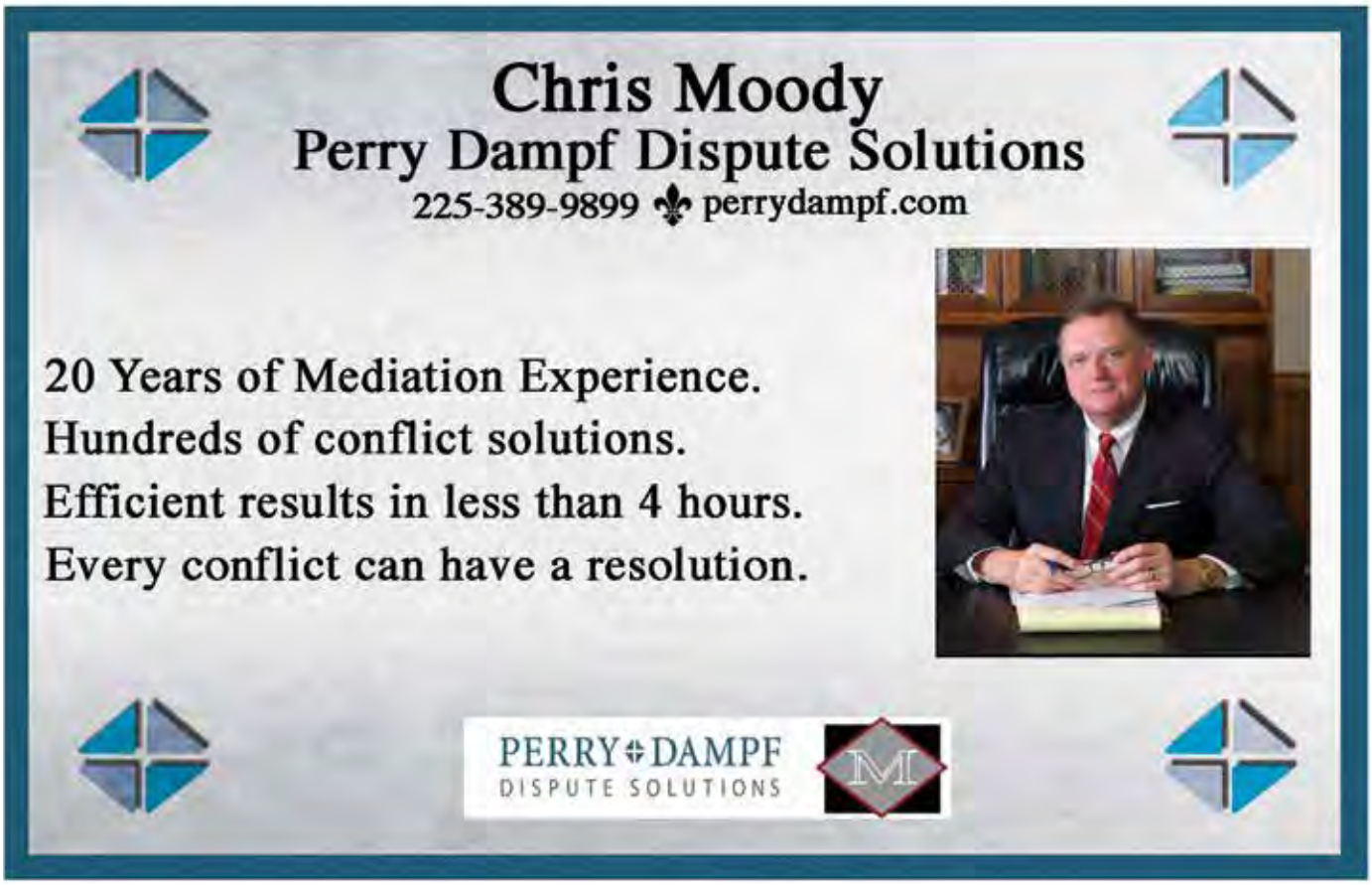
Make-Whole Amount; Post-Petition Interest Rate

Ultra Petroleum Corp. v. Ad Hoc Comm. of Unsecured Creditors (In re Ultra Petroleum Corp.), 924 F.3d 533 (5 Cir. 2019).

Ultra Petroleum Corp. and several affiliates filed for relief under Chapter 11 of the U.S. Bankruptcy Code following the crash of oil prices in 2015. Prior to filing, the debtors issued unsecured notes worth $1.46 billion to various noteholders and took out an additional $999 million in a revolving credit facility. Shortly after filing the petition in April 2016, oil prices rose again, resulting in a solvent debtor and allowing a plan wherein all creditors would be paid in full.

Under the note agreements, the note holders were entitled to a "Make-Whole Amount" to compensate them for lost future interest. The note agreements also provided that the Make-Whole Amount was triggered upon filing bankruptcy. Similarly, the credit facility had an acceleration clause that was also triggered upon filing bankruptcy. Both provisions in the note agreements and the credit facility provided for a contractual default interest rate that was above the federal judgment rate.

The plan proposed by the debtors did not include the Make-Whole Amount or the post-petition interest rate as set forth in the note agreements and the credit facility. Rather, the plan provided that the debtors would pay: 1) the outstanding principal; 2) pre-petition interest at a rate of 0.1 percent; and 3) post-petition interest at the federal judgment rate. The unsecured noteholders were labeled "unimpaired," thereby preventing them from objecting to the plan. The unsecured noteholders argued that because they were deprived of the Make-Whole Amount and the contractual default rate (as opposed to the judgment rate), they were "impaired" and would be "unim-



paired" only if granted the Make-Whole Amount and post-petition interest at the contractual default rate.

The bankruptcy court concluded that unimpairment "requires that creditors receive all that they are entitled to under state law." *In re Ultra Petroleum Corp.*, 575 B.R. 361, 372 (S.D. Tex. 2017). Finding that New York law, which governed the contracts, allowed the Make-Whole Amounts, the bankruptcy court concluded that the unsecured noteholders were impaired by the plan and, thus, entitled to further payment to make them unimpaired. Additionally, the bankruptcy court held that the Bankruptcy Code did not limit contractual default interest rates and, therefore, post-petition interest would be awarded at the contractual interest rate and not the federal judgment rate.

