Arbitration Contracts Are Enforceable to Bar Class-Action Suits Under Federal Law

Local stores asked customers to go ahead and leave home without their American Express cards. A group of merchants came together to file a class-action suit in the United States District Court for the Southern District of New York against the credit mogul American Express. The suit was filed as a violation of antitrust laws, alleging that American Express was imposing a tying arrangement, thereby forcing stores that accept AmEx charge cards to also accept credit and debit cards from AmEx. The problem arose because these credit and debit cards come with a fee charged to the merchant that is roughly 30 percent higher in comparison to the competitor credit/debit cards. Beyond these additional fees, the merchants claimed they were pushed to file suit because AmEx includes a clause in their contract that states there "shall be no right or authority for any Claims to be arbitrated on a class action basis . . . ." *In re Am. Express Merchants' Litig.*, 554 F.3d 300, 304 (2 Cir. 2009).

The merchants involved in this case argued that this clause violated federal antitrust laws under Section 1 of the Sherman Act and sought treble damages for the class under Section 4 of the Clayton Act. The merchants argued that if they were forced to arbitrate separately, as the contract states, they would be spending far more to prove their claims than they are able to recover due to the caps on payouts that arbitration allows. Additionally, the merchants stated that in order to meet the burden of proof in their claim, they would need to come together and share resources. American Express countered that this clause was in the contract to which these merchants agreed and cited 9 U.S.C. § 2, which states that contracts for arbitration in a transaction involving commerce were valid, irrevocable

and enforceable.

On Jan. 30, 2009, the 2nd Circuit Court of Appeals ruled in favor of the merchants and said that if American Express were allowed to enforce the clause against class-action suits, it would "effectively preclude any action seeking to vindicate the statutory rights asserted by the plaintiffs" and that "[t]he bar on class arbitration threatens the premise that arbitration can be a fair and adequate mechanism for enforcing statutory rights." This opinion was entered by circuit judges Pooler, Sack and Sotomayor. Judge Sotomayor was later appointed to the U.S. Supreme Court.

This battle remained in the courts until it was picked up by the United States Supreme Court in 2013, *American Express Co. v. Italian Colors Restaurant,* 133 S.Ct. 2304 (2013). The decision came down 5-3, with Justice Scalia delivering the opinion of the court and to which Chief Justice Roberts, Justice Kennedy and Justice Alito joined. Justice Thomas filed a concurring opinion. Justice Sotomayor took no part in the consideration or decision of the case due to her involvement as a circuit judge. The majority opinion stated that the Federal Arbitration Act "does not permit courts to invalidate a contractual waiver of class arbitration on the ground that the plaintiff's cost of individually arbitrating a federal statutory claim exceeds the potential recovery."

Justice Kagan filed a dissenting opinion, in which Justice Ginsburg and Justice Breyer joined, taking up in part the merchant's invocation of the "effective vindication" rule. That rule states that an arbitration clause will be enforced only "so long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 105 S.Ct. 3346 (1985). As noted by Justice Kagan, in the present case, the merchant could be awarded a maximum of $38,549 if it prevailed at arbitration. In order to prevail, however, the merchant would have to provide an expert economic analysis "defining the relevant markets, establishing AmEx's monopoly power, showing anticompetitive effects, and measuring damages." Such an analysis would cost between several hundred thousand and 1 million dollars. Justice Kagan opined that "no rational actor would bring a claim worth tens of thousands of dollars if doing so meant incurring costs in the hundreds of thousands." She further noted that the arbitration agreement in question not only precludes class arbitration, but any avenue for "sharing, shifting, or shrinking necessary costs" for proving the merchant's case. As a result, "AmEx has insulated itself from antitrust liability — even if it has in fact violated the law." The Supreme Court's majority decision held, however, that the doctrine of effective vindication was only to be used if the laws waived a party's *rights to pursue* the case. The fact that "it is not worth the expense involved in *proving* a statutory remedy does not constitute the elimination of the *right to pursue* that remedy."

The U.S. Congress is responding to the criticism of consumer groups claiming this ruling to be unfair. In 2013, during the 113th Congress's First Session, the Arbitration Fairness Act was introduced via House Resolution 1844 and Senate Bill 878. The goals of this legislation would be to combat decisions like *American Express v. Italian Colors Restaurant* by preventing companies from using forced arbitration clauses. These bills were seen as recently as December 2013 but did not make it to a vote during this session.

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Post-Confirmation State-Court Claims Belonged to Debtor

***Shoshana Trust v. Ransom* (*In re Lothian Oil, Inc.*)**, ____ F. Appx. ____ (5 Cir. 2014) (unpublished).

In 2007, Lothian Oil, Inc. filed for Chapter 11 bankruptcy in the Western District of Texas. One year later, the bankruptcy court confirmed the debtor's plan of reorganization. Thereafter, an unofficial committee of shareholders, including the appellants herein (appellants), filed a challenge to the debtor's plan, arguing that several property transfers approved in the plan resulted from "improper insider dealing." After the bankruptcy judge rejected the challenge, several of the appellants filed a state-court action in New York (New York Action). In this suit, the appellants raised claims against many entities involved in the bankruptcy and sought a constructive trust over the properties transferred from the Lothian estate. In 2010, the defendants removed the New York Action to the United States District Court for the Eastern District of New York, which then transferred the case to the Western District of Texas. The Texas

federal district court subsequently referred the case to the bankruptcy court, which "treated it as an adversary proceeding associated with the Lothian bankruptcy."

During the New York Action transfer process, the defendants sought to enjoin the New York Action in the bankruptcy proceedings, arguing that it violated the debtor's plan. The bankruptcy court issued a permanent injunction that was later affirmed by the district court. While the injunction was on appeal, the bankruptcy court permitted the filing of motions related to the New York claims in the bankruptcy adversary proceeding. The bankruptcy court granted various motions to dismiss the New York claims and, after denying multiple untimely appeals, only one motion to dismiss remained. The district court affirmed the remaining motion to dismiss, holding that while the bankruptcy court maintained core jurisdiction over the New York claims, the appellants lacked standing.

On appeal to the 5th Circuit, the appellants challenged numerous decisions of the bankruptcy and district courts. The 5th Circuit reviewed and found itself bound by a panel opinion previously issued in the Lothian bankruptcy, *Lothian IV. McClain v. Lufkin Indus., Inc.*, 649 F.3d 374, 385-86 (5 Cir. 2011). *Lothian IV* had affirmed the bankruptcy court's injunction and issued several findings of fact, holding that because the New York claims asserted by the appellants were "derivative of an injury Lothian suffered," the claims became a part of Lothian's bankruptcy estate. As the confirmed plan terms specified that the claims reverted to the newly restructured Lothian, the *Lothian IV* panel found that only Lothian had standing to pursue the claims.

