 529 (La. 1993); Lejeune Bros., Inc. v. Goodrich Petroleum Co., 06-1557 (La. App. 3d Cir. 11/28/07); *see* also, St. Martin v. Mobil Exploration & Producing U.S., 224 F.3d 402 (5th Cir. 2000)).

28. Minivelle, LLC v. Atl. Ref. Co., 337 F. App'x. 429, 431 (5th Cir. 2009) (citing Minivelle, LLC v. IMC Global Operations, Inc., 380 F. Supp. 2d 755 (W.D. La. 2004)).

29. An exception of no right of action is a peremptory exception under LA. CODE CIV. PROC. ANN. art. 927 (2005). The exception enforces the requirement that an action be "brought only by a person having a real and actual interest which he asserts." LA. CODE CIV. PROC. ANN. art. 681 (2011). The exception is used to determine "whether the plaintiff 'belongs to the particular class in whose exclusive favor the law extends a remedy.'" *Eagle Pipe & Supply*, 47 So. 3d at 439 (quoting Babineaux v. Pernie-Bailey Drilling Co., 262 So. 2d 328, 333-34 (La. 1972)). In

assignment.[30]

Courts have rejected the notion that the right to sue for property damage that occurred prior to the sale transfers with the land as an action appurtenant to the property and necessary for its perfect enjoyment.[31] Even in cases where there has been a general subrogation of all rights in the purchase agreement, Louisiana courts have generally deemed them insufficient to transfer the personal right to sue for property damage prior to the sale of the property.[32] Although the cases establishing the rule did not address hidden damages, the Subsequent Purchaser Doctrine was articulated in broad terms that seemed to include overt and hidden damage incurred prior to the purchase of property. This Section discusses the cases that established the Subsequent Purchaser Doctrine as well as the cases that have applied it. This Section also focuses on the underlying principles and justifications used by courts in the application and maintenance of the doctrine in the face of damage caused by former lessees and the implied warranty against redhibition.

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essence, "[t]he exception of no right of action tests whether the plaintiff has [any] interest in judicially enforcing the right asserted." St. Jude Med. Office Bldg. v. City Glass & Mirror, Inc., 619 So. 2d 529, 530 (La. 1993). Notably, the exception is not meant to consider whether "the remedy can be exercised against a particular defendant." Eagle Pipe & Supply, Inc. v. Amerada Hess Corp., 09-0298, p. 10 (La. App. 4 Cir. 9/8/10); 47 So. 3d 428, 439 (citing *Babineaux*, 262 So. 2d at 334).

30. The problem with this requirement is that property purchasers cannot contract for protection they don't yet know exists. Although a purchaser can contract for the right to sue the tortfeasor, placing the burden on the innocent party is inappropriate when a tortfeasor is clearly responsible for the damages. *See* Minivelle, LLC v. Atl. Ref. Co., 337 F. App'x. 429, 431 (5th Cir. 2009).

31. *See* Clark v. J.L. Warner & Co., 6 La. Ann. 408 (La. 1851).

32. Bradford v. Richard, 16 So. 487 (La. 1894).

1. THE BEGINNING OF THE SUBSEQUENT PURCHASER DOCTRINE

In *Clark v. Warner & Co.*, the Supreme Court of Louisiana addressed the rights of owners of property damaged prior to their purchase.[33] The plaintiff purchased a house that shared a wall with the neighboring property, an ice house depot.[34] As a result of activities at the neighboring property prior to the plaintiff's purchase, both properties were devastated by pressure and moisture.[35] The plaintiff's home became a great danger to the occupants and had to be demolished.[36] As a result, the plaintiff brought suit against the owner of the neighboring property.[37] The Louisiana Supreme Court reversed the decision of the district court, which allowed for damages against the neighbor.[38] The supreme court found that the district court set out a "radically erroneous legal principle" in finding that the plaintiff had acquired by law and title all of the rights and claims of the prior owner.[39]

The Louisiana Supreme Court distinguished the concept that "the purchaser of property is presumed to purchase all actions appurtenant to the property and necessary to its perfect enjoyment," from the actions for damages actually suffered prior to purchase.[40] The court emphasized that the rights and appurtenances in the bill of sale intended to convey the real rights, not the strictly personal rights of the vendor.[41] The court also looked to the principle in Civil Code article 2315 and stated that the corollary is that "reparation must be made to him who suffered the injury."[42] The court looked to the fact that the

33. Clark v. J.L. Warner & Co., 6 La. Ann. 408, 408 (La. 1851).

34. *Id.*

35. *Id.*

36. *Id.*

37. Clark v. J.L. Warner & Co., 6 La. Ann. 408, 408 (La. 1851).

38. *Id.* at 408-09.

39. Clark v. J.L. Warner & Co., 6 La. Ann. 408, 409 (La. 1851).

40. *Id.*

41. *Id.*

42. *Id.* The *Eagle Pipe & Supply* court also used this idea, but arrived at the opposite decision. Eagle Pipe & Supply, Inc. v. Amerada Hess Corp., 09-0298, p. 7 (La. App. 4 Cir. 2/10/10); 47 So. 3d 428, 441, *writ granted*, 2010-2289 (La. 2/4/11); 56 So. 3d 982.

purchaser had knowledge of the damage when he purchased the property and that the modest price was likely a reflection of this.[43] As a result, the court stated that a purchaser should not be able to profit in the form of an action for damages without an express assignment of rights from the owners at the time of the damage.[44] Because this was a case of overt or obvious damages, the denial of monetary damages and the strict adherence to the underlying principles was logical. In cases of hidden damages, however, this approach is misplaced.

Even in cases where a subrogation or assignment of rights was given in favor of the subsequent purchaser, Louisiana courts have been reluctant to allow recovery in actions that would fall under the Subsequent Purchaser Doctrine. *Bradford v. Richard* is one of the earliest cases of note to address whether a purchaser of property had a right of action for damages that occurred prior to the purchase of the land when an actual subrogation was included in the deed.[45] In *Bradford*, the plaintiff sought damages against trespassers who cut down and removed a large number of cypress trees from the property nearly a year before he became the owner.[46] The plaintiff argued that his right to bring the action was based on his deed, which provided for a subrogation of all rights in his favor.[47] The court noted that "damages actually suffered by the vendor before the sale . . . are personal to him, and cannot be recovered by the purchaser without an express subrogation."[48] The Louisiana Supreme Court viewed the subrogation language in the deed as ambiguous and inadequate to transfer the specific right of action against the particular

43. Clark v. J.L. Warner & Co., 6 La. Ann. 408, 409 (La. 1851).

44. *Id.* The court found the plaintiff was non-suited because the some damages could have occurred after his purchase and further testimony could likely establish this. *Id.* at 410.