The 5th Circuit granted the direct appeal and reversed the bankruptcy court's ruling that to be unimpaired under 11 U.S.C. § 1124(1), a creditor must receive all that it is entitled to under state law. Section 1124(1) states that a claim is not impaired if "*the plan* . . . leaves unaltered the legal, equitable, and contractual rights to which such claim or interest entitles the holder of such claim or interest" (emphasis added). The 5th Circuit focused on the use of the term "the plan" and followed the 3rd Circuit's holding in *In re PPI Enterprises (U.S.), Inc.*, 324 F.3d 197, 207 (3 Cir. 2003), which held that when the Bankruptcy Code (or other statute) is the source of the impairment, as opposed to the plan itself, there is no impairment under § 1124.

Next, the court embarked on an extensive review of English bankruptcy law and the Bankruptcy Code's adoption of the same. Under English bankruptcy law, the "Solvent-Debtor Exception" allowed interest to continue to accrue on a creditor's claim post-commission (petition) where a contract providing for such interest and sufficient funds in the debtor's estate existed. The court concluded that § 726(a)(5) codified *a version* of the Solvent-Debtor Exception, but not an identical version to it. Under 11 U.S.C. § 726(a)(5), a creditor may receive "payment of interest at the legal rate from the date of the filing of the petition, on any claim paid under paragraph (1), (2), (3), or (4) of this subsection." The court initially noted that under 11 U.S.C. § 1129(a)(7), the best-interest test, as outlined in § 726(a), is available only to *impaired* creditors in Chapter 11 cases, not unimpaired creditors, as the unsecured creditors were here. Thus, § 726 could not be used by these creditors. However, the court noted that the Code was otherwise silent as to interest on unimpaired claims in Chapter 11.

On remand, the court suggested that because the Make-Whole Amounts were only triggered upon filing bankruptcy and were intended to compensate the noteholders for the loss of future unmatured interest on the notes, they were themselves unmatured interest. Section 502(b)(2) disallows any claim "to the extent that . . . such claim is for unmatured interest." 11 U.S.C. § 502(b)(2). Thus, the Make-Whole Amounts would be unallowed by virtue of the Bankruptcy Code, not the plan. However, the court also noted the possibility that because the Code is otherwise silent on interest for unimpaired, unsecured creditors in Chapter 11, the Solvent-Creditor Exception may have survived in the penumbra of the modern Bankruptcy Code, in which case it would act as a carve-out to section 502(b)(2). This determination was left to the bankruptcy court on remand.

As to the post-petition interest rate, the court presented two possibilities. The rate could be based on the general post-judgment interest statute, 28 U.S.C. § 1961, or based on the bankruptcy court's inherent equitable powers, which would allow it to apply the contractual default interest rate if determined to be equitable. Because the bankruptcy court never reached this question, that too was left open on remand.

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Clean Water Act

On Dec. 13, 2018, the Assistant Secretary of the Army for Civil Works issued a policy directive memorandum to the Chief of Engineers for the Army Corps of Engineers establishing a 60-day default period in which states must act on requests for Water Quality Certifications (WQC) under Section 401 of the Clean Water Act (CWA) (33 U.S.C. § 1344). The memorandum also directs the development of guidance concerning the criteria district engineers should use in identifying reasonable timeframes for requiring states to act.

Section 404 of the CWA authorizes the Department of the Army through its Chief of Engineers to issue permits for the discharge of dredged or fill material into waters of the United States, including wetlands (404 permit). 33 U.S.C. § 1344. Before the Corps can issue a 404 permit, however, Section 401 of the CWA requires that the state in which the discharge originates grant a WQC. 33 U.S.C. § 1341(a)(1). According to the general permitting procedure outlined in the CWA and the federal regulations, after an application for a 404 permit is submitted to the Corps, the Corps then requests a WQC from the state. From receipt of the WQC request, the state has 60 days to act, unless the district engineer determines a shorter or longer period is reasonable. 33 C.F.R. § 325.2(b)(ii). This longer period cannot exceed one year from the date the state receives the request. *Id.* and 33 U.S.C. § 1341(a)(1). If the state does not act within the permitted timeframe, then the requirement for the state to issue a WQC is waived and the Corps may issue the 404 permit.

The Assistant Secretary acknowledges in the memorandum that it has become normal practice for the Corps to give the states one year to act on the WQC request. To remedy this practice, the memorandum establishes a default timeframe of 60 days in which the states must issue a WQC. The district engineer may still determine, however, that circumstances require a longer period. But to help district engineers determine what these circumstances should be, the memorandum directs the Corps to draft guidance immediately establishing criteria for identifying reasonable timeframes in which the states must act. The memorandum provides that the type of proposed activity and the complexity of the site that will be impacted are factors that may determine the reasonableness of the timeframe. Of further note is that a state's request for additional time will no longer be approved automatically. Requests by the state for a longer timeframe based on workload or resource issues or insufficient information will not be considered.

This memorandum is the latest effort to make the WQC process more predicable in light of WQC issues impacting recent projects under the jurisdiction of the Federal Energy Regulatory Commission. In addition, although with a more aggressive timeline, this memorandum is consistent with S. 3303 introduced by U.S. Sen. Joe Barasso titled the "Water Quality Certification Improvement Act."

Clean Air Act

Luminant Generation Co. and Big Brown Power Co. have requested a rehearing en banc by the 5th Circuit Court of Appeals of matters that were the subject of an opinion issued on Oct. 1, 2018.

In *United States v. Luminant Generation Co.,* 905 F.3d 874 (5 Cir. 2018), the 5th Circuit examined two important issues on first impression — first, the court determined when a 42 U.S.C § 7475(a) violation accrues as a matter of law; and, second, the court considered whether the federal government's injunctive relief claims are subject to the five-year statute of limitations set by 28 U.S.C. § 2462.18 as it applies to an action to recover civil penalties for violation of the preconstruction requirements of § 7475(a).

On the first issue, the 5th Circuit rejected the United States' argument that a new five-year clock begins to run each day a modified facility operates without a permit. Finding that § 7475(a) relates to construction only and not to post-construction operation, the court joined the 3rd, 7th, 8th, 10th and 11th Circuits in holding that a violation of the § 7475(a) occurs during the construction period. More specifically, the court held that "any claim asserted under § 7475(a) accrues at the moment unpermitted construction commences. "*Id.* at 884.