The 5th Circuit supported *Lothian IV*'s findings by stating that when claims become part of the bankruptcy estate, "only the entity to which those claims are reserved under the restructuring plan has standing to assert them." The 5th Circuit further reasoned that because the proceeding was unable to be considered apart from the bankruptcy proceeding itself, the bankruptcy court maintained core jurisdiction over all of the New York claims. Reviewing prior 5th Circuit jurisprudence and citing *Southmark Corp. v. Coopers & Lybrand (In re Southmark Corp.)*, 163 F.3d 925, 931 (5 Cir. 1999), the court stated that "claims which are 'inseparable from the bankruptcy context' and cannot 'stand alone from the bankruptcy case' fall within the bankruptcy court's core jurisdiction." Therefore, the 5th Circuit affirmed the district court's holding that the bankruptcy court had core jurisdiction over the appellants' claims and that the appellants lacked standing to assert those claims.

Standing Required to File Involuntary Bankruptcy: Bona Fide Dispute Hurdle

***Credit Union Liquidity Servs., L.L.C. v. Green Hills Dev. Co., L.L.C.* (*In re Green Hills Dev., L.L.C.*)**, 741 F.3d 651 (5 Cir. 2014).

Credit Union Liquidity Services, L.L.C., (CULS) entered into a construction loan agreement with Green Hills Development Co., L.L.C., as a part of a land development plan. Green Hills executed a promissory note and a security agreement while CULS dispersed more than $8 million, reserving an additional $5.5 million for construction advances. After several advancements by CULS, the relationship between CULS and Green Hills soured, leaving Green Hills with an outstanding balance of more than $8 million. Greens Hills subsequently filed suit against CULS in Texas state court seeking damages for claims ranging from fraud to equitable subordination. In response, CULS filed a counterclaim for the outstanding amount it claimed to be owed under the loan agreement.

In addition, while the Texas litigation was still pending, CULS filed an involuntary bankruptcy proceeding against Green Hills in the Bankruptcy Court for the Southern District of Mississippi. Green Hills filed a motion to dismiss the bankruptcy petition, arguing that CULS lacked standing because its

claim against Green Hills was subject to a bona fide dispute as to liability and amount in the Texas litigation. The bankruptcy court dismissed the bankruptcy petition, holding that CULS failed to demonstrate that Green Hills was failing to pay its debts and that the claim was, in fact, subject to a bona fide dispute. The district court affirmed, and CULS appealed to the 5th Circuit.

On appeal, the 5th Circuit reviewed the language of section 303, which permits a set number of creditors to file an involuntary bankruptcy petition against a debtor as long as the claim is "not . . . the subject of a bona fide dispute as to liability or amount," among other criteria. The 5th Circuit affirmed the bankruptcy court's dismissal of the involuntary petition, finding that the CULS claim was subject to a bona fide dispute. Noting that section 303 was amended by the Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA) of 2005, which added the "as to liability or amount" language, the 5th Circuit discussed that post-BAPCPA cases recognize that a bona fide dispute as to the amount is alone sufficient to deny a creditor standing to file an involuntary petition and any pre-BAPCPA case law to the contrary is no longer good law. In light of the amendment, the 5th Circuit rejected the bankruptcy court's application of a pre-BAPCPA case, *Chicago Title Insurance Co. v. Seko Investment, Inc. (In re Seko Investment, Inc.)*, 156 F.3d 1005 (9 Cir. 1998), in which the 9th Circuit held that a debtor's counterclaim arising from an unrelated contract was insufficient to "put in doubt" a creditor's claim for purposes of section 303. The 5th Circuit reasoned that because Green Hills' counterclaims in the Texas litigation *directly* called into question Green Hills' liability to CULS, and the pre-BAPCPA *Seko* case provided no justification for *related* counterclaims, the bankruptcy courts reliance on *Seko* was misplaced.

In considering whether a claim is subject to a bona fide dispute, the 5th Circuit reviewed the standard it developed in *Subway Equipment Leasing Corp. v. Sims (In re Sims)*, 994 F.2d 210, 221 (5 Cir. 1993), in which it held that a "bankruptcy court must determine whether there is an objective basis for either a factual or legal dispute." Under the *Sims* standard, the creditor has the burden to establish a prima facie case that no bona fide dispute exists, after which the debtor must present evidence sufficient to rebut the prima facie case. Reasoning that the bankruptcy court is not required to actually resolve the dispute, the 5th Circuit stated that the court is only required to assess the facts to determine whether a bona fide dispute exists. The 5th Circuit supported the bankruptcy court's "thorough and independent" review of the Texas litigation evidence in determining whether a bona fide dispute existed under the facts. The 5th Circuit determined that, because a debtor can demonstrate a bona fide dispute exists without filing a separate lawsuit, a creditor whose claim is at issue in multi-yearlong litigation cannot short-circuit that process by forcing the debtor into bankruptcy. Therefore, the 5th Circuit found that the CULS claim was subject to a bona fide dispute in regard to the Texas litigation pending at the time the involuntary petition was filed and affirmed the bankruptcy court's dismissal of the involuntary petition.

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Louisiana Supreme Court: State Gun Laws Still Valid

In the latest criminal case to be considered by the Louisiana Supreme Court, the court weighed in on the constitutionality of Louisiana gun laws.

In *State ex rel. J.M.*, 13-1717 (La. 1/28/14), ____ So.3d ____, the State charged a Baton Rouge juvenile with intentional concealment of a weapon and possession of a handgun by a juvenile. In juvenile court, the youth argued that the corresponding criminal statutes were invalid under the "right to bear arms" provision of the Louisiana Constitution. Agreeing with the defendant, the juvenile court found the statutes to be partially unconstitutional.

On appeal to the Louisiana Supreme Court, the first statute before the court was La. R.S. 14:95.8, which makes it a crime for anyone under the age of 17 to "possess any handgun on his person," unless the youth is participating in certain enumerated activities, such as a firearm safety course, range practice, licensed hunting or traveling to one of these activities. The statute also permits a youth to possess a handgun at his residence with his parent's or guardian's permission, and anywhere with his parent's or guardian's written permission.

The second statute before the court was La. R.S. 14:95, which criminalizes the "illegal carrying of weapons" and, more specifically, "the intentional concealment of any firearm."

The primary question before the court was whether either of these two criminal statutes could withstand the Louisiana Constitution's newly bolstered Second Amendment counterpart, La. Constitution Article 1, Section 11. Before Dec. 10, 2012, this provision provided: "The right of each citizen to keep and bear arms shall not be abridged, but this provision shall not prevent the passage of laws to prohibit the carrying of weapons concealed on the person." However, Louisiana's Constitution now states, "The right of each citizen to keep and bear arms is fundamental and shall not be infringed. Any restriction of this right shall be subject to strict scrutiny."

Despite this change in language, the Louisiana Supreme Court affirmed that:

> the right to bear arms has always been a fundamental right and the amendment to the constitutional provision merely sought to ensure that the review standard of an alleged infringement of this fundamental right was consistent with developing standards of constitutional analysis.

Importantly, the court recognized that the voters who amended the Louisiana Constitution did so against the backdrop of decades of relatively unchanged gun laws. Absent any intent to change long-applied gun laws, the court determined that the juvenile-possession and concealed-gun laws both furthered compelling government interests and are narrowly tailored.