45. Bradford v. Richard, 16 So. 487 (La. 1894).

46. Bradford v. Richard, 16 So. 487, 487 (La. 1894).

47. *Id.* at 488. The original clause in the deed stated the following: "With full substitution and subrogation in and to all the rights and actions of warranty which said board has or may have against all preceding owners and vendors, and to all other rights and actions against all other persons . . . ." *Id.* A supplemental deed was also given to the plaintiff after the filing of the suit. *Id.* It stated that the prior landowner intended to transfer "'every right of action" that it had against trespassers for cutting or removing timber to Bradford. *Id.*

48. *Bradford*, 16 So. at 488. The court also stated that the purchaser of property acquires "all actions appurtenant to the property and necessary to its perfect enjoyment." *Id.*

defendants in the case.[49] The court focused on the deed's failure to mention the transfer of any rights against particular parties or for particular actions.[50] *Bradford* reinforced the principle that damages occurring prior to the sale of property are personal to the owner at the time unless there is an express subrogation. Despite the subrogation language in the deed, the court still found that the personal action had not been transferred.[51] As a result, this case clarified that the express subrogation required to transfer the personal right had to be more than a general assignment of all rights in order to be deemed sufficient for such a right of action to transfer.[52]

The need for an express and unambiguous assignment of rights further limited the likelihood that a subsequent purchaser could hold a tortfeasor liable for the damages he caused. Although the facts did not require a discussion of whether this same express subrogation was needed for hidden damages that occurred prior to the sale, the holding in *Bradford* did not appear to create a rule limited to rights to sue for overt property damage prior to the time of the sale.

2. THE SUBSEQUENT PURCHASER DOCTRINE AS APPLIED TO DAMAGES CAUSED BY A PRIOR LESSEE OF A LEASE EXPIRED AT THE TIME OF SALE

Many of the cases arising under the Subsequent Purchaser Doctrine followed a fact pattern where landowners purchased land after a prior lease had expired and the former lessee or his agents had damaged the land. The courts addressing the issue began by looking to Louisiana's established position on rights arising from contracts of lease—leases create only personal rights.[53] The court used this traditional notion to justify finding

49. Bradford v. Richard, 16 So. 487, 488 (La. 1894). The court found that both the original deed and the supplemental deed were unclear as to exactly what cause of action was transferred to the plaintiff. *Id.*

50. *Id.* at 489.

51. *Id.* The court found that both the original deed and the supplemental deed were unclear as to exactly what cause of action was transferred to the plaintiff. *Bradford*, 16 So. at 489.

52. *Id.*

53. *See* LeJeune Bros., Inc. v. Goodrich Petroleum Co., 06-1557, p. 13 (La. App. 3 Cir. 11/28/07); 981 So. 2d 23, 32; Prados v. S. Cent. Bell Tel. Co., 329 So. 2d 744 (La. 1976).

that truly injured parties lacked the right to sue the tortfeasors who caused their harm because they were not parties to the original lease contract and had not received an express assignment of the right to sue for pre-purchase damages resulting from prior leases. The reliance on Louisiana lease law merely led to more confusion and seemed to blur the lines between personal rights arising from tort law and personal rights arising from contract law.

The rights of a subsequent purchaser in relation to pre-purchase property damage caused by a former lessee were addressed in *Prados v. South Central Bell*.[54] In *Prados*, the defendant and former landowner entered into a lease on the land that terminated shortly before the property was sold to James L. Prados.[55] The new landowner demanded that the former lessee remove structures and improvements that were made upon the land during the term of the lease, finding support for these demands in the contractual provisions in the lease and codal provisions requiring the lessee to deliver the property back in the same condition as when he took possession.[56] The court determined that South Central Bell was obligated under the lease to remove the improvements on the formerly leased property at the termination of the lease.[57] Thus, the plaintiff, as ancestor in title, could assert the right to compel the removal.[58] Although *Prados* involved a contract of lease, the court stated that the contract provisions in the recorded lease and the codal provisions of the time allowed it to deviate from the general rule that leases establish only personal rights.[59]

However, on rehearing, the court firmly disagreed with its previous determination.[60] The court in *Prados* stated that rights arising from a contract of lease are personal in nature, and personal rights can never be considered accessories of an immovable in a sale.[61] The court further emphasized that the right to assert damages is personal to the landowner at the time

54. Prados v. S. Cent. Bell Tel. Co., 329 So. 2d 744, 744 (La. 1976).
55. *Id.* at 745-46.
56. *Id.* at 746.
57. *Id.* at 747.
58. Prados v. S. Cent. Bell Tel. Co., 329 So. 2d 744, 747 (La. 1976).
59. *Id.* at 748.
60. *Id.* at 748-51.
61. Prados v. S. Cent. Bell Tel. Co., 329 So. 2d 744, 750 (La. 1976).

of the damage without express assignment.[62] The decision on rehearing adhered to the traditional principles of lease law and found that the plaintiff did not have a cause of action.[63]

For decades, courts have cited *Prados* for its role in the classification of rights and the discussion of the Subsequent Purchaser Doctrine.[64] In *Hopewell, Inc. v. Mobil Oil Co.*, the second circuit relied on *Prados* to uphold a finding of no right of action for a subsequent purchaser.[65] In *Hopewell*, the plaintiffs purchased property that was contaminated due to oilfield operations of a former lessee.[66] The plaintiffs discovered the damage after the purchase and sued the former lessee.[67] The court relied on *Prados* and found that since the right to sue for the damages was personal to the owner at the time of the damage, the plaintiff had no right of action.[68] However, the Louisiana Supreme Court reversed this decision in a one-paragraph opinion:

> Granted. Judgment of the Court of Appeal is reversed. Judgment of the trial court denying defendant's exception of no right of action is reinstated. *Prados v. South Central Bell Telephone Co.*, 329 So. 2d 744 (La. 1975) (on rehearing), which the Court of Appeal relied upon, involves rights arising under a lease and is distinguishable from the instant facts. Case remanded to the trial court for further proceedings.[69]

The persistent reliance on lease law in Louisiana to develop the Subsequent Purchaser Doctrine resulted in confusion as to the nature of the claim in some suits where the tortfeasor happened to be a prior lessee. The court in *Prados* noted the potential for confusion in cases involving property damage and

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62. *Id.*

63. *Id.*

64. *See* Hopewell, Inc. v. Mobil Oil Co., 33,774 (La. App. 2 Cir. 11/1/00); 770 So. 2d 874, *rev'd*, 00-3280 (La. 2/9/01); 784 So. 2d 653; St. Jude Med. Office Bldg. v. City Glass & Mirror, Inc., 619 So. 2d 529 (La. 1993); Dorvin Land Corp. v. Jefferson Parish, 469 So. 2d 1011, 1013 (La. Ct. App. 1985).

