Mail Box Rule Applies to Administrative Appeals of Contracting Officer's Final Decisions

Tessada & Associates, Inc., ASBCA No. 59446 (April 21, 2015).

In 2009, the National Aeronautics and Space Administration (NASA) awarded a Federal Acquisition Regulation (FAR)-type contract to Tessada & Associates, Inc. On July 31, 2013, Tessada submitted a certified claim to the NASA contracting officer responsible for the subject contract's administration. A "claim" is a form of contract dispute in which contractors seek relief from actions and events that occur after contract award in a FAR-type contract. *See generally*, FAR Subpart 33.2. On April 25, 2014, the contracting officer emailed Tessada the contracting officer's final decision denying the claim.

In response, Tessada sent a notice of appeal of the final decision to the Armed Services Board of Contract Appeals (ASBCA) by Federal Express on July 22, 2014, which ASBCA received on July 25, 2014 (91 days after Tessada received the final decision). By U.S. mail, he also sent a copy of the notice to the contracting officer on July 24, 2014 (90 days after Tessada received the final decision), which the contracting officer received on Aug. 26, 2014. The copy sent to the contracting officer bore a July 24, 2014, postmark.

The ASBCA reviews administrative appeals of final decisions under the Contract Disputes Act, 41 U.S.C. §§ 7101-7109. ASBCA is one of four boards of contract appeals that are available to potential appellants dissatisfied with contracting officers' final decisions as an alternative to pursuing litigation at the Court of Federal Claims for contract disputes that occur after contract award. The others are the Civilian Board of Contract Appeals, the Postal Service Board of Contract Appeals and the Tennessee Valley Board of Contract Appeals. The board one appeals to depends on the government agency involved. ASBCA has jurisdiction to decide appeals regarding contracts made by the Department of Defense or an agency that has designated ASBCA to decide the appeal, like NASA in this case. ASBCA is the largest board and issues the majority of decisions. ASBCA consists of 20 to 30 administrative judges who handle between 500-900 appeals a year.

To be considered timely, an appeal of a final decision to a board of contract appeals must be made within 90 days from when the potential appellant receives the final notice. *See generally*, 41 U.S.C. § 7104(a). In this case, ASBCA *sua sponte* raised the issue of timeliness, and, as such, jurisdiction to hear the matter. The government declined to take a position on whether Tessada's notice of appeal was timely. It is important to note that ASBCA is considered to "liberally construe" timeliness. *See generally, AIW-Alton, Inc.*, ASBCA No. 46917, 94-3 BCA 27,279.

ASBCA has held that, when a notice of appeal is mailed via the U.S. Postal Service, "the date of filing an appeal is the date of transfer to [the] U.S. Postal Service." *Thompson Aerospace, Inc.*, ASBCA Nos. 51548, 51904, 99-1 BCA 30,232 at 149,569. However, a notice carried by commercial courier is deemed filed on the date the notice is delivered to ASBCA. *See, Bay Gulf Trading Co.*, ASBCA No. 54122, 03-2 BCA 32,297 at 159,805 (*citing, Tyger Constr. Co.*, ASBCA Nos. 36100, 36101, 88-3 BCA 21,149 at 106,781).

Citing to its own opinion in *Thompson Aerospace*, ASBCA noted that "filing the notice with the contracting officer is tantamount to filing an appeal with this Board." 99-1 BCA 30,232 at 149,569 (*quoting, McNamara-Lunz Vans & Warehouses, Inc.*, ASBCA No. 38057, 89-2 BCA 21,636 at 108,856). In *Thompson Aerospace*, ASBCA also recognized, as was in the case at hand with Tessada, that this rule applies even when a contractor attempts timely service directly on the ASBCA. In Tessada's case, the ASBCA found "no good reason why the USPS 'mail box' filing rule should not equally apply to notices of appeal mailed to the [contracting officer]." Subsequently, ASBCA applied the rule to Tessada's notice that was sent by U.S. mail to the contracting officer and postmarked July 24, 2014, 90 days after Tessada received the final decision. The reasoning by ASBCA resulted in the board finding Tessada's notice of appeal to be timely under the Contract Disputes Act, where it otherwise would not have, and therefore, ASBCA had jurisdiction over the appeal.

While ASBCA is bound by the Act's "90-day timeliness rule," this decision is one in a line of decisions that suggests the Board will try to find ways to get the notices to fit within the statutory scheme. Counsel advising appellants who may have waited to obtain counsel or take action on a final decision, possibly "well after" the appellant received it, should be familiar with this decision as a possible appeal saver.

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The Race to Finalize the Cycle of Armstrong's Arbitration

Lance Armstrong, a U.S. cyclist who was stripped of seven consecutive Tour de France titles in 2012 following a doping scandal, faces a $10 million sanction issued by a Texas arbitration panel in favor of SCA Promotions, a risk-management company specializing in event and sports promotions that Team Armstrong selected to protect the financial interests of team owners and sponsors, *www.scapromotions.com*. This was the same Texas arbitration panel that awarded Armstrong $7.5

million nine years earlier through an Agreed Final Arbitration Award based on a settlement agreement between Armstrong and SCA. The settlement agreement was negotiated in response to Armstrong's 2006 claim against SCA for its failure to pay him $5 million in satisfaction of his rights under a "Contingent Prize Contract" between the parties. Some nine years later, after Armstrong publicly acknowledged his use of performance-enhancing drugs, SCA moved the panel to reconvene arbitration and requested sanctions and forfeiture against Armstrong. The panel then returned a $10 million sanction against Armstrong in favor of SCA.

Texas and U.S. jurisprudence offer little guidance as to when an arbitration panel may exercise jurisdiction or authority to entertain or award sanctions. However, the majority of the arbitration panel in the present case concluded that, although arbitration tribunals have jurisdiction over only those parties and issues affirmatively delegated to them, the parties, through the settlement agreement and in the anticipation of potential future disputes, provided for continuing jurisdiction over this matter to this specific arbitration panel. *Stolt-Nielsen S.A. v. Animal Feeds Int'l Corp.*, 130 S.Ct. 1758 (2010). Armstrong's use of the panel on two prior occasions to affirmatively seek relief, including seeking sanctions against SCA, further evidenced his acceptance of the panel's jurisdiction.

Although the majority could not point to a specific Texas law on point, it cited Armstrong's "bad faith" and the "implied covenant to cooperate," including the "the obligations of parties to be truthful, to not commit perjury and to not intentionally submit fraudulent evidence in arbitrations," as authority to issue a sanction against Armstrong. The majority found that the "employment of perjured testimony and fraudulence [sic] prevented the Tribunal from performing those obligations which were owed to all of the parties participating in the arbitration." Based on jurisdiction delegated in the original settlement agreement and Armstrong's failure to admit to doping prior to the original settlement, the panel awarded SCA $7.5 million originally paid to Armstrong, along with $2 million in attorney fees and another $500,000 in "additional cost insusceptible of precise calculation."