This decision, together with the court's companion decision in *State v. Draughter*, 13-0914 (La. 12/10/13), 130 So.3d 855, cast considerable doubt on the ability of criminal defendants to raise new challenges to the constitutionality of gun laws under revised Article 1, Section 11.

Louisiana DUI Checkpoints Potentially Unconstitutional

Louisiana citizens are well aware of the risks posed by drunken driving, just as they are aware of the risks posed by DUI checkpoints. However, a recent case before the Baton Rouge City Court and the 19th Judicial District Court indicates that arrests made at state DUI checkpoints may well be unconstitutional.

Under basic constitutional law, even the temporary stop of a vehicle constitutes a Fourth Amendment seizure. Accordingly, state and federal decisions have made clear that law-enforcement checkpoints must serve a legitimate government purpose and not unduly infringe on individual liberty interests. However, the Louisiana Supreme Court has taken things a step further, outlining precise guidelines to be considered when evaluating the constitutionality of police checkpoints in the state: (1) advance warning of the checkpoint, (2) minimal detention of the motorist, (3) use of systematic, nonrandom criteria for stopping motorists, and (4) the "location, time and duration of a checkpoint, and other regulations for operation of the checkpoint, preferably in written form, established by supervisory or other administrative personnel rather than the field officers implementing the checkpoint." *State v. Jackson*, 00-0015 (La. 7/6/00), 764 So.2d 64, 72.

A motorist was recently arrested at one of these checkpoints in Baton Rouge, where DUI checkpoints have become increasingly common. Challenging his stop before the Baton Rouge City Court, the defendant argued that the checkpoint was unconstitutional because "administrative personnel" were on the scene, helping to implement the checkpoint. Under *Jackson*, the defendant contended, the direct participation of the DUI Task Force Commander at the checkpoint rendered his seizure and arrest unconstitutional. Citing *Jackson*, the Baton Rouge City Court agreed and suppressed evidence of the stop. *State v. Parks*, Baton Rouge City Court, No. BR00434419, Div. D (5/15/13).

The State immediately appealed the matter to the 19th JDC, where Judge Donald Johnson affirmed the City Court's holding: "Because the two roles, supervisor/administrative personnel and field officer, were performed by one officer, this court concludes that it is a violation of . . . the checkpoint guidelines set forth by the Louisiana Supreme Court in *State v. Jackson*. The text of *Jackson* seems to suggest that the two roles are to be performed separately by two different individuals." *State v. Brian Parks*, No. 11-13-0366, 19th JDC (1/31/14).

While the State is sure to challenge these holdings, supervisory participation in Louisiana DUI checkpoints is common. If other courts follow these rulings, many DUI defendants may be able to challenge the constitutionality of their arrests.

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5th Circuit Says Exclusion of Evidence of Environmental Damage Harmless

U.S. v. Tuma, 738 F.3d 681 (5 Cir. 2013).

In February 2011, John Tuma and his son, Cody Tuma, were both charged in a five-count indictment with violations of the Clean Water Act, conspiracy and obstruction of justice related to illegal wastewater discharges from the Arkla Disposal Services, Inc. (Arkla) wastewater-treatment facility in Shreveport. John Tuma was both general manager and owner of Arkla until he sold it to CCS Midstream Services (CCS) in September 2006, and apparently continued as general manager after the sale. Cody Tuma was the plant operator in 2005 and night-shift supervisor in 2006 at Arkla.

The Arkla facility received wastewater from industrial processes and oilfield exploration and production facilities and treated the wastewater through a multi-step process. The facility was authorized to discharge the treated wastewater to either the city of Shreveport's publicly owned treatment works (POTW) or to the Red River. EPA's investigation revealed that a designated tank at Arkla was filled with clean well or city water, sometimes mixed with unprocessed water, which was then sampled, approved and discharged to the POTW. Relying on the sampling results from the "clean" tank, the facility then allegedly discharged untreated wastewater from the other tanks illegally without any testing, sampling or city approval.

A federal jury in Shreveport convicted John Tuma of discharging untreated wastewater directly into the Red River without a permit, discharging untreated wastewater into the city of Shreveport POTW in violation of its permit, and obstructing an EPA inspection. Tuma appealed his conviction on several grounds, including exclusion of evidence about the lack of environmental harm caused by the discharges. Tuma proffered witnesses who would have testified that no environmental harm resulted from the illegal wastewater discharges. The 5th Circuit pointed out that evidence of environmental harm was not required to prove any of the offenses and did not provide an affirmative defense to any of the offenses, making the testimony or evidence Tuma sought to put forth irrelevant. Consequently, the exclusion of the proferred evidence was harmless.

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Community Property

Gisleson v. Deputy, 13-0150 (La. App. 4 Cir. 8/7/13), 122 So.3d 1089.

A request for reasons for judgment under La. C.C.P. art. 1917 is mandatory, and the remedy for a trial court's failure to comply is to seek writs or a remand to compel compliance, not by an assignment of error on appeal.

The fact that Dr. Deputy's pre-marital medical education led to the parties' higher standard of living did not convert the separate property debt into a community debt. The interest paid on the separate debt was not a community obligation because the interest was not a "cost of the civil fruit that was his increased earning power," because his increased earning power was not a "fruit" of his medical education. Furthermore, her student loan incurred during the marriage was a community obligation.

The trial court's finding that she was free from fault in the breakup of the marriage was based on a credibility determination after conflicting testimony and was not an abuse of its discretion, nor was its award of $655 per month spousal support for 18 months. The court stated: "We decline to advise Ms. Gisleson that she is required to shop for groceries at Wal-Mart or Family Dollar, or set a price limit on what she can spend at restaurants."

Davis v. Gravois, 13-0439 (La. App. 4 Cir. 9/25/13), 125 So.3d 541.

Although the parties were divorced on Nov. 4, 1981, and Mr. Davis retired from the Marine Corps on July 1, 1987, Ms. Gravois did not file to partition his military retirement benefits until Oct. 3, 2011. The courts found that Michigan law applied. Michigan law allowed the court to consider the duration of the marriage, the parties' contributions to the marital estate, their stations in life and earning abilities, fault and other equitable circumstances. However, the 4th Circuit found that the trial court did not err in awarding her one-half of the monthly pension benefit multiplied by the number of years of his service in the military during their marriage divided by the total number of years of his service in the military. The court rejected Mr. Davis's argument that the court erred in awarding her sums already disbursed because she had not claimed reimbursement in her petition and subsequent pleadings, ruling that her listing of the asset in her descriptive list did not distinguish between past and future payments and that she had claimed any and all interest she might have in the pension. Nevertheless, the court of appeal found that her claims for her share of payments over 10 years old were prescribed because the right to reimbursement is a personal action subject to a 10-year prescriptive period.

Succession of Begnaud, 13-0232 (La. App. 3 Cir. 10/9/13), 123 So.3d 1252.

