Alternative Dispute Resolution

Mandatory Arbitration Agreements and the Power of the Tweet

Mandatory arbitration clauses have become commonplace in corporate employment agreements, fueled by a push over the past three decades by the court system's expansion and application of the Federal Arbitration Act (FAA), 9 U.S.C.S. § 3. While commonplace, commentators have expressed significant concern with the direction of this push and its effects on employment discrimination, harassment and the protection of employee's rights. Take, for instance, the placement of a mandatory arbitration clause in a summer associate's employment contract. Law students, like many new employees, are faced with a power imbalance in the negotiation of summer associate positions. Given a high supply of students, a small number of very competitive positions and careers at stake, most students are in no position to negotiate with law firms or decline an offer due to a mandatory arbitration clause.

Using the widespread power of the social media platform Twitter, Ian Samuel, a lecturer at Harvard Law School, recently posted a tweet detailing the prominent firm Munger Tolles & Olson's practice of requiring all summer associates to sign employment contracts that included mandatory arbitration agreements, which he stated were "plainly calculated to shield [the firm] from claims of harassment." Included in the stream of tweets were photos of the alleged mandatory arbitration agreement obtained by an "anonymous Firstie," requiring mandatory arbitration for all "employment-related claims." Among the claims that require arbitration are those arising under Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act, the Equal Pay Act of 1963 and the Americans with Disabilities Act.

Samuel's call for the removal of mandatory arbitration agreements is not the only call that has gathered significant attention lately. His tweets come on the heels of the National Association of Attorneys General sending a letter, signed by all 56 attorneys general and chief legal officers of every state and U.S. territory, calling on Congress to enact "needed legislation to protect the victims of sexual harassment in the workplace." The letter detailed the custom that has emerged of using employment contracts that contained boilerplate "take-it-or-leave-it" clauses, written in the "fine print," which the National Association of Attorneys General stated results in the deprivation of an employee's fundamental right to access the judicial system.

These events also follow the recent discussion of the protection of judicial law clerks and legal externs from similar claims, expressed by Chief Justice John G. Roberts, Jr. as a "problem of sexual harassment in the workplace" that the "judicial branch is not immune" to. The report detailing this discussion was issued less than two weeks after Judge Alex Kozinski of the 9th Circuit announced his retirement while facing multiple accusations of sexual misconduct with clerks.

With this discussion piercing a number of communities, it is apparent that an issue has been identified. Potential for reform came in 2017 when a bill sponsored by Rep. Henry Johnson, Jr., titled the "Arbitration Fairness Act of 2017," was introduced. The bill provides, in general, that "[n]otwithstanding any other provisions of this title, no predispute arbitration agreement shall be valid or enforceable if it requires arbitration of an employment dispute, consumer dispute, antitrust dispute, or civil rights dispute." *https://www.congress.gov/bill/115th-congress/house-bill/1374/text*. As of the drafting of this article, the bill still sits idle before the Subcommittee on Regulatory Reform and has a 3 percent chance of passing, according to *https://www.govtrack.us*.

Notwithstanding congressional inaction, change may be coming through the use of non-legislative methods, like Twitter, by advocates fighting what they believe to be injustice. With attention being drawn to these mandatory arbitration agreements, firms like Munger Tolles & Olson are being forced to reconsider their current employment contracts and the provisions in them. In fact, it did not take long for the firm to reconsider its agreement after Samuel drew attention to it. The firm released a tweet within two days stating that it was "wrong" and that the firm "will no longer require any employees, including summer associates, to sign any mandatory arbitration agreements."

For more information on these issues, see:

► *https://www.epi.org/publication/the-arbitration-epidemic/*

► *https://twitter.com/isamuel/status/977700343789314050*

► *https://myfloridalegal.com/webfiles.nsf/WF/HFIS-AVWMYN/$file/NAAG+letter+to+Congress+Sexual+Harassment+Mandatory+Arbitration.pdf*

► *http://www.supremecourt.gov/publicinfo/year-end/2017year-endreport.pdf*

► *http://twitter.com/Orrick/status/978344236725735425*

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Bankruptcy Law

Safe Harbor Provision of Bankruptcy Code

Merit Mgmt. Grp., L.P. v. FTI Consulting, Inc., 138 S.Ct. 883 (2018).

This March, the Supreme Court resolved a circuit split regarding whether the safe harbor provision of Bankruptcy Code section 546(e) protects all transfers conducted through a financial institution from avoidance as a fraudulent conveyance. While the code permits trustees to recover certain fraudulent transfers, section 546(e) protects certain transfers made by, to or for the benefit of financial institutions (among other entities). However, it was unclear among the circuits whether transactions are protected when the financial institution merely acts as a "conduit" through which the funding passed.

In *Merit Management*, Valley View Downs, L.P., and Bedford Downs Management Corp. entered into a leveraged buyout wherein Valley View agreed to purchase Bedford's shares for $16.5 million. Two banks acted as intermediaries, wiring the purchase price from Valley View to Bedford's shareholders, its largest being Merit Management Group, L.P. One of the banks also held the Bedford stocks in escrow as security for Bedford's post-sale obligations to Valley View. Valley View later filed for Chapter 11 bankruptcy, and the litigation trustee challenged the sale as a fraudulent transfer, arguing that Valley View was insolvent at the time of the transaction. Merit Management countered that the transaction was protected from avoidance under the safe harbor provision of section 546(e), as the transaction was made between two financial institutions. The bankruptcy court agreed, but the 7th Circuit reversed, reasoning that this interpretation was too broad and that section 546(e) cannot be read to protect transactions where a financial institution acts as a "mere conduit" in the transaction.

