Why Wait to Mediate?

In current ADR news, mediation ends a five-year battle between two Tampa, Fla., "shock jocks." In 2008, Todd (MJ) Schnitt, a talk-radio-show host, and his wife Michelle filed suit against disc jockey rival Bubba "The Love Sponge" Clem, his Bubba Radio Network, Inc. (BRN) and Cox Radio, Inc., the station that carried the show. Schnitt asserted the claim of defamation, stating that Clem called Schnitt's wife a whore on-air and insinuated that Schnitt accepted favors and gifts for radio plugs and that Schnitt engaged in possible radio ratings tampering. Five years later and days before trial, Cox came to a settlement with Schnitt. Details of that settlement were kept confidential, and Cox relayed that it was strictly a business decision that in no way demonstrated that it did not support Clem.

The case against Clem and BRN went to trial. Clem's defense was that all comments were simply opinions used for satire on a public figure and were protected by the First Amendment. The trial lasted approximately three weeks, and the jury deliberated for about three hours, rendering a verdict on Jan. 13, 2013, that Clem did not defame Schnitt. Schnitt moved to retry the case on Feb. 12, 2013, claiming that Clem's attorneys practiced misconduct by setting up one of Schnitt's attorneys mid-trial for a DUI arrest.

Schnitt's legal situation compounded when he fired his representing attorneys after the original trial. They went to court against him seeking nearly $1 million in outstanding legal fees on top of the $1 million in court costs and legal fees he already paid from the 2008 filing of the case through the trial that ended on Jan. 30, 2013. He is also responsible for paying his newly obtained representation. For his part, Clem had spent between $800,000 and $3 million in legal fees, per varying news reports.

Schnitt and Clem agreed to mediate on March 14, 2013. The mediation lasted 12 to 13 hours and concluded around midnight. News reports indicated that Clem was asleep on the floor during the last hour, as he was due to be on the radio at 3 a.m. on Friday. Clem's attorney, Joseph Diaco, Jr., stated that the mediator "did a heck of a job, employing persistence, a rational and common sense approach and relentless determination to keep us there." Elaine Silvestrini, "Bubba the Love Sponge, Schnitt reach mediation settlement," *The Tampa Tribune*, April 14, 2013, *http://tbo.com/news/crime/bubba-the-love-sponge-schnitt-reach-mediation-settlement-b82464866z1*. The mediation was a success and accomplished what five years of litigation had not, ending the dispute with an agreement that both parties could live with.

In the settlement, Clem agreed to drop his request for reimbursement for his attorney costs thus far and, in return, Schnitt agreed to drop his motion for retrial or any appeal on the failed defamation claim. The agreement also established that should Clem ever mention Schnitt's wife or family on the air again, he would pay $5,000 per violation. However, it appears that verbal assaults on Schnitt himself are still allowable, based on news reports. Clem felt that he won because he

was protecting the verdict in support of the First Amendment and for other broadcasters' benefit. He also was relieved to finally have closure on the matter and to be able to save the money it would have cost him to continue the litigation. Schnitt felt he won because he was able to protect his family from the verbal tirades of Clem, which is what he sought all along.

After learning the details of the "shock jock" case, it can easily be determined that finality was not achieved through litigation. While the jury found in favor of the defense in the original trial, the plaintiff filed a motion for a new trial. This case could have continued for years more with potential appeals and other motions. Many positives could have been established if mediation had occurred sooner: more than $2 million in legal fees could have potentially been saved, years of emotional stress could have been avoided, and closure could have been obtained much earlier.

The Schnitts' lawyer, Wil Florin, said it best when he stated that the mediation was "something that should have happened a long time ago. Their previous lawyers and Clem's lawyer should have sat down years ago and had a professional discussion about their differences. It's just sad that didn't happen, but we're very happy with the result." *Id.*

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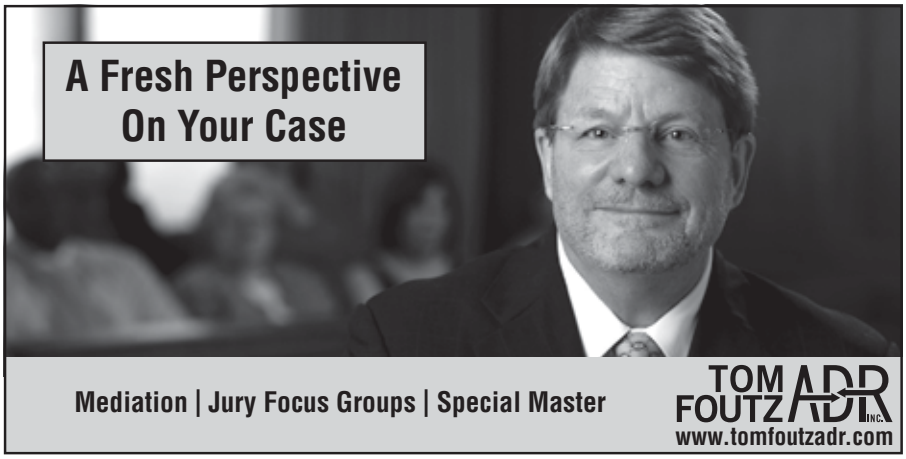

Unforeseeable Business Circumstances Exception to WARN Act Notice

In re Flexible Flyer Liquidating Trust, (5 Cir. 2013), 2013 WL 586823 (unpublished)**.**

The debtor, FF Acquisition Corp., formerly doing business as Flexible Flyer, was a manufacturing company funded primarily by its parent company, Cerberus Capital Management Corp., and one outside lender, CIT Group Commercial Systems, L.L.C. Flexible Flyer never made a profit and, year after year, Cerberus threatened to shut it down but always continued funding it. Due to continuing financial deterioration, CIT reduced its financing and eventually cut it off entirely, and Cerberus refused to grant any additional funding to the flailing business. Two days after CIT terminated all funding, Flexible Flyer was forced into Chapter 11 bankruptcy and that same day issued company-wide layoffs of more than 100 employees without any advance notice. Thereafter, numerous employees asserted WARN Act notice violations.

The 5th Circuit concluded that the appropriate standard was that closings and layoffs are not reasonably foreseeable when they are "caused by some sudden, dramatic, and unexpected action or condition outside the employer's control." Courts are to look to the "*probability* of occurrence [not the possibility] that makes a business circumstance 'reasonably foreseeable.'" In assessing the foreseeability of business circumstances, the focus is "on an employer's business judgment."