65. Hopewell, 770 So. 2d 874.

66. *Id.*

67. *Id.*

68. *Id.*

69. Hopewell, Inc. v. Mobil Oil Co., 00-3280, p. 2 (La. 2/9/01); 784 So. 2d 653, 653.

former leases.[70] The court acknowledged that rights and obligations under a contract of lease are hybrid in nature and that the classification should be determined based on the rights asserted.[71] The Louisiana Supreme Court's decision in *Hopewell*, however, may be an indication that the court does not believe that the Subsequent Purchaser Doctrine should be applied strictly in cases of hidden damage. Unfortunately, the brevity of the court's opinion has left lower courts and practitioners to make their best guess of what was intended by *Hopewell*.

3. THE SUBSEQUENT PURCHASER DOCTRINE APPLIED TO HIDDEN DAMAGES

Although hidden damages were not directly addressed during the creation of the Subsequent Purchaser Doctrine, they have been the source of much confusion and concern when applying the Doctrine. In particular, hidden damages related to oil and gas contamination on land has emerged as a major source of discussion within the context of the Subsequent Purchaser Doctrine.

The oil and gas operations in Louisiana, as well as the Louisiana Supreme Court's decision in *Corbello v. Iowa Production*, requiring remediation and restoration of property in "Oilfield Legacy" cases,[72] have flooded Louisiana courts with plaintiffs seeking damages for land contamination from oilfield operations that occurred in the past.[73] In many of these actions, the Subsequent Purchaser Doctrine has been implicated because the acts that caused the contamination were often committed decades before, making the likelihood of a sale or transfer of the property very high. Although a majority of these cases have presented additional issues involving environmental damage, the same principles have been used to determine the rights of subsequent purchasers regarding pre-purchase property damage.

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70. Prados v. S. Cent. Bell Tel. Co., 329 So. 2d 744, 747 (La. 1976).

71. *Id.*

72. "'Legacy litigation' refers to hundreds of cases filed by landowners seeking damages from oil and gas exploration companies for alleged environmental damage . . . . These types of actions are known as 'legacy litigation' because they often arise from operations conducted many decades ago, leaving an unwanted 'legacy' in the form of actual or alleged contamination." Marin v. Exxon, 09-2368, p. 2 n.1 (La. 10/19/10); 48 So. 3d 234, 239 n.1 (citing Loulan Pitre, Jr., *"Legacy Litigation" and Act 312 of 2006*, 20 TUL. ENVTL. L.J. 347 (2007)).

73. Corbello v. Iowa Prod., 02-0826 (La. 2/25/03); 850 So. 2d 686.

In *Wagoner v. Chevron*, the second circuit held that, even in the case of hidden damage,[74] a subsequent purchaser does not have a right of action for damage inflicted prior to the sale.[75] *Wagoner* involved damages caused by several former lessees during the terms of each of their leases, dating as far back as 1945.[76] The court relied on *St. Jude*, *Lejeune Bros.*, and *Dorvin* in finding that "a purchaser cannot recover from a third party for property damage inflicted prior to the sale" under the Subsequent Purchaser Doctrine.[77]

The court in *Wagoner* seemed to classify the damages and rights in the case as arising under a lease.[78] The damage occurred due to the actions of prior lessees and during the term of the expired leases.[79] This led the court to find that the right to sue for the damages was a personal right (rather than real or property right) that could not be transferred to the subsequent owner without a specific conveyance of the right.[80] The court stated that

> [t]he right to damages conferred by a lease, whether arising under a mineral lease or a predial lease, is a personal right, not a property right; and, as a personal right, it does not pass to the new owners of the land when there is no specific conveyance of that right in the instrument of sale.[81]

Even after discussing that the damages in the case were discovered only after the purchase of the property, the court further stated that "[t]he reasoning behind these principles is

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74. For this Comment, "hidden damages" means damages that occurred prior to the purchase of property, but were discovered by the subsequent purchaser after the sale.

75. Wagoner v. Chevron, 45,507-CA (La. App. 2 Cir. 11/24/10); 55 So. 3d 12.

76. *Id.* at 16.

77. *Id.* at 23 (citing St. Jude Med. Office Bldg. v. City Glass & Mirror, Inc., 619 So. 2d 529 (La. 1993); Lejeune Bros., Inc. v. Goodrich Petroleum Co., 06-1557 (La. App. 3 Cir. 11/28/07); 982 So. 2d 23; Dorvin Land Corp. v. Jefferson Parish, 469 So. 2d 1011 (La. Ct. App. 1985)).

78. *Wagoner*, 55 So. 3d 12.

79. *Id.* at 16. Chevron's mineral lease of the property at issue began in 1945 and terminated in 1992. *Id.* Devon, formerly Pennzoil, also conducted operations on the land pursuant to a lease from 1992 to 2002. *Id.*

80. *Id.*

81. Wagoner v. Chevron, 45,507-CA (La. App. 2 Cir. 11/24/10); 55 So. 3d 12, 23 (citations omitted).

that the buyer is presumed to know the overt condition of the property and to take that condition into account in agreeing to a sales price."[82] This statement appeared to be contrary to the court's holding, considering that the damages in *Wagoner* were hidden until after the sale.

While this renewed reliance on Louisiana lease law and its principles is possibly misplaced, the court struggled to stay true to the Subsequent Purchaser Doctrine when it came to hidden damages.[83] As a result, the court declined to find that the cases that created the Subsequent Purchaser Doctrine limited the rule to overt damages only and found that the plaintiffs had no right to sue for pre-purchase property damage.[84] Although the court's reasoning seemed odd, the finding of no right of action for the subsequent purchasers was in line with most of the previous cases on point. However, *Eagle Pipe & Supply, Inc. v. Amerada Hess Corp.*, decided by the fourth circuit at nearly the same time, appears to hold that in the cases of covert, pre-purchase damage, the subsequent purchaser is the party with the real and actual interest.