On the second issue, the 5th Circuit joined the 10th and 11th Circuits in holding that actions brought by the government in its sovereign capacity are exempt from the application of the concurrent-remedies doctrine. In so reasoning, the court cited to the U.S. Supreme Court's holding in *E.I. Du Pont De Nemours & Co. v. Davis*, 44 S.Ct. 364, 366 (1924), that "an action on behalf of the United States in its governmental capacity . . . is subject to no time limitation, in the absence of congressional enactment clearly imposing it." Finding no such congressional enactment, the 5th Circuit held that "the district court erred in dismissing the government's equitable-relief claims under Rule 12(b)(6) based on the concurrent-remedies doctrine."*Luminant* at 887. The decision does not address the merits of the government's injunction action.

Dissenting in part, Judge Jennifer Walker Elrod disagreed with the majority's ruling on the injunction issue, arguing that the forms of injunctive relief requested by the government in this case "are really just time-barred penalties in disguise." *Id.* at 891. Judge Elrod reasoned that "[b]ecause the statute is concerned only with the construction or modification of a facility, and not its subsequent operation, there is no ongoing or future unlawful conduct to enjoin." *Id.* at 889.

The United States and the Sierra Club as intervenor plaintiff have opposed the Texas power plants' request for rehearing in briefs filed on Feb. 12, 2018. The 5th Circuit has not yet ruled on the defendants' petition. Because of the importance of the issues at stake, this case warrants continued monitoring.

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Custody

Lewis v. Lewis, 18-0378 (La. App. 4 Cir. 10/3/18), 255 So.3d 1216.

The trial court did not err in increasing Mr. Lewis' physical custody with the children to a 50/50 schedule, as he had retired and moved from Shreveport to Slidell, closer to Ms. Lewis' residence in New Orleans, such that he was able to ensure the children's attendance and participation at their school. The court confirmed that the time parents who have joint custody spend with their children is "physical custody," not "visitation." The court further found that his retirement from the military was forced, due to his medical condition, and, therefore, he was not voluntarily unemployed. The trial court did not err in reducing his child support, using Schedule B.

O'Neal v. Addis, 52,377 (La. App. 2 Cir. 9/26/18), 256 So.3d 493.

On the mother's rule to modify custody, the trial court found, and the court of appeal affirmed, that there had been no material change of circumstances. Although the father had moved 90 miles away, worked on weekends and left the child with his mother, and the parents had a record of poor communication, the trial court ordered that they maintain the alternating weekly schedule, attend parenting classes and use Our Family Wizard, a co-parenting app. Moreover, the court of appeal affirmed the trial court's setting a six-month review hearing to monitor the child's situation with the alternating-week custody. Although the trial court did not assign a domiciliary parent, the court of appeal found that, given the parties' communication issues, one should have been appointed and remanded to the trial court to name a domiciliary parent.

E.R. v. T.S., 18-0286 (La. App. 5 Cir. 10/11/18), 256 So.3d 551, *writ denied*, 18-1843 (La. 2/18/19), ____ So.3d ____, 2019 WL 927614 (Mem).

Although, during the course of the matter, there were allegations of sexual abuse in different incidents against both children, the trial court did not err in maintaining joint custody, rather than awarding sole custody to the father, as it was in the children's best interest that the joint-custody arrangement remain, albeit with the father named as the domiciliary parent. The trial court made a credibility call, based on the parties' testimony, and discounting a report from DCFS validating a complaint that the mother had abused the parties' son, which the trial court found not to be accurate. Moreover, the complaint was not otherwise validated. Further, the other child's therapist testified that it was in the child's best interest that the joint-custody arrangement remain, as the child would benefit by having both parents in her life on a regular basis. Further, the trial court properly applied the *Bergeron* standard in

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finding that, although there may have been a change of circumstances, it was not in the children's best interest to change the legal custody status as the changes as a whole did not rise to the *Bergeron* standard. The trial court also did not improperly prevent the parties from eliciting expert testimony, even allowing testimony regarding previous incidents that were part of a previous *res judicata* judgment.

Interim Spousal Support

Holly v. Holly, 18-0207 (La. App. 3 Cir. 9/26/18), 255 So.3d 1158.

Because Ms. Holly did not have a motion for final spousal support pending at the time the judgment of divorce was granted, her interim spousal support terminated upon the granting of the judgment of divorce. La. Civ.C. art. 113. The court found that Ms. Holly's general prayer for relief "as law, equity or the nature of the case permit" did not constitute a pending claim for final spousal support under art. 113.

Spousal Support Arrears

Waites v. Waites, 17-0499 (La. App. 4 Cir. 10/10/18), 256 So.3d 539.

After Ms. Waites filed a motion seeking spousal support arrears, Dr. Waites filed a motion to terminate his support obligation based on alleged extrajudicial agreements; and, in the alternative, alleged that he was entitled to a credit for accelerated payments he claimed to have made between 1993 and 1996. After the court granted his request for credit, she appealed, and the court of appeal affirmed. She claimed that he had made no additional payments at all during that period of time. He claimed that they had agreed that, while she was attending law school for these three years, he would provide her additional funds, but he had no written evidence of his payments. The trial court made a credibility decision, believing him and his current wife that payments had, indeed, been made. The court of appeal accepted the trial court's credibility determination. Further, she filed an exception of prescription in the court of appeal, claiming that his alleged credit was prescribed. However, the court of appeal found that even if the claim for credit were prescribed, under La. C.C.P. art. 424, a prescribed claim can be used as an offset or a defense.

Paternity

McLaren v. Foster, 18-0136 (La. App. 3 Cir. 9/26/18), 256 So.3d 383.

Mr. McLaren filed a petition to disavow paternity, and the minor children filed a general denial as well as several exceptions, including a challenge to the constitutionality of La. Civ.C. arts. 185, 186, 187 and 189. After the trial court denied the children's exceptions and ordered DNA tests, the children appealed. The court of appeal found that, as the judgment was not a final judgment or an appealable interlocutory judgment, the court did not have appellate jurisdiction over the matter. Moreover, the court chose not to exercise its supervisory jurisdiction to convert the appeal to an application for supervisory writs because there was no evidence in the record, and, thus, the court could not determine the issues in any event. However, importantly, the court stated: "This does not preclude the minor children from asserting the same arguments in an appeal once a judgment on the disavowal of paternity claim is rendered."