In applying this standard to Flexible Flyer's conduct, the 5th Circuit found Flexible Flyer's closing was not reasonably foreseeable because even though the company was experiencing financial difficulties, there was no indication that shutdown would be imminent. After analyzing the facts, the 5th Circuit reasoned that the CFO was reasonable in thinking the business would probably continue onward, and the sudden cutoff of funding was "completely unanticipated" in light of Flexible Flyer's history with CIT and Cerberus. As the WARN Act allows "good faith, well-grounded hope, and reasonable expectations," Flexible Flyer was not required to issue WARN Act notice, even though its business was struggling in the weeks leading up to the layoffs, as its condition appeared to be improving.

The WARN Act "regulations protect the employer's exercise of business judgment and are intended to encourage employers to take all reasonable actions to preserve the company and the jobs." Therefore, the 5th Circuit stated that to hold Flexible Flyer liable for WARN Act violations would serve only to encourage employers to abandon companies even when there is some probability of success.

"Artificial Impairment" to Meet Section 1129(a)(10) Voting Requirements

In re Village at Camp Bowie I, L.P., 710 F.3d 239 (5 Cir. 2013).

The debtor, Village at Camp Bowie I, L.P., proposed a plan under which two classes were impaired. The first impaired class voted to accept the plan because while they were impaired, their $60,000 worth of claims would still be paid in full within three months. The second impaired class creditor, Western Real Estate Equities, L.L.C., whose claim

totaled approximately $32 million, voted against the plan as its claim would be stretched out for five years.

Western objected to the plan's confirmation, asserting that Village's plan offended Section 1129(a)(10), which requires that a plan receive the vote of "at least one class of claims that is impaired under the plan." Western alleged that Village impaired the unsecured trade claims solely to create an accepting impaired class, pointing to the fact that Village had enough cash on hand to pay the trade claims in full at the time of confirmation. Western asserted the minimally affected trade claims were thus "artificially impaired," and their acceptance could not satisfy Section 1129(a)(10). Western further claimed Village's tactics were an abuse of the bankruptcy process that violated the good faith requirements of Section 1129(a)(3).

The 5th Circuit noted that the circuits are divided over whether Section 1129(a)(10) draws a distinction between artificial and economically driven impairment. Some have held that only economic impairment qualifies as "a claim is not impaired for purposes of Section 1129(a)(10) if the alteration of the rights in question arises solely from the debtor's exercise of discretion." *Matter of Windsor on the River Associates, Ltd.*, 7 F.3d 127 (8 Cir. 1993). Other courts have held that Section 1129(a)(10) does not distinguish between discretionary and economically driven impairment, observing that "the plain language of section 1124 says that a creditor's claim is 'impaired' unless its rights are left 'unaltered' by the Plan," and that "[t]here is no suggestion . . . that only alterations of a particular kind or degree can constitute impairment." *Matter of L&J Anaheim Assocs.*, 995 F.2d 940, 943 (9 Cir. 1993). The 5th Circuit expressly rejected *Windsor* and joined the 9th Circuit by holding that Section 1129(a)(10) does not distinguish between discretionary and economically driven impairment.

The 5th Circuit stated that by shoehorning a motive inquiry and materiality requirement into Section 1129(a)(10), *Windsor* warps the text of the Bankruptcy Code, requiring a court to "deem" a claim unimpaired for purposes of Section 1129(a)(10) even though it plainly qualifies as impaired under Section 1124. The 5th Circuit held that the Bankruptcy Code *must* be read literally, and congressional intent is relevant only when the statutory language is ambiguous.

The 5th Circuit rejected Western's application of the 5th Circuit decision of *Matter of Greystone III Joint Venture*, 995 F.2d 1274 (5 Cir. 1991), in which the 5th Circuit held that a plan proponent cannot gerrymander creditor classes solely for purposes of obtaining the impaired accepting class necessary to satisfy Section 1129(a)(10). Dismissing Western's contention that *Greystone* enunciates a "broad, extrastatutory policy against 'voting manipulation' and urges that prohibiting artificial impairment is merely the next logical extension of this policy," the 5th Circuit stated that *Greystone* does not stand for the proposition that a court "can ride roughshod over affirmative language in the Bankruptcy Code to enforce some Platonic ideal of a fair voting

requirement."

A plan proponent's motives and methods for achieving compliance with the voting requirement of Section 1129(a)(10) must be scrutinized, if at all, under the rubric of Section 1129(a)(3), which imposes a good-faith requirement on a plan proponent. The 5th Circuit determined Village's plan was proposed in good faith.

The 5th Circuit noted, however, that its decision:

> does not circumscribe the factors bankruptcy courts may consider in evaluating a plan proponent's good faith. In particular, though we reject the concept of artificial impairment as developed in *Windsor*, we do not suggest that a debtor's methods for achieving literal compliance with Section 1129(a)(10) enjoy a free pass from scrutiny under Section 1129(a)(3).

Ultimately, the Section 1129(a)(3) inquiry is fact-specific, fully empowering the bankruptcy courts to deal with potential bad faith.

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Environmental Law

The O&M of Air Pollution Control

Louisiana's air-quality regulations require air-pollution-control facilities installed on a property to be operated and maintained to control emissions even when ambient air-quality standards in the affected areas are not exceeded. The regulation, Rule 905, requires the air-pollution-control facilities to "be used and diligently maintained in proper working order" regardless of the circumstances. La. Admin. Code tit. 33, pt III, § 905(A) (2013) (effective December 1987). Consequently, any air-pollution-control facilities that were installed on power plants to comply with the Environmental Protection Agency's (EPA) now-vacated 2011 Cross-State Air Pollution Rule (CSAPR) are required to be operated and maintained per the requirements of Rule 905. As a result, operation and maintenance (O&M) costs will be incurred pending promulgation of a replacement rule, or resolution of litigation, that will be borne by the owner and operator or passed along to customers.

Uncertainties of CSAPR Continue

The EPA promulgated CSAPR (also commonly known as the "Transport Rule") to replace the Clean Air Interstate Rule (CAIR) for implementing the requirements of the Clean Air Act, 42 U.S.C. 7401 *et seq*., concerning the transport of air pollutants across state boundaries. CSAPR limited sulfur dioxide (SO_2) and nitrogen oxides (NO_x) emissions from certain "upwind" states' coal- and natural-gas-fired power plants based on those states' contributions to "downwind" states' air-quality problems. The rule identified Louisiana as an "upwind" state significantly affecting or interfering with the maintenance of five ozone monitors in the Houston, Texas, area.