Although *Wagoner* and *Eagle Pipe & Supply* were decided within months of each other, the courts reached opposite results. The issue of the classification of rights derived from or related to property damage prior to acquiring ownership, as well as the ramifications of labeling rights as real or personal, is easily seen in the case history of *Eagle Pipe & Supply*.[85] The litigation in *Eagle Pipe & Supply* arose from the actions of a former lessee, Union Pipe, and several other companies doing business on the land during the lease term, the Defendants, who contaminated the land that was the subject of a lease agreement.[86] After the lease had expired, but before the contamination was discovered, the former lessor sold the land to a third-party, Eagle Pipe and

82. *Id.* (citing Prados v. S. Cent. Bell Tel. Co., 329 So. 2d 744 (La. 1975); Lejeune Bros., Inc. v. Goodrich Petroleum Co., 06-1557 (La. App. 3 Cir. 11/28/07); 981 So. 2d 23).

83. *Wagoner*, 55 So. 3d at 23.

84. Wagoner v. Chevron, 45,507-CA (La. App. 2 Cir. 11/24/10); 55 So. 3d 12.

85. Eagle Pipe & Supply, Inc. v. Amerada Hess Corp., 09-0298, p. 1 (La. App. 4 Cir. 2/10/10); 47 So. 3d 428, 431, *writ granted*, 2010-2289 (La. 2/4/11); 56 So. 3d 982.

86. Eagle Pipe & Supply, Inc. v. Amerada Hess Corp., 09-0298, p. 1 (La. App. 4 Cir. 2/10/10); 47 So. 3d 428, 431, *writ granted*, 2010-2289 (La. 2/4/11); 56 So. 3d 982.

Supply, Inc. (Eagle Pipe).[87] Eagle Pipe sued the tortfeasors, even though the lease was not in effect at the time of the sale and the land was contaminated prior to its ownership of the property.[88] Eagle Pipe argued that it was the proper plaintiff because the prior landowner and lessor had not suffered any damage and that the tortfeasors were the proper defendants because they caused the damage to the land.[89] Several defendants filed exceptions of no right of action.[90] The trial court granted the exceptions of no right of action and dismissed Eagle Pipe's claim.[91]

The Louisiana Fourth Circuit Court of Appeal affirmed the trial court's decision, finding that Eagle Pipe did not have a valid claim against the defendants.[92] In so deciding, the court focused on the cases that had previously applied the Subsequent Purchaser Doctrine.[93] The court noted that the rights arising from the lease and tortious activity during the prior ownership were personal rather than real and could not be asserted by the third-party purchaser, Eagle Pipe, without a specific assignment of rights.[94] Further, the court stated that Eagle Pipe had not shown that a deviation from the general rule that "a purchaser cannot recover from a third party for property damage inflicted prior to the sale" would be appropriate without such an express subrogation.[95]

Seven months later, on rehearing, the fourth circuit reversed itself on the exception of no right of action, finding that Eagle Pipe was "the party that sustained injury allegedly caused by [the defendants]. . . ."[96] The court focused on the injury that was sustained as a result of defendants' actions and the fact that the

87. *Id.* at 431.

88. *Id.*

89. *Id.* at 433.

90. *Id.* at 432-33. See *supra* note 29 for an explanation of the exception of no right of action.

91. *Eagle Pipe & Supply*, 47 So. 3d at 432.

92. *Id.* at 433.

93. *Id.* at 432-34.

94. Eagle Pipe & Supply, 47 So. 3d at 433.

95. Eagle Pipe & Supply, Inc. v. Amerada Hess Corp., 09-0298, p. 1 (La. App. 4 Cir. 2/10/10); 47 So. 3d 428, 433, *writ granted*, 2010-2289 (La. 2/4/11) (citing St. Jude Med. Office Bldg. v. City Glass & Mirror, Inc., 619 So. 2d 529, 530 (La. 1993)).

96. Eagle Pipe & Supply, Inc. v. Amerada Hess Corp., 09-0298, p. 1 (La. App. 4 Cir. 2/10/10); 47 So. 3d 428, 437.

prior lessor had not actually suffered any injury.[97] The court noted that the general rule enunciated in Louisiana Civil Code article 2315 requires that "reparations [be made] to 'him who suffered the injury.'"[98]

The fourth circuit distinguished the facts of *Eagle Pipe & Supply* from the related precedent. Although the court stated that it was not deviating from *Hopewell*, *LeJeune Bros.*, or *Dorvin*, it did not purport to limit the Subsequent Purchaser Doctrine based on the nature of the damage to property.[99] In these and related cases, the courts consistently held that "the landowner at the time of the alleged damages is the person with the real and actual interest to assert the claim for damages to the land."[100] The court further noted that the holding in *Prados* was limited to rights arising under a lease and did not extend to rights not arising from a former lessee's activities as a lessee *qua* lessee.[101]

The court's opinion on rehearing seemed to stretch the current law in order to prevent an inequitable result in a case where there was an obvious wrongdoer and the damages to the land were both dangerous and expansive. This is demonstrated by the court's need to rely on the general codal principle in article 2315 rather than a more particular article or related doctrine.[102] Overall, the result was inconsistent with the Subsequent Purchaser Doctrine as it was enunciated in early decisions. However, the court's approach addressed many problems with the Subsequent Purchaser Doctrine and resulted in a reasonably fair decision for the parties involved.[103]

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97. *Eagle Pipe & Supply*, 47 So. 3d at 442 ("[T]he previous owners sustained no injury through the sale of the land because they allegedly received full value for their interest as if it were uncontaminated.").

98. *Id.* (citing Clark v. J.L. Warner & Co., 6 La. Ann. 408, 408 (La. 1851)).

99. *Id.* at 440.

100. Dorvin Land Corp. v. Jefferson Parish, 469 So. 2d 1011, 1013 (La. Ct. App. 1985).

101. *Eagle Pipe & Supply*, 47 So. 3d at 439-40. The court noted that had Eagle Pipe's claims been related to a breach of lease obligations, *Prados* may have been relevant. *Id.* at 440 n.10.

102. Eagle Pipe & Supply, Inc. v. Amerada Hess Corp., 09-0298, p. 1 (La. App. 4 Cir. 2/10/10); 47 So. 3d 428, 441-42, *writ granted*, 2010-2289 (La. 2/4/11); 56 So. 3d 982.

103. The Louisiana Supreme Court granted writs on February 4, 2011 and heard oral arguments on May 13, 2011. Eagle Pipe & Supply, Inc. v. Amerada Hess Corp.,

D. THE RELEVANCE OF THE WARRANTY AGAINST REDHIBITORY DEFECTS TO SUBSEQUENT PURCHASERS

Although the cases in this Comment rely primarily on the claims arising from the tortious acts of third parties, one of the first claims to be considered in cases of hidden damages to property at or near the time of a sale is the breach of the warranty against redhibitory defects. This warranty is intended to protect parties who unknowingly purchase damaged property, yet it does not appear that the intention was to hold the parties actually causing the damage responsible.[104] Therefore, in cases invoking the Subsequent Purchaser Doctrine because of hidden damages that occurred prior to the sale, the tortfeasor cannot be held directly responsible for their actions in a redhibitory action.