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Notice of Claim by Certified Mail Required

84 Lumber Co. v. Cont'l Cas. Co., 914 F.3d 329 (5 Cir. 2019).

In this case, a second-tier subcontractor (the claimant) provided labor and services to a subcontractor on two Louisiana public school projects. After completion of its work, the claimant filed two sworn statements of claims alleging that it had not been paid in full in connection with the two projects. The claimant sent two emails to the attorney for the general contractor. Attached to the emails were letters from the claimant to the respective project owners on the projects stating that it had not been paid. Thereafter, the claimant filed suit against the general contractor and the payment bond surety alleging unjust enrichment and nonpayment under the Louisiana Public Works Act (the LPWA).

In the lawsuit, the general contractor and surety filed a motion for summary judgment seeking dismissal of the claims asserted against them, arguing that the claimant did not provide the notice required under the LPWA. Specifically, the general contractor and surety argued that La. R.S. 38:2247 requires second-tier claimants to provide written notice of a claim to the general contractor within 45 days of the recordation of the sworn statement and mail such notice by registered or certified mail to the general contractor's Louisiana office. The district court granted the motion for summary judgment, concluding that the notice provided by the claimant was insufficient and dismissing the LPWA claim. The claimant appealed.

On appeal, the claimant contended that the general contractor had actual notice of its claim, which was sufficient to satisfy the requirements of La. R.S. 38:2247. In so arguing, the claimant relied on prior Louisiana appellate decisions including *Bob McGaughey Lumber Sales, Inc. v. Lemoine Co.*, 590 So.2d 664 (La. App. 3 Cir. 1991); *"K" Constr., Inc. v. Burko Constr., Inc.*, 629 So.2d 1370 (La. App. 4 Cir. 1993), *writ denied*, 634 So.2d 391 (La. 1994); and *Nu-Lite Electric Wholesalers, L.L.C. v. Axis Constr. Group, Inc.*, 17-1204 (La. App. 1 Cir. 4/9/18), 249 So.3d 10, *writ denied*, 18-0914 (La. 9/28/18), 253 So.3d 153.

The U.S. 5th Circuit Court of Appeals rejected the claimant's argument. It stated:

> Section 2247 prescribes a specific, two-prong method by which notice must be given: (1) by registered or certified mail (2) to the general contractor's Louisiana office. It says nothing about actual notice, much less email to the general contractor's

lawyer. Because the LPWA "must be strictly construed," and the notice requirements are "clear and unambiguous" and do not lead to absurd consequences, we must apply § 2247 as written.

The court acknowledged the conflicting Louisiana cases law, with some cases requiring a strict interpretation and others seemingly holding that actual notice was sufficient. However, the court stated that the claimants in the other cases were closer to complying with Section 2247 than the case here, and the issue of whether actual notice was received was disputed in this case. The court affirmed the judgment of the district court and held that an emailed notice to the prime contractor's lawyer was not sufficient notice under La. R.S. 38:2247.

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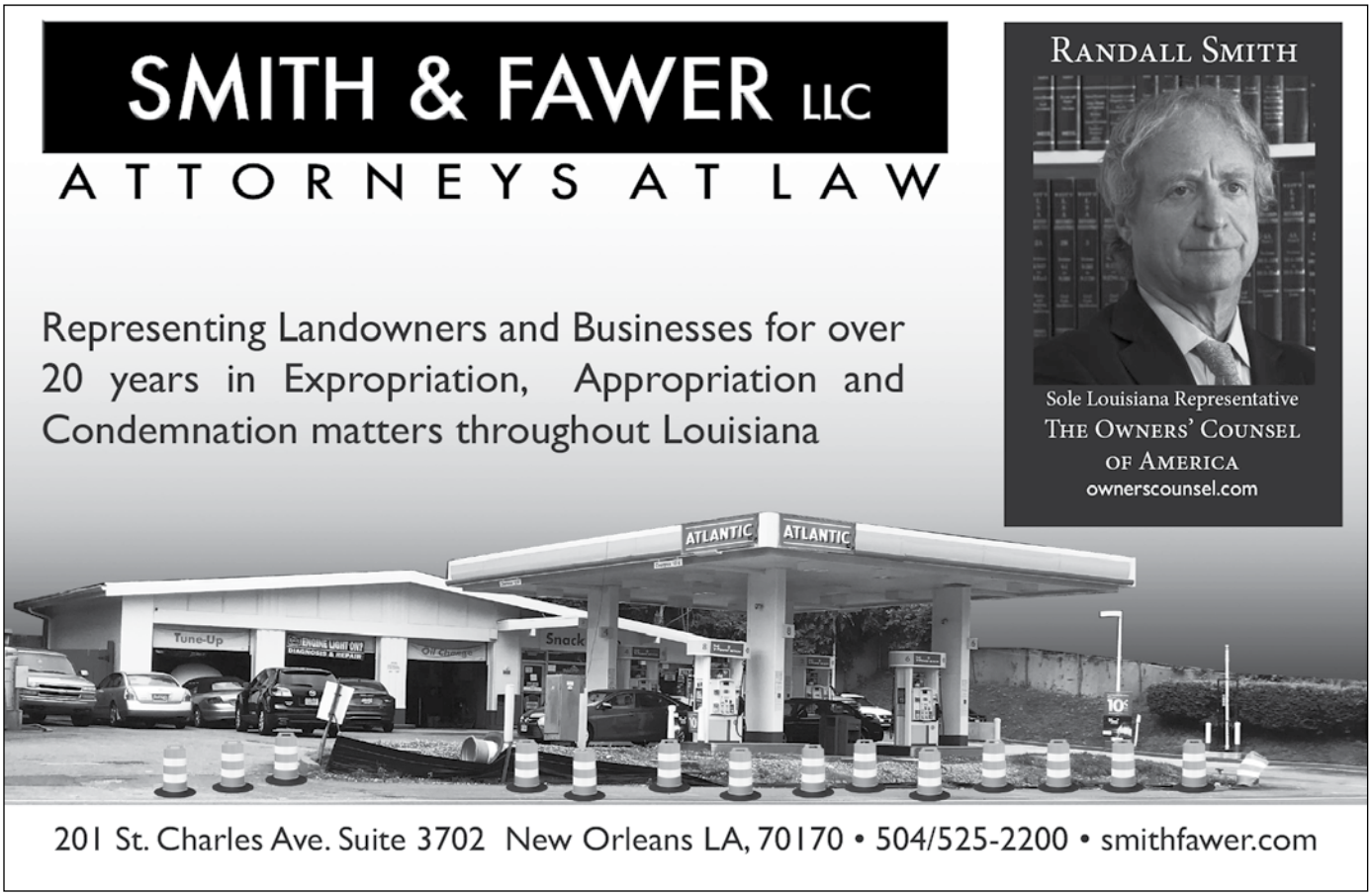
United States

U.S. EEOC v. Global Horizons, Inc., 915 F.3d 631 (9 Cir. 2019).

