Restrict Procurement Competition to Veteran-Owned Businesses

Kingdomware Techs., Inc. v. United States, 136 S.Ct. 1969 (2016).

Around January 2012, the Department of Veterans Affairs (Department) sought to procure an Emergency Notification Service. To do this, the Department sent a request for quotes (RFQ) to a non-veteran-owned company through the General Services Administration's (GSA) Federal Supply Schedule (FSS). The FSS consists of pre-negotiated contracts for supplies or services between private vendors and the GSA for the benefit and use of various federal agencies. These contracts are usually for supplies or services in bulk; this usually gives the agency using the FSS economy-of-scale pricing.

The company that was sent the RFQ responded to the Department with a favorable price quote. On Feb. 22, 2012, the Department subsequently entered into an agreement with the company to supply the emergency notification service and concluded the contract in May 2013. At some point after the award, Kingdomware Technologies, Inc. filed a post-award bid protest with the Government Accountability Office (GAO).

A protest is a written objection by an interested party to a solicitation or other (federal) agency request for bids or offers, cancellation of a solicitation or other request, award or proposed award of a contract, or termination of a contract if terminated due to alleged improprieties in the award. *See* FAR 33.101 (2014). Three fora are available to potential protestors to hear these challenges — (1) the federal agency soliciting the requirement; (2) the Court of Federal Claims (COFC); and (3) the GAO. The GAO adjudicates protests under the Competition in Contracting Act of 1984 (CICA), 31 U.S.C. §§ 3551-56.

In its protest, Kingdomware alleged

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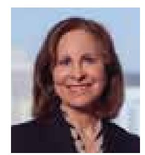

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that the Department procured multiple contracts through the FSS without restricting competition to veteran-owned small businesses as required by the "rule of two" under 38 U.S.C. § 8127(d). In general, section 8127 provides that the secretary of the Department of Veterans' Affairs "shall award" contracts by restricting competition for the contract to veteran-owned small businesses. The rule is derived from section 8127(d), which generally provides that the contracting officer must: (1) reasonably expect that at least two of these businesses will submit offers/bids/quotes, and that (2) the award can be made at a fair and reasonable price that offers the best value to the United States.

Here, Kingdomware alleged that the Department could not award the subject contract without researching to see if the rule applied. The GAO agreed with Kingdomware and made corrective recommendations. The Department did not follow the GAO's recommendations. Subsequently, Kingdomware filed suit in the COFC and sought declaratory and injunctive relief. The COFC granted summary judgment in favor of the Department. *See, Kingdomware Techs., Inc. v. United States*, 107 Fed. Cl. 226 (2012). The parties then raised the issue to the Court of Appeals for the Federal Circuit, and a divided panel affirmed the COFC decision. *See, Kingdomware Techs., Inc. v. United States*, 754 F.3d 923 (2014). The Supreme Court granted cert.

The question before the Court was whether section 8127(d) requires the Department to apply the rule in all procurements, or whether the statute gives the Department some discretion in applying the rule. In looking at the language of the statute, the Court found that section 8127(d) unambiguously requires the Department to use the rule before contracting under the competitive procedures. In making this finding, the Court focused on the use of the term "shall" in section 8127(d) and contrasted that with the use of the term "may" in sections 8127(b) & (c). Specifically, the Court found that "Congress' use of the word 'shall' demonstrates that § 8127(d) mandates the use of the Rule of Two in all contracting before using competitive procedures. Unlike the word 'may,' which implies discretion, the word 'shall' usually connotes a requirement."

The Federal Circuit and the Department afforded several arguments for an alternative reading of section 8127(d). The Federal Circuit reasoned that the section's prefatory clause, which declared that the purpose of the rule, to meet the annual contracting goals that the Department is required to set under section 8127(a), made section 8127(d) discretionary. The Supreme Court did not find this reasoning sound and, citing to established precedent, found that the prefatory clause has no bearing on, nor does it change, the plain meaning of the operative clause of the section, citing *Yazoo & Mississippi Valley R. Co. v. Thomas*, 10 S.Ct. 68 (1889). Further, the Court found that the Federal Circuit's reasoning would produce an anomaly that would render sections 8127(b) & (c) inapplicable after the prefatory clause's goals were met.