In Louisiana, sellers assume several general obligations simply by the nature of the contract into which they enter.[105] Sellers are bound to deliver the thing sold and to warrant the ownership, peaceful possession, fitness, and absence of hidden defects or vices.[106] Purchasers of property in Louisiana receive a specific protection in the form of a warranty against redhibitory defects in Louisiana Civil Code article 2520.[107] Essentially, this

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2010-2289 (La. 2/4/11); 56 So. 3d 982. Although the court did not offer reasons for granting the application, the resulting circuit split was likely a major factor. LA. SUP. CT. R. X(a)(1) states:

> The grant or denial of an application for writs rests within the sound judicial discretion of this court. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of the reasons that will be considered, one or more of which must ordinarily be present in order for an application to be granted: The decision of a court of appeal conflicts with a decision of another court of appeal, this court, or the Supreme Court of the United States, on the same legal issue.

LA. SUP. CT. R. X.(a)(1).

104. Actions brought for a breach of this warranty are against the seller and empower the buyer to either rescind the sale or seek a reduction in the price. *See* LA. CIV. CODE ANN. art. 2520 (2011).

105. LA. CIV. CODE ANN. art. 2475 (2011).

106. LA. CIV. CODE ANN. art. 2475 (2011).

107. LA. CIV. CODE ANN. art. 2520 states:

> The seller warrants the buyer against redhibitory defects, or vices, in the thing sold. A defect is redhibitory when it renders the thing useless, or its use so inconvenient that it must be presumed that a buyer would not have bought the thing had he known of the defect. The existence of such a defect gives a buyer the right to obtain rescission of the sale. A defect is redhibitory also when, without rendering the thing totally useless, it diminishes its usefulness or its value so that it must be presumed that a buyer would still have bought it but for a lesser price. The existence of such a defect limits the right of a buyer to a

warranty provides that if the property sold is found to have certain defects or vices at the time of the sale that would have caused the buyer not to purchase the property or would render the property less useful or less valuable, the buyer has an action against the seller to either rescind the sale or receive a reduction in the purchase price.[108] The warranty against redhibition is limited to hidden defects, and there is no action for disclosed or apparent defects.[109] Additionally, to take advantage of the warranty, the defect must be one that would not have been discovered by a reasonably prudent purchaser.[110] This requirement of inspection on the part of the buyer goes beyond a casual observation.[111] The level of diligence required on the part of the buyer in their investigation for defects is that of a prudent administrator.[112]

Originally, courts were very resistant to waivers of the warranty against redhibition, so the need for the waiver to be explicit and expressly agreed to by both parties has developed over time.[113] Now, however, waivers of redhibition and "as is" sales are such common place in the real estate industry that often contracts of sale have boilerplate language that meets the express requirement for the avoidance of this warranty.[114] The relative

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reduction of the price.

LA. CIV. CODE ANN. art. 2520 (2011).

108. *Id.*

109. LA. CIV. CODE ANN. art. 2521 (2010). This Comment's proposed legislation, similarly, does not provide a cause of action for purchasers of overtly damaged property. *See infra* Part IV.

110. LA. CIV. CODE ANN. art. 2521 (2010).

111. *Id.* at cmt.d.

112. *Id.* at cmt.c. However, the purchaser is not required to deface or damage the property in their inspection to get the benefit of the warranty. *See* Barker v. Tangi Exterminating Co., 448 So. 2d 690 (La. Ct. App. 1984). In *Barker*, a purchaser of damaged property was deemed to have acted as a reasonably prudent buyer even though sawdust at the baseboards, which was covered by furniture during the inspection, may have indicated termite damage. Id. at 691-92. The court, noting that the damage was only revealed once the baseboards and sheetrock were removed, found that the buyer was not required to deface the property during inspection to benefit from the warranty against redhibition. Barker v. Tangi Exterminating Co., 448 So. 2d 690, 692 (La. Ct. App. 1984).

113. *See* LA. CIV. CODE ANN. art. 2520 cmt.c (2011) ("The warranty against redhibitory vices can be avoided only by an express and explicit waiver.").

114. *See* Philip Bergeron, *"AS-IS" Waiver of Redhibition*, RE/MAX NEW ORLEANS, http://www.pbergeron.remax-louisiana.com/remaxla/modules/agent/agent.asp?p=text&id=4340 (last visited Sept. 19, 2011) ("In today's real estate market, the majority of homes are sold with the

ease of waiving the warranty against redhibition and the rise in buyer sophistication has caused actions invoking the warranty to become much less frequent.

Consider the following illustration of the warranty against redhibition:

> *Bobby purchases a house from Larry. Ten days after the sale, Bobby moves in and notices that water is collecting in the front yard. He discovers that a pipe under the house is broken and has been broken for about two weeks. Bobby's pre-purchase inspection did not reveal the damage, and Larry was unaware of the issue. Under Louisiana's warranty against redhibition, Bobby brings an action against Larry since the repair cost is likely to be over $10,000.*

Under this hypothetical, Bobby would likely be entitled to a reduction in the sales price since the damage existed at the time of the sale and was not discoverable upon reasonable inspection. However, if Bobby had signed a waiver of redhibition at the time of purchase, he would not be entitled to recover the damages.

Unfortunately, many people are left without a remedy due to their own careless contract drafting, but unlike the Subsequent Purchaser Doctrine, there is no clear and available tortfeasor to place liability on in a redhibitory action.

III. ANALYZING THE LIMITATIONS OF THE CURRENT SUBSEQUENT PURCHASER DOCTRINE

There are a few obvious problems with the Subsequent Purchaser Doctrine as it was expressed in early decisions and in its application since. This Section addresses the problems with the current approach to the Subsequent Purchaser Doctrine. First, the doctrine treats all subsequent purchasers as equal, leading to inequity in many situations.[115] Second, the rule does not align with the basic principle articulated in Louisiana Civil

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waiver of redhibition."); *see also* Lisa Heindel, *What Does "As Is With a Waiver of Redhibition" Mean?*, WEST BANK LIVING (June 26, 2008), http://westbankliving.com/2008/06/26/what-does-as-is-with-a-waiver-of-redhibition-mean (last visited Oct. 10, 2011).