The trial court granted and the court of appeal affirmed the stepmother's declaratory judgment action to allow her the right to be buried in the family cemetery next to Mr. Begnaud and their poodle, over the objection of his children, who were the naked owners of the grounds.

Child Support

Moyer v. Moyer, 13-0212 (La. App. 3 Cir. 10/9/13), 123 So.3d 880.

A suspension of child support payments due to the custodial parent's secreting of the children can be retroactive only to the date of demand. Although Mr. Moyer was in arrears for nonpayment of child support, the trial court did not err in refusing to find him in contempt because Ms. Moyer's testimony that he was $40,000 in arrears was "completely false," and she had blatantly and intentionally misrepresented his payments. Because of her lack of credibility and numerous violations of judgments, 30 days in jail and $5,000 in attorney's fees was not an abuse of the trial court's discretion regarding her contempt.

Custody

Foshee v. Foshee, 12-1358 (La. App. 4 Cir. 8/28/13), 123 So.3d 817.

Mr. Foshee's entering into a consent judgment for a physical custody schedule was not an acquiescence to the trial court's judgment naming Ms. Foshee as the domiciliary parent, which issue was the subject of this appeal. Even though the mother and child experienced certain hardships in Africa where she was doing missionary work, because she had been the primary caretaker and had created a stable environment and family for the child, Ms. Foshee was maintained as the domiciliary parent.

Ramirez v. Ramirez, 13-0166 (La. App. 5 Cir. 8/27/13), 124 So.3d 8.

The maternal aunt was granted sole custody of her sister's 10-year-old child, who had lived with her primarily since his birth. Custody to the mother may have resulted in substantial harm to the child because the mother was from Honduras and was in the United States illegally, and, thus, was subject to deportation; she had a "history of delegating the responsibility for raising her other children to others;" and she had failed over the years to maintain contact with and to support the child. The trial court was not required to explicitly make findings under the La. Civ.C. art. 134 factors, and its statement that its findings were made pursuant to Civ.C. art. 133 was "legally sufficient." An award of "liberal visitation" to the mother was appropriate.

Final Spousal Support

Barron v. Barron, 13-0450 (La. App. 3 Cir. 10/9/13), 123 So.3d 1232.

The court of appeal reversed the trial court's award of $1,500 final spousal support to Ms. Barron because the house note that was included in her expense list was paid in full between the time of the trial and the court's judgment, as evidenced by the record. Thus, it lowered the final spousal support award to one-third of Mr. Barron's net income, beginning the month the note was fully paid. The initial award also exceeded one-third of his net income, but the trial court had stated that it was exceeding the statutory limit because she was paying the note and he had no house note or rent expense.

Rhymes v. Rhymes, 13-0823 (La. 10/15/13), 125 So.3d 377.

The Louisiana Supreme Court granted writs and reversed the trial court and court of appeal, finding that because the trial court must consider all relevant factors in awarding final spousal support, it was obligated to consider Ms. Rhymes's home schooling of the children as it affected her earning capacity, among the other facts of the case.

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Admiralty: What is a Vessel?

Warrior Energy Servs. Corp. v. ATP Titan M/V, ____ F.Appx. ____ (5 Cir. 2014).

Superior contracted with ATP to provide certain services and supplies to the Titan, a floating oil-and-gas production facility moored on the Outer Continental Shelf offshore of Louisiana. ATP subsequently declared bankruptcy, and Superior was not paid. Superior filed suit, asserting, *inter alia*, maritime liens against the Titan. ATP and the Titan moved to dismiss, asserting that the district court lacked *in rem* jurisdiction over the Titan. The motion was granted, and Superior appealed.

The Maritime Lien Act states that "a person providing necessaries to a vessel . . . has a maritime lien on the vessel [and] may bring a civil action *in rem* to enforce the lien." In this case, federal jurisdiction under the Maritime Lien Act turns on whether the Titan is a "vessel." 46 U.S.C. § 31342(a).

A vessel is defined as "every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water." 1 U.S.C. § 3. This includes "any watercraft practically capable of maritime transportation, regardless of its primary purpose or state of transit at a particular moment . . . whether the watercraft's use as a means of transportation on water is a practical possibility or merely a theoretical one." *Stewart v. Dutra Constr. Co.*, 125 S.Ct. 1118 (2005).

The 5th Circuit concurred with the district court's finding that, as a matter of law, the Titan was not a vessel, based upon its precedent addressing similar structures, for these reasons: (1) The Titan was moored to the floor of the Outer Continental Shelf by 12 chain mooring lines connected to 12 anchor piles, each weighing 170 tons and each embedded over 200 feet into the seafloor, and by an oil-and-gas-production infrastructure; (2) it had not been moved since it was constructed and installed at its current location in 2010; (3) it had no means of self-propulsion, apart from repositioning itself within a 200-foot range by manipulating its mooring lines, similar to the spar in *Fields v. Pool Offshore*, 182 F.3d 353 (5 Cir. 1999), which the court found had "extremely limited and purely incidental mobility;" and (4) moving the Titan would require approximately 12 months of preparation and at least 15 weeks for its execution, and would cost between $70 and $80 million.

The district court's judgment of dismissal was affirmed.

Workers' Compensation: Employees' Alternative Remedy in Tort

Danos v. Boh Bros. Const. Co., 13-2605 (La. 2/7/14), ____ So.3d ____; ***Miller v. Statler Supply Co.***, 13-2558 (La. 1/27/14), ____ So.3d ____.

Two factually similar cases occasioned the Supreme Court to revisit the Louisiana Workers' Compensation Act to determine an injured worker's right to recover in tort.

In the first, an employee was directed to use a cutting saw on a pipe, which was lying on the ground without support. The pipe buckled, kicking back the saw, causing head and neck injuries to the worker. Plaintiffs alleged Boh Bros. committed an intentional tort by requiring performance of an unsafe act. In the second, a worker was killed when a large engine block he was cleaning fell on him. Plaintiffs alleged the employer failed to adhere to proper safety procedures, having had notice of the frayed straps, rusted chains and lack of a safety latch on the engine-hoisting mechanism, making decedent's injuries substantially certain to follow. Both defendants' motions for summary judgment were denied by the district court, and the court of appeal denied supervisory writs.

The court found that to recover in tort for a workplace accident, a plaintiff must prove "the employer (1) consciously desired the physical result of its act, whatever the likelihood of that result happening from its conduct, or (2) knew that the result is substantially certain to follow from its conduct, whatever its desire may be as to that result." The court quoted *Reeves v. Structural Preservation Systems*, 98-1795 (La. 3/12/99), 731 So.2d 208, 213, for the substantial certainty requirement:

> Believing that someone may, or even probably will, eventually get hurt [by a workplace practice] does not rise to the level of an intentional act, but instead falls within the range of negligent acts that are covered by workers' compensation.
>
> "Substantially certain to follow" requires more than a reasonable probability that an injury will occur and "certain" has been defined to mean "inevitable" or "incapable of failing."... [An] employer's mere knowledge that a machine is dangerous and that its use creates a high probability that someone will eventually be injured is not sufficient to meet the "substantial certainty requirement.". . . [M]ere knowledge and appreciation of a risk does not constitute intent, nor does reckless or wanton conduct by

an employer constitute intentional wrongdoing.