To comply with CSAPR, ozone-season NO_x emissions from coal- and natural-gas-fired generating units in Louisiana were required to be reduced starting May 1, 2012. Prior to CSAPR's taking effect, however, the D.C. Court of Appeals stayed the rule. *See* Order, 11-1302 at 2 (Dec. 30, 2011). Subsequently, in August 2012, the court vacated CSAPR and EPA-issued federal implementation plans and remanded the proceeding to the EPA to promulgate a replacement rule, finding the EPA to have exceeded its authority and violated the Clean Air Act by promulgating CSAPR. *EME Homer City Generation, L.P. v. EPA*, 696 F.3d 7 (D.C. Cir. 2012), *petition for cert. filed*, 81 USLW 3567 (2013). In vacating CSAPR, the court required the EPA to continue administering the rule's predecessor, CAIR. *Id*. at 38.

LDEQ Proposes Limited Exemptions from Mandatory Control Operations

The Louisiana Department of Environmental Quality (LDEQ) has proposed narrow exemptions to Rule 905 that would eliminate the need to operate and maintain air-pollution-control facilities not currently necessary under the vacated rule. The proposed amendment, AQ338, would allow the LDEQ to grant an exemption to the owner or operator of an air-pollution-control facility that was installed solely to comply with either (1) a proposed federal or

state regulation that fails to be promulgated, or (2) a final federal or state regulation that is vacated and remanded. The exemption would not excuse compliance with any pollution limits, standards or requirements otherwise imposed by a permit or other regulation. Nor would the exemptions authorize changes in the operations of a facility that would result in increased air-pollutant emissions. The amendment also proposes to exclude from the mandatory operating requirements of Rule 905 any pollution-control facilities installed to comply with regulations that limit the use of the controls to specific circumstances or times.

The LDEQ will send a final version of its proposed Rule 905 amendment to the House Committee on the Environment and the Senate Committee on Environmental Quality (collectively the "Legislative Oversight Committees") for consideration. If not disapproved by the Legislative Oversight Committees, the amended Rule 905 could become final as early as May 2013. At the federal level, next steps for CSAPR are responses to the petition for writ of certiorari that must be filed by May 29, 2013.

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Community Property

Tucker v. Tucker, 47,373 (La. App. 2 Cir. 8/1/12), 103 So.3d 493, *writ denied*, 12-1940 (La. 11/9/12).

At the termination of the parties' community property regime, Ms. Tucker had $36,986 in contributions to the Louisiana Teachers' Retirement System, but she did not have sufficient years of service to qualify for a monthly pension. She bought, with her separate property, additional years so as to qualify. She argued that Mr. Tucker was not entitled to a share of her monthly retirement benefits under *Sims* because she could not have received such benefits at the community termination, so he was entitled to only one-half of the contributions made during the community. He claimed, and the court of appeal agreed, that he was entitled to 41 percent of the monthly benefit under *Sims*. The court of appeal held that the non-employee spouse is entitled to "the interest attributable to the community when payments become due," not just to "the monetary value of the plan at the time of the community's dissolution." Whether she purchased or worked for the extra years, they were still treated as her separate property under the *Sims* formula. The proper focus is on the creditable service attributable to the community years. He also was entitled to reimbursement from her for 41 percent of the benefits she had already received. He did not have to pay her 41 percent of the separate funds she used to buy the added years because they were treated as her separate property years, and she got the benefit attributable to those years. She was not entitled to an offsetting amount against her retirement benefits for Social Security benefits he would

receive because he was 15 years away from being eligible for Social Security, and she was now working as a teacher in Texas and accumulating pension benefits there. In a footnote, the court of appeal raised the question of the constitutionality of La. R.S. 9:2801.1 regarding a Social Security offset.

Williams v. Williams, 12-0732 (La. App. 3 Cir. 12/5/12), 104 So.3d 760.

The trial court did not err in applying its discretion to decline to allocate other community property under La. R.S. 9:2801.1 to Ms. Williams equal in value to Social Security payments Mr. Williams had received and was to receive.

Paternity

Udomeh v. Joseph, 11-2839 (La. 10/26/12), 103 So.3d 343.

Even though Mr. Udomeh failed to file an avowal action to seek to be named the child's father within one year of the child's death, his suit for the child's wrongful death pled sufficient facts under Louisiana's fact-pleading system to state a cause of action for an avowal action, and the defendants had fair notice that his paternity was at issue.

Child Support

Richards v. Richards, 47,492 (La. App. 2 Cir. 9/20/12), 105 So.3d 77.

The court of appeal reversed the trial court's determination that a child's reaching the age of majority and graduating from high school such that child support terminated can never be a material change of circumstances to seek spousal support. Here, Ms. Richards's previous award of spousal support had terminated. When the child support ended, she sought to reinstate the spousal support. The court of appeal found that such a change could be a factor to be considered in determining whether a change of circumstances had occurred, and remanded for evidence on why her previous spousal support terminated, what joint expenses she previously shared with the child continued and whether there were changes in her income and expenses since the previous judgment.

Custody

Atkins v. Atkins, 47,563 (La. App. 2 Cir. 9/26/12), 106 So.3d 614.

After the mother filed for divorce in Louisiana and moved with the child to Arkansas, the father was named the domiciliary parent. The trial court erred in not considering both the La. Civ.C. art. 134 custody factors as well as the La. R.S. 9:355.12 relocation factors. The mother had credibility issues regarding her move to Arkansas. The father was more likely to facilitate and encourage the child's relationship with the other parent, he had the benefit of involvement and help of his extended family, and the child's history was in Louisiana. The negative effects of the child's being separated from his half-sister were outweighed by the other considerations.

Thibodeaux v. Thibodeaux, 12-0752 (La. App. 3 Cir. 12/5/12), 104 So.3d 768.

The 3rd Circuit distinguished the Supreme Court's footnote in *In Re Downing*, 05-1553 (La. 5/17/06), 930 So.2d 897, and reversed the trial court's finding that Ms. Thibodeaux was in contempt for having a civil warrant issued for the return of the child from Mr. Thibodeaux. The court of appeal held that La. R.S. 9:343 was not only available to a custodial parent against a non-custodial parent, but could also be used by a party with joint custody and co-domiciliary parent status to compel the other party to abide by the terms of the physical custody arrangement.

Procedure/Contempt

Short v. Short, 12-0312 (La. App. 5 Cir. 11/13/12), 105 So.3d 892.

The Domestic Commissioner did not err in holding Ms. Short in contempt and sentencing her to 48 hours in parish prison for responding to two interrogatories with "FU" and "NOYFB," even though her attorney, not she, signed the responses, because she was responsible for the answers.

Procedure/Temporary Restraining Order

Shirley v. Shirley, 47,442 (La. App. 2 Cir. 10/10/12), 107 So.3d 99.