The dissenting arbitrator, Ted Lyon, labeled the sanctions as a product of the "do right rule" — "it doesn't matter what the law is, let's just do what is right." SCA's motion to reconsider was, in his opinion, foreclosed based on the language of the settlement agreement that it was the intent of the parties for the agreement to be "[f]ully and forever binding on The Parties . . ." and that both parties expressly waived any right to "challenge, appeal or attempt to set aside the Arbitrator Award." Moreover, SCA had much motivation for the settlement to constitute a final agreement on the matter — the company was accused of engaging in selling insurance in Texas without a license, which, if true, would expose SCA to possible liability for treble damages and attorney fees. The confidentiality agreement in the settlement kept the finding that SCA had engaged in license-less insurance sales from being disclosed to the Texas Department of Insurance.

SCA is currently seeking a declaration by a Texas court that the arbitration panel's reconsidered award is a final judgment. It is difficult to predict the outcome of this battle as such an award is unprecedented and unsupported by legal provisions or jurisprudence. There is, however, a federal case on point that indicates the district court's "review of an arbitration award is extraordinarily narrow." *Antwine v. Prudential Bache Sec., Inc.*, 899 F.2d 410, 413 (5 Cir. 1990). Armstrong's legal counsel urges that the initial voluntary settlement constituted a "final and binding settlement" and preempts any ruling to the contrary — an opinion only Lyon, the dissenter in the arbitration, found convincing. The results of the Texas court's decision are bound to be contentious and cause waves in the arbitration world. Ultimately, either a former athletic champion is permitted to collect on his wrongfully procured winnings or a license-less prize insurer is permitted to forge the way for a slippery slope of arbitration awards to be "re-litigated eight years [after the fact] or to infinity" (Lyon's dissent, the reconsidered arbitration decision).

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Bankruptcy Law

Orders Denying Plan Confirmation Are Not Final, Appealable Orders

Bullard v. Blue Hills Bank, 135 S.Ct. 1686 (2015).

A Chapter 13 debtor proposed a plan of repayment, and the debtor's secured lender objected to the plan. The bankruptcy court denied confirmation of the plan, and the debtor appealed. The 1st Circuit Bankruptcy Appellate Panel ruled that the order denying confirmation was not a final, appealable order; however, it heard the appeal as an interlocutory appeal. After the appellate panel affirmed the bankruptcy court's order, the debtor appealed to the 1st Circuit Court of Appeals, which dismissed the appeal due to a lack of jurisdiction. The 1st Circuit held the order denying plan confirmation was not a final order; thus, it did not have jurisdiction to hear the appeal.

The issue before the Supreme Court was whether an order denying confirmation of a plan is a final, appealable order. In a unanimous decision, the Supreme Court held that such an order is not a final, appealable order as long as the debtor is able to propose another plan.

In bankruptcy cases, orders are immediately appealable "if they finally dispose of discrete disputes within the larger case." *Id.* at 1692. That concept is incorporated into Section 158(a) of Title 28, which provides that bankruptcy appeals as of right may be taken from "final judgments, orders, and decrees . . . in cases and *proceedings*." 28 U.S.C. § 158(a) (emphasis added).

In *Bullard*, the Supreme Court found that the relevant "proceeding" is the entire process of attempting to confirm a plan that would allow the bankruptcy to proceed forward, rather than a separate "proceeding" for each proposed plan as argued by the debtor. The Supreme Court reasoned that "only plan confirmation — or case dismissal — alters the status quo and fixes the rights and obligations of the parties." *Bullard*, 135 S.Ct. at 1692. However, when a plan is denied and the debtor is able to amend that plan, the automatic stay remains in place, the parties' rights and obligations are not fixed, and the debtor is still able to obtain a discharge; therefore, nothing is final for purposes of an appeal.

The Supreme Court also reasoned that orders denying confirmation are not final because: (1) the text of 28 U.S.C. § 157(b)(2)(L) lists as a "core proceeding" in a bankruptcy "confirmations of plans" but does not list denials of plans; (2) immediate appeals of denied plans would result in delay and inefficiencies that would defeat the purpose of final orders; and (3) if a debtor is not able to obtain an immediate appeal, he would be encouraged to work with his creditors to achieve a confirmable plan. The Supreme Court acknowledged that debtors will still have the ability to appeal orders denying plan confirmation through interlocutory appeals.

Notice Required Before Imposing Criminal-Contempt Sanctions and Entering Injunctions

Wheeler v. Collier, 596 F. App'x. 323 (5 Cir. 2015).

McBride & Collier and its partners (collectively, the appellants) advertised and performed "No Money Down" bankruptcies and paid the court costs up front. McBride & Collier represented the debtor, Dorothy May Wheeler, in her Chapter 7 case. Wheeler filed an adversary proceeding alleging Collier debited her bank account in violation of 11 U.S.C. §§ 362 and 524, and that the appellants acted as "debt relief agencies" and, thus, violated 11 U.S.C. §§ 526(c) and 528(a) by failing to provide her with a clear fee agreement.

The district court entered a minute entry that counsel should be prepared to present evidence and argue at a hearing whether the appellants (1) violated 11 U.S.C. § 528 and (2) should be held in contempt under 11 U.S.C. § 105 for violating the discharge injunction under 11 U.S.C. § 524(a)(2). The district court entered judgment in favor of the debtor, finding the appellants (1) violated 11 U.S.C. §§ 526 and 528, and (2) were in contempt under Section 105 for violating the discharge injunction. In addition to disgorgement of their fees, punitive damages and attorneys' fees, the district court imposed $10,000 as sanctions for contempt payable to the clerk of court and ordered the appellants to cease and desist all "No Money Down" bankruptcies and remove and cancel any advertisements of "No Money Down" bankruptcies. The appellants appealed the $10,000 sanctions and injunctions.

On appeal, the 5th Circuit vacated the imposition of the $10,000 in sanctions and the injunctions entered against the appellants. With respect to the sanctions, the court held that the $10,000 constituted criminal-contempt sanctions and that the minute entry failed to provide sufficient notice that the hearing constituted a criminal-contempt proceeding. The 5th Circuit found that the minute entry referenced only contempt pursuant to 11 U.S.C. § 105 for violating the discharge injunction, and that 11 U.S.C. § 105 provides grounds for only civil contempt. Therefore, the 5th Circuit held that the minute entry did not provide sufficient notice for a criminal-contempt proceeding. Similarly, the 5th Circuit held the minute entry did not even suggest that the district court was considering enjoining the appellants for their "No Money Down" bankruptcy practices, and, therefore, the district court failed to provide sufficient notice to the appellants to properly enter an injunction against them. Accordingly, the 5th Circuit vacated the order with respect to the sanctions and injunction and remanded.

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Law Progressing with Technology

Act Number 84 of the 2015 Louisiana Regular Legislative Session works to bring the law up to speed with the world's technological advancements. The Act amends La. C.C.P. art. 2639 by adding subpart (9), which recognizes electronic signatures on promissory notes, if obtained in accordance with the Louisiana Uniform Electronic Transactions Act.

The Act further amends subpart (F) of La. C.C.P. art. 2637 by including electronically signed documents among those that need not be authentic.

Going further, the Act amended the definition of "record" under La. R.S. 13:3733.1, with respect to financial institutions, to include information that is electronically stored and retrievable in perceivable form. The Act also now defines "electronic record" and "electronic signature."