115. *See infra* Part III.A.

Code article 2315.[116] Third, the current rule promotes judicial inefficiency by denying an actual injured party the right to directly bring an action against the tortfeasor and instead sue the former landowner who would then have to sue the torfeasor.[117] Finally, the lack of a clear pronouncement of the doctrine has led to much confusion about its purpose and uses, which has led to inconsistent results.[118]

A. TREATING ALL SUBSEQUENT PURCHASERS EQUALLY

The main problem with the Subsequent Purchaser Doctrine has been the assignment-of-rights requirement, which is necessary if the new purchaser is to have a right of action in his claim for damages.[119] The requirement of an assignment of rights makes sense in situations where the damage is obvious prior to the purchase of the land, but it seems illogical to apply this same requirement in situations where the damage is either unknown by all parties or hidden by the tortfeasor. The complete bar on suits brought against tortfeasors by subsequent owners for property damage prior to the purchase has resulted in inequitable deviation from general principles in Louisiana law.

In the case of obvious damage, a purchaser is better equipped to negotiate the price of the property due to the damage or include a subrogation or assignment of rights in the purchase agreement or contract for sale. If the purchaser is unable to negotiate a lower price or an assignment of rights, then a court should not interfere to restore the property that was knowingly purchased with a defect or damage. For example, in *St. Jude Medical Office Building v. City Glass & Mirror*, the purchaser bought property through a judicial sale for substantially less than the value of the property even though they were aware of the defects in the property.[120] There, not only was the purchaser aware of the damage, but the damage was likely part of the reason that the property was sold for less than one third of the original value.[121] In situations like this, the law does not need to

116. *See infra* Part III.B.

117. *See infra* Part III.C.

118. *See infra* Part III.D.

119. *See* Bradford v. Richard, 16 So. 487 (La. 1894).

120. St. Jude Med. Office Bldg. v. City Glass & Mirror, Inc., 619 So. 2d 529 (La. 1993).

121. *Id.* St. Jude Medical Center originally acquired a loan for $25 million to

step in to help the purchaser. Allowing suits by a subsequent purchaser of overtly damaged property without an express assignment or subrogation could lead to a windfall for subsequent purchasers who buy damaged property for a bargain.

However, in the cases involving hidden damage, purchasers are not in the same position to protect their interests and make informed decisions. In these situations, the vendor is often unaware of the damage that the tortfeasor has either purposely or unknowingly concealed, and the purchaser assumes that the property purchased will suit his needs and be free from damage. The purchaser lacks the information necessary to request either a specific assignment of rights or a price adjustment. As a result, a purchaser can unknowingly buy property for what is presumably fair market value without an assignment of rights for prior hidden damage and be left with no remedy against the tortfeasor. Consider this hypothetical:

> *A landowner leases his land to an oil refining company. Throughout the lease, the oil company intentionally disposes of toxic waste related to the refining process on the land and conceals its actions. The landowner is unaware of the activities on the land or of the resulting damage. The lease expires, and the landowner decides to subdivide the land and sell the lots to individuals. After the purchase, each of the new landowners builds a home. Shortly thereafter, the government tests the soil and discovers dangerous levels of toxic contamination. The previous landowner files for bankruptcy, and the current landowners are ordered to evacuate their homes.*

In the above hypothetical, the current landowners are left with dangerous and useless property with little hope for the recovery of damages. Environmental laws would likely require the tortfeasor to remediate the land, but the current landowners still face a multitude of problems and measurable damages. The former landowner is insolvent. Further, under the Subsequent

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construct a medical office and retail complex and purchase the related land. *Id.* at 529-30. After construction was complete, the defects in the building caused an estimated $10 million in damages. St. Jude Med. Office Bldg. v. City Glass & Mirror, Inc., 619 So. 2d 529, 529-530 (La. 1993). The subsequent purchaser of the property paid $7.5 million at a judicial sale. *Id.*

Purchaser Doctrine, the tortfeasor (oil company) is insulated from suit by the current landowners for damages. Ultimately, the tortfeasor is rewarded for hiding its actions, and the current landowners are left without remedy for the related damages.

B. DEVIATION FROM CIVIL CODE ARTICLE 2315

The above hypothetical highlights another problem with the Subsequent Purchaser Doctrine—failure to comply with Louisiana Civil Code article 2315. This article establishes the general codal principle that "[e]very act whatever of man that causes damages to another obliges him by whose fault it happened to repair it."[122] The current approach of the Subsequent Purchaser Doctrine allows the tortfeasor to avoid his obligation under this principle when property is transferred without an express assignment of rights. This treatment incentivizes hiding the effects of one's tortious acts and protects true tortfeasors from liability.

It seems obvious that, based on article 2315, the "reparation must be made to him who suffered the injury."[123] However, the Subsequent Purchaser Doctrine has declined to recognize that the party actually suffering the injury in the purchase of property with hidden damage is the new owner, not the owner of the land when the tortious act occurred. Consequently, truly injured property owners have no redress against tortfeasers. The court in *Eagle Pipe & Supply* recognized this principle and concluded that article 2315 is best served by allowing claims under the Subsequent Purchaser Doctrine.[124]

Louisiana courts have declined to interpret article 2315 according to its literal meaning.[125] However, allowing tortfeasors

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122. LA. CIV. CODE ANN. art. 2315 (2011).

123. Bradford v. Richard, 16 So. 487, 488 (La. 1894).

124. Eagle Pipe & Supply, Inc. v. Amerada Hess Corp., 09-0298, p. 13-15 (La. App. 4 Cir. 02/10/10); 47 So. 3d 428, 441-42, *writ granted*, 2010-2289 (La. 2/4/11); 56 So. 3d 982.

125. *See* La. Swabbing Serv., Inc. v. Enter. Prod. Co., 00-1161, p. 8 (La. App. 3 Cir. 5/2/01); 784 So. 2d 862, 864-65 ("[W]ere we to apply the literal language of La. Civ. Code Ann. art. 2315, a tortfeasor might be 'held liable to repair any damages remotely caused by his or her fault.' However, '[a]s a matter of policy, the courts, under the scope of duty element of the duty-risk analysis, have established limitations on the extent of damages for which a tortfeasor is liable.'") (quoting Trahan v. McManus, 97-1224, p. 8-9 (La. 3/2/99); 728 So. 2d 1273, 1278.).

to escape liability when an action is timely and there are real and measurable damages goes against both the intention and the spirit of the law. Most of the exceptions to the general rule foreclose any chance for suit against a would-be tortfeasor, while the Subsequent Purchaser Doctrine recognizes liability and an action for damages, but limits the party who may bring the action.