Mr. Shirley made telephone threats to Ms. Shirley to burn down her house with her and the children in it and to have her killed. Those threats were sufficient to support a temporary restraining order under La. R.S. 46:2131, and under La. R.S. 14:40.3, cyberstalking, and La. R.S. 14:285, telephone harassment, because they were more than just mere harassment, and the trial court's credibility findings and ruling were made in accord with the spirit and letter of laws designed to protect victims of domestic violence.

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Construction Contracts

So often, standard language in construction contracts is overlooked as "boilerplate" and the true importance of the language is neglected — until a particular clause is invoked in a difficult situation. Even contracts "written for breach" (that is, with an eye toward adjusting the rights of the parties upon the breach of one of the parties) do not always generate results that under the circumstances seem equitable.

Such was the case for the public owner in *St. Bernard Port, Harbor & Terminal District v. Guy Hopkins Construction Co.*, 12-0167 (La. App. 4 Cir. 1/16/13), 108 So.3d 874. The litigation involved a general contractor on a public works project for construction of water, sewer and drainage pipes and advance demolition related to the job. At trial, it was adduced that the contractor had apparently underbid the roughly $3.5 million project by approximately $2 million, a matter that had been raised by the public owner to the contractor at the time of bidding but was "ignored" by the contractor. During the project, the contractor abandoned work and was placed in default.

Several aspects of the claims of the parties were settled prior to trial, leaving to be decided a handful of typical construction claims, as well as apparently competing claims, on one hand, of the owner for liquidated damages, and, on the other hand, of the contractor for payment to it of the balance of the contract sum.

Nearly all of the portions of the judgment determining the claims related to the construction items were decided in favor of the public owner and against the defaulted contractor. Likewise, the owner's liquidated damages claim — which sought 91 additional days of liquidated damages over and above 42 days of liquidated damages actually withheld prior to the trial — was granted by the trial court and affirmed by the court of appeal. Remaining then to be decided was the defaulted general contractor's claim for the unpaid balance of the contract.

The unpaid balance of the general contract was nearly $460,000. The trial court had granted that amount to the general contractor, subject to deductions for damages due the owner for unfinished or improperly performed work of the general contractor. The owner opposed the award, arguing that the failure of the general contractor to achieve substantial completion and its concomitant causing of damages to the public owner precluded a finding that any additional contract monies could possibly be due to the general contractor. The court of appeal disagreed with the public owner and affirmed this aspect of the judgment in favor of the defaulted general contractor.

According to the court of appeal, notwithstanding jurisprudence in Louisiana holding that substantial

completion is the linchpin for a defaulted contractor to seek additional compensation under a contract, the particular contract between the parties — in a fairly standard clause — provided to the contrary. Within the contract was a provision governing default and termination by the owner, which provided express language allowing the general contractor — after the owner undertook at its own expense to complete the work — recovery of the contract balance ("If the unpaid balance of the Contract Price exceeds the direct, indirect and consequential costs of completing the Work . . . such excess will be paid to CONTRACTOR."). Noting that the parties (particularly the public owner) undertook steps that comported exactly with the circumstances contemplated by the default and termination clause in question, the court of appeal refused to disturb the finding, granting the contract balance to the defaulted general contractor.

Public Contracts

Public policy in Louisiana resulted several years ago in the enacting of a provision within the Louisiana Public Bid Law (La. R. S. 38:2211 *et seq*.) that prohibits certain no-damage-for-delay clauses in general contracts between public owners and general contractors. The provision — contained at La. R.S. 38:2216(H) — prohibits in a public works construction contract any provision that "purports to waive, release, or extinguish the rights of a contractor to recover" delay damages for delays "caused in whole, or in part, by acts or omissions within the control of the contracting public entity . . . ."

In *Barber Brothers Contracting Co. v. State*, 11-2305 (La. App. 1 Cir. 11/8/12), ____ So.3d ____, the Louisiana Department of Transportation and Development and the plaintiff had entered a $17.4 million contract for highway construction in East Baton Rouge Parish. The contract in question had within it a provision that arguably denied the contractor the opportunity to seek delay damages caused by the failure of utility companies, pipeline owners and the like "affected by the work" to move their utilities and related appurtenances. In the reported decision, the court noted that the contract provided that the Department would undertake to notify all known utility companies, etc. of the proposed highway construction so that those entities could carry out the necessary steps to allow the road construction to proceed.

Certain of the public utilities located within the project boundaries delayed relocation of affected facilities in such a manner that the duration of the contract (originally 585 days) was required to be extended by change order. However, in connection therewith, no increase in the project price was allowed.

Following the completion of construction, the general contractor filed suit for delay damages in excess of $1 million, and also to recover liquidated damages that had been assessed by the Department — liquidated damages the

contractor contended were themselves a result of the utility-related delays (as well as constituting additional delays for which an extension of time had not been granted). As one of its defenses, the Department asserted the contractual delay-damage waiver, and on that point the parties filed cross motions for summary judgment. The trial court granted partial summary judgment in favor of the contractor on the basis of La. R.S. 38:2216(H), and the Department appealed.

On appeal, the Department urged that the separate series of statutes governing the Department and its contracts found at Title 48 of the Louisiana Revised Statutes did not contain a provision corresponding to La. R.S. 38:2216(H) and, therefore, the contractual delay-damage waiver was valid. The general contractor, along with Louisiana Associated General Contractors, Inc., which filed an *amicus curiae* brief, argued that the prohibition in Title 38 should apply as long as the law did not expressly conflict with the provisions of Title 48. The court of appeal agreed.

Although Title 48 indicates that the title "shall exclusively govern" contracts involving the Department, the court noted that Title 48 provided in pertinent part that "other laws relating to the department which are not in conflict with the provisions" of Title 48 are also applicable to the Department's contracts. Holding that Department contracts are "public contracts" as defined in Title 38, the court of appeal, finding no provision in Title 48 expressly conflicting with La. R.S. 38:2216(H), affirmed the lower court's finding that the delay-damage waiver was void, and, in accordance with the language of La. R.S. 38:2216(H), the offending provision was "severed" from the remainder of the contract.

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Federal Tort Claims Act

Millbrook v. United States, 133 S.Ct. 1441 (2013).

Millbrook, a prisoner in federal custody, alleged he was forced to perform oral sex on a Bureau of Prisons corrections officer while another officer held him in a chokehold and a third officer stood watch. He filed suit against the United States for assault and battery under the Federal Tort Claims Act, 28 U.S.C. § 1346(b) (FTCA), which waives the government's sovereign immunity from tort suits, including those based on certain acts committed by federal law enforcement officers. The government argued that the FTCA did not waive its immunity on Millbrook's tort claims because they fell within the intentional tort exception in § 2680(h), citing the 3rd Circuit's precedent in *Pooler v. United States*, 787 F.2d 868 (1986). *Pooler* interpreted the exception to apply only to tortious conduct that occurred during the course of "executing a search, seizing evidence, or making an arrest." The district court agreed and granted the government's motion for summary judgment. The 3rd Circuit affirmed. The Supreme Court granted certiorari to resolve a split among the circuits as to interpretation of § 2680(h)'s "intentional tort exception."