Finding the factual circumstances in neither case to meet these criteria, the court held that each plaintiffs' exclusive remedy was in workers' compensation, and granted writs reversing the district court and granting defendants' motions for summary judgment.

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U.S. 9th Circuit

Sachs v. Republic of Austria, 737 F.3d 584 (9 Cir. 2013).

The U.S. 9th Circuit Court of Appeals, sitting *en banc*, issued an important decision regarding the scope of commercial activities qualifying as exceptions to sovereign immunity under the Foreign Sovereign Immunities Act (FSIA). Plaintiff Sachs purchased a Eurail pass in California from a U.S. company based in Massachusetts. After arriving in Austria, Sachs attempted to board a moving train in Innsbruck and fell to the tracks through a platform gap. Her injuries ultimately required amputation of both legs above the knee.

Sachs filed suit in California against the Republic of Austria and the Austrian national railway, the latter being part owner of the Eurail network organized under Luxembourg law. The complaint asserted diversity jurisdiction and various negligence, defect and failure-to-warn claims. The Republic of Austria was dismissed via uncontested motion. The Austrian national railway was granted summary judgment on FSIA immunity grounds. The FSIA provides a presumption of immunity to foreign states from suits in state and federal courts. FSIA exceptions to sovereign immunity include certain actions taken by the foreign sovereign that constitute an explicit or implicit waiver, actions involving the foreign state's interest in property located in the United States and commercial or tortious actions in the United States. This case focuses solely on the FSIA commercial activity exception.

Sachs's jurisdictional argument on appeal narrowly addressed the sale of the Eurail pass in the United States, which she contends is a commercial activity imputable to the Austrian national railway. The railway counters that the Eurail pass sale made by the U.S. company is sufficiently attenuated to preclude application of the FSIA commercial activity exception.

The 9th Circuit followed the principle of avoiding circuit splits under the FSIA by adhering to prior 2nd and D.C. Circuit decisions. The court held that the Eurail pass sale is imputed to the national railway for purposes of finding a commercial activity carried on in the United States. The *en banc* court also found that the sale created "substantial contact" with the United States and plaintiff's claims were "based upon" the commercial activity in the United States.

The court explained the nexus as follows:

> Here, buying the Eurail pass from [the Massachusetts company] was the start of Sachs's tragic misadventure, and buying the pass in the United States helped to define the scope of duty owed by common carrier OBB [the Austrian national railway] to the pass purchaser and traveler, Sachs. Because the sale of the Eurail pass is an essential fact that Sachs must prove to establish her passenger-carrier relationship with OBB, a nexus exists between an element of Sachs's negligence claim and the commercial activity in the United States.

Sachs, 737 F.3d at 600. This *en banc* decision expands both the reach of the FSIA commercial activity exception and the jurisdiction of U.S. courts. A petition for certiorari was filed March 5, 2014, and further review by the U.S. Supreme Court could happen as the Supreme Court has recently taken a dim view of expanding U.S. jurisdiction over international businesses, particularly in the personal jurisdiction area.

11th Circuit

Agility Defense & Gov't Servs. v. U.S. Dep't of Defense, 739 F.3d 586 (11 Cir. 203).

A panel of the 11th Circuit issued a significant opinion expanding the reach of federal agency suspensions to innocent affiliates of indicted parent companies. The 11th Circuit reversed a ruling in favor of Agility Defense & Government Services, a Huntsville, Ala., logistics company, regarding suspensions it received due to the actions of its Kuwait-based parent company. The Federal Acquisition Regulation (FAR) governs federal agencies' purchases of goods and services. FAR allows the relevant tendering or contracting government agency to debar or suspend contractors that are deemed non-responsible for, *inter alia*, commissions of fraud or criminal offense, unfair trade practices or "other offense[s] indicating a lack of business integrity or business honesty . . . ." 739 F.3d at 588. The federal agency's suspension power extends to any affiliate of a government contractor where they are named and provided notice and an opportunity to respond to the allegations. *Id.*

In this case, Agility's parent, Public Warehousing Co., was indicted by a grand jury for a purported multi-billion-dollar fraud in connection with its government food-supply contract for military personnel in the Middle East. Public Warehousing was suspended under FAR as a result of the indictment, and the suspension was extended to Agility based on its affiliate status. Agility responded to the suspension, but its termination request was denied. An application for a temporary restraining order was denied by the District Court for the District of Columbia. Agility filed suit in the U.S. District Court for the Northern District of Alabama seeking injunctive and declaratory relief. The District Court granted summary judgment in favor of Agility on the ground that the federal agency did not have sufficient authority under FAR to suspend Agility indefinitely beyond the FAR 18-month timeframe based solely upon its affiliate status.

The 11th Circuit ruled on appeal that (1) suspensions of an indicted government contractor's affiliate may continue indefinitely where legal proceedings have been initiated against the indicted contractor; and (2) the indefinite suspension is not an unconstitu-

tional deprivation of due process because FAR provides the affiliate ample time and process to contest the suspension. *Id.* at 589.

This decision is another in a series of cases expanding the power of U.S. agencies and courts to penalize and punish corporate affiliates for the wrongdoing of their parent companies.

Trade Promotion Authority

Bipartisan Congressional Trade Priorities Act of 2014, (S. 1900 & H.R. 3830) (113th Congress, 2d Session).

One of the most hotly contested constitutional debates surrounds the question of whether the executive or legislative branch of government has authority to enter international economic agreements that promote the interests of the United States overseas. For the last 30 years, Congress and the Executive branch have avoided a constitutional showdown by reaching a constitutional compromise in the form of power-sharing legislation, known historically as "fast-track" or "trade promotion" authority. With one exception, every President since Franklin Delano Roosevelt has enjoyed congressional sanction to negotiate international free-trade agreements. President Obama currently sits as the only President without this authority. The most recent legislative grant expired in 2007. President Obama has remained undeterred and has embarked on an aggressive agenda seeking free-trade agreements with the Pacific Rim and Europe. No agreement reached by President Obama is binding, however, without some form of trade promotion authority and ultimate congressional approval of the agreement.

As his last act before departing to serve as the U.S. ambassador to China, Sen. Max Baucus (D-MT) introduced the Bipartisan Congressional Trade Priorities Act of 2014, which grants President Obama trade promotion authority while leaving intact Congress's ability to vote up or down on any final agreement. The legislation seeks to update negotiating objectives while also improving upon the 2002 legislation's congressional consultation process. The House version of the bill is identical, but neither will likely see daylight any time soon. Upcoming mid-term elections make controversial trade legislation very unpopular. In the meantime, President Obama continues to negotiate on both the Asian and European fronts without formal authority that is unlikely until a post-election lame duck session.