Changes Abound in Motion for Summary Judgment Again

Motions for summary judgment have been getting a lot of attention in recent years from the Louisiana Legislature. As of the date of this article's deadline, while not yet signed by the Governor, House Bill 696 would amend La. C.C.P. art. 966 to change summary judgment proceedings again. The changes are extensive, and even include timelines for the hearing and filing of the opposition and documents. Further, objections to documentation submitted as a part of a motion for summary judgment must be raised in the timely filed opposition or reply memorandum, which would mean they cannot be raised for the first time at a hearing.

Of significance is that, on review, ap-

pellate courts cannot reverse a trial court's denial of a motion for summary judgment and grant a judgment dismissing the case or a party without first assigning the case for briefing and providing the parties an opportunity to request oral argument.

This bill is slated to take effect on Jan. 1, 2016, but will not be retroactive to cases wherein the motion for summary judgment is pending adjudication or appeal prior to the effective date. With that in mind, it may take a while to see how this shakes out in both trial and appellate practice.

Balance Billing: Personal Right, But Appropriate for Class Action Resolution

Prentiss Baker v. PHC-Minden, L.P., 14-2243 (La. 5/5/15), ____ So.3d ____, 2015 WL 2091993.

In the *Louisiana Bar Journal*, Vol. 62, No. 4 (December 2014/January 2015), the authors noted that the Louisiana Supreme Court found a private right of action existed in the Balance Billing Act. *Anderson v. Ochsner Health Syst.*, 13-2970 (7/1/14), ____ So.3d ____, 2014 WL 2937101. The Louisiana Supreme Court granted a supervisory writ to resolve whether actions under the Balance Billing Act could be certified as a class under La. C.C.P. art. 591(A).

Prior to this ruling, the 2nd Circuit and 3rd Circuit were directly at odds. The 3rd Circuit had affirmed certification of similar cases, but, in *Prentiss Baker*, the 2nd Circuit found that a class action was not the best vehicle for resolving these actions and reversed the trial court's ruling of class certification. Ultimately, the Louisiana Supreme Court found that the class action "is superior to any other available method for a fair and efficient adjudication of the common controversy over the disputed billing and lien practices," and, in so holding, reversed the 2nd Circuit Court of Appeal's decision.

As a note, the court also stated "class action certification is *purely procedural*. What is of primary concern in the certification proceeding is simply whether the plaintiffs have met the statutory requirements to become a class action, *not* the merits of the underlying litigation."

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New Policy Statement Defining RAGAGEP

Apparently, the Occupational Safety and Health Administration (OSHA) could not wait to complete rulemaking and, on June 5, 2015, issued an interpretation letter staking out its position concerning the current meaning of a very important concept: recommended and generally acceptable good engineering practices (RAGAGEP). The letter is online at: *https://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=INTERPRETATIONS&p_id=29414*.

Previously, both OSHA and the EPA published Requests for Information for potential rulemaking on this very issue. *See*, 78 Fed. Reg. 73756 (Dec. 9, 2013) and 79 Fed. Reg. 44604 (July 31, 2014). Historically, the EPA has promulgated Risk Management Program (RMP) rules consistent with OSHA's Process Safety Management (PSM) rules.

References to RAGAGEP within the PSM and RMP rules are few, and the term RAGAGEP is undefined. Further, both of these rules are performance standards. Given these two factors, the application of requirements referencing RAGAGEP has been understandingly variable and at times inconsistent with OSHA's and the EPA's expectations. Ultimately, the question is whether the various degrees of implementation of RAGAGEP are compliant with the rule. In a decision by an administrative law judge (ALJ) of the Occupational Safety and Health Review Commission, the judge concluded that OSHA had overreached with its strict interpretation of RAGAGEP. *See, Sec. of Labor v. BP Prods. N. Am.*, No. 10-0637, Aug. 12, 2013, 2013 WL 9850777. Whether the June 2015 interpretations are supportable under the current rule will be a hot topic; at a minimum, these interpretations provide a possible glimpse as to OSHA's plans for future rulemaking. Following is a discussion of three of the more important interpretations.

RAGAGEP References Are Narrow

OSHA's June 2015 interpretation opens by acknowledging that RAGAGEP applies to only three references within the rule: equipment (a defined and narrow term), inspection procedures, and inspection frequency. Arguably, this acknowledgment means that RAGAGEP does not necessarily apply to other PSM elements, such as facility siting. Additionally, according to the guidance, "[e]mployers do not need to consider or comply with a RAGAGEP provision that is not applicable to their specific worksite conditions, situations, or applications." Such suggests that RAGAGEPs published for petroleum refineries (*e.g.*, API-520) or chemical plants should not necessarily be applied to such worksites as, for example, compressor stations.

Internal Procedures Must Be Equivalent to Published Codes and Standards

When issuing the PSM rule, OSHA agreed that "the phrase recognized and generally acceptable good engineering practices would include both appropriate internal standards and applicable codes and standards." *See*, 57 Fed. Reg. 6356, 6391 (Feb. 24, 1992). In the 2013 Request for Information, OSHA stated that it intended for appropriate internal standards to be used only when codes and standards were unavailable or when the internal code was more stringent. *See*, 78 Fed. Reg. at 73761. This position was rejected by the ALJ in the *BP* case. *See, Sec. of Labor v. BP*, *supra*, at pp. 19-21.

In an apparent response to that decision, OSHA now says that for an internal procedure to be "appropriate," it must "meet or exceed the protective requirements of published RAGAGEP where such RAGAGEP exist." Notwithstanding that this requirement is not mentioned in the original rule or preamble, the statement itself creates more questions than it does answers. For example, the ALJ ruled that pressure-drop requirements in BP-Husky's procedures did not have to follow existing published RAGAGEPs. Is OSHA's new requirement meant to be consistent with this decision or to supersede it? Also, elsewhere in the interpretation letter, OSHA explains that an employer may choose between published RAGAGEPs that "contain similar but not identical requirements." Pursuant to such, OSHA provided two example RAGAGEPs and declared both as "protective." However, if an internal standard must meet or exceed published standards or codes, must you also choose the published standard that meets or exceeds all other published codes? If an internal procedure is protective, must its protective requirements exceed a published code or standard?

"Should" Means "Shall" (or the Equivalent)

The final issue raised by the June 2015 interpretation letter is a game changer; it indicates that the term "should" as used in industry standards really essentially

means "shall" by putting the burden of proof on an employer to justify an alternative. The interpretation letter requires that the employer determine and document if an employer chooses to use an alternative approach to an action designated within a published industry standard as a recommendation using the word "should." In the interpretation letter, OSHA cites API-520 and concludes that it is protective and acceptable to OSHA. According to API-520 (Eighth Edition, 2008), "as used in a standard, 'should' denotes a recommendation or that which is advised *but not required* in order to conform to the specification." (Emphasis added.) If "the phrase recognized and generally acceptable good engineering practices would include . . . applicable codes and standards," would not conformance with a code or standard be compliance with RAGAGEP?