The FTCA waives the government's immunity for certain intentional torts committed by law enforcement officers in 28 U.S.C. § 2680(h):

> The provisions of this chapter and section 1346(b) of this title shall not apply to . . . (h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights: *Provided*, that, with regard to acts or omissions of investigative or law enforcement officers of the United States Government, the provisions of this chapter and section 1346(b) of this title shall apply to any claim arising . . . out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution.

The reference to § 1346(b) requires that the acts or omissions giving rise to the claim occur while the officer is "acting within the scope of his office or employment." The Supreme Court found this language sufficient to trigger FTCA's waiver: The conduct must arise from one of the six enumerated intentional torts, and the law enforcement officer's acts or omissions must fall within the scope of his office or employment.

Some lower courts have read into the text additional limitations to narrow the scope of the law enforcement proviso. *See*, *e.g.*, *Pooler* and *Orsay v. United States Dep't of Justice*, 289 F.3d 1125 (9 Cir. 2002), holding that the law enforcement proviso "reaches only those claims asserting that the tort occurred in the course of investigative or law enforcement activities." *Orsay*, 289 F.3d at1136.

Writing the unanimous opinion, Justice Thomas stated:

> None of these interpretations finds any support in the text of the statute. . . . By its terms, [the FTCA] focuses on the *status* of persons whose conduct may be actionable, not the types of activities that may give rise to a tort claim against the United States. . . . The plain text confirms that Congress intended immunity determination to depend on a federal officer's legal authority, not on a particular exercise of that authority. Consequently, there is no basis for concluding that a law enforcement officer's intentional tort must occur in the course of executing a search, seizing evidence, or making an arrest in order to subject the United States to liability.
>
> *Millbrook*, 133 S.Ct. 1445.

Balancing Risk and Utility in Determining Liability

Broussard v. State, 12-1238 (La. 4/5/13), ____ So.3d ____.

Paul Broussard, a UPS driver, was making a delivery to the Wooddale Tower, a state-owned office building in Baton Rouge,

as he did on a daily basis. The elevator stopped in a misaligned position, *i.e.*, the elevator car's floor was 1.5-to-3-inches higher than the building's floor. Unable to push his UPS dolly with its 300-pound load over the rise and into the car, he attempted to pull it in, causing severe back injury, which disqualified him for further UPS employment. He took a job as a dry-cleaner truck driver, at reduced wages. He sued the state, alleging negligence in failing to properly maintain and adequately repair a defective thing within its custody and care, thereby creating an unreasonable risk of harm. The jury found for Broussard, resulting in an award of $985,732.56.

The 1st Circuit Court of Appeal reversed. Applying the four-prong, risk-utility test articulated by the Supreme Court in *Pryor v. Iberia Parish School Board,* 60 So.3d 594 (La. 3/15/11), the court concluded that the elevator's social utility outweighed the risk created by its defective, yet readily apparent, condition, which did not present a serious risk of harm.

Four pertinent factors of the risk-utility balancing test are: "(1) the utility of the complained-of condition; (2) the likelihood and magnitude of harm, including the obviousness of the condition; (3) the cost of preventing the harm; and (4) the nature of the plaintiff's activities in terms of its social utility or whether it is dangerous by nature." A reviewing court is in no better position than the jury or trial court to make the determination of whether a defective thing presents an unreasonable risk of harm. Reversing the 1st Circuit, the Supreme Court noted that each case "must be judged under its own unique set of facts and circumstances.… There is no bright-line rule. The fact-intensive nature of our risk-utility analysis will inevitably lead to divergent results."

No groundbreaking here, but Justice Knoll's 26-page opinion is a cogent, comprehensive review and analysis of Louisiana tort law in general and risk-utility standards in particular. Recommended reading. Justices Victory and Guidry each filed dissenting opinions.

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United States

Russia Trade Action Plan, Department of Commerce (March 18, 2013).

Following on the heels of Russia's long-negotiated accession to the World Trade Organization (WTO), the United States and Russia announced a high-level Working Group to implement an action plan to direct bilateral trade and investment over the next few years. The Working Group is co-chaired by the U.S. Department of Commerce and the Russian Ministry of Economy. The 2012 U.S. exports to Russia increased year-to-date by 29 percent, greater than six times the overall growth rate for U.S. exports. Foreign direct investment in Russia also increased 17 percent in 2011. The Working Group will focus on diversifying bilateral trade, reducing barriers to trade between small- and medium-sized enterprises and increasing the volume of trade in key industrial sectors.

Attorney Conduct, Department of Commerce, 77 Federal Register 123 (6/26/12).

Antidumping and countervailing duty trade practice before the Department of Commerce involves a quasi-judicial regulatory process with very few rules governing attorney and non-attorney representative conduct. Commerce notified the public on June 26 of its intention to amend its regulations to add a section strengthening the accountability of those who appear before proceedings at the International Trade Administration. The proposed rule provides that both attorneys and non-attorney representatives may be subject to disciplinary action upon good cause. The rule is modeled after the International Trade Commission's rule, 19 CFR 201.15. Where it differs is that Commerce will maintain a public registry of persons who are suspended or barred from practice in order to maintain the integrity of the proceedings by deterring attorney and non-attorney representative misconduct.

Views and Estimates Letter, House of Representatives, 113th Congress, Committee on Ways and Means (Feb. 23, 2013).

The U.S. House Ways and Means Committee issued its annual draft Views and Estimates letter outlining its 2013 legislative agenda. The draft letter is marked up and later submitted to the Budget Committee. The Budget Committee requires submission of any committee legislative plans to move legislation with a budgetary impact.

The committee outlined an aggressive trade agenda. Most importantly, legislation granting President Obama Trade Promotion Authority (TPA) will be taken up. TPA is necessary for the President to close any trade agreements. TPA legislation is always contentious, not so much because of the substance of the law, but because of the constitutional power-sharing compromise it represents. TPA allows the President to negotiate international economic treaties, which are generally considered within the constitutional prerogative of the Congress. The compromise allows the President to negotiate the agreement within parameters set forth by the Congress and with Congress voting on the agreement in an up-or-down vote with no amendments or changes allowed. President Obama has been actively negotiating a TransPacific Partnership agreement and recently notified Congress of his administration's intent to open negotiations with Europe on a TransAtlantic framework.