World Trade Organization

European Union-Cost Adjustment Methodologies and Certain Anti-Dumping Measures on Imports from Russia, WT/DS474/1 (Jan. 6, 2014).

Russia initiated its first trade dispute at the World Trade Organization (WTO) dispute settlement mechanism since its WTO accession on Aug. 22, 2012. Russia requested consultations with the European Union regarding several EC regulations pertaining to the administrative procedures and methodologies used in calculating anti-dumping duties. In particular, Russia asserts that various EC regulations related to "cost adjustments" in measuring and calculating Russian production costs are inconsistent with the WTO Anti-Dumping and Subsidies and Countervailing Measures Agreements. The products at issue are imported steel products and ammonium nitrate, both of which are subject to definitive anti-dumping measures in the European Union. WTO procedures require the two parties to engage in formal consultations before a dispute-settlement panel is created to adjudicate the dispute. Consultations are ongoing at this time.

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Supreme Court Clarifies Rules on Donning and Doffing Cases Under FLSA

Sandifer v. U.S. Steel Corp., 134 S.Ct. 870 (2014).

On Jan. 27, 2014, the U.S. Supreme Court held that the Fair Labor Standards Act (FLSA) did not require an employer to pay workers for time spent donning and doffing protective gear. In *Sandifer*, the plaintiffs brought a collective action under Section 203(o) of the FLSA, seeking back pay for time spent putting on and taking off pieces of protective gear that they assert U.S. Steel requires workers to wear because of hazards at its steel plants. U.S. Steel argued that this donning and doffing time, which would otherwise be compensable under the Act, is noncompensable under a provision of its collective bargaining agreement (CBA) with petitioners' union. That provision's validity depended on Section 203, which allows parties to collectively bargain over whether "time spent in changing clothes . . . at the beginning or end of each workday" must be compensated.

U.S. Steel requires workers to put on and take off this equipment before and after their eight-hour shifts, but pays for only eight hours of work. The workers demanded that the unpaid donning and doffing time be compensated as overtime. The workers said flame-retardant jackets and pants, work gloves, wristlets, hard hats, snoods, leggings, metatarsal boots, safety glasses, earplugs and a respirator are protective gear, not clothing. U.S. Steel disagreed, saying any wearable item is clothing. As a result, it should not have to pay unionized employees for "donning and doffing."

Sandifer specifically involved Section 203(o) of the FLSA, which provides that a company and a union are free to negotiate as part of a CBA whether time spent by employees changing clothes at the beginning or end of each workday is compensable. In that case, the lawsuit focused on the meaning of "changing clothes." In the work setting, what are "clothes"? What constitutes "changing" clothes? If the workers were merely "changing clothes," then the union agreement bargaining away the workers' rights were valid. If the workers were doing more than just "changing clothes," then the union agreement was invalid.

In a unanimous decision, the court ruled that time spent donning and doffing protective gear constituted "changing clothes" under Section 203(o). Writing on behalf of the court, Justice Antonin Scalia said the time spent putting on safety gear was not subject to compensation because it was not sufficiently different from "changing clothes." Looking to the dictionary, the court determined that the term "clothes" means anything that is "both designed and used to cover the body" and is "commonly regarded as dress." It includes clothes that are worn for "protection," but does not include everything that is "worn on the body," such as "accessories" and "tools." The court construed "changing clothes" to mean "altering" ones clothing, either by "substituting one item for another" or putting "clothes on over other items already worn."

Applying these definitions, the court rejected the plaintiffs' contention that "changing" clothes did not apply to employees putting protective gear over their street clothes, ruling that the time spent changing clothes includes the time spent altering as well as substituting dress. The court concluded that nine of the 12 items the plaintiffs were required to wear — a flame-retardant jacket, pair of pants, a hood, a hardhat, a snood, wristlets, work gloves, leggings and boots — fell within the term "clothes" and that the company and the union could agree that time spent putting on these items was not compensable.

The court did, however, find that the remaining three items the plaintiffs were required to wear — glasses, earplugs and a respirator — were not clothes. Nevertheless, the court found that time spent donning and doffing these items was still not compensable. Scalia referred to a lower court ruling that said the time spent putting on safety glasses and earplugs was "minimal" and that respirators are put on as needed at workstations. The court went on to state that when an employee spends time donning both clothes and non-clothing items, compensability will depend on how much time is spent on each. "If an employee devotes the vast majority of time in question to putting on and off equipment or other non-clothes items," none of the time would qualify as "time spent in changing clothes." Conversely, "if the vast majority of time is spent donning and doffing 'clothes,'" as defined by the court, "the entire period qualifies, and the time spent donning and doffing other items need not be subtracted."

Scalia stated a ruling separating different types of items would create a problem for judges handling such cases. The court explained that the federal courts should not be spending their time trying to calculate how much time was spent on each piece of equipment and instead look at the entire process as a whole to determine whether the time is compensable. It is unlikely that Congress intended to "convert federal judges into time-study professionals," Scalia wrote.

Sandifer involved a provision of the FLSA dealing with a unionized employer and a union contract that specifically covered donning and doffing. In the non-union context, the time spent putting on protective gear at the beginning and end of the work day is compensable. The Supreme Court's decision will make it more difficult for unionized workers

to seek pay for time spent changing clothes before and after work if it is not specifically addressed during labor negotiations.

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Appeal of Commissioner's Orders

Gatti v. State, 13-0289 (La. App. 1 Cir. 1/15/14) (unpublished).

Several plaintiffs who own mineral rights in land above the Haynesville Shale brought suit against the Commissioner of Conservation, challenging the commissioner's creation of 640-acre units for the Haynesville Shale. The plaintiffs explained that, in the Haynesville Shale, operators typically drill horizontal wells and use hydraulic fracturing to stimulate those wells. Because of the formation's low porosity, a well does not drain hydrocarbons from outside the area that is hydraulically fractured, and typically about eight horizontal wells are needed to drain a 640-acre area. Further, both the commissioner and numerous oil and gas companies that the plaintiffs also named as defendants knew that about eight wells would be needed to drain a 640-acre unit. The plaintiffs argued that, given these facts, the commissioner exceeded his authority when he created 640-acre units.

In support of their argument, the plaintiffs relied on La. R.S. 30:9(B), which authorizes the commissioner to create units. The statute states in part: "A drilling unit, as contemplated herein, means the maximum area which may be efficiently and economically drained by one well." The plaintiffs argued that other statutes give the commissioner the authority to create units larger than an area that can be drained by one well in certain circumstances, but those circumstances did not exist under the facts of this case, and neither 30:9(B) nor any other law authorized the commissioner to create 640-acre Haynesville Shale units. Nevertheless, the commissioner had created 640-acre units.

Further, because the units could not be drained by a single well, the commissioner often had granted the unit operator a permit to drill a unit well, as well as additional permits to drill "alternate unit wells" within the same unit. The plaintiffs asserted that the commissioner also lacked authority to grant such permits for alternate unit wells. The plaintiffs sought class certification for a class of individuals prejudiced by the commissioner's allegedly unauthorized unitization order. The plaintiffs also sought damages against the oil and gas company defendants, as well as a declaratory judgment that R.S. 30:9(B) does not authorize the commissioner to grant alternate unit well permits and that, except in limited circumstances, the commissioner lacks authority to create units larger than the area that can be drained by one well.