Finally, when developing the rule, OSHA said that codes and standards and appropriate internal standards could be considered RAGAGEP. Some industry publications available to be considered a RAGAGEP are not called codes or standards but are instead considered "Recommended Practices." Should an employer be compelled to address every recommendation within a Recommended Practice?

In conclusion, as the wait is on for OSHA to issue new proposed rules, OSHA has offered new interpretations to the meaning of the old rules. Unfortunately, these interpretations create many more questions. Perhaps rulemaking would be a good approach to resolve these issues.

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Property

Succession of Gassiott, 14-1019 (La. App. 3 Cir. 2/4/15), 159 So.3d 521, *writ denied*, 15-0493 (La. 5/15/15), ____ So.3d ____, 2015 WL 3477434.

Although the parties were separate in property, upon Mr. Gassiott's receiving proceeds from a medical-malpractice lawsuit, he deposited one-half of those proceeds into a checking account in his name alone, and the other half in a joint savings account in his and his wife's name. She then withdrew those funds, $77,769, four days before his death. His children sought to have her return the money. The trial court found, and the court of appeal affirmed, that the creation of the savings

account was a donation *inter vivos* to her; and, further, her withdrawal of the funds from the account also accomplished a manual donation *inter vivos*. His opening the savings account in her name and her acceptance of that donation by signing the documents to create the account established the donation *inter vivos*. His confirmation to his preacher, months before his death, that he put money in the bank for her and intended her to have it, as well as his telling her shortly before his death that he wanted her to withdraw the money, evidenced his continuing intent to donate the funds to her.

Thompson v. Thompson, 14-0963 (La. App. 3 Cir. 3/4/15), 159 So.3d 1121.

Ms. Thompson's petition to annul the parties' community-property-partition judgment on the basis of Mr. Thompson's alleged "fraud, non-disclosure, and ill practices" was prescribed because she had sufficient information to put her on notice that something might be wrong more than one year prior to her filing her petition. Her claim of coercion was also dismissed. The trial court's award of $25,744 in attorney's fees to Mr. Thompson as the prevailing party under La. C.C.P. art. 2004 was affirmed. The court of appeal awarded him an additional $2,800 for attorney's fees he incurred on her appeal.

Procedure

David v. David, 14-0999 (La. App. 3 Cir. 2/4/15), 157 So.3d 1164, *writ denied*, 15-0494 (La. 5/15/15), ____ So.3d ____, 2015 WL 3477436.

Mr. David's motion to recuse the trial judge filed the day before trial was properly denied because he failed to allege any proper grounds for recusation. However, the trial court award of sanctions against Mr. David and his attorney for filing a frivolous pleading was reversed because they were entitled to notice and a hearing prior to sanctions being imposed upon them.

Paternity

Miller v. Thibeaux, 14-1107 (La. 1/28/15), 159 So.3d 426.

In this wrongful death case, Miller alleged only that the decedent was his son and that he was the deceased's biological father. The trial court overruled the defendant's exception of no right of action and issued a judgment of paternity. The court of appeal reversed, finding that Miller failed to present sufficient allegations to state a cause of action for filiation. The Supreme Court reversed the court of appeal and reinstated the trial court's judgment, finding that, under its prior opinion in *Udomeh v. Joseph*, 11-2839 (La.10/26/12), 103 So.3d 343, the putative father's failure to specifically request a finding of filiation, or to specifically allege that the action was an avowal action, did not preclude the court from issuing a judgment of paternity when allegations of biological paternity are made, as "there was no other purpose an allegation of paternity could have served." *Miller*, 159 So.3d at 432. Moreover, the "bare allegations" were nevertheless sufficient to put defendants on notice that the putative father was claiming paternity of the child and, effectively thereby, initiating an action to establish filiation.

Three justices dissented, arguing that conclusory allegations of paternity are insufficient to establish a cause of action without additional supporting facts. The dissent argued that an action for avowal must be instituted, not simply that defendants be put on notice "by way of filing the wrongful death and survival action — the very action that [the legislature] sought to prevent a putative father who has not proven filiation from bringing in the first place." *Id*. at 437.

Custody

State ex rel. P.T., 14-1160 (La. App. 3 Cir. 3/4/15), 159 So.3d 1184, *writ denied*, 15-0693 (La. 5/1/15), 2015 WL 2371704.

The court of appeal affirmed the trial court's denial of the maternal grandparents' petition for adoption, agreeing that joint custody between the maternal grandparents and the paternal grandmother was more in the child's best interest because adoption carried permanency, whereas custody allowed for flexibility and adaptability to adjust to the child's ongoing needs. Joint custody between the maternal grandparents and paternal grandmother was appropriate, as the child had a close and loving relationship with both, both were fit to care for her and capable of raising her, and it was important to continue the child's contact with both. However, the court of appeal reversed the trial court's designation of all three as co-domiciliaries, finding that the failure to name domiciliary custodians could lead to additional litigation if the maternal and paternal grandparents had disagreements. Because the child had been living primarily with the maternal grandparents, the court found that they should be named as the domiciliary grandparents.

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Predatory Billing by Healthcare Providers: Class Certification

Baker v. PHC-Minden, L.P., 14-2243 (La. 5/5/15), ____ So.3d ____, 2015 WL 2091993.

PHC-Minden (Minden) had a regular practice of billing insured patients involved in automobile accidents where a third-party health-insurance company was liable for the crash. After admission, Minden sought information concerning all parties' automobile insurance. The information was used to send a lien pursuant to La. R.S. 9:4752 to the liability insurer and the patient's attorney seeking to collect from the patient's damage settlement the full and undiscounted rate. Only later would Minden file with the patient's health insurer. Even if receiving payment, it maintained its claim to collect the full amount from the settlement, using medical liens. Plaintiffs claimed that Minden was liable to them and those similarly situated for damages and recompense. Plaintiffs alleged hundreds of other patients have been subjected to this collection policy, in violation of the Health Care Consumer Billing and Disclosure Protection Act, La. R.S. 22:1871 *et seq.* (Balance Billing Act). They filed a motion to certify the class, and Minden opposed. Finding class action a superior method of proceeding in the matter, the trial court granted certification. On appeal, the 2nd Circuit reversed, a result inconsistent with holdings in the 3rd Circuit, and the Louisiana Supreme Court granted a writ to resolve the conflict.

The court defined class action as "a non-traditional litigation procedure that permits a representative with typical claims to sue or defend on behalf of, and stand in judgment for, a class of similarly situated persons when the question is one of common interest to persons so numerous as to make it impracticable to bring them all before the court." *Baker* at *6. Errors made in deciding class action issues "should be in favor of and not against the maintenance of the class action, because a class certification order is *always* subject to modification or decertification, if later developments during the course of the trial so require." *Id.* at *7. A trial court has wide discretion in deciding whether to certify a class, and the standard on review is manifest error/abuse of discretion.

In Louisiana, the requirements for class certification are set forth in La. C.C.P. art. 591, which provides five threshold prerequisites: (1) numerosity — joinder of all members is impracticable; (2) commonality — questions of law or fact common to the class; (3) typicality — claims or defenses of representative parties typical to those of the class; (4) adequacy of representation — will fairly and adequately protect the interests of the class; and (5) objective definability of class — the class may be defined objectively in terms of ascertainable criteria, such that the court may determine the constituency of the class for the purposes of any judgment rendered.