The Supreme Court affirmed, ruling that the relevant consideration is the transfer the trustee actually seeks to avoid. The Court noted that, where a transfer from A to D is executed, using B and C as intermediaries, the court should look to the transfer the trustee seeks to avoid (*i.e.*, A→D) to determine whether that transfer meets the safe-harbor criteria, and should not look to any "component parts" of the transfer (*i.e.*, A→B→C→D). Therefore, the Court determined that only the $16.5 million transfer from Valley View to Merit Management was relevant to its determination. Because neither Valley View nor Merit (neither A nor D) were entities covered under section 546(e), the transfer did not fall within the purview of the safe harbor provision.

Stated plainly, a transaction wherein the parties use a financial institution merely as an intermediary is not protected by section 546(e).

Equipment Lease

Kimzey v. Premium Casing Equip., L.L.C., No. 16-01490 (W.D. La. March 14, 2018), 2018 WL 1321971.

The debtor leased equipment from Premium Casing Equipment, L.L.C., prior to filing its bankruptcy petition. At the time of the bankruptcy filing, the debtor's principals decided to continue leasing the equipment as backup in case the debtor's owned equipment malfunctioned. However, the leased equipment was never used after the bankruptcy petition was filed, and the debtor moved to reject the Premium lease.

Premium subsequently sought allowance of an administrative-expense claim pursuant to section 503(b)(1)(a) for post-petition rentals owed on the equipment. Two unsecured creditors challenged the claim, but the bankruptcy court allowed the administrative claim in the amount of $57,752.93, reasoning that the equipment was an actual, necessary expense of preserving the estate. The court noted that the 5th Circuit does not require that the expense confer a financial benefit on the estate in order to be "necessary." The court also noted that the debtor's principals exercised sound business judgment in deciding to retain the equipment.

On appeal, the district court agreed that the post-petition equipment rentals were actual, necessary expenses for the preservation of the debtor's estate. The district court noted that a prima facie case under section 503(b)(1) can be established by showing that the claim arose from a transaction with the debtor-in-possession, and that the goods or services enhanced the debtor's ability to operate as a going concern. The appellants argued that, because the leases pre-dated the bankruptcy, Premium could not establish that it had transacted with a debtor-in-possession. The court dismissed this argument.

The court reasoned that the ongoing nature of a lease facilitates the legislative purpose behind section 503(b), which is to foster continued operations between a debtor and its creditors. The court held that the debtor's principals' post-petition decision to retain the leased equipment sufficed to constitute a "transaction with the debtor-in-possession" as required by the first prong necessary to establish a prima facie case for the administrative-expense claim.

The court further held that it was not necessary that the debtor use the equipment, or incur a tangible benefit for the estate, in order to satisfy the second prong requirement that the transaction enhanced the debtor's ability to operate as a going concern. The court held that the business judgment exercised by the debtor's principals was reasonable, and, ultimately, retaining the leased equipment increased the debtor's capacity to handle potential new business or overcome any unexpected equipment shortfalls that might have arisen post-petition. The district court thus affirmed the bankruptcy court's decision, finding that an actual financial benefit is not necessary to approve an administrative expense, and less calculable benefits, such as the ability to continue business as usual, may be sufficient.

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Corporate and Business Law

Identifying an Agent of a Limited Liability Company

Spinks Constr., Inc. v. Quad States Constr., L.L.C., 17-0580 (La. App. 1 Cir. 12/21/17), ____ So.3d ____, 2017 WL 6523080.

In 2008, Spinks Construction, Inc. executed a subcontracting agreement to provide various materials and labor to Quad States Construction, L.L.C. After completion of the work, Spinks claimed Quad States failed to pay $162,597.40 of the total balance. In March 2015, Spinks filed a petition against Quad States and three individuals, Dale Lancaster, James Richard Lancaster and Kris Ainsworth, claiming: (1) Quad States owed the remainder of what was due; (2) Dale Lancaster was personally liable as the "sole member" of Quad States; and (3) James Richard Lancaster and Ainsworth were personally liable as "qualifying parties" of Quad States.

In response, the three individuals filed a peremptory exception of no cause of action, claiming that they could not be personally liable for the business debts of a limited liability company. Answering the exception, Spinks argued the individuals were liable under La. R.S. 9:4814, which establishes personal liability of agents of contractors who knowingly fail to pay subcontractors with money received from construction contracts. Identifying Dale Lancaster as the "sole member" of Quad States, and James Richard Lancaster and Ainsworth as the "qualifying parties" of Quad States, Spinks argued the three individuals were "agents" under 9:4814. The trial court disagreed, finding: (1) prescription of the claim under the broader Louisiana Private Works Act; and (2) failure of Spinks to properly claim the three individuals were agents of Quad States. The trial court did not provide Spinks with an opportunity to amend its petition.

Considering Spinks' three assignments of error, the 1st Circuit affirmed in part, reversed in part, and remanded the case to the trial court. The 1st Circuit declined to consider Spinks' first two assignments regarding prescription because it was unnecessary to its ultimate holding. Addressing the third assignment regarding the appropriateness of the exception, the 1st Circuit agreed that Spinks' petition failed to state a legal cause of action against the three individuals. Considering only the petition and its attachments, Spinks failed to state a cause of action under R.S. 9:4814. The petition did not properly allege the individuals to be "agents" of Quad States according to the meaning of the statute.