Office of the U.S. Trade Representative

► Ambassador Ron Kirk has stepped down to return to private practice. Demetrios Marantis was selected to serve as acting U.S. trade representative until a permanent replacement is nominated.

► The U.S.-Iraq trade pact negotiated in 2005 is scheduled to take effect this year.

► The United States intends to negotiate and enter into a new International Services Agreement at the WTO. Public comment from stakeholders ended in April.

► The United States and Brazil have completed the process by which the United States will recognize Brazilian Cachaca as a distinct product of Brazil. Cachaca is the

main ingredient in the Brazilian caipirinha drink. Brazil has begun the process of providing reciprocal distinctive recognition to Tennessee Whiskey and Bourbon Whiskey from the United States.

World Trade Organization

United States-Solar Panels from India (Feb. 12, 2013).

The United States has requested WTO dispute settlement consultations with India regarding local content requirements in India's solar program. The United States claims that India's national solar program requires solar power developers to use domestic solar cells and modules to the exclusion of foreign solar equipment. The United States also alleges that India is providing impermissible subsidies to its domestic solar industry. Consultations are the first step in the dispute settlement process. If the dispute is not resolved through consultations within 60 days, the United States may request that a dispute-settlement panel resolve the matter.

U.S.-Ecuador Bilateral Investment Treaty, Permanent Court of Arbitration, No. 2009-23; Fourth Interim Award on Interim Measures of the Tribunal Constituted Under the Permanent Court of Arbitration in the Matter of an Arbitration Between Chevron Corporation and the Republic of Ecuador (Feb. 7, 2013).

This long-running dispute involves a $19 billion award in favor of Ecuador against Chevron regarding rain-forest environmental damage caused by Chevron during exploratory activities in a remote region. The tribunal issued three interim awards on interim measures and previously found Ecuador in violation of the prior interim awards for failing to use best efforts to prevent enforcement of the award abroad. Ecuador was specifically ordered to "take all measures at its disposal to suspend or cause to be suspended the enforcement or recognition within and without Ecuador of any judgment against the First Claimant [Chevron] . . . ."

In its latest Fourth Interim Award, the tribunal found that original judgment had been made "final, enforceable and subject to execution" in violation of its prior interim awards and measures. The tribunal emphasized that its prior rulings were directed to both the respondent's executive branch *and* to all organs and instrumentalities of the respondent's state. Ecuador is now required to show cause as to why the tribunal should not compensate Chevron for harm caused by Ecuador's noncompliance with the prior awards.

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Applicability of Model Form JOA to Future Leases

Clovelly Oil Co. v. Midstates Petroleum Co., 12-20255 (La. 3/19/13), ____ So.3d ____.

Through assignments of interest, Clovelly Oil and Midstates Petroleum became parties to a 1972 joint operating agreement (JOA). The JOA was based on the 1956 version of the "AAPL Form 610 — Model Form Operating Agreement."

A dispute arose after Midstates acquired a new mineral lease in 2008. Relying on the JOA, Clovelly argued that it was entitled to a 56.25 percent interest in the lease. Midstates disagreed. The JOA entitled Clovelly to 56.25 percent of the interests to which the JOA applied, but Midstates argued that the JOA applied only to interests that the parties owned when they entered the JOA.

Midstates noted that the JOA used present tense language when it described the mineral interests to which the JOA would apply. For example, the JOA's preamble states (emphasis supplied):

> [T]he parties . . . *are* owners of oil and gas leases covering and, if so indicated, unleased mineral interests in the tracts of land described in Exhibit "A," and all parties have reached an agreement to explore and develop *these* leases and interests for oil and gas . . . .

Similarly, the JOA defined "oil and gas interests" by referring to interests that "are owned by the parties."

Clovelly, on the other hand, noted that the JOA stated that "the *lands*, oil and gas leasehold interests and oil and gas interests intended to be developed and operated under this agreement" were "described in 'Exhibit A'" (emphasis supplied). Moreover, Exhibit A, which was titled "Lands subject to this agreement," described an area that included the land covered by Midstates' new lease.

The district court granted summary judgment for Midstates. The 3rd Circuit reversed, stating that Exhibit A conflicted with the portions of the JOA that referred to interests in the present tense. The appellate court held that, under traditional rules of contract interpretation, the language of Exhibit A would prevail because it was typewritten and thus was more likely to reflect the true intent of the parties than the other, pre-printed portions of the JOA.

The Louisiana Supreme Court reversed

the 3rd Circuit and reinstated judgment for Midstates. The court agreed that typewritten language generally will prevail over printed language when a conflict between them is irreconcilable, but a court should attempt to reconcile different portions of a contract. Here, the purported conflict between portions of the JOA could be reconciled if the JOA was interpreted as applying only to mineral leases and other mineral interests owned by the parties when the JOA was entered, with Exhibit A describing a geographical area within which all those interests were located.

The court noted that such an interpretation was reasonable because the parties had not entered a separate area of mutual interest agreement (AMI), which parties commonly do when they want a JOA to apply to future leases. The court also cited commentators who have noted that JOAs typically do not apply to future leases in the absence of an AMI. Indeed, the American Association of Professional Landmen, the promulgator of the model form used by the parties, filed an *amicus* brief supporting Midstates' position.

Claims for "Additional Remediation"

State v. La. Land & Exploration Co., 12-0884 (La. 1/30/13), ____ So.3d ____.

Plaintiffs brought suit against several defendants, seeking remediation and a money judgment for contamination allegedly caused by the defendants' oil and gas activities. Such "legacy litigation" is governed in part by La. R.S. 30:29, which provides that if a defendant is found liable for contamination, the Department of Natural Resources must propose a remediation plan and the court must approve either that plan or some other plan that a party proves is more feasible. Any damages award generally must be paid into the registry of the court to fund the approved plan.

Here, the defendants sought a summary judgment that the plaintiffs were not entitled to a money judgment exceeding what was necessary to fund the approved plan. The defendants noted that 30:29(D) requires the entirety of the damages award to be placed into the registry of the court, except as provided by 30:29(H). In turn, Subsection (H) states in part (emphasis supplied):

> This Section shall not preclude an owner of land from pursuing a judicial remedy or receiving a judicial award for private claims suffered as a result of environmental damage, except as otherwise provided in this Section. Nor shall it preclude a judgment ordering damages for or implementation of additional remediation in excess of the requirements of the plan adopted by the court pursuant to this Section *as may be required in accordance with the terms of an express contractual provision*. Any award granted in connection with the judgment for additional remediation is not required to be paid into the registry of the court.