Art. 591(B)(3) adds an additional require-

ment — "that a class action is superior to other available methods for the fair and efficient adjudication of the controversy." The court found that superiority was the "single, paramount issue," and that if the court resolved the superiority issue in plaintiff's favor, the remaining issues all related to the calculation of damages. The court stated many of the claims may be small or nominal in nature, rendering individual action financially impractical, if not impossible. Thus, it found the class action the superior method for adjudication as the common question "regarding the legality, under the Balance Billing Act, of a health care provider's collection of filing medical liens to recover its full rate for services from an insured's settlement or judgment with a third party tortfeasor." *Id.* at *14. The judgment of the 2nd Circuit Court of Appeal was reversed, and the judgment of the trial court was reinstated. The case was remanded to the district court.

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International Law

U.S. Supreme Court

Zivotofsky v. Kerry, 135 S.Ct. 2076 (2015).

The U.S. Supreme Court issued a splintered 6-3 decision on June 8, 2015, addressing the separation of powers between the Executive and Legislative branches in connection with the "delicate subject" of Jerusalem. Noting that "[q]uestions touching upon the history of the ancient city and its present legal and international status are among the most difficult and complex in international affairs," the Court examined whether the President has the exclusive constitutional power to grant formal recognition to a foreign sovereign. *Zivotofsky*, 135 S.Ct. at 2081. If such power resides exclusively with the President, the Court had to address whether a Congressional statute could force the Executive to issue a statement contradicting its exercise of the recognition power.

The specific question before the Court was whether a Congressional mandate allowing a U.S. citizen born in Jerusalem to have his or her passport's place of birth listed as Israel violates the President's foreign affairs power to recognize foreign sovereigns. *Id.* Petitioner Menachem Zivotofsky was born in 2002 to U.S. citizens living in Jerusalem. *Id.* When his mother applied for his passport at the U.S. Embassy in Tel Aviv, she requested the place of birth as "Jerusalem, Israel." The U.S. Embassy refused the request on the ground that U.S. policy prohibits the use of Israel in connection with Jerusalem; accordingly, the Embassy would only list Jerusalem as the place of birth on his passport. *Id.* at 2083.

Petitioner's parents brought suit against the U.S. Secretary of State on his behalf in the U.S. District Court for the District of Columbia, seeking to enforce a Congressional statute, discussed *infra*, requiring for "purposes of the registration of birth, certification of nationality, or issuance of a passport of a United States citizen born in the city of Jerusalem, the Secretary [of State] shall, upon the request of the citizen or the citizen's legal guardian, record the place of birth as Israel." *Id.* at 2117. The District Court dismissed the lawsuit, reasoning that it presented a nonjusticiable political question and petitioner lacked standing to bring such a claim. The Court of Appeals for the District of Columbia reversed on the standing issue, but later affirmed the District Court's political question ruling. *Id.* at 2083. The U.S. Supreme Court vacated the political question part of the judgment, and after remand, the Court of Appeals found the statute an unconstitutional violation of the President's exclusive foreign affairs power to recognize a foreign sovereign. The Supreme Court again granted certiorari, this time to determine the separation of powers question at issue. *Id.*

Justice Kennedy authored the opinion of the Court, providing a textbook analysis of the separation of powers formula set forth in *Youngstown Sheet & Tube Co. v. Sawyer*, 72 S.Ct. 863 (1952) (concurring opinion). The case presents a direct conflict between a Presidential action and the express will of Congress. Accordingly, Presidential power is at its lowest ebb, and in order to prevail, the Presidential power at issue must be both exclusive and conclusive on the issue. *Zivotofsky* at 2083-84.

U.S. Executive policy regarding the recognition of Jerusalem has been consistent over time. President Truman first formally recognized Israel by written statement in 1948. However, neither President Truman nor any other U.S. President since has issued a formal statement or declaration recognizing Israeli sovereignty over Jerusalem. The United States has consistently refused to issue a unilateral declaration regarding Jerusalem's sovereign status, insisting that any recognition must result from agreement between Israel and Palestine. *Id.* at 2081.

U.S. policy on Jerusalem stretches to the consular act of issuing passports. The U.S. State Department's Foreign Affairs Manual recognizes that passports are construed as reflections of official U.S. policy, and, as such, the place of birth on a passport shall only be listed as the "country [having] present sovereignty

over the actual area of birth." No sovereign may be listed in conflict with Executive Branch policy. *Id.* The Foreign Affairs Manual specifies that the United States recognizes no sovereign over Jerusalem and the place of birth for citizens born in Jerusalem should be Jerusalem. *Id.* at 2082.

Congress sought to override the Foreign Affairs Manual in the 2002 Foreign Relations Authorization Act. *Id.* Section 214(d) of the Act, titled "Record of Place of Birth as Israel for Passport Purposes," requires the Secretary upon request of a citizen or legal guardian to record Israel as the place of birth of U.S. citizens born in Jerusalem. President George W. Bush signed the Act into law and issued a statement indicating that U.S. policy regarding Jerusalem had not changed and any construction of the Act as mandatory rather than permissive would impermissibly interfere with the President's foreign affairs recognition power. *Id.*

The Court conducted an exhaustive analysis of the Constitution and prior historical precedent on the issue of foreign sovereign recognition. The Court had no difficulty concluding that the "text and structure of the Constitution grant the President the power to recognize foreign nations and governments." *Id.* at 2086. The more difficult question is whether the recognition power is exclusive. The Court ruled as follows on the exclusivity of the recognition power:

> The various ways in which the President may unilaterally effect recognition — and the lack of any similar power vested in Congress — suggest that it is [exclusive]. So, too, do functional considerations. Put simply, the Nation must have a single policy regarding which governments are legitimate in the eyes of the United States and which are not. Foreign countries need to know, before entering into diplomatic relations or commerce with the United States, whether their ambassadors will be received; whether their officials will be immune from suit in federal court; and whether they may initiate lawsuits here to vindicate their rights. These assurances cannot be equivocal.
>
> *Id.*

The President's exclusive power over recognition extends beyond formal recognition to the power of his agents to maintain such recognition determinations in formal U.S. statements. *Id.* at 2094-95. Invoking precepts of general international law, the Court found that recognition could be effected by any "written or oral declaration of the recognizing state." *Id.* at 2095. The Court concluded that section 214(d) impermissibly contradicts the President's act of recognition with respect to Jerusalem and, therefore, is an unconstitutional exercise of power specifically reserved and limited to the Executive Branch. *Id.* at 2096.

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Supreme Court Rules for Pregnant Workers in UPS Case

Young v. United Parcel Serv., Inc., 135 S.Ct. 1338 (2015).

On March 25, 2015, the U.S. Supreme Court ruled that employers cannot impose a "significant burden" on pregnant workers and that a pregnant worker can show that her employer's practices are unjustified if the employer makes accommodations for a large percentage of non-pregnant workers, while denying the same kinds of accommodations to pregnant workers.