The 1st Circuit interpreted R.S. 9:4814's reference to "agent" to be an incorporation of Louisiana's general law on agency, or mandate. According to Louisiana law, an agent, or mandatary, can represent a principal under either actual or apparent authority. Actual authority is based on express or implied agreement, and apparent authority is based on the conduct between the principal and the putative agent. In this case, none of the three individuals were alleged to have such power.

Spinks alleged James Richard Lancaster and Ainsworth to be "qualifying parties" of Quad States. The term "qualifying parties" is statutorily defined and refers to certain individuals who represent contractors on matters of state licensing and regulation. As qualifying parties, James Richard Lancaster and Ainsworth may have had limited agency power but were not agents within the meaning of R.S. 9:4814.

Spinks further alleged that, as a sort of "default" rule, Dale Lancaster, as the "sole member" of Quad States, could be presumed to be the general agent of the company. Disagreeing with this assertion, the 1st Circuit cited La. R.S. 12:1305(C), 1311 and 1317 as standing for the proposition that a third person must consult a company's articles of organization and written operating agreement, if any, to determine which individuals have the authority to act on behalf of that company. Reliance on the fact of membership alone — even if an individual is the sole member — is insufficient. Spinks should have consulted Quad States' organizational documents to determine whether Dale Lancaster was an agent of the company.

In addition to its inadequate assertions of agency power, Spinks failed to allege that any of the three individuals actually received money on behalf of Quad States and failed to apply the money to the balance owed to Spinks. By not properly addressing the legal elements of R.S. 9:4814, Spinks failed to state a cause of action in its petition, and the 1st Circuit affirmed the exception of no cause of action. Reversing the trial court in part, however, the 1st Circuit ruled Spinks was entitled to an opportunity to amend its petition under La. C.C.P. art. 934. The 1st Circuit remanded the case to the trial court for further proceedings consistent with its ruling.

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Family Law

Custody

In re C.A.C., 17-0108 (La. App. 4 Cir. 11/2/17), 231 So.3d 58.

After this long-term, same-sex couple separated, the non-biological mother sought custody of the child they had raised together since her birth. After the trial court awarded joint custody, with the biological mother as the domiciliary parent, and a physical custody schedule, the biological mother appealed. The court of appeal first found that the allegation in the non-biological mother's petition that removal from the non-biological mother's care would result in substantial harm to the minor child and was not in her best interest was sufficient to state a cause of action. The biological mother argued that the non-biological mother failed to show that sole custody to the biological mother would cause substantial harm to the child. The case turned, in large measure, on what was meant by "substantial harm." The trial court, and the court of appeal, found that substantial harm could be caused to the child by an emotional separation from the non-biological mother, whom the child considered her mother, and with whom she had a strong bond.

The biological mother's expert testified that the child was showing no symptoms of substantial harm, and that, therefore, there was no substantial harm. The biological mother further argued that there was no present substantial harm shown, and that the possibility for assumed future substantial harm was not sufficient to deprive her of her constitutionally guaranteed rights as the biological mother. To that end, the court of appeal noted: "As with all constitutional rights, a parent's right must be balanced with the child's right to a custodial arrangement which promotes his or her best interests." The biological mother also argued that the mother's rights as the natural tutor of the child were violated by requiring a joint custody arrangement with a non-parent. Important in the court's analysis was the biological mother's apparent pattern, and continuing desire, despite her testimony, to restrict and exclude the non-biological mother from access to the child and her activities and care.

The appellate court determined that the trial court did not err in finding that the biological mother was a fit parent but further finding that substantial harm would occur to the child if the biological mother were awarded sole custody. The court examined the La. Civ.C. art. 134 custody factors and found that it was in the child's best interest to have a joint custody arrangement. Importantly, the court of appeal noted that La. Civ.C. art. 133, which provides for custody for a non-parent, was not designed to address the situation where a same-sex couple had acted as parents for a child over an extended period of time, and where the child had a strong attachment to both adults. The dissent argued that no present substantial harm was shown, and, therefore, the mother's constitutional rights should not have been infringed upon.

Howze v. Howze, 17-0358 (La. App. 1 Cir. 9/28/17), 232 So.3d 606.

Although the trial court found that Ms. Howze did not meet the *Bergeron* burden to modify this considered decree of legal and physical custody, it nevertheless revised the physical-custody schedule to an alternating-week schedule. The court of appeal found that although a more "flexible" standard might be applied to "tweak" visitation schedules, changing the access schedule here to alternating weeks was more than "tweaking," and that since Mr. Howze failed to meet the *Bergeron* burden, the trial court's judgment was reversed.

Community Property

Vedros v. Vedros, 16-0735 (La. App. 5 Cir. 10/25/17), 229 So.3d 677, *writ denied*, 18-0004 (La. 2/23/18), 237 So.3d 520.

The court of appeal reversed the trial court's denial of Mr. Vedros' reimbursement claim for community funds used to make mortgage payments on Ms. Vedros' separate property. Since the property was not used as the family home, Mr. Vedros was entitled to reimbursement for the entire note, not just the reduction in the principal. Further, Ms. Vedros admitted that community funds were used to pay the notes, even though the actual checks were not allowed into evidence. The trial court did not err in ordering Mr. Vedros to pay to Ms. Vedros one-half of the funds that he withdrew from accounts registered in the parties' children's names. The court of appeal affirmed the application of lack of marketability and minority interest discounts regarding the value of the community portion of a business after discussing prior jurisprudence and finding that discounts were acceptable in the present case. Distributions made by the business entity to Ms. Vedros were reported on K-1 forms, rather than W-2 forms, and were, therefore, treated as profit distributions, rather than salary or bonuses, and Mr. Vedros was entitled to one-half of those distributions. The court of appeal addressed and distinguished whether those distributions were properly treated as payments to the owners as business profits, or compensation to Ms. Vedros for post-termination efforts, skills and labor.