The Department made three arguments. First, the Department argued that the mandatory provision under section 8127(d) did not apply to "orders" under "pre-existing FSS contracts." The Court found this argument unpersuasive noting that "orders" under the FSS were still contracts under the Federal Acquisition Regulation. Second, the Department argued that the Court did not appreciate the distinction between FSS orders and contracts; specifically, that FSS orders were only for simplified acquisitions and that applying the rule to those acquisitions would hamper mundane purchases. The Court also found this argument unpersuasive and corrected the Department's "understated" explanation of the FSS. The Court pointed out that the FSS was not just for simplified acquisitions and that the Department itself had used the FSS for acquisitions "well above simple procurement." Lastly, the Department asked the Court to find the FSS were "orders" and not "contracts" in accordance with its interpretation. The Court refused to apply the *Chevron* deference here, citing to the unambiguous nature of the statute. *See, Chevron U.S.A. Inc. v. Natural Resources*

Defense Council Inc., 1046 S.Ct. 2778 (1984).

Consequently, the Court determined that the subject statute was clear, and reversed and remanded the case.

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LLC Statute Trumps General Discovery Rules

Channelside Services, L.L.C. v. Chrysochoos Group, Inc., 15-0064 (La. App. 4 Cir. 5/13/16), 194 So.3d 751.

A judgment creditor obtained a charging order against a judgment debtor's interest in a Louisiana limited liability company (LLC). Seeking enforcement of its rights against the judgment debtor's property, the judgment creditor issued the LLC a notice of records deposition and subpoena duces tecum for production of the LLC's business and financial records. The LLC moved to quash the deposition and subpoena, arguing that the requested discovery was unduly burdensome, not supported by a showing of good cause and restricted under the specific provisions of the LLC Act, La. R.S. 12:1301 *et seq.* The judgment creditor opposed the motion to quash and moved to compel, arguing that the requested discovery was necessary for enforcement of the charging order and that Louisiana statutes pertaining to judgment debtor examinations permit a creditor to examine any third party upon any matter relating to a judgment debtor's property. *See*, La. C.C.P. arts. 1421-1472, art. 2451. The court ruled in favor of the LLC, holding that the specific statute relating to inspection of a LLC's business records governed over general discovery rules.

In weighing the right of a judgment creditor to obtain information in execution of its judgment against the right of the LLC to be free from harassment, undue burden and financial loss, the court noted that a creditor's exclusive remedy against the member's interest is to apply to a court of competent jurisdiction for a charging order, whereby "the court may charge the membership interest of the member with payment of the unsatisfied amount of judgment with interest . . . . [T]o the extent so charged, the judgment creditor shall have only the rights of an assignee of the membership interest." *Id.* at 758-59, *citing* La. R.S. 12:1331. An assignee of a membership interest in a LLC is granted certain financial rights to profits, losses and allocations, but no other rights or powers as a member. *See*, La. R.S. 12:1330. Under La. R.S. 12:1319, the right to obtain and inspect an LLC's records is reserved to the members of the LLC. The court held that a judgment creditor with a charging order is an assignee — not a member — of the LLC and does not have the right to obtain or review the LLC's records.

Importantly for business and corporate practitioners, the opinion contrasts the default creditor protections offered by an LLC versus those extended to partner-

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ships and corporations. Specifically, "the Louisiana LLC Act affords LLCs different and greater protections from charging creditors of its members compared to Louisiana laws pertaining to creditors of corporate shareholders or partners in a partnership." *Id.* at 760. A creditor may seize a partner's interest in the partnership and be paid an amount equal to the value of the interest as of the time of seizure. *See*, La. Civ.C. arts. 2819, 2823. Similarly, a creditor may seize a shareholder's stock and exercise all rights associated with the stock. *See*, Susan Kalinka *et al.*, *Limited Liability Companies and Partnerships: A Guide to Business and Tax Planning*, 9 La. Civ. L. Treatise § 3.2 (4th ed. 2015); La. R.S. 12:1-140, 12:1-723. Under the LLC Act, the exclusive remedy of a judgment creditor of a member is obtaining a charging order against the membership interest and being treated as an assignee of that membership interest. Practitioners should consider the protections afforded by an LLC in advising clients on entity formation and conversion and the difficulties associated with attempting to monetize a membership interest in an LLC when advising clients seeking to secure a debt or enforce a judgment.