When UPS driver Peggy Young became pregnant, her doctor advised her not to lift heavy packages. She requested a light-duty assignment, but UPS denied her request, despite the fact that UPS made such accommodations available to three groups of employees: those who were injured on the job, workers who were covered by the Americans with Disabilities Act (ADA) and workers who lost their commercial driver's license. UPS refused to reassign Young or let co-workers help her, and so she was forced to take an unpaid leave. During this time, she lost her medical coverage. Young sued UPS and claimed she had been the victim of discrimination under the Pregnancy Discrimination Act (PDA).

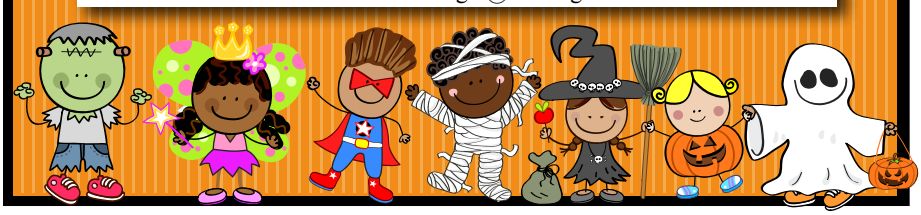
The PDA has two relevant clauses. While the first prohibits discrimination, the second — the one at issue in *Young* — has broader language that pregnant women must be "treated the same for all employment-related purposes . . . as other persons not so affected but similar in their ability or inability to work...." Young argued that UPS's policy was discriminatory because it permitted light-duty accommodations to some workers who had similar types of work restrictions, but did not allow the same accommodation for her. Under the second clause of the PDA, she argued, UPS must grant her the same accommodations available to other workers with similar restrictions, and refusing to do so was discrimination. UPS argued that no policy could violate the PDA if it was pregnancy-neutral — that is, if it did not single out pregnancy as the only condition that did not merit some particular accommodation.

In a 6-3 decision, the majority opinion, written by Justice Stephen G. Breyer, rejected the interpretations offered by both parties. With respect to Young's interpretation, Breyer wrote that pregnant women were not entitled to "most favored nation" status, under which they could demand an accommodation that was offered to any other worker. With respect to UPS's interpretation, the majority reasoned that if an employer accommodates some temporary disabilities, it has to accommodate pregnancy. The employer need not accommodate any temporary disabilities, but, if it does, it cannot treat pregnancy worse than it treats other temporary disabilities.

The majority, instead, applied a new approach to the second clause of the PDA, which makes use of the framework established in *McDonnell Douglas Corp. v. Green*, 93 S.Ct. 1817 (1973). Under that test, a plaintiff must first make out a prima facie case, demonstrating that she was treated differently from someone similarly situated but outside the protected class. The district court in Young's case had held that she failed to make out a prima facie case because none of the proposed comparators were "similarly situated." UPS's justification for its accommodation policy was circular — she was not similarly situated to anyone covered by the policy because she was not covered by the policy.

Justice Breyer's opinion rejects this application of *McDonnell-Douglas*. A plaintiff can establish a prima facie case of pregnancy discrimination simply by showing that "she belongs to the protected class, that she sought accommodation, that the employer did not accommodate her, and that the employer did accommodate others 'similar in their ability or inability to work.'"

Just like in other discrimination



claims, the company would then have an opportunity to show if there was any "legitimate, nondiscriminatory, nonpretextual justification for these differences in treatment." After the employer articulates a legitimate reason for its treatment of the plaintiff, the plaintiff has the opportunity to reach a jury by "providing sufficient evidence that the employer's policies impose a significant burden on pregnant workers, and that the employer's 'legitimate, nondiscriminatory' reasons are not sufficiently strong to justify the burden, but rather — when considered along with the burden imposed — give rise to an inference of intentional discrimination." For example, a company cannot just claim that it would be too expensive or inconvenient for them to accommodate a pregnant woman.

In his concurring opinion, Justice Samuel A. Alito, Jr. makes it clear that the PDA has a "further requirement of equal treatment irrespective of intent." To determine whether the conduct was discriminatory, Justice Alito argued that the treatment of pregnant employees should be compared to the treatment of non-pregnant employees in similar jobs with similar abilities and inabilities to work.

In his dissenting opinion, Justice Antonin G. Scalia argues that the Act only prohibited an employer from distinguishing between employees of similar abilities and inabilities because of pregnancy, while differing treatment for other reasons is permissible. He argued that the court overstepped its role.

UPS has since changed its policy to explicitly include accommodations for pregnant workers, but the rules laid out by the case will impact working women around the country, as they guide lower courts in future litigation. Young's case now goes to trial to establish the facts regarding UPS's accommodations of others and their refusal to accommodate her.

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Lieu Warrants; Mineral Reservation

Midstates Petroleum, L.L.C. v. State Mineral & Energy Bd., ____ So.3d ____ (La. App. 3 Cir. 4/15/15), 2015 WL 1650549.

This case involves a concursus proceeding between Louisiana's State Mineral and Energy Board and titleholders of land located in Beauregard Parish. The legal question — Who owns the minerals underlying the tract of land?

In 1858, the State sold land with minerals to John Laidlaw. The land, however, had been sold previously by the federal government. Pursuant to Act 104 of 1888, the State issued a lieu warrant to Laidlaw in 1919. A lieu warrant is a promise (or obligation) by the State to transfer land "of the same class" as that originally sold to the holder of the warrant. The warrant is issued "in lieu" of returning the money obtained by the State for the piece of property erroneously sold. Laidlaw's heirs later assigned the warrant to Alvin Albritton. Albritton was issued a patent to satisfy the warrant in 1944.

In 2011, the Albritton heirs granted a mineral lease on the property to Midstates Petroleum. The State later claimed that the minerals belonged to it because a 1921 amendment to the Louisiana Constitution prohibited the sale of minerals on any property sold by the State. The State ultimately entered into an operating agreement with Midstates, and Midstates drilled a well on the land. A concursus proceeding to clarify ownership was initiated by Midstates and the Albrittons in 2012.

On cross-motions for summary judgment, the State argued that the minerals were owned by it because of the 1921 amendment. The Albrittons, however, argued that the obligations per the lieu warrant were not abrogated by the amendment.

The trial court ruled in favor of the Albrittons, finding that the amendment did not affect the obligations created by the lieu warrant. On appeal, the 3rd Circuit affirmed, holding that this case was analogous to a prior case in which the Louisiana Supreme Court found that a subsequent constitutional amendment did not affect existing obligations established by the lieu warrant.

Tax Adjudication; Mineral Lease

Sapphire Land Co. v. Chesapeake La., L.P., 49,712, ____ So.3d ____ (La. App. 2 Cir. 5/20/15), 2015 WL 2405709.

In April 1986, two acres of land located in Caddo Parish (Haynesville Shale) were sold to Ebey. Ebey neglected to pay his 1986 property taxes. The property was subsequently sold to Smith at a tax sale. A tax deed was executed and recorded in the conveyance records of Caddo Parish. Notice was sent to Ebey advising him of the tax sale and the three-year redemption period if he paid the back taxes due. It was disputed whether the notice was sent to the proper address for Ebey. In 1987, Smith did not pay the taxes on the property. The property was offered for bid at a tax sale, but no bids were received. The property was thus adjudicated to Caddo Parish. All tax sales were advertised in the *Shreveport Journal*.