Relocation

Holley v. Holley, 17-0325 (La. App. 5 Cir. 11/20/17), 232 So.3d 717.

The court of appeal found that 75 miles under the relocation statute is to be measured "'as the crow flies,' rather than by surface or road miles." The parties' respective measurements of the distance, depending on the route taken, was in some cases more and in some cases less than 75 miles. Thus, the relocation statutes did not apply, since the move here was less than 75 straight-line miles from home to home.

Cohabitation

Ronquille v. Ronquille, 17-0207 (La. App. 5 Cir. 11/15/17), 233 So.3d 189.

Even though Mr. Ronquille showed that Ms. Ronquille's male friend had spent eight consecutive nights at her home, the trial court found, and the court of appeal affirmed, that they were not cohabitating in the manner of married persons so as to extinguish Mr. Ronquille's spousal-support obligation. The trial court had also found that Ms. Ronquille's testimony regarding the living arrangement lacked credibility, and there was evidence indicating a relationship, but the record as a whole did not present sufficient evidence to establish that they were cohabitating.

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Fidelity, Surety and Construction Law

Recordation of Statement of Claim Before Recordation of Substantial Completion Appropriate with Proper Notice

Nu-Lite Elec. Wholesalers, L.L.C. v. Axis Constr. Group, L.L.C., 17-1204 (La. App. 1 Cir. 4/9/18), ____ So.3d ____, 2018 WL 1703964.

Nu-Lite Electrical Wholesalers, L.L.C., the supplier to an electrical subcontractor on a public project, alleged that it was not paid in full by the subcontractor.

On Sept. 20, 2010, Nu-Lite sent notice of its intent to file a sworn statement of claim to the owner, the general contractor and the payment bond surety. Nu-Lite recorded its statement of claim on Oct. 1, 2010. On May 11, 2011, Nu-Lite filed suit against the general contractor, the payment bond surety and the subcontractor. Thereafter, on Dec. 12, 2011, the owner recorded a certificate of substantial completion, which constituted a notice of acceptance of the work. Thus, Nu-Lite's statement of claim was recorded well before the recordation of substantial completion.

The general contractor and surety filed a peremptory exception of no right of action, arguing that Nu-Lite failed to comply with the recordation and notice requirements of the Louisiana Public Works Act. They argued that a bond claim (set forth in La. R.S. 38:2247) was predicated on compliance with La. R.S. 38:2242(B), which requires a claimant to record a sworn statement of the amount due within 45 days from the recordation of the notice of acceptance, which Nu-Lite failed to do. The trial court agreed, relying on *Gootee Constr., Inc. v. Atkins*, 15-0376 (La. App. 4 Cir. 11/4/15), 178 So.3d 639, and determined that Nu-Lite had no right of action because it recorded its statement of claim prematurely — well before the recordation of the certificate of substantial completion. The trial court dismissed the claims against the general contractor and surety, and Nu-Lite appealed.

The court of appeal noted that, in *Pierce Foundations, Inc. v. Jaroy Constr., Inc.*, 15-0785 (La. 5/3/16), 190 So.3d 238, the Louisiana Supreme Court held that the recordation provision in La. R.S. 38:2242(B) was permissive and was not a mandatory requirement for a bond claim under La. R.S. 38:2247. The court then concluded that Nu-Lite's filing of its claim prior to the filing of the notice of acceptance was not detrimental to Nu-Lite's claim. Relying on *Pierce* and *"K" Constr., Inc. v. Burko Constr., Inc.*, 629 So.2d 1370, 1374 (La. App. 4 Cir. 1993), the court found that "La. R.S. 38:2242(B) only contemplates a situation in which the notice of acceptance is filed prior to the lien having been filed." The court reasoned that the issue was whether the supplier's actions were sufficient to provide notice to the general contractor and the surety of its claims. The court found that the supplier notified the general contractor and surety of its intention to file a claim, subsequently recorded its claim in the public records and commenced a lawsuit to enforce its claim, which lawsuit was answered by the general contractor and surety. The court concluded that Nu-Lite's actions provided the defendants with sufficient notice of the claim and, therefore, satisfied the requirements of 38:2242(B).

The court also addressed the requirement in 38:2247 to provide notice to the contractor within 45 days of the recordation of the notice of acceptance. The court examined the record and concluded that the contractor had actual notice of the claim stated with substantial accuracy within 45 days of the notice of acceptance.

The court held that the provisions of 38:2242(B) and 38:2247 were satisfied. It reversed the judgment of the trial court and remanded for further proceedings.

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Insurance, Tort, Workers' Compensation & Admiralty Law

Interpretation of Maritime Insurance Contracts

Cont'l Ins. Co. v. L&L Marine Transp., Inc., 882 F.3d 566 (5 Cir. 2018).