The U.S. 9th Circuit Court of Appeals issued a sweeping decision with potentially wide-ranging effects on employers using foreign seasonal labor. Many Louisiana agriculture and non-agriculture businesses use temporary foreign labor to satisfy acute seasonal labor needs. The sugar cane, rice, crawfish, shrimp, lawn care and hotel industries are just a few examples of Louisiana businesses that use seasonal foreign labor under either the federal H-2A (agriculture workers) or H-2B (non-agriculture workers) programs.

This case involves charges brought by the EEOC against a pair of Washington State fruit growers for racial and national origin discriminatory treatment of foreign workers under Title VII. The growers hired a labor contractor to supply temporary workers to assist with labor shortages in their orchards. The labor contractor recruited workers from Thailand and brought them to the United States under the H-2A visa program. The H-2A program imposes various requirements on employers, including the provision of housing, meals and transportation (non-wage benefits) to the foreign workers. The growers' contract with the labor contractor delegated to the contractor the responsibility for housing, transportation, food and wages.

The Thai workers complained of various discriminatory and exploitative behavior both during their recruitment in Thailand and at the orchards, including false promises of large wages, excessive recruitment fees for the opportunity to work, poor working conditions, uninhabitable housing, inadequate and dangerous transportation, and lack of food. The district court and circuit court of appeal divided the allegations into



"orchard-related" and "non-orchard related" matters. The labor contractor failed to appear to defend itself against the charges, and the district court entered a default judgment. The growers conceded responsibility for the orchard-related work condition allegations, but disputed responsibility for non-orchard-related matters involving housing, transportation and meals.

The district court granted the growers' motion to dismiss the non-orchard-related allegations because the EEOC had not plausibly alleged that the growers were joint employers of the Thai workers. The court found that non-orchard-related matters like housing, feeding, transporting and paying were outsourced to the labor contractor, and the growers' employment relationship with the workers extended only to orchard-related issues.

The 9th Circuit reversed the district court's finding that the growers were joint employers of the Thai workers for non-orchard-related matters. The 9th Circuit adopted the common-law agency test for determining joint employers under Title VII discrimination actions. The key element of the common-law agency test is control, and the 9th Circuit concluded that the growers were employers under the H-2A program.

In a typical employment relationship, the employer does not have control over non-workplace matters such as housing, meals, and transportation. Employees are usually expected to find their own housing, provide for their own meals, and arrange for their own transportation to and from work. Those matters ordinarily do not constitute terms and conditions of employment, so if an employee experiences discrimination in obtaining adequate housing, for example, the employer would not be liable for failing to stop that discrimination.

The H-2A program establishes a different relationship between an employer and the foreign guest workers it employs. As explained above, the H-2A regulations place on the shoulders of an "employer" (a defined term to which we will return in a moment) the legal obligation to provide foreign guest workers with housing, transportation, and either low-priced meals or access to cooking facilities. Under the regulations, these benefits constitute "material terms and conditions of employment," which must be stated in the job offer provided to all potential H-2A workers. The H-2A program thus expands the employment relationship between an H-2A "employer" and its workers to encompass housing, meals, and transportation, even though those matters would ordinarily fall outside the realm of the employer's responsibility.

Id. at 639-40 (citations omitted).

The terms of the contract between the growers and the labor contractor did not change the analysis. The 9th Circuit acknowledged the contractual delegation of non-orchard-related responsibility to the labor contractor, but the growers' legal obligations as "employers" under the H-2A program arise as a matter of law and cannot be contractually avoided. *Id.* at 640.

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Courts Should Consider Rejected Settlement Offers When Deciding Attorney's Fees to Prevailing FLSA Plaintiff

The U.S. 5th Circuit Court of Appeals held that district courts may consider a plaintiff's decision to reject a Rule 68 settlement offer more favorable than the judgment she ultimately obtained at trial in determining the amount of attorney's fees that should be awarded. *See, Gurule v. Land Guardian, Inc.*, 912 F.3d 252, 255 (5 Cir. 2018). In doing so, the 5th Circuit joined a number of other federal appellate courts — including the 3rd, 4th, 6th, 7th, 9th and 10th Circuits — that have all adopted the same view. *See, Lohman v. Duryea Borough*, 574 F.3d 163, 167-69 (3 Cir. 2009); *Sheppard v. Riverview Nursing Ctr., Inc.*, 88 F.3d 1332, 1337 (4 Cir. 1996); *McKelvey v. Sec'y of U.S. Army*, 768 F.3d 491, 495 (6 Cir. 2014); *Moriarty v. Svec*, 233 F.3d 955, 967 (7 Cir. 2000); *Haworth v. Nevada*, 56 F.3d 1048, 1052 (9 Cir. 1995); and *Dalal v. Alliant Techsystems, Inc.*, 182 F.3d 757, 761 (10 Cir. 1999).

In *Gurule*, four employees who worked at a Houston nightclub filed suit against their employer, alleging that the company had violated the minimum wage and overtime requirements of the Fair Labor Standards Act (FLSA). One of the employees settled his claims shortly after the case was filed, and two other plaintiffs' claims were later dismissed on summary judgment. This left only one employee who proceeded to trial on her FLSA claims. After a one-day trial, the jury returned a verdict in favor of the plaintiff and awarded her a total of $1,131.39 in compensatory damages, which the district court later doubled as liquidated damages. The employee then filed a motion seeking an award of $129,565 in attorney's fees pursuant to the FLSA's fee-shifting provision. *See,* 29 U.S.C. § 216(b). The district court awarded only $25,089.30 in attorney's fees, citing, *inter alia*, the fact that the damages awarded to the plaintiff were less than each of the four Rule 68 settlement offers she had received from the employer over the course of the litigation. An appeal followed.

