

# SUPREME COURT OF LOUISIANA

*No. 95-C-1425*

JAMES BILLY RAY FONTENOT

Versus

CHEVRON U.S.A. INC., DANTZLER BOAT AND BARGE CO.,  
AND AETNA CASUALTY AND SURETY CO.

LEMMON, J., Concurring

Chevron's requiring Hercules to waive, in the workover contract, Hercules' right to subrogation for payment of worker's compensation benefits frustrated the prohibitions of the Louisiana Oilfield Indemnity Act and clearly violated La. Rev. Stat. 9:2780G. Accordingly, if this action had gone to trial on the merits of plaintiff's claim, Hercules could have pleaded Chevron's violation of the Act to overcome any objection by Chevron to the assertion of a subrogation claim by Hercules or Hercules' insurer. However, Hercules, the party to the workover contract whom the Act was intended to protect, is not a party to this action and has not in any way raised the issue of Chevron's violation of the Act in the workover contract with Hercules. Rather, it is Hercules' insurer (Aetna) who, although not a party to the workover contract, attempts to assert the illegality of the subrogation waiver, required by the workover contract, as a basis for enforcing Hercules' subrogation right that Hercules had paid to Aetna to waive.

Aetna's claim for subrogation, asserted by intervention in plaintiff's action against Chevron, should be denied on a combination no right of action/estoppel defense. Aetna had no real and actual interest under La. Code Civ. Proc. art. 681 in intervening in plaintiff's action to assert the subrogation right it had charged plaintiff's employer an

additional premium to waive.<sup>1</sup> Only Hercules, the party coerced by Chevron into executing the illegal waiver of subrogation provision in the workover contract, had a real and actual interest in asserting that illegality as a bar to Chevron's enforcement of the waiver.

Moreover, since Aetna accepted a premium from Hercules for its contract to pay Hercules' compensation obligation to plaintiff as well as for its waiver of the subrogation right it would have otherwise received for paying such compensation, Aetna is estopped from repudiating its waiver under the insurance contract whose validity is not in dispute.

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<sup>1</sup>Aetna's claim is really asserted against plaintiff, who was in possession of the settlement funds paid by the two tortfeasors as well as the compensation paid by Aetna. Presumably, the settlement value of plaintiff's claim in this action was the total of the settlement funds paid by Chevron and Dantzler plus the compensation already received. If so, plaintiff is not obtaining a "double recovery," as the majority suggests. Rather, Chevron is paying less than its full obligation by taking advantage of the compensation already paid by Aetna (as insurer of Hercules' compensation obligation). Chevron thus is probably benefitting from the waiver of subrogation it illegally forced upon Hercules. The question, nevertheless, is whether Aetna, in its position as Hercules' compensated insurer, has a real and actual interest in asserting that illegality.