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Community Property

Radcliffe 10, L.L.C. v. Burger, 14-0347 (La. App. 1 Cir. 3/28/16), 191 So.3d 79.

Radcliffe 10, L.L.C., the judgment creditor of Mr. Burger, sought to revoke a judgment obtained by the Burgers, during their marriage, to obtain a separation of property, to terminate their legal regime and to partition their previously existing community property. The trial court revoked the Burgers' judgment, finding that it was void ab initio because, although obtained under La. Civ.C. art. 2329, it was obtained by contradictory petition, rather than joint petition. In a per curiam opinion, en banc, by 10 of the 12 judges of the 1st Circuit, the trial court's judgment was maintained, since the court could not reach a majority to affirm or reverse. Five of the 10 judges would have affirmed, but the other five would have reversed. Numerous well-supported and -considered arguments were made by the judges in concurring and dissenting opinions. The case should be read for the contrasting analyses of the various issues at play.

Custody

State ex rel. S.K., 15-0457 (La. App. 5 Cir. 7/29/15), 189 So.3d 1103.

An appeal from a judgment terminating parental rights must be taken within 15 days from the mailing of the notice of the judgment under Louisiana Children's Code article 332(A), due to the priority nature of matters regarding parental status.

Ardoin v. Grice, 15-0972 (La. App. 3 Cir. 4/13/16), 190 So.3d 440.

Two ex parte custody orders — one to the putative father, and one to the putative father's mother — were declared absolute nullities because (1) no service had ever been effectuated on the mother regarding the pleadings that gave rise to those ex parte orders, and (2) the ex parte orders were not obtained in compliance with law. On the custody trial between the mother and the non-party putative paternal grandmother, the trial court further erred by placing the burden on the mother to regain custody of her child, which had been inappropriately taken from her under the above ex parte orders. The court of appeal awarded custody to the mother, finding that the putative paternal grandmother had failed to show that an award of custody to the mother would result in substantial harm to the child. The trial court's suspension of the father's visitation was affirmed, as he had been incarcerated, as was the requirement that he petition the court prior to any visitation being awarded. The court ordered that custody be transferred from the paternal grandmother to the mother immediately upon the finality of the court of appeal's opinion.

Darby v. Duplechain, 16-0002 (La. App. 3 Cir. 5/4/16), 192 So.3d 258.

After the parties appeared before the hearing officer, the hearing officer recommended that a protective order be issued against Mr. Duplechain and in favor of Ms. Darby and her two children. Mr. Duplechain objected and obtained a hearing before the trial court. After an in-chambers conference with the court, Mr. Duplechain orally moved for a continuance, which was denied. He then requested that the matter be heard, which the trial court also denied. Nevertheless, the trial court adopted the recommendation of the hearing officer and issued the protective order. The court of appeal reversed, finding that Mr. Duplechain's due process rights were violated, as he was not given a meaningful opportunity to be heard, as no evidence was taken despite his request for a hearing. The court of appeal remanded the matter for hearing.

Divorce

Barajas-Merez v. Valdovinos-Moreno, 15-0473 (La. App. 1 Cir. 2/26/16), 190 So.3d 758.