C. JUDICIAL INEFFICIENCY AND WHY USE OF ALTERNATIVE PATHS TO TORFEASOR LIABILITY FOR DAMAGES FAILS

The current rule prevents a direct action by the actual injured party against the tortfeasor, but it does not prevent a less direct method of recovery in some situations. Some subsequent purchasers may be able to bring a claim for a hidden defect or damage against the former landowner under Louisiana's warranty against redhibitory defect article.[126] Article 2520 allows a landowner to bring a claim against a seller if the thing sold has a redhibitory defect or vice.[127] If the former landowner were required to pay under this action, he would likely have a valid claim against the tortfeasor.[128]

In theory, this roundabout process could prevent the tortfeasor from escaping liability. However, relying on redhibitory claims to remediate the tortious actions of a third party is less practical and less functional than a direct cause of

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126. LA. CIV. CODE ANN. art. 2520 (2011) provides:

> The seller warrants the buyer against redhibitory defects, or vices, in the thing sold.
>
> A defect is redhibitory when it renders the thing useless, or its use so inconvenient that it must be presumed that a buyer would not have bought the thing had he known of the defect. The existence of such a defect gives a buyer the right to obtain rescission of the sale.
>
> A defect is redhibitory also when, without rendering the thing totally useless, it diminishes its usefulness or its value so that it must be presumed that a buyer would still have bought it but for a lesser price. The existence of such a defect limits the right of a buyer to a reduction of the price.

LA. CIV. CODE ANN. art. 2520 (2011).

127. LA. CIV. CODE ANN. art. 2520 (2011).

128. As noted in *Eagle Pipe & Supply*, the former owners "sustained no injury through the sale of the land because they allegedly received full value for their interest as if it were uncontaminated." Eagle Pipe & Supply, Inc. v. Amerada Hess Corp., 09-0298, p. 13-15 (La. App. 4 Cir. 02/10/10); 47 So. 3d 428, 442, *writ granted*, 2010-2289 (La. 2/4/11); 56 So. 3d 982. As a result, the former owner probably would have lacked standing to bring a suit against the tortfeasor, unless Eagle Pipe successfully brought an action for a redhibitory defect first.

action for several reasons. First, requiring an additional suit is a needless expense and inconvenience. In the redhibition cases that invoke the Subsequent Purchaser Doctrine, the vendor (prior owner) is an innocent party who simply happened to own the land when it was damaged. In many cases, the owner at the time of the damage is not even aware of the damage.

Second, this option is not always available because the warranty provided by article 2520 can easily be avoided by an express waiver.[129] If the subsequent purchaser waives his rights to bring a redhibitory action, then this path to the tortfeasor is nonexistent. It is common practice today to sell real estate with a waiver of redhibition.[130] Additionally, in order to protect the seller, his agent will generally suggest a waiver of redhibition.[131] As such, this action is not available to many purchasers because they waived their right.

The purpose behind the waiver of redhibition is to protect the *seller* of the property from suit, not previous tortfeasors outside of the chain of title.[132] Therefore, these tortfeasors should not be able to hide behind the protection demanded by and provided for the seller of the property. Further, the rules on redhibition do not apply to property purchased through judicial sales, so tortfeasors that caused damage to properties that are sold in this manner would still escape liability.[133] In all, redhibitory actions fail to be a sufficient remedy for subsequent purchasers and do not hold the true wrongdoers responsible for their actions.

D. INCONSISTENCY IN THE JUDICIAL SYSTEM

The latest issue arising under the Subsequent Purchaser Doctrine is that Louisiana courts inconsistently apply the doctrine. Most recently, the *Eagle Pipe & Supply* and *Wagoner* decisions show that the lack of an official and clear pronouncement of the Subsequent Purchaser Doctrine causes

129. Williams v. Ring Around Prods., Inc., 344 So. 2d 1125 (La. Ct. App. 1977); Cal. Chem. Co. v. Lovett, 204 So. 2d 633 (La. Ct. App. 1967).

130. *See* Bergeron, *supra* note 114.

131. *See* Heindel, *supra* note 114.

132. LA. CIV. CODE ANN. art. 2548 (2011) ("The buyer is subrogated to the rights in warranty of the seller against other persons, even when the warranty is excluded.").

133. LA. CIV. CODE ANN. art. 2537 (2011).

confusion among the circuits.[134] Although the Louisiana Supreme Court has yet to reach a decision specifically on point, it recognized the need for some clarity on the issue in its recent decision, *Marin v. ExxonMobil Corp.*[135] There, the court stated that determining whether a subsequent purchaser has the right to sue for property damage that occurred prior to the purchase was one of the reasons that it granted writs in *Marin.*[136] However, the case was decided on the threshold issue of prescription,[137] and the court did not have the opportunity to reach the subsequent purchaser issue. The recent circuit split will likely continue to haunt the Louisiana Supreme Court until it has an opportunity to directly address the issue.

It is clear from the opinions issued in *Wagoner* and *Eagle Pipe & Supply* that this issue is complicated and that the Subsequent Purchaser Doctrine has not been sufficiently articulated. In both cases, the courts came to their final determinations after reversing themselves on rehearing. Even with the additional consideration, the courts have found themselves on opposite sides of the battle over whether a buyer of property with hidden damage caused by a third party can bring a suit against the tortfeasor. Within the judicial system, there is

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134. *Compare* Eagle Pipe & Supply, Inc. v. Amerada Hess Corp., 09-0298 (La. App. 4 Cir. 2/10/10); 47 So. 3d 428 (holding that the subsequent purchaser of property damaged prior to purchase did have a right of action against tortfeasor), *with* Wagoner v. Chevron, 45,507-CA (La. App. 2 Cir. 11/24/10); 55 So. 3d 12 (holding that the subsequent purchaser of property damaged prior to purchase did not have a right of action against tortfeasor).

135. Marin v. Exxon, 09-C-2368, p. 1, 31 (La. 10/19/10); 48 So. 3d 234, 238, 256 n.18.

136. Marin v. Exxon, 09-C-2368, p. 1, 31 (La. 10/19/10); 48 So. 3d 234, 238, 256 n.18. ("We note that one of the reasons we granted this writ was to determine whether a subsequent purchaser has the right to sue for property damages that occurred before he purchased the property, particularly where the damage was not overt.").