Three tugs were towing a barge, FSB 101, on the Mississippi River, with the M/V ANGELA RAE (lead tug) and the M/V FREEDOM positioned behind FSB 101 and the M/V MISS DOROTHY positioned at its head. The MISS DOROTHY allided with a fender system on the Sunshine Bridge and sank, setting off a dispute between P&I and Atlantic Specialty, both insurers of the ANGELA RAE, as to which policy covered the loss.

The Atlantic Specialty policy covered the following situations: (1) the ANGELA RAE collides with something else, (2) the ANGELA RAE strands her tow, (3) the ANGELA RAE causes her tow to come into collision with anything else, or (4) the ANGELA RAE causes any damage to her tow or her tow's freight.

P&I sued because its policy covered only situations that Atlantic Specialty's does not. P&I contended that the MISS DOROTHY'S loss falls within the third situation covered by Atlantic Specialty's policy, *i.e.* that the ANGELA RAE caused her "tow" to come into collision with the fender system, urging application of the "dominant-mind" doctrine to define" tow" for the purposes of this insurance contract.

The dominant-mind doctrine is a principle of maritime tort law holding that when a flotilla, *i.e.,* the tugs and tow as a unit, causes damage to some third party, typically only the tug is liable, given that it is usually in control of the operation. P&I argued, and the district court agreed, that because the ANGELA RAE was the lead tug and responsible for the navigation of the flotilla, the MISS DOROTHY was the "tow" of the ANGELA RAE.

The 5th Circuit declined this application of tort principle to the interpretation of an insurance contract, instead relying on the eight corners rule to assess whether there is a duty to defend by applying the allegations of the complaint to the underlying policy without resort to extrinsic evidence. The court assumed the facts in Continental's complaint: "the ANGELA RAE was the lead tug; the MISS DOROTHY was assisting the ANGELA RAE with the towage of FSB 101; and the ANGELA RAE negligently caused the MISS DOROTHY's allusion." Thus the issue was narrowed and framed: Was the MISS DOROTHY the "tow" of the ANGELA RAE for purposes of Atlantic Specialty's policy?

The court noted that, under Louisiana law, the interpretation of insurance policies is governed by general rules of contract interpretation, and thus courts should seek to determine the parties' common intent, as reflected by the words of the policy. Seeking the "plain, ordinary and generally prevailing meaning" or "technical meaning" of the word "tow," the court consulted dictionaries, including Black's Law, Merriam-Webster and the Oxford English; case law including Supreme Court and 5th Circuit opinions; and Schoenbaum's treatise on Admiralty and Maritime Law to synthesize a definition of tow — some ship or boat "that is being provided extra motive power from another vessel by being pushed or pulled."

The court concluded that "'tow,' as used in Atlantic Specialty's policy, is defined by its plain, ordinary meaning: a vessel that is provided auxiliary motive power by being pushed or pulled. A tug remains a tug when it is tugging (*i.e.,* pushing or pulling), and a tow is a tow only when it is being towed (*i.e*., being pushed or pulled). And because the MISS DOROTHY was not provided any extra motive power, it was not a tow. Atlantic Specialty's policy does not apply."

Federal Officer Removal Statute – 2011 Amendment

Legendre v. Huntington Ingalls, Inc., 885 F.3d 398 (5 Cir. 2018).

Four Legendre brothers filed suit in state court against Huntington Ingalls (Avondale) for the death of their sister, Mary Jane Wilde, from mesothelioma, allegedly caused by defendants having exposed her to asbestos. Avondale removed to federal district court under the federal officer removal statute, 28 U.S.C. §1442. The 5th Circuit affirmed the district court's decision to remand to state court, holding that, under controlling precedent, Avondale must show a causal connection ("causal nexus") between the federal officer's direction and the conduct that is the subject of the complaint. Avondale appealed.

To remove, a defendant must show, *inter alia*, that it acted pursuant to a federal officer's directions and that a causal nexus exists between its actions under color of federal office and the plaintiff's claims. In the past, §1442 permitted removal "only when the state suit was 'for any act under color of such office.'" Congress amended the statute in 2011 "to allow the removal of a state suit 'for *or relating to* any act under color of such office.'"

The Legendres' unrebutted evidence showed that while the government required Avondale to use asbestos, it neither required nor restricted its use of safety measures. Safety was Avondale's responsibility, and government inspectors neither monitored nor enforced safety regulations. To remove, "Avondale must show a causal connection between the federal officer's direction and the conduct challenged by the Legendres . . . . Avondale has not made this showing."

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International Law

International Trade Law Actions

The United States has undertaken several unilateral international trade law actions in the past few months, spurring vocal reaction and retaliation from United States' trading partners. The following is a brief summary of the measures taken, or proposed to date, with references to specific retaliatory measures where appropriate.

Presidential Proclamations 9704 and 9705

Adjusting Imports of Aluminum into the United States, 83 Fed. Reg. 51, 11619 (March 8, 2018). ***Adjusting Imports of Steel into the United States***, 83 Fed. Reg. 51, 11625 (March 8, 2018).

On March 8, President Trump issued two presidential proclamations seeking to adjust imports of steel and aluminum into the United States pursuant to Section 232 of the Trade Expansion Act of 1962, 19 U.S.C. § 1862. The proclamations follow findings by the U.S. Department of Commerce that imports of certain steel and aluminum products are impairing the national security of the United States. President Trump's executive orders impose a 25 percent import tariff on various categories of steel and a 10 percent import tariff on numerous aluminum products.

Reaction to the tariffs was swift. On March 22 — the day before the tariffs became effective — the United States instituted two separate procedures for exclusions and exemptions. First, product-specific exclusions from the tariffs may be sought from the U.S.