The defendants filed exceptions, several of which were based on the plaintiffs' failure to seek timely judicial review of the commissioner's actions. La. R.S. 30:12(A) authorizes any "person who is aggrieved" by an order of the commissioner to seek review of that order in "the district court of the parish in which the principal office" of the commissioner is located — that is, in the 19th Judicial District Court for East Baton Rouge Parish. R.S. 30:12(A)(2) states that any suit for such review "must be brought within sixty days" of the order that the plaintiff challenges. Here, the plaintiffs had not sought review within 60 days of the orders that they challenged. Accordingly, the district court granted the defendants' exceptions and dismissed the plaintiffs' claims.

The plaintiffs appealed, arguing that R.S. 30:12 does not provide the exclusive basis for challenging an order of the commissioner, and that they were not seeking review under 30:12. Instead, they were seeking a declaratory judgment, pursuant to La. C.C.P. art. 1871, that the commissioner's actions were improper. The Louisiana 1st Circuit agreed, holding that if a plaintiff challenges the commissioner's actions as being beyond his statutory authority, 30:12 does not provide the exclusive basis for such a challenge, and that such a challenge can be brought as a declaratory judgment pursuant to the Code of Civil Procedure. Further, if a plaintiff brings his challenge as a declaratory judgment, he is not bound by the time limits found in R.S. 30:12. Accordingly, the 1st Circuit reversed the judgment granting the exceptions and remanded the case to the district court.

Contract Formation

Walsworth v. Chesapeake La., L.P., 48,588 (La. App. 2 Cir. 11/20/13), 128 So.3d 1266.

Chesapeake offered to lease the plaintiffs' land. The plaintiffs agreed to certain basic terms of Chesapeake's offer, such as the bonus amount, royalty and the length of the primary term. But the plaintiffs rejected other provisions proposed by Chesapeake and, in September 2008, the plaintiffs made a counteroffer. In October 2008, Chesapeake rejected the plaintiffs' proposed counteroffer and terminated negotiations. The plaintiffs sued, arguing that the parties had a binding agreement to lease. The district court disagreed and dismissed the plaintiffs' claims on summary judgment. The Louisiana 2nd Circuit affirmed.

Subsequent Purchaser's Legacy Litigation Claims

Broussard v. Dow Chemical Co., ____ F.Appx. ____ (5 Cir. 2013).

A plaintiff brought suit for contamination of his land. The United States District Court for the Western District of Louisiana reasoned that the plaintiff had no right of action because the alleged contamination occurred prior to his purchase, as a result of activities that the defendant conducted pursuant to an oil and gas lease that terminated prior to the plaintiff's purchase. Based on that reasoning, the district court dismissed the case on summary judgment and the United States 5th Circuit affirmed.

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Nurses as Panelists

In Re Med. Rev. Panel of Vankregten, 48,622 (La. App. 2 Cir. 2/5/14), ____ So.3d ____.

A hospital and two of its nurses were the only two respondents named in a medical-review-panel complaint. The plaintiffs nominated a nurse to serve on the panel. Defendants objected, contending that only a physician could serve on this panel. The plaintiffs countered by refusing to nominate a physician, arguing that the MMA allows for health-care providers of the same class and specialty as those eligible to serve. The chair advised that he had no authority to settle the dispute, and the hospital filed a motion to compel the plaintiffs to "comply with the MMA." The trial court ruled that the MMA "contemplates that only medical doctors serve on a medical review panel."

In considering the plaintiffs' supervisory writ, the appellate court noted there were "no reported Louisiana cases that squarely address[ed] this issue." The plaintiffs argued that the MMA's provision for appointment of a "health care provider" to the panel, by definition, is not limited to physicians. Contrastingly, the hospital's position was that despite including the nurses as individual respondents, the hospital was "in effect" the only party respondent, thereby requiring that all panelists be physicians as per the terms of the MMA.

The statute at issue was La. R.S. 40:1299.47, particularly part C(3)(j). In support of its position, the hospital relied on the following portion of the statute: "If there is only one party defendant which is a hospital, community blood center, tissue bank, or ambulance service, all panelists except the attorney shall be physicians."

In its consideration of the foregoing arguments, the court found notable Section 1299.47A(1) relative to the minimum requirements for filing a panel complaint and recited part (b)(vi), which requires that a request for review contain "a brief description of alleged malpractice ***as to each named defendant health care provider***." (Emphasis added by the court.)

The court reviewed the plaintiffs' panel request and noted that all of the negligence allegations therein pertained to the actions and/or inactions of the nurses and determined that no independent basis for liability of the hospital was alleged. Accordingly, the court concluded that there was "effectively" only one defendant in the case because only Schumpert could be vicariously liable to the plaintiffs, and in such circumstances, the MMA mandates that the panel be composed of physicians only.

Physicians' Desk Reference: 2 Cases

Deroche v. Tanenbaum, 13-0979 (La. App. 4 Cir. 12/18/13), ____ So.3d ____.

Mrs. Deroche sued Dr. Tanenbaum after she developed complications following a colonoscopy. Among her allegations of negligence was the claim that Dr. Tanenbaum failed properly to inform her of the potential risks (one of which was nephrotoxicity) as-

sociated with the use of Fleet Phospho-Soda preparation (FPS prep).

Defendant's motion for summary judgment was granted, and the plaintiffs appealed. One assignment of error concerned the trial court's refusal to accept *Physicians' Desk Reference* (PDR) information as evidence sufficient to defeat the motion.

Plaintiffs argued that Mrs. Deroche was given outdated instructions contrary to the manufacturer's directives and warnings. There was no expert medical testimony on this issue, but the plaintiffs cited PDR warnings and instructions and a photocopy of a gastroenterologist's affidavit from an earlier product liability suit filed by the Deroches against the FPS prep manufacturer — a suit that had been dismissed. The medical review panel had addressed these issues and opined that the physician's instructions were "within the variations that were considered appropriate at the time of this procedure."

The appellate court held that the PDR information, standing alone, would not defeat a motion for summary judgment:

> We specifically hold that a manufacturer's labeling and package insert standing alone is insufficient to establish the prevailing medical standard of care required by La. R.S. 9:2794. Similarly, we find that a physician's medical decision to deviate from a manufacturer's labeling also does not *ipso facto* establish a breach of the applicable standard of care.

Plaintiffs also argued that the copy of the affidavit from the gastroenterologist in the dismissed product liability case provided support to Mrs. Deroche's claim that she was given outdated instructions for taking the FPS prep. The court found the affidavit lacking in that it contained no opinions and only authenticated an expert report offered by the gastroenterologist in another case, was silent about the standard of care for gastroenterologists, and in no way could support a contention that Dr. Tanenbaum was negligent.