In 2009, Caddo Parish granted a mineral lease to Classic Petroleum. Classic later assigned the lease to Chesapeake. The Commissioner of Conservation then created a unit and named Chesapeake as unit operator. Chesapeake drilled and completed a well inside the unit. Classic's assignment of the lease to Chesapeake was recorded.

Sapphire Land Co. purchased the interests of the Ebey and Smith heirs by quitclaim deeds in 2010. By this time, Caddo Parish's interest had been recorded in the public record for 22 years. Chesapeake's mineral lease was also recorded in the public record. Sapphire later paid the 1987 taxes owed on the property, and, in October 2010, a certificate of redemption was issued. Sapphire sent letters to Chesapeake claiming that it was the "unleased owner" and demanded that Chesapeake (1) release part of its lease, and (2) send its accounting records to Sapphire. Chesapeake refused to do so. Sapphire sued.

Sapphire argued to the trial court that the mineral lease was void *ab initio* because the tax adjudication was improper. The trial court, after a trial on the merits, held that

Sapphire did not meet its burden of proof and dismissed its claims with prejudice. Sapphire appealed.

The Louisiana 2nd Circuit Court of Appeal affirmed the holding of the trial court, finding that:

> (1) the period for redemption ended in 1991; Sapphire did not redeem the property until 2010;
> (2) the notices previously sent to Ebey and Smith were proper because the tax collector took all reasonable steps to apprise them of the tax delinquencies and upcoming tax sales;
> (3) Caddo Parish was not required by law to institute a lawsuit in order to take possession of the property; thus the failure to do so did not affect its ability to take possession, and further the failure to file a lawsuit did not affect the validity of the mineral lease; and
> (4) any interest Sapphire might own in the property was subject to Chesapeake's lease because it was recorded in 2010 and the quitclaim deeds acquired by Sapphire specifically said that the property was subject to "all restrictions . . . of public record."

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Fax Filing Requests for Review

In re: Med. Review Panel Claim of Tillman, 15-0178 (5 Cir. 4/22/15).

Rose Tillman died on May 22, 2012. The plaintiffs faxed a medical-review-panel request to the Division of Administration on May 22, 2013, at 7:43 p.m. The Division of Administration's website shows that facsimile filings are permissible and that faxes received after 5 p.m. will be stamped as filed the next business day.

The Tillman request was date-stamped by the Division of Administration on May 23 at 9:09 a.m. The PCF advised the plaintiffs that it had received the panel request dated May 22 and that the "file date of the request was also May 22." Then, on Nov. 10, 2014, the PCF advised all parties that, pursuant to La. R.S. 40:1299.47(A)(2)(b), it was changing the file date to the next business day (May 23), whereupon the defendants filed an exception of prescription, which the district court denied. In a supervisory writ to the court of appeal, the defendants argued that the plaintiffs' case was prescribed because it was filed one day beyond the applicable one-year prescriptive period.

The appellate court found clear and unambiguous the pertinent portions of La. R.S. 40:1299.47(A)(2)(b): A request for review is timely filed on the date of mailing the request if it is sent to the Division of Administration by certified or registered mail. The plaintiffs had used neither certified nor registered mail; thus, the court ruled that the Division of Administration correctly changed the filing date to May 23 because the request was filed after 5 p.m., which was the beginning of the "next business day." The defendants' writ was granted, and the plaintiffs' case was dismissed with prejudice.

Informed Consent

Snider v. La. Med. Mut. Ins. Co., 14-1964 (La. 5/15/15), ____ So.3d ____, 2015 WL 2082480.

This case was reported in the February/March 2014 issue of the *Louisiana Bar Journal* (Vol. 61, No. 5) after the Louisiana Supreme Court reversed and remanded to a court of appeal that court's reversal and remand of a jury verdict for the defendants. The Supreme Court ruled that the appellate court erred when it used a *de novo* standard of review instead of a manifest-error standard, thereby substituting its own opinion in place of the fact-finder's. The court instructed the appellate court to consider and to rule on all of the plaintiff's assignments of error.

On remand, the appellate court again reversed the trial court's judgment, reasoning that the jury was manifestly erroneous in failing to find a defendant's actions breached the acceptable standard of care.

The Supreme Court's second review of the case convinced it that the jury's finding in favor of the defendant was not manifestly erroneous, and it again reversed the court of appeal, again remanded it to the appellate court, and again instructed it "to consider the remaining assignments of error in the appeal."

Physician's Testimony on Nursing Standards of Care

McGregor v. Hospice Care of La. in Baton Rouge, L.L.C., 14-2591 (La. 4/24/15), ____ So.3d ____, 2015 WL 2260926.

The decedent was a terminal metastatic cancer patient enrolled in hospice care. Hospice nurses treated him at home and would thereafter report their findings to his treating oncologists, who would then make determinations about prescribing pain medication.

The patient's son and a Hospice nurse had a disagreement, leading the son to refuse the nurse's request to assess his father. She thereafter called the son and advised that Hospice was discharging the patient from its care, whereupon the son called one of the treating physicians who was aware of the confrontation. The doctor said she concurred in Hospice's decision. That same day, the patient was transferred by ambulance to a hospital, where hours later he died.

A medical-review panel exonerated the treating physicians, who were then joined in an earlier filed lawsuit against Hospice,

a nonqualified provider.

All defendants filed motions for summary judgment, claiming that the plaintiffs had no expert testimony to establish a breach of a standard of care. The trial court agreed and dismissed the case. The plaintiffs appealed, arguing that the deposition testimony of their physician expert (Dr. Samuels, whose specialty was reported in neither the Supreme Court nor appellate court opinions) had provided testimony sufficient to overcome a motion for summary judgment. The defendants countered that the plaintiffs' expert testified by deposition that he was unfamiliar with the standard of care applicable to hospice nurses concerning the issues in question and, therefore, the plaintiffs could not satisfy their burden of proof.

Dr. Samuels had testified that he was not familiar with the standard of care for hospice nurses and had no opinion about another issue concerning "partially filling" prescriptions. Dr. Samuels also testified, however, that Hospice did breach the standard of care by discharging the patient without proper notification "by way of certified letter" to the patient, specifying therein the time period the patient would be given to obtain alternative care and that, during the interim, a health-care provider is obligated to continue to provide care. He also testified that the standard of care for discharging a patient is not limited to any particular specialty. Hospice was unable to show that its standard of care for discharging a patient differed from Dr. Samuel's standard. The court of appeal reversed the summary judgment, and the case was remanded to the trial court.

The Supreme Court then accepted the defendant's writ application and issued a per curiam opinion in which it held that the trial court erred in excluding the testimony of the plaintiffs' expert because "hospice nursing" and "partial refill prescriptions" are medical areas "subsumed within the expertise of plaintiff's expert" and "the fields are not separately recognized areas of expertise." The case was remanded to the court of appeal.