The 5th Circuit affirmed. In its opinion, the court noted that the "degree of success" is commonly recognized as the most important factor in determining a reasonable attorney's fee. *Id.* at 261. "In measuring that success," the court continued, "a court should ask whether the party would have been *more* successful had his attorney accepted a Rule 68 offer instead of pressing on to trial." *Id.* In the case before it, the employee had spurned multiple Rule 68 offers ranging from $1,500 to $5,000 and decided to proceed to trial. Ultimately, however, she was able to recover only $1,131.39 in compensatory damages, meaning that her efforts in the lawsuit had actually been financially counter-productive. A court is not required to "close its eyes to the reality that plaintiff's post-offer legal work produce[d] a net loss," the panel concluded. *Id.* (quoting 12 Charles Alan Wright and Arthur R. Miller, Fed. Practice and Proc. § 3006.2 (3d ed. 2018)). Thus, because the district

properly considered the rejected Rule 68 offers in ordering a substantial reduction to the plaintiff's fee award, the 5th Circuit affirmed the district court's judgment.

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LOWLA Lien; Mineral Servitude

Marlborough Oil & Gas, L.L.C. v. Baker Hughes Oil Field Operations, Inc., ____ So.3d ____ (La. App. 1 Cir. 11/14/18), 2018 WL 5961770.

Marlborough Oil & Gas, L.L.C., owned a mineral servitude in the Baton Rouge area. Two wells were located on the property — the Marlborough No. 1 and the Marlborough No. 3 (wells). Northwind Oil & Gas, Inc. obtained a lease from Marlborough to operate the wells. In 2012, Baker Hughes provided certain labor, equipment, machinery and materials to Northwind in connection with its operation of the Marlborough No. 3 well (No. 3 well). Northwind failed to pay Baker Hughes more than $412,000 for services rendered.

Baker Hughes later filed a lien pursuant to the Louisiana Oil Well Lien Act (LOWLA, La. R.S. 9:4861-4873) in the mortgage records of West Baton Rouge Parish. It also filed a lawsuit and a notice of *lis pendens* regarding the lawsuit in the mortgage records. In 2013, Baker Hughes filed and prevailed on a motion for summary judgment against Northwind. Baker Hughes was awarded $412,415.54 in damages plus attorney's fees, interest and costs by the trial court.

Four years later, Marlborough sought a declaratory judgment that the Baker Hughes judgment did not affect or encumber Marlborough's servitude or any tubing, casing, equipment, pipelines or other constructions situated on the lease. Baker Hughes denied that Marlborough was entitled to this relief. In support of its position, Marlborough filed a motion for summary judgment. After a hearing, the trial court ruled in Marlborough's favor, finding that the Baker Hughes judgment did not have any effect as to: (1) Marlborough's successors, lessees and assigns; and (2) the mineral servitude owned by Marlborough affecting the leased property described in the judgment.

Baker Hughes appealed to the Louisiana 1st Circuit Court of Appeal. Baker Hughes enumerated four assignments of error, but only the first two assignments were considered by the appellate court. In its first two assignments of error, Baker Hughes contended that the trial court erred in granting summary judgment because the record showed that it fully complied with the requirements of LOWLA when it secured its lien and obtained the judgment at issue. In reviewing the statutory requirements set forth in LOWLA, the appellate court agreed and found that Baker Hughes *did comply* with all of the requirements of LOWLA — it filed its lien on time; its lien contained the proper lease description; etc. Thus, the appellate court ultimately found that the Baker Hughes judgment, in fact, did affect the lease as a whole, not just the well for which the services and materials were provided (here, the No. 3 well).

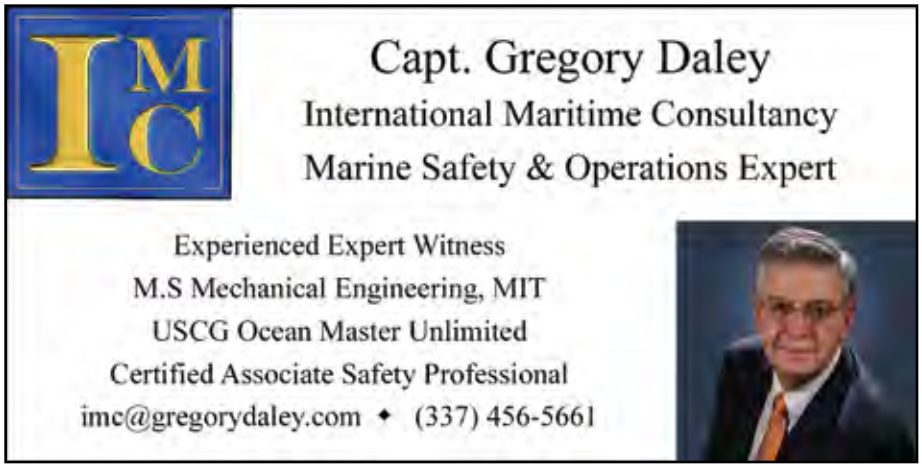
Marlborough argued that the Baker Hughes judgment should not have any effect on the Marlborough servitude because the operating interest giving rise to Baker Hughes' lien and judgment expired. The appellate court dismissed this argument, however, finding that Marlborough failed to produce any evidence showing that other wells (aside from the No. 1 and No. 3 wells) were not maintaining the lease. Because Marlborough failed to meet its burden of proof on the expiration of the lease, the appellate court refused to accept Marlborough's argument. The appellate court further found that Baker Hughes' lien and judgment affected only *the lessee's interests under the existing lease*, not any hydrocarbons owed to the lessor, nor would it affect any new lease that Marlborough might grant.

Interruption of Prescription of Non-Use; Shut-In Well

Gilmer v. Principle Energy, L.L.C., 52, 218 (La. App. 2 Cir. 9/16/18), 256 So.3d 1139.

In April 2008, plaintiff signed a royalty conveyance of 50 percent of 1/5th of 8/8ths interest in six tracts to Regal Energy, L.L.C., which later became Principle Energy, L.L.C. The conveyance provided that the deed "shall have a prescriptive period of three years," rather than the usual 10 years provided by Louisiana mineral law. It also provided that a shut-in well could perpetuate the deed.