Department of Commerce. Second, country-wide exemptions are permitted at the discretion of the United States Trade Representative (USTR) and White House. Canada and Mexico were granted immediate exemptions pending negotiations on an updated NAFTA. Temporary exemptions were also granted to Australia, Argentina, South Korea and Brazil. Japan is expected to seek an exemption during an upcoming state visit to the United States.

China responded to the tariffs on April 2 by imposing its own import tariffs on various U.S. commodities produced in politically sensitive jurisdictions. China also requested dispute-settlement consultations with the United States under the World Trade Organization (WTO) Dispute Settlement Understanding, the first step in the process of formal dispute proceedings. China is treating the U.S. tariffs as a safeguards measure and contends that the steel and aluminum tariffs violate various provisions of the WTO Agreement on Safeguards.

China's Policies and Practices Related to IP

Notice of Determination and Request for Public Comment Concerning Proposed Determination of Action Pursuant to Section 301: China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation, 83 Fed. Reg. 67, 14906 (April 6, 2018).

On Aug. 18, 2017, the USTR initiated an investigation into whether certain policies of the Chinese government constitute impermissible restrictions on U.S. intellectual property rights. The USTR investigated Chinese forced technology-transfer practices, whereby China allegedly requires the transfer of U.S. intellectual property to Chinese companies in order to do business in China. The USTR also examined non-market-based, technology-licensing requirements and Chinese government direct investment in the United States seeking to procure the transfer of important intellectual property. On March 22, 2018, the USTR published its full report, which concluded that the Chinese acts, policies and practices impose an unreasonable burden or restriction on U.S. commerce under Section 301 of the Trade Act of 1974, 19 U.S.C. 2411. The USTR published a list of $50 billion worth of proposed tariffs on Chinese goods that benefit from Chinese industrial policies, including the Made in China 2025 initiative. The recommended action is currently in a public comment period, with a public hearing conducted on May 15, 2018. China has not formally responded to the proposed measures, but retaliation is expected once the tariffs are final.

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Mineral Law

Early Termination; Drilling Contract; Damages

Baywater Drilling, L.L.C. v. Sw. Energy Partners, L.L.C., No. 17-30615, 2018 WL 501387 (5 Cir. Jan. 19, 2018).

Baywater Drilling, L.L.C., was hired by Southwest Energy Partners, L.L.C., to perform drilling services on a well located in Cameron Parish. Shortly after Baywater began its work, Southwest terminated the operations because the well "took a kick" (i.e., started flowing early due to high pressure). Southwest based its stoppage on Section 6.3(b) of the contract, which stated, "Operator [Southwest] shall have the right to direct the stoppage of the work to be performed by Contractor [Baywater] . . . at any time prior to reaching the specified depth . . . even though Contractor has made no default . . . . Operator shall reimburse contractor as set forth in subparagraph 6.4 . . . ."

Prior to the termination, Southwest paid Baywater $490,500 — $400,000 for 20 days of worked performed, $20,000 for hiring a tug boat to move Baywater's rig from the well and $70,500 for various other expenses. Despite receiving this amount, Baywater filed a lawsuit claiming that it was entitled to an additional $300,000 as an early termination payment. Baywater based its claim on Section 6.4 of the contract, which provided that the operator was to pay the contractor "for all applicable daywork rates and all other charges and reimbursements due to Contractor; but in no event shall such sum, exclusive of reimbursements due, be less than would have been earned for 15 days [of work]."

Baywater argued that the "but in no event" language of Section 6.4 required that Southwest pay an additional $300,000. The trial court disagreed. On summary judgment, it denied Baywater's claim and held that Southwest's prior payments satisfied its obligation under the contract. On appeal, the U.S. 5th Circuit Court of Appeals affirmed the trial court's interpretation of the drilling contract. The court found that Section 6.4 was not a liquidated damages clause; instead, it was a minimum payment requirement in the event the contract terminated before the 15th day of performance. Here, Southwest's payment of $490,500 by the 20th day exceeded the minimum payment requirement. The court further found that Southwest did not breach the contract; instead, it exercised its right to terminate it. The court did not find that Baywater was entitled to an additional $300,000 early termination payment, which would have amounted essentially to a windfall for Baywater.

Pugh Clause; Lease Interpretation

J&L Oil Co. v. KM Oil Co., L.L.C., La. App. 2 Cir. 2/28/18, ____ So.3d ____, 2018 WL 1075402.

A 1951 mineral lease required that the lessee drill certain wells to a specific depth by certain dates. The first well was to be completed by Jan. 1, 1952, to a depth of 1,700 feet. Thereafter, successive wells were to be drilled on a continuous basis, e.g., the second well was to be started 30 days after the completion or abandonment of the first well, the third well was to be started after the completion or abandonment of the second well, and so on, up to five wells. The 1951 lease also required that if this successive completion schedule was not followed, the 1951 lease would terminate and the lessee would have no right to resume drilling. It also stated that if five wells were timely drilled, the lease would remain in effect as long as the wells were producing in paying quantities. If fewer than five wells were timely drilled or one of the five wells stopped producing in paying quantities, then lessee would retain only five acres in a square with the well in the center for those wells that continued to produce. Any well that failed to produce in paying quantities would not hold any portion of the lease as to any acreage. A total of 13 wells were ultimately drilled.