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Taxation

La. R.S. 47:305.1(A) Sales Tax Exemption Only Applies to Original Construction

Coastal Drilling Co. v. Dufrene, 14-0960 (La. App. 1 Cir. 6/5/15), ____ So.3d ____, 2015 WL 3537527.

The 1st Circuit Court of Appeal affirmed summary judgment that found unconstitutional the Louisiana Department of Revenue's (Department) regulation interpreting the sales-tax exemption under La. R.S. 47:305.1(A). The court found in favor of the local taxing authority, holding Coastal Drilling Co., L.L.C., liable for the use tax assessed on parts and materials used to restore an inland-marine-drilling barge that was damaged by fire.

After being damaged by fire in 2005, Rig 21 was restored. When an audit revealed that Coastal had not paid local sales tax on the parts, materials, equipment and machinery purchased in connection with the work performed to restore the barge, St. Mary Parish's Director of Sales and Use Tax and Ex-Officio Sales and Use Tax Collector issued a use-tax assessment for the items used in restoring Rig 21. Coastal timely paid the assessment under protest and filed suit to recover.

The Collector asserted that the tax exemption provided by La. R.S. 47:305.1(A) applied only to "articles of tangible personal property that are installed on ships, vessels, barges, commercial fishing vessels, drilling ships and drilling barges during original construction," and as the parts installed on Rig 21 were not installed during "original construction," Coastal was not entitled to a refund of the taxes paid under protest. The Collector further alleged that the provisions of the Department's regulation, LAC 61:I.4403 (Regulation 4403), by which Coastal claimed authority for extension of the exemption, did not apply because Rig 21 was not "destroyed" by fire, but instead "damaged." The Collector also reconvened to challenge the constitutionality of Regulation 4403.

In prior proceedings, the district court held that the repairs to Rig 21 did not qualify as a reconstruction under Regulation 4403, and, therefore, Coastal was not entitled to the tax exemption. The district court did not reach the constitutionality of Regulation 4403. In the prior appeal, the court vacated the district court's judgment and remanded the matter for a determination of the constitutionality of Regulation 4403. On remand, the district court declared Regulation 4403 to be unconstitutional as exceeding the scope of the exemption provided in La. R.S. 47:305.1(A). Coastal appealed again.

The court rejected Coastal's attempt to broadly define the word "build" to encompass the concepts of reconstruction and restoration as this would violate the principles that a tax exemption is an exceptional privilege that must be expressly and

Code of Professionalism

► My word is my bond. I will never intentionally mislead the court or other counsel. I will not knowingly make statements of fact or law that are untrue.
► I will clearly identify for other counsel changes I have made in documents submitted to me.
► I will conduct myself with dignity, civility, courtesy and a sense of fair play.
► I will not abuse or misuse the law, its procedures or the participants in the judicial process.
► I will consult with other counsel whenever scheduling procedures are required and will be cooperative in scheduling discovery, hearings, the testimony of witnesses and in the handling of the entire course of any legal matter.
► I will not file or oppose pleadings, conduct discovery or utilize any course of conduct for the purpose of undue delay or harassment of any other counsel or party. I will allow counsel fair opportunity to respond and will grant reasonable requests for extensions of time.
► I will not engage in personal attacks on other counsel or the court. I will support my profession's efforts to enforce its disciplinary rules and will not make unfounded allegations of unethical conduct about other counsel.
► I will not use the threat of sanctions as a litigation tactic.
► I will cooperate with counsel and the court to reduce the cost of litigation and will readily stipulate to all matters not in dispute.
► I will be punctual in my communication with clients, other counsel and the court, and in honoring scheduled appearances.

Following approval by the Louisiana State Bar Association House of Delegates and the Board of Governors at the Midyear Meeting, and approval by the Supreme Court of Louisiana on Jan. 10, 1992, the Code of Professionalism was adopted for the membership. The Code originated from the Professionalism and Quality of Life Committee.

clearly conferred in plain terms, and that tax exemptions are strictly construed against the taxpayer. Relying on prior decisions by the Louisiana Supreme Court, as well as its own prior decisions, the court held the La. R.S. 47:305.1(A) tax exemption applies only to materials, equipment and machinery that become component parts during the original construction of a ship, vessel or barge and does not apply to the replacement of the original component parts of vessels.

Accordingly, the court found that the district court did not err in finding Regulation 4403 unconstitutional, as the regulation exceeded the scope of the exemption authorized in La. R.S. 47:305.1(A), which applies only to component parts of vessels added during the original construction of the vessel.

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U.S. Supreme Court Tackles Two State Tax Issues

The U.S. Supreme Court confronted two tax issues in the most recent term.

In *Direct Marketing Ass'n. v. Brohl*, 135 S.Ct. 1124 (2015), the Court held that a trade association of retailers who sell to Colorado residents online may bring suit in federal court, as the action was not barred by the Tax Injunction Act (TIA), 28 U.S.C. § 1341. Colorado has a complementary sales-and-use-tax regime, requiring resident consumers who purchase tangible personal property from a retailer who does not collect sales or use tax at the point of sale, such as those operating online, to file a return and remit the taxes to the state. Colorado enacted legislation requiring non-collecting retailers whose gross sales in Colorado exceed $100,000 to notify its Colorado customers of their use tax obligations and to report tax-related information to its customers and Colorado. Direct Marketing Association brought suit in federal court alleging that the notice and reporting requirements were unconstitutional under both state and federal law, and sought an injunction. Although the district court enjoined state officials from enforcing the notice and reporting requirements, the 10th Circuit held that the district court lacked jurisdiction over the suit because of the TIA, which prohibits federal courts from enjoining, suspending or restraining the assessment, levy or collection of any tax under state law where a plain, speedy and efficient remedy is available in state courts. The Supreme Court reversed, finding that the relief sought would not enjoin, suspend or restrain the assessment, levy or collection of Colorado's sales-and-use taxes because the notice-and-reporting requirements do not fall under the definitions of assessment, levy or collection.

In *Comptroller of the Treasury of Md. v. Wynne*, 135 S.Ct. 1787 (2015), the Court held in a 5-4 decision that Maryland's personal-income-tax scheme, which allowed residents to receive a tax credit against their state income tax for taxes paid to other states, but disallowed a credit against their county income tax, violated the dormant Commerce Clause. Maryland bifurcates its state income tax into state and county income-tax regimes, yet both are assessed and collected by the state. In *Wynne*, the taxpayers had income from an S Corporation that earned income in multiple states and claimed a credit for taxes paid to other states on their 2006 income-tax return. Maryland's Comptroller allowed the credit against their state income tax but disallowed the credit against their county income tax. The Supreme Court determined that this system causes taxpayers' income to be taxed twice, incentivizing taxpayers to choose to engage in intrastate rather than interstate economic activity in violation of the dormant Commerce Clause. The Court noted that this scheme operates as a tariff and may be cured by granting a credit for income taxes paid to other states. The principal dissent by Justice Scalia highlighted the inconsistency of the majority's decision with prior dormant Commerce Clause decisions because the Maryland tax does not discriminate on its face against interstate commerce.

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