Six months later, XTO Energy spudded the E.B. Brown No. 1 well on plaintiff's property. When the well was tested, it showed that it could produce 1,156 MCF of gas per day, but it was never put into production because a pipeline was not available. Thus, the well was shut-in. In May 2009, the Louisiana Commissioner of Conservation created a compulsory unit,



designating the Brown well as the unit well. The Davis well, a later-drilled producing well, was named as an alternate unit well.

Plaintiff attempted to have the operator release the deed on prescription grounds because more than three years had passed since the royalty deed was conveyed and there was no production. When that effort failed, plaintiff sued. The parties filed cross-motions for summary judgment based on prescription of non-use. The trial court found that *prescription had been interrupted* pursuant to La. R.S. 31:90-91 by the Commissioner's order creating a unit on which there existed a shut-in well capable of producing in paying quantities. Plaintiff appealed. The Louisiana 2nd Circuit Court of Appeal affirmed, holding that prescription of non-use had been interrupted on (and had commenced anew from) the date that the unit was created.

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Competency of Expert Witnesses: Whose Rules Apply?

Coleman v. United States, 912 F.3d 824 (5 Cir. 2019).

In response to the defendant's motion for summary judgment, the plaintiff offered reports from two medical experts to support her claims under the Federal Tort Claims Act (FTCA). The magistrate judge disallowed one report but accepted the testimony of the other expert over the defendant's objection. The defendant argued that Texas law required medical experts in malpractice suits to be "practicing medicine" at the time of the testimony or at the time the claim arose; however, the magistrate judge determined that state law did not apply to a FTCA claim. The district judge disagreed, ruling that a federal court hearing a malpractice claim under the FTCA was required to apply Federal Rules of Evidence and state court rules of evidence when determining the competency of medical experts. Thus, both experts were stricken, and summary judgment was granted.

The appellate court noted that one section of Texas' requirements allowed courts to "depart from those criteria if, under the circumstances, the court determines that there is a good reason to admit the expert's testimony." Overall, the appellate court reasoned that not all contingencies had been considered and wrote:

> In summary, the district court was correct in its determination that Federal Rule of Evidence 601 requires that Coleman's proffered expert witness must satisfy the state law standards for expert witness competency in addition to the Federal Rule of Evidence 702 standards for the admissibility of expert witness testimony. However, because the district court erred in its determination that it was undisputed that Coleman's proffered expert failed to meet those state law standards, and also [because the district court] failed to consider whether there was "good reason" for excusing that requirement, we VACATE and REMAND for further proceedings consistent with this opinion.

Prescription

Mantiply v. Hoffman, 18-0292 (La. App. 3 Cir. 1/16/19), ____ So.3d ____, 2019 WL 208738.

The patient appealed a jury verdict that found no standard of care had been breached. The defendant doctor's response to the appeal included the assertion that the trial court had erred in denying his exception of prescription, contending that the patient had sued his employer (VA Hospital) but did not name him as a defendant until years later. The prescription exception was denied prior to the trial, and the defendant's writ to the appellate court was denied. The appellate court noted, however, that the previous writ denial did not preclude reconsideration of the issue on appeal, nor did it prevent the appellate court from reaching a different conclusion.

The patient had been treated by the defendant at a VA hospital, and the hospital had been timely sued. The plaintiff did not learn until more than a year later that the defendant doctor was not an employee of the VA but instead was an independent contractor. However, the appellate court noted that when the patient presented to the VA, he was treated by the defendant, "who was wearing VA medical center attire," and that the VA defended against the patient's claims until advising him, more than a year after the claim was filed, that the defendant was not a VA employee. Considering that it would not be necessary to name the defendant doctor if he were a VA employee, the appellate court found that *contra non valentem* applied to stop the running of prescription, affirming the trial court's denial of the defendant's exception. Nevertheless, the appellate court then decided that the jury verdict was neither manifestly erroneous nor clearly wrong, and the jury's no-breach verdict was affirmed.

Admissibility of Panel Opinions

Sanderson v. Tulane Univ. Hosp. & Clinic, 18-0588 (La. 6/15/18), 245 So.3d 1043.

The trial court disallowed the introduction into evidence of the panel opinion after deciding that there was a conflict of interest between a panel member and a defendant. In this 4-3 *per curiam* opinion, the Louisiana Supreme Court opined that, absent "allegations that the medi-

cal review panel superseded its statutory authority," the panel opinion is subject to "mandatory admission." The majority concluded that "[t]he mere fact that a member of the panel may not have disclosed a potential conflict of interest is not a ground for automatic exclusion of the panel's opinion," adding that the plaintiff would have "an adequate opportunity to explore any potential bias" at the trial during cross-examination, thus allowing the factfinder to assign appropriate weight to the panel opinion.

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Steel: Further Processing Exclusion

Arcerlor Mittal Laplace, L.L.C. v. St. John the Baptist Par. Sch. Bd.., BTA Docket No. L00187 (1/8/19).

Arcerlor Mittal Laplace, L.L.C. (taxpayer) disputed the taxability of several transactions surrounding its production of low-carbon steel at its mill in LaPlace, La. The taxpayer raised three principle issues as detailed below. Based thereon, the taxpayer sought various refunds.

First, the taxpayer asserted that sales tax was excluded on its purchases of cylindrical carbon electrodes used to dissolve carbon into scrap metal under the further-processing exclusion provided by La. R.S. 47:301(10)(c)(i)(aa) (Further Processing Exclusion). The Louisiana Board of Tax Appeals (board) held that the carbon from the electrodes was a "recognizable, identifiable and beneficial component of the Taxpayer's end product." The board found the real issue was whether the electrodes were purchased for the purpose of inclusion into the taxpayer's end product. The board held that the taxpayer's use of the electrodes was to heat scrap metal, the taxpayer did not show the electrodes were purchased for the purpose of adding carbon to the taxpayer's steel, and thus the addition of carbon from the electrodes was incidental to the electrodes use as a heat source. Therefore, the board held the electrodes did not qualify for the Further Processing Exclusion.