The judgment of the trial court was affirmed.

Ekendahl v. Louisiana Medical Mutual Insurance Co., 48,374 (La. App. 2 Cir. 8/28/13), 124 So.3d 461.

Following a trial on the merits, the trial judge ruled in favor of the defendants. Among the issues on appeal was the weight to be given *Physicians' Desk Reference* (PDR) evidence.

The appellate court cited *Terrebonne v. Floyd*, 99-0766 (La. App. 1 Cir. 5/23/00), 767 So.2d 758, in which the 1st Circuit Court of Appeal "explained" that specific manufacturer's warnings "can be sufficient to establish a *prima facie* showing of negligence." It also cited *Christiana v. Sudderth*, 02-1080 (La. App. 5 Cir. 2/25/03), 841 So.2d 911, in which the 5th Circuit "stated" that a deviation from PDR information "may be negligence for which expert testimony is not required to establish the applicable standard of care, because such evidence may be sufficient to make a prima facie showing of negligence."

After recognizing these opinions, the *Ekendahl* court affirmed the verdict for defendant and wrote: "A manufacturer's warning is evidence, but not conclusive evidence, of a standard of care." The court further stated, "[Plaintiff's] argument that the standard of care should be set by the manufacturer of the [product] and not by the physicians is contrary to well-settled law."

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U.S. Supreme Court Denies Petition for Certiorari

McLane Southern, Inc. v. Bridges, 10-1259 (La. App. 1 Cir. 3/21/13), 110 So.3d 1262, *writ denied,* 13-1187 (La. 8/30/13), 120 So.3d 270, *cert denied*, 134 S.Ct. 1033 (2014).

The U.S. Supreme Court denied McLane Southern, Inc.'s petition for certiorari to address the 1st Circuit Court of Appeal's holding that the Louisiana Department of Revenue's interpretation and application of the meaning of "invoice price," which sets the excise-tax base for tobacco products, does not discriminate against interstate commerce to violate the Commerce Clause of the U.S. Constitution.

McLane is a Louisiana-bonded wholesale tobacco dealer located in Mississippi that brings tobacco products into Louisiana for sale and distribution to retailers. McLane purchased the tobacco products at issue from a supplier, U.S. Smokeless Tobacco Brands, Inc. (UST-Sales), an affiliate of U.S. Smokeless Tobacco Manufacturing Co. (UST-Manufacturing). UST-Manufacturing sells to UST-Sales the tobacco products that UST-Sales then sells to McLane. All of these sales occur outside of Louisiana. McLane then sells the products to its customers in Louisiana.

The 1st Circuit held that the base for the tax on the tobacco products is the price McLane paid to UST-Sales, not the price UST-Sales paid to UST-Manufacturing. The court found that the language in La. R.S. 47:842(12) is "clear and unambiguous" that the price as invoiced to the Louisiana tobacco dealer by the manufacturer, jobber or other persons engaged in selling tobacco products sets the tax base.

The 1st Circuit dismissed McLane's argument that such an interpretation of La. R.S. 47:842(12), that an alleged "'shifting tax base' rewards the location of economic activity in Louisiana and penalizes the location of the activity in other states," was discriminatory "against interstate commerce in violation of the Commerce Clause." The 1st Circuit held that Louisiana's excise tax on tobacco products is assessed against the first dealer who causes tobacco products to be in Louisiana for sale or distribution, and that the tax is assessed at the same rate. This is true regardless of where the products originate, *i.e.*, whether the person manufactures the products for sale in the state, brings the products into the state or causes the products to be brought into the state.

McLane applied for a writ to the Louisiana Supreme Court for review of the 1st Circuit's decision, which was denied. Upon the denial of McLane's writ application, McLane filed a petition for certiorari with the U.S. Supreme Court. In McLane's petition, McLane sought certiorari on the issue of whether the Commerce Clause of the U.S. Constitution allows states to tax goods

distributed by out-of-state wholesalers more heavily than goods distributed by in-state wholesalers. The U.S. Supreme Court has denied certiorari.

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La. Supreme Court Rules on Constitutionality of City Ordinance

Jackson v. City of New Orleans, 12-2742 (La. 1/28/14), ____ So.3d ____.

The Louisiana Supreme Court examined the sections of a city ordinance that imposed a penalty on delinquent ad valorem taxes, authorized the taxing unit to contract with outside agencies for the collection of delinquent taxes, and imposed a collection fee for doing so — all in light of its prior decision in *Fransen v. City of New Orleans*, 08-0076 (La. 7/1/08), 988 So.2d 225. As in the earlier case, the court again found that the "collection fee" violated the provisions of Article VII, § 25(A)(1) of the Louisiana Constitution, which both restricts and delineates the acceptable tax collection mechanism for ad valorem taxes. The court found no basis to overturn the district court's ruling of unconstitutionality and held that the state constitution places the duty to collect ad valorem taxes on a local government's official tax collector and further limits the collection of delinquent ad valorem taxes exclusively to tax sales conducted by the collector.

With respect to the penalties and collection fees at issue, the court concluded that any penalty or collection fee designed to allow the wholesale outsourcing of a government tax collector's responsibility to collect delinquent ad valorem taxes is unconstitutional and that a tax collector's recoverable "costs" must be actual costs reasonably incurred to collect a particular taxpayer's delinquent ad valorem taxes, the assessment of which can be made only on a case-by-case basis.

The court also reaffirmed that property owners must use the payment-under-protest procedure to dispute any tax, penalty, interest, fees or costs. Since with respect to most of the periods at issue, the plaintiffs had paid neither the ad valorem taxes timely (and consequently penalties, fees and interest were assessed) nor the late payment penalties timely (within the 30 days referred to in the section of the ordinance that imposes the city penalty or within the 90 days in the provision that imposes the collection "cost"), the ability of the plaintiffs to contest the penalties was prescribed. Only one of the plaintiffs had followed the payment-under-protest provision in the city ordinance for at least one of the disputed tax years with respect to the penalties.

Ultimately, this holding prevents a property owner from obtaining the refund of an illegal ad valorem tax penalty if the illegal penalty is not paid timely. Although the penalties and fees imposed by the ordinance were held to be unconstitutional, the Louisiana Supreme Court affirmed the district court's decision to grant the city's exception of no cause of action and dismiss the claims of those plaintiffs who did not follow the payment-under-protest procedure. The court found no merit in the plaintiffs' assertion that the payment-under-protest laws should not apply to the penalties and fees at issue as a result of their unconstitutionality. The court held that because the plaintiffs contested the delinquent penalties and collection fees, as opposed to the underlying ad valorem tax, they should have paid the contested amounts in accordance with the payment-under-protest procedure set forth in the city ordinance. Property owners who paid the penalty either untimely or without protesting the penalty at the time of payment are foreclosed from obtaining a refund at this point, while, in accordance with this decision, the city should be foreclosed from collecting the penalty from those taxpayers whose property has been assessed with, but who have not paid, this penalty to date. Both parties have sought a rehearing by the court in this case.

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