137. Marin v. Exxon, 09-C-2368, p. 1, 31 (La. 10/19/10); 48 So. 3d 234, 253, 255 (addressing whether oilfield contamination qualified as a continuing tort that could receive the benefit of a suspension of the prescriptive period and stating that "[a] court must look to the operating cause of the injury sued upon and determine whether it is a continuous one giving rise to successive damages, or whether it is discontinuous and terminates, even though the damage persists and may progressively worsen") (quoting Hogg v. Chevron USA, Inc., 09-2632 & 09-2635 (La. 7/6/10); 45 So. 3d 991). This further limited the likelihood that a tortfeasor will be held responsible for oil contamination or legacy cases.

an obvious preference for uniformity, and the current state of the Subsequent Purchaser Doctrine leaves something to be desired.[138]

IV. PROPOSING A LEGISLATIVE SOLUTION TO INCORPORATE A HIDDEN DAMAGES AND DEFECT EXCEPTION

The absence of a clear rule on the rights of subsequent purchasers has led Louisiana courts to deviate from the general principles expressed in the Louisiana Civil Code in the name of preserving others.[139] There are a number of reasons that justify a legislative solution, including consistency among the courts, protection of the rights of property purchasers, and preservation of the principle enunciated in article 2315. These concerns can be best addressed by a legislative solution that focuses on the inequity resulting from the denial of the right to sue for pre-purchase damage and the recent inconsistency in Louisiana courts.

First, the Subsequent Purchaser Doctrine should be codified. The principles that led to the establishment of the doctrine are valid and established in the Code.[140] However, for some reason, the Subsequent Purchaser Doctrine has been ignored by the legislature. Further, much of the confusion that has resulted from the application of this doctrine is due to the fact that the cases establishing the rule did so in a piecemeal fashion based on the facts relevant in each case. This approach has led to inconsistent treatment under the law and a circuit split.

Second, the codified doctrine should include a hidden damage or defect exception. In situations where a purchaser buys property known to be damaged, the Subsequent Purchaser Doctrine would still result in the purchaser having no right of action against the tortfeasor, unless there is an express assignment of the right. Given the general principle that a buyer

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138. *See* Lou Grossman, *Louisiana Second Circuit Court of Appeals Upholds Application of Subsequent Purchaser Doctrine in Oilfield Legacy Case*, LOUISIANA LAW BLOG (Jan. 20, 2011), http://www.louisianalawblog.com/306049-print.html (last visited Oct. 10, 2011); Richard A. Curry, *The Latest Limitation on Corbello-Wagoner v. Chevron*, MCGLINCHEY STAFFORD, http://www.mcglinchey.com/contentDetail.asp?id=11952 (last visited Oct. 10, 2011).

139. *See supra* Part II.A.

140. Wagoner v. Chevron, 45,507-CA (La. App. 2 Cir. 11/24/10); 55 So. 3d 12, 23 (stating that the buyer of property is presumed to know its overt condition).

is presumed to know the overt condition of the property he purchases, this exception would be equitable. It would also be in line with the current treatment of hidden property defects under redhibition.[141] The policy of protecting a party who purchases property with hidden defects could easily be incorporated into the Subsequent Purchaser Doctrine.

Below is a proposed Louisiana Revised Statute that would both codify the Subsequent Purchaser Doctrine and create an exception to the general rule:

> *When a purchaser of immovable property buys property that was damaged prior to the sale of said property, an action for damages against the tortfeasor shall remain personal to the owner of the property at the time of said damages unless there has been an express and unambiguous assignment of the right in favor of the purchaser.*
>
> *However, in cases of hidden or covert damage existing prior to or at the time of the sale, the right to sue the tortfeasor shall be extended to the purchaser of the property if the following can be shown:*
>
> *(1) neither the previous landowner nor the purchaser knew or reasonably should have known of the damage prior to the sale of the property;*
>
> *(2) the purchaser conducted a reasonable investigation of the property prior to the sale; and*
>
> *(3) the buyer has suffered a measurable injury as a result of the damage to the property.*

This type of clear statement of the law is needed to provide guidance to Louisiana courts and inform purchasers of immovable property in Louisiana of their rights. Although the general concepts of "real" and "personal" rights may have originally led to a judicial rule denying subsequent purchasers the right to sue for pre-purchase property damage, this rule has been at odds with a number of other important principles in Louisiana law. Denying subsequent purchasers the right to sue for pre-purchase property damage often allows a guilty tortfeasor to walk away without any

141. *See supra* notes 104-14 and accompanying text.

penalty.[142] Further, it directly contradicts the legislature's intention to protect property purchasers from hidden damage in existence at the time of purchase.[143]

The current state of the law, however, does not leave much room for the Louisiana Supreme Court to issue an opinion that both stays true to its role as an interpreter of the law and prevents the inequity that results from denying subsequent purchasers the right to sue. Thus, the burden is on the legislature to issue a rule that best conforms to the fundamental principles of Louisiana law and protects the interests that have been important in Louisiana for many years.[144]

The proposed rule recognizes the basic concept of "personal rights" and their importance in Louisiana property law by mandating an express and unambiguous assignment of the right to sue for pre-purchase property damages.[145] The exception, however, seeks to cure some of the inequity that results from the denial of a right to sue where the pre-purchase damage was hidden.[146] Further, the exception aligns this area of the law with the current law on redhibitory defects and the policy of providing protection for property purchasers from hidden damages in existence at the time of property sales.[147] Overall, this proposed rule addresses the various concerns expressed by many of the courts that encountered the Subsequent Purchaser Doctrine, provides a clear statement of the law, and protects the fundamental principles of Louisiana law.

V. CONCLUSION

On one hand, the Subsequent Purchaser Doctrine has properly barred suits by purchasers who knowingly and without an express assignment of rights purchase property damaged prior to the sale and then seek damages against the tortfeasor. On the other hand, the Subsequent Purchaser Doctrine has helped tortfeasors to escape liability when the results of their acts

142. *See supra* note 3.

143. *See* LA. CIV. CODE ANN. art. 2315 (2011).

144. *See* LA. CIV. CODE ANN. art. 2315 (2011).

145. *See supra* Parts II.A-B.

146. *See* Wagoner v. Chevron USA Inc., 45,507-CA (La. App. 2 Cir.11/24/10); 55 So. 3d 12; *see also supra* Part I.

147. *See supra* Parts II.C.3. & III.A.

remain hidden long enough for the property to be sold to a subsequent purchaser. Although the Subsequent Purchaser Doctrine is flawed, its complete elimination is not necessary and would likely cause more harm than good. However, the adoption of a legislative version of the judicially-created doctrine, with the addition of a clear exception for hidden damages, would serve to fill the gaps, clarify the law, and promote the fundamental principles of tort law in Louisiana.

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