The defendants argued that Subsection (H) barred a money judgment for "remediation in excess of . . . the plan" because no contract expressly authorized additional cleanup in this case. A majority of the Louisiana Supreme Court disagreed, stating that 30:29(H) was not meant to change substantive rights, and suggesting that limiting damages awards as suggested by the defendants would change substantive rights.

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Expert Witness Qualification

Benjamin v. Zeichner, 12-1763, (La. 4/5/13), ____ So.3d ____.

Benjamin was first reported in *Louisiana Bar Journal*, Vol. 60, No. 4.

The trial court found that Dr. James Shamblin did not meet the expert witness qualifications set forth in La. R.S. 9:2794(D). The inability of the plaintiffs to produce any admissible expert testimony to support their case led the trial court to grant the defendant's motion for a directed verdict.

Objections concerning Dr. Shamblin's qualification went before the trial court by way of the plaintiff's motion in limine. During the hearing on the motion, it was learned that Dr. Shamblin had given up his licenses to practice medicine in Alabama and Louisiana prior to trial. Defendants argued that because he was not licensed to practice in any jurisdiction in the United States at the time of trial, and despite the fact that he was licensed and practicing at the time of the alleged negligence, the Tulane Medical School graduate was nevertheless not qualified because there was no competent evidence to prove he met the requirement of 9:2794(D)(1)(d), *i.e.*, that he graduated from an "accredited medical school."

There was no question that Dr. Shamblin was a 1958 graduate of Tulane Medical School, but the trial court found no admissible evidence that Tulane was "accredited" by the American Medical Association's Liaison Committee on Medical Education in 1958. The plaintiffs attempted to introduce a "fax letter" from Tulane as to its 1958 status, but the court ruled that the letter and the attachment to it were inadmissible hearsay.

The court of appeal reversed the trial court's rulings on Shamblin's qualification. That court found it significant that although the expert had relinquished his medical licenses prior to trial, he had begun reviewing the evidence in the case before having done so, further noting that Shamblin's affidavit was signed in 2004, years before he relinquished his licenses. The court of appeal also relied on subsection 9:2794(D)(1)(a) as

additional evidence of his qualification, in that he "was practicing medicine . . . at the time the claim arose," concluding that the failure of subsection (d) to contain a specific time period created an ambiguity.

The defendant's writ application to the Louisiana Supreme Court was granted to permit the court to interpret the medical malpractice expert-witness statute and thus to review the court of appeal's decision under a de novo standard.

The Supreme Court's opinion began with its finding that the words of the statute were clear and unambiguous.

Of the four mandatory requirements of section 2794(D)(1), it was undisputed that Dr. Shamblin met the first three, *i.e.*, he was practicing at the time of the claim, he had knowledge of the standard of care, and he was qualified based on training and experience. The issue was whether he was licensed to practice medicine at the time of trial or was a graduate of an accredited medical school. There is no ambiguity between subsections (D)(1)(a) and (D)(1)(d), as "(a)" allows for a witness to be qualified if he was licensed to practice medicine at the time the claim arose, *i.e.*, in the past, whereas "(d)" requires a current valid license or graduation from an accredited medical school at the time the witness is offered as an expert, *i.e.*, in the present.

The absence of licensure at the time of trial meant that Shamblin could qualify only if he were a graduate of an accredited medical school, and both lower courts determined that the plaintiff failed to establish that Tulane Medical School was accredited by either the American Medical Association's Liaison Committee on Medical Education or the American Osteopathic Association. The Supreme Court precluded discussion of whether the "fax" document was properly excluded as hearsay and simply found that the evidence did not conclusively establish that Tulane was accredited at the time of trial, and that the court could not "assume accreditation" based solely on Dr. Shamblin's having been licensed to practice in Louisiana in 1959. The trial court's granting of the directed verdict in favor of Dr. Zeichner was reinstated.

Tainted Panel Opinion

Fanguy v. Lexington Ins. Co., 13-0114 (La. 4/1/13), ____ So.3d ____.

Fanguy was first reported in *Louisiana Bar Journal*, Vol. 60, No. 6.

Dr. Vernon Carriere swore the oath to participate in a medical review panel after being nominated by Dr. Michael Graham. The panel exculpated Graham, following which a lawsuit was filed. Fanguy then produced prima facie and unrebutted evidence that Carriere and Graham were both officers of the same medical corporation and moved to exclude the panel opinion and the testimony of all three panelists. The trial court granted the motion to exclude Carriere's testimony but denied the motion to exclude the panel opinion or the testimony of the two other physician-members of the panel.

Plaintiff's writ application to the 5th Circuit was granted, and the opinion and the testimony of the panelists were excluded, the court reasoning that it was illogical to allow any of this evidence "due to Dr. Carriere's taint of the entire medical review."

Defendants' writ application to the Supreme Court was granted. In a *per curiam*, the court wrote:

> While we are unable to say the lower courts committed error in finding that the undisclosed financial relationship between Dr. Carriere and Dr. Graham presented the appearance of impropriety, which vitiated Dr. Carriere's oath of impartiality and thereby tainted the MRP proceedings, we believe that justice would best be served by ordering the re-constitution of the MRP with different physician-members and allowing that new panel to deliberate and issue an opinion on the issues presented in this case. Accordingly, we affirm the decision of the appellate court, in part, and reverse the appellate court, in part, insofar as it failed to order that a new MRP be impaneled; we remand this matter to the district court for further proceedings in accordance with the foregoing.

Seemingly, a party, whether plaintiff or defendant — or a prospective panelist — may intentionally participate in violating a panelist's oath of office and, if found out, suffer no consequence other than to allow the guilty party to begin the panel process anew.

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Federal Taxation: FATCA Final Regulations

The U.S. Department of the Treasury and the Internal Revenue Service issued final regulations implementing section 1471 through 1474 of the Internal Revenue Code, commonly referred to as the Foreign Account Tax Compliance Act (FATCA). The IRS issued final regulations governing information reporting by foreign financial institutions (FFIs) and withholding on certain payments to FFIs and other foreign entities (T.D. 9610). Under FATCA, U.S. withholding agents must withhold tax on certain payments to FFIs that do not report to IRS certain information regarding U.S. accounts and on certain payments to certain payors that do not provide information on their substantial U.S. owners to withholding agents.

Among other things, the regulations

integrate model intergovernmental agreements (IGAs) into the IRS reporting requirements; phase in the timelines for withholding, due diligence and reporting (making them more consistent with IGAs); provide more detail on and increase the types of payments subject to withholding; provide guidance as to obligations with respect to certain low-risk FFIs; allow for consolidated compliance programs for related entities; and provide other guidance on identifying entities whose information must be reported. The regulations, located in 26 C.F.R. §§ 1.1471-0 through 1.1474-7 and 301.1474-1, became effective Jan. 28, 2013.