This case turns on the interpretation of the Pugh clause in the 1951 lease and whether it was satisfied. The current operator, J&L Oil, sued defendants — KM Oil Co., L.L.C., et al. — for affecting its mineral lease. At the district court level, the parties filed cross-motions for summary judgment, including affidavits. The trial court ruled in favor of defendants' motion for summary judgment and denied J&L's motion. The trial court found that the affidavits submitted in support of J&L's motion for summary judgment did not demonstrate that the 1951 Pugh clause was satisfied.

The appellate court affirmed the trial court's ruling. The appellate court found that the affidavits submitted in support of J&L's motion for summary judgment were insufficient because they did not provide the dates the wells were drilled, nor did J&L provide evidence that the five required wells had consistently produced since being drilled in 1951-1952. The court further found that a statement in the 1977 lease, noting that the 1951 lease remained "a producing mineral lease," was not sufficient to show that the Pugh clause of the 1951 lease had been satisfied.

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Professional Liability

Summary Judgment

Thomas v. Drew, 17-0818 (La. App. 3 Cir. 3/7/18), ____ So.3d ____, 2018 WL 1178109.

Thomas underwent shoulder arthroscopy to repair his rotator cuff syndrome. He was administered a number of anesthetic/pain-relieving/anti-emetic medications pre-, peri- and post-operatively. He was discharged from the surgical center that same day, apparently in good condition. But six hours later, he was found at home unconscious, after having taken only one oxycodone after discharge. He remained in a coma for five days. Upon his release, he had lost the use of the left side of his body.

Following a medical-review-panel opinion in favor of the healthcare providers, Thomas filed a lawsuit against Dr. Drew claiming that he had been released too early following his surgery, thus causing the complications that followed.

Drew filed a motion for summary judgment, offering the unanimous medical-review-panel opinion in support. Thomas opposed the motion with the affidavit of an anesthesiologist-pain-management physician, Dr. Gros, who opined that Thomas was "not monitored long enough prior to discharge from the Recovery Room at Lafayette Surgery Center." Drew claimed that Gros was not qualified to render an opinion about the standard of care of an orthopedic surgeon, further arguing that Thomas provided no expert testimony to show Drew's alleged breach of any standard of care caused or contributed to any damages.

Thomas argued that Drew failed to follow proper procedure for objecting to Gros' expert opinion when he failed to challenge Gros' qualifications as an expert as required by La. C.C.P. art. 1425, *i.e.*, a *Daubert* challenge or a motion *in limine*. The trial court found that Drew did challenge the qualifications of Gros in his reply memorandum supporting the motion for summary judgment, thereby following the proper procedure of La. C.C.P. art. 966(D)(2) in objecting to Gros' affidavit.

The appellate court agreed with Thomas that *Daubert* standards should be considered by the trial court in determining whether the expert is qualified. However, the appellate court noted that, at the hearing on the summary judgment motion, defense counsel extensively discussed the applicability of *Daubert*, and the transcript showed that the trial judge did conduct a *Daubert* analysis concerning Gros' qualifications to testify about an orthopedist's standard of care. The trial and appellate courts agreed that the alleged malpractice was not peculiar to orthopedic surgery and thus an expert in orthopedic surgery was not required; nevertheless, they found that Gros' affidavit was insufficient to establish that Dr. Drew breached the standard of care because it never stated "what standard of care was owed to Mr. Thomas by Dr. Drew post-operatively or that Dr. Drew breached any standard of care at all in his care of Mr. Thomas." Drew was never mentioned in Gros' affidavit, and it simply made a conclusory statement about the patient's post-operative care. "Affidavits that are conclusory with no supporting underlying facts are legally insufficient to defeat a motion for summary judgment." The trial court's granting of the motion for summary judgment in favor of Dr. Drew was affirmed.

HCP Claim of Malicious Prosecution and Defamation

Jeansonne v. Bonano, 17-0828 (La. App. 1 Cir. 1/23/18), ____ So.3d ____, 2018 WL 525367.

Mr. Bonano filed a medical-review-panel (MRP) complaint against Dr. Jeansonne arising from Mrs. Bonano's death. The panel exculpated Jeansonne. Bonano did not file a lawsuit. Jeansonne, nevertheless, sued Bonano, alleging malicious prosecution and defamation, claiming that Bonano "knew" Jeansonne could not be responsible for Mrs. Bonano's death and "had no evidence to support or even suggest such a claim." Bonano responded with exceptions of no cause of action and prescription. The trial court sustained the exception of no cause of action as to Jeansonne's malicious prosecution claim and sustained the exception of prescription as to the defamation claim.

The appellate court reviewed statutory law pertaining to medical-review panels, noting that, irrespective of the findings of the panel, it is the court that decides the rights of the parties, not the panel, which simply renders an opinion. Therefore, no cause of action existed.

As to the defamation claim, the court noted that the panel reached its opinion on Dec. 3, 2013, during a telephone conference in which Jeansonne's counsel participated, and Jeansonne's counsel received a copy of the signed opinion on Jan. 14, 2014. Jeansonne's defamation claim was filed on Jan. 7, 2015.