Second, the taxpayer sought qualification under the Further Processing Exclusion for various chemicals that are injected into the scrap metal after the scrap metal melts into a liquid state, after the taxpayer hired the third party to remove these excess chemicals from the taxpayer's furnace (slag chemicals). Specifically, the issues raised were whether the slag chemicals were "actually produced for resale, and whether the Slag Chemicals were purchased for the purpose of inclusion in the Taxpayer's end-product." The board first determined that the agreement between the taxpayer and a third party was a sale for resale under Louisiana tax law because the taxpayer gave possession of the slag chemicals in exchange for valuable services. The taxpayer received a benefit in the form of cheap access to raw materials. Next, the board determined that the slag chemicals qualified for the Further Processing Exclusion as they were purchased for the purpose of inclusion in the slag because the evidence showed an intent to produce and exchange slag, and the taxpayer purchased the slag chemicals with the intention that they would "oxidize with impurities in molten scrap metal and form Slag."

Third, the taxpayer sought to classify the (1) electric-arc furnace, (2) natural-gas-fired furnace, (3) caster, (4) flocking tank and (5) truck scale located in the steel mill as immovable property so repairs to these items would be non-taxable services. First, the board concluded that it could not be determined whether the caster, flocking tank, natural-gas-fired furnace and truck scale were immovable because the photographs of the steel mill submitted as evidence did not show whether these things were connected to their surrounding structures or if the things could be moved without substantial damage to them. Based on the photographic evidence, the board concluded that the repairs to the electric-arc furnace were not taxable as the item was immovable because of its thorough connection to the mill and substantial damage would be caused by its removal.

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Property Tax and Use Tax Developments Keep Things Interesting

In a property tax sale case, *Deichmann v. Moeller*, 18-0358 (La. App. 4 Cir. 12/28/18), ____ So.3d ____, 2018 WL 6823153, the 4th Circuit Court of Appeal held that a tax sale was an "absolute nullity," finding that the pre-sale tax-notification requirements were not met. The court of appeal was reviewing a district court holding declaring the sale a "nullity," without further comment. The district court also held that the tax-sale purchaser was entitled to recover taxes and costs paid as well as penalties and interest. Because the lower court's decision was premised on a finding that the property was being redeemed, the applicable penalty rate was 5 percent and 12 percent interest per year. As part of the lower court's decision, the sale would be null only if, within one year, the owner made full and complete payment to the purchaser.

The court of appeal, however, reversed the lower court's findings, specifically finding that the sale was an "absolute nullity" on the basis that the pre-tax sale publication requirements had not been satisfied, resulting in a violation of the owner's due process rights. As the sale was an absolute nullity, no penalty was applicable, and the interest rate was reduced to 10 percent. Finally,

the appellate court noted that there is no requirement under the circumstances that payment be made within one year as, unlike governmental liens that must be repaid within one year, there is no similar requirement under the law for a repayment period in connection with an absolute nullity.

For those following use-tax developments (generally, use taxes apply in those instances when sales taxes don't), *Frank's Int'l, L.L.C. v. Kimberly Robinson*, BTA Dkt. No. 10050D (12/11/18), stands for the proposition that there is no use tax on the importation of property if there is no "use" in the state. In *Frank's International*, the Louisiana Board of Tax Appeals held that manufactured or purchased tools stored in the state for use in customer jobs or for the taxpayer's own use in federal waters were entitled to a use tax refund because the tools were not stored for use or consumption within Louisiana. The board also concluded that there were alternative grounds for exempting the tools from use tax because the manufactured tools were manufactured for export outside Louisiana, the purchased tools were purchased for resale or lease to the taxpayer's customers, and the tools intended for use in federal waters were exempt because they were purchased or manufactured for first use offshore beyond the territorial limits of any state. In so holding, the board also noted that the Department failed to request or contest the taxpayer's supporting documentation related to the refund claim and that the Department apparently denied the refund claim solely because of the taxpayer's participation in a tax amnesty program.

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Who Owns the Lift Station?

In *Fontenot v. Town of Mamou*, 18-0301 (La. App. 3 Cir. 12/19/18), 2018 WL 6630268, the 3rd Circuit analyzed the ownership of a lift station that was maintained by the Town that was located primarily on Fontenot's property. Although nothing was filed in the conveyance records regarding the lift station, the mayor stated he was unaware of any prior owner disputing the Town's ownership or denying access to the lift station. The trial court held the Town acquired ownership of the immovable property through 30-year acquisitive prescription because the Town possessed and maintained the lift station since 1982.

A precarious possessor is one who exercises possession with permission from the owner, and only possesses for himself after giving the owner actual notice of its intent to possess as owner. Acquisitive prescription does not run in favor of a precarious possessor. While evidence was presented that the landowners permitted construction of the lift station and did not interfere with maintenance or operation of it, there was no evidence presented that the Town gave actual notice of its intent to possess as owner; therefore, the Town's precarious possession never terminated. Accordingly, the 3rd Circuit held the Town was not the owner of the land beneath the lift station.

Fontenot also asserted ownership of the lift station on the grounds that buildings and other constructions permanently attached to the ground are presumed to be owned by the ground owner. If constructed on the land of another with his consent, the constructions belong to the person who constructed them only if that separate ownership is evidenced by an instrument filed for registry. The appellate record contained no recorded evidence of separate ownership. The 3rd Circuit remanded the case to the district court for further proceedings on this issue.

How Much Incapacity Is Required to Be Forced Heir?

In *Succession of Heyd*, 18-0385 (La. App. 3 Cir. 12/6/18), 261 So.3d 74, a will was challenged on the grounds that a permanent incapacity rendered a child a forced heir. The will stated that the testator had no forced heirs. Appellant presented evidence that he was gored by a goat and had to undergo a craniotomy, which caused personality changes, cognitive impairment, seizures and a determination of disability by the Social Security Administration, the State of Louisiana and the insurer for his then-employer. Notwithstanding, the trial court held that the appellant was not a forced heir.

The appellant's doctor stated that the appellant had not refilled his seizure medication in years and had no medical limitations placed on him. The doctor further stated that appellant's "disability, if currently existent, is minimal and does not materially affect the handling of his affairs." Evidence was presented that appellant owned and operated an exotic animal breeding and sales business. Another doctor stated the appellant was incapacitated only during the time of a seizure. Consequently, the 3rd Circuit affirmed, finding that appellant was not a forced heir because of his ability to work.

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