State Taxation: Repair Parts and Materials for Lease or Rental Equipment

The Louisiana Department of Revenue issued Revenue Ruling No. 13-003 stating that repair parts and materials purchased to repair or maintain lease or rental equipment are not excluded from sales tax. Sales of tangible personal property for lease or rental are excluded from sales tax under La. R.S. 47:301(10)(a)(iii). Louisiana imposes sales tax on sales of services, which, under La. R.S. 47:301(14), include the furnishing of repairs to tangible personal property. In support of this Revenue Ruling, the Department cites *International Paper Co. v. East Feliciana School Board*, 02-0648 (La. App. 1 Cir. 3/28/03), 850 So.2d 717, 720, *writ denied*, 03-1190 (La. 6/20/03), 847 So.2d 1235, holding that labor and material or parts "go hand in hand" and are not divisible. Consequently, repair and maintenance parts for the lease or rental are subject to sales tax and are not excluded under La. R.S. 47:301(10)(a)(iii).

Local Taxation: Tax Collector's Failure to Respond to Refund Requests

In *TIN, Inc. v. Washington Parish Sheriff's Office*, 12-2056 (La. 3/19/13), ____ So.3d ____, the Louisiana Supreme Court clarified a procedural issue involving the tax collector's failure to respond to the taxpayer's request for refund. The court determined that where the collector had not acted on the refund claim, the taxpayer was not restricted to the payment-under-protest procedure. The taxpayer in this case sent four requests for refund covering various tax periods to the Washington Parish Sheriff's Office, Sales and Use Tax Department, seeking refund of use taxes paid on purchases of raw materials used in a papermaking process. Although Washington Parish denied two of the refund requests, the parish did not provide reasons for those denials. The lower courts viewed Washington Parish's denial of the first refund request as a determination that the taxes were due and considered this to be constructive denial of the subsequent requests, holding that the taxpayer's only remedy was to pay the taxes under protest and file suit to recover because the refund request was based on the ground that the collector had misinterpreted the law. The Louisiana Supreme Court reversed and remanded.

First, the court discussed La. R.S. 47:337.63, the statute providing the payment-under-protest procedure, which states that "[a]ny taxpayer protesting the payment of any amount found due by the collector or the enforcement of any provision of law in relation thereto shall remit to the collector the amount due and at that time shall give notice of intention to file suit . . . ." The court stated that while the payment-under-protest procedure is

the only remedy available in cases after the tax collector denies a refund request, a taxpayer is not required to pay taxes under protest in order to seek a refund where there has not been "any amount found due by the collector or the enforcement of any provision of law in relation thereto" to which the taxpayer could protest, as the case was here.

Second, the court discussed La. R.S. 47:1625 (applicable to tax periods before July 1, 2003) and La. R.S. 47:337.81 (before its amendment in 2010), which are substantially similar statutes regarding appeals from a collector's disallowance of refund claims. Under these statutes, if Washington Parish's failures to respond were considered to have operated as constructive denials of the refund claims, after one year had elapsed from the requests, TIN would have been required to either appeal within 60 days under La. R.S. 47:1625 or request a redetermination hearing within 30 days under La. R.S. 47:337.81. The court found that while these provisions apply where the collector fails to act, the respective 60-day and 30-day time periods apply only after the notice of disallowance of the claims, which did not occur in this case.

In sum, with respect to these refund requests to local tax collectors that were not acted on, the taxpayer was not required to pay the taxes under protest in order to seek a refund and the collector's failure to respond did not amount to a constructive denial of the claims that would have triggered the time period for the taxpayer to act. The court stated that:

> It is within the sole control of the tax collector to begin the running of the time periods for requesting redetermination or appeal. He or she must simply do his or her job and respond to properly filed refund requests.

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Succession Representatives: No Consent Needed for Granting Mineral Leases

Davis v. Prescott, 47,799 (La. App. 2 Cir. 2/27/13), ____ So.3d ____.

In August 2006, Edward Thomas Davis died leaving five surviving children as well as a tract of immovable property in Claiborne Parish. Elmer E. Prescott III, decedent's son-in-law, was appointed independent executor of the estate. On June 19, 2007, without first informing the legatees, Prescott, as the independent executor of the estate, granted a three-year mineral lease on the property to a third party. In March 2008, the succession was closed and Steven M. Davis and his four siblings were placed in possession of the property.

Subsequently, Davis filed suit against Prescott, arguing, inter alia, that Prescott breached his fiduciary duty as an executor by granting a mineral lease without first obtaining Davis's permission. After a trial, the court found Prescott liable for $69,436 for failing to obtain consent from all legatees prior to granting a mineral lease greater than one year on the property. The court later signed an amended judgment correcting a clerical error and changing the damages award to $40,000. Prescott appealed.

Reversing the trial court's decision, the Louisiana 2nd Circuit Court of Appeal held that La. C.C.P. art. 3226 does not require a succession representative to obtain a legatee's consent prior to entering a mineral lease on succession property for greater than one year. Specifically, the appellate court held that the first paragraph of article 3226, which the trial court relied on, does not apply to the granting of mineral leases. Rather, the second and third paragraphs of article 3226, added by Acts 1974, No. 131, § 1, govern the treatment of mineral leases, and nowhere in these paragraphs is there a requirement to obtain the consent of the heirs or legatees.

In reaching its holding, the court reasoned that the language in the second paragraph of article 3226, stating that a court "may authorize the granting of mineral leases on succession property" and that "the leases may be for a period of greater than one year as may appear reasonable to the court," indicated legislative intent to treat mineral leases differently than surface leases. The court found that if the Legislature had intended the requirement of obtaining an heir's consent to apply to mineral leases, there would be no need for the additional verbiage in the second paragraph.

The court next reasoned that the history of the law pertaining to a succession representative's authority to lease mineral rights indicated that the Legislature never intended the requirement for a legatee's consent deriving from the first paragraph of article 3226 to apply to a succession representative's authority to grant mineral leases on succession property. The court explained that obtaining consent of interested legatees or heirs has never been required in order to grant mineral leases on succession property. Specifically, prior to a 1974 amendment, the language of article 3226 specifically stated that obtaining such consent did not apply to the granting of mineral leases, and present language of article 3226 did nothing to alter these longstanding requirements. On the contrary, the court concluded that the present language serves to perpetuate them.

Accordingly, the court held that the trial court erred in relying on the first paragraph of this article to the exclusion of the second paragraph, which specifically pertains to the leasing of mineral rights. Because article 3226 does not require a succession representative to obtain a legatee's consent prior to entering a mineral lease on succession property for greater than one year, the court reversed the judgment of the trial court in favor of Prescott.

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