The trial court ruled that prescription began to run on Dec. 3, 2013, when the panel made its ruling during the telephone conference. Jeansonne argued that an action for defamation based on allegations made in a judicial proceeding against a party cannot be filed until the proceeding is concluded, which he claimed would not occur until 90 days after a claimant receives the panel's final opinion, as required by the MMA, *i.e.*, prescription on the defamation claim did not begin until Bonano's right to file a malpractice claim terminated. Alternatively, Jeansonne argued that the opinion was finalized on the date on which Bonano received the panel's opinion by certified mail (Jan. 16). The trial court disagreed and found "no requirement that an action for defamation arising out of allegations made in a [MRP cannot] be brought until the [MRP] is terminated. Instead, prescription begins to run when the plaintiff has knowledge of the allegedly defamatory publication," a finding with which the court of appeal concurred.

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Taxation

Valuation of Unusable Salt Caverns

Blanchard v. Axiall, L.L.C., No. 035890, 23rd Judicial District Court (12/19/17).

Axiall, L.L.C., owns a number of salt caverns in Assumption Parish, Louisiana, where several years ago a salt cavern failed. The Louisiana Department of Natural Resources subsequently promulgated regulations that severely curtailed Axiall's ability to use its salt caverns. However, the local assessor rejected Axiall's assertion that, under the new regulations, the property was essentially worthless. Upon review, the Louisiana Tax Commission agreed with Axiall. The Commission found that the salt caverns were to be valued under the guidelines for oil and gas properties and that they were not being, nor could they be, used for a commercial purpose due to the new restrictive regulations. The Commission determined a nominal fair market value for the properties.

On appeal, the district court in Assumption Parish reversed. The district court found first that the properties should have been valued as ordinary business assets, not oil and gas properties, despite their intended use for oil and gas storage. The district court next found that Axiall used the caverns for commercial production of brine for its manufacturing establishment and for disposal. Accordingly, the district court reinstated the assessor's valuations. The matter is currently on appeal to the Louisiana 1st Circuit Court of Appeal.

In the meantime, the Louisiana Tax Commission considered a very similar case by another taxpayer. See, *Blue Cube Operations, L.L.C. v. Assumption Parish Board of Review*, No. 16-22007-001. In its decision, the Commission doubled down and emphasized that brine wells are no different from oil and gas wells and that the local assessor's refusal to value brine wells under the guidelines for oil and gas properties was invalid, incorrect and an abuse of the assessor's discretion. The Commission further noted that the local assessor had submitted no evidence explaining or justifying his valuation of the salt caverns. The Commission noted that it could only speculate that the assessor must have determined the salt caverns to have some commercial use. However, the taxpayer presented specific and compelling evidence establishing that the salt caverns had no separate commercial value and were not (and could not) be used to store hydrocarbons as intended. Finally, the Commission concluded that, until the process to convert the caverns for the storage of hydrocarbons is completed, they are simply holes in the ground without any inherent additional commercial value. The Commission then determined a nominal fair market value for the properties. The local assessor has appealed this decision to the district court in Assumption Parish.

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Latest Act of the Legislature Controls

Metals USA Plates & Shapes Se., Inc. v. La. Dep't of Rev., 17-0699 (La. App. 3 Cir. 3/21/18), ____ So.3d ____, 2018 WL 1464054.

The 3rd Circuit Court of Appeal held a corporation engaged in the metals business was not entitled to a sales-tax refund on purchases of welding gases because certain commercial purchases of fuels and gases were not excluded from sales tax under La. R.S. 47:301(10)(x).

The resolution of the dispute hinged entirely on the interpretation of two acts passed by the Louisiana Legislature in the same session, each applicable to the purchase of the welding gases at issue, and certain exemptions from sales taxes for those purchases. Act 1 of the 2008 Second Extraordinary Session excluded from tax any fuel or gas purchased, and Act 9 of the same session excluded only butane and propane gases. Each act attempted to amend and reenact the same provision of La. R.S. 47:301(10)(x). Both acts in question were passed in the same legislative session, but evidence in the record established that Act 9 was passed following the passage of Act 1.

The taxpayer contended that the two acts could be read together and harmonized; however, the 3rd Circuit found the two acts were plainly irreconcilable. Acts 1 and 9 could not be harmonized to give effect to both acts consistent with legislative intent. The 3rd Circuit referenced the Louisiana Department of Revenue's attempt to resolve the conflict between Acts 1 and 9 in Louisiana Revenue Information Bulletin No. 08-022, 07/21/08 (RIB). The RIB stipulated that the Department's position has been that, since Act 9 was the last expression of the Legislature, the amendments to La. R.S. 47:301(10)(x) made by Act 9 are controlling and supersede the amendments to the same statute by Act 1. Moreover, the 3rd Circuit looked to the testimony in the record that established that welding gases, such as those at issue, have been taxed by the Department consistently at all times pertinent. Thus, the Department maintained its current position with respect to Acts 1 and 9 since their enactment. Accordingly, based on a thorough reading of the plain wording of the two acts, the 3rd Circuit found Acts 1 and 9 were in conflict, and the last expression of legislative will, Act 9, impliedly repealed Act 1.

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ANSWERS for puzzle on page 40.

1 D	A		2 O	3 L	O	4 G	R	5 A	P	6 H	I	7 C
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9 S	W	O	R	N	I	N		10 R	E	A	L	
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12 N	I	E	C	E		13 R	E	L	I	E	V	E
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14 E	N	15 M	I	T	Y		16 D	17 E	N	O	V	O
R		Y				18 E		X				C
19 I	N	S	U	20 L	T	S		21 C	A	22 U	S	A
T		T		L		T		E		F		T
	23 F	I	F	A		24 A	P	R	I	O	R	I
25 A		C		M		T		P		S		O
26 T	E	S	T	A	M	E	N	T	S		27 O	N