Plaintiff was a Mexican illegal alien residing in Terrebonne Parish. Defendant was still residing in Mexico and was unable to be located by the court-appointed curator *ad hoc*. On plaintiff's motion to obtain the divorce, the trial judge denied the judgment, stating that because plaintiff was an illegal alien, he did not believe that the plaintiff had any standing or the right to the benefits of the law of the state of Louisiana. Thus, he wrote "JUDGMENT Denied" across the proposed divorce judgment. The court of appeal dismissed the plaintiff's appeal, finding that the judgment was not a final judgment because it lacked the necessary decretal language and other formal-

ities. The dissent argued that the court of appeal should have converted the appeal to a writ, exercised its supervisory authority, granted the writ, vacated the court's judgment and remanded for further proceedings. The dissent expressed the position that the trial court should have allowed the plaintiff to proceed on the divorce. The dissent also stated:

> Because the majority has dismissed this appeal based on a lack of a valid, final judgment, this divorce proceeding is still pending before the trial court below. Procedurally, plaintiff may again attempt to set the matter for trial on the merits or attempt to take a confirmation of default, whichever is legally appropriate.

Id. at 763 n.2 (Pettigrew, J., dissenting).

Child Support

State ex rel. C.I.B. v. Bye, 16-0102 (La. App. 5 Cir. 5/12/16), 191 So.3d 1207.

Mr. Bye's appeal of a child support ruling rendered in juvenile court, under La. R.S. 46:236.1.1, *et seq.,* was untimely, since filed more than 15 days after the issuance of the judgment. Matters in juvenile court, which are controlled by the Children's Code, are subject to the procedural provisions of the Children's Code, which provides for appeal delays of 15 days, rather than the similar 30-day provision of the Code of Civil Procedure.

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Tort: No Class

Crutchfield v. Sewerage & Water Bd. of New Orleans, ____ F.3d ____ (5 Cir. 2016), 2016 WL 3769303.

In May 1995 — 10 years before Katrina and 21 years before our present difficulties — New Orleans experienced a major flood, causing multiple deaths and more than $3 billion in damages. This prompted Congress to provide increased flood protection for the region in the Water Resources Development Act of 1996, authorizing the Army Corps of Engineers to partner with state and local agencies to improve drainage and prevent flooding in Orleans, Jefferson and St. Tammany parishes via the Southeast Louisiana Urban Flood Control Project. This procedur-

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ally complex case involved the construction of the Dwyer Road Intake Canal, a 7,000-foot-long, 14-to-16-foot-deep box culvert in New Orleans' Ninth Ward, begun in 2008 and completed five years later. The suit was filed in state court in 2012, seeking to represent a class of owners of immovable property and residents within 1,000 feet to the north or south of the project, approximately 1,054 houses, alleging construction activities such as excavation, dewatering and pile driving damaged and stigmatized their property and caused them mental and emotional distress.

All defendants except the Sewerage and Water Board (Board), which plaintiffs claim exercised oversight and control over the project, were dismissed. The Board filed a third-party demand against Hill Brothers Construction, the general contractor. Hill brought in several subcontractors and removed to federal court under the federal-officer-removal statute (28 U.S.C. § 1442(a)(1)) on the ground that its challenged conduct related to work it performed on a Corps of Engineers contract. Plaintiffs sought remand, arguing that Hill's non-compliance with the Corps' contract specifications precluded availability of the government-contractor defense. Unimpressed, the district court kept the matter in federal court.

Plaintiffs then moved to certify a class. Denying plaintiffs' motion, the district court concluded that they failed to satisfy the requirements of commonality under Rule 23(a) and predominance and superiority under Rule 23(b)(3). The threshold criteria for certification of Rule 23 class actions are:

> 1. The class is so numerous that joinder of all members is impracticable.
> 2. There are questions of law or fact common to the class.
> 3. The claims and defenses of the representative parties are typical of the claims or defenses of the class.
> 4. The representative parties will fairly and adequately protect the interests of the class.

The court stated that the relevant provision was Rule 23(b)(3), which allows a class action to be maintained "if the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." The court gave three reasons for denying the motion for class certification — commonality under Rule 23(a) and predominance and superiority under Rule 23(b)(3), with lack of predominance being the "fatal defect." The court explained that the predominance requirement "tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." The court quoted Wright and Miller's treatise:

> When one or more of the central issues in the action are common to the class and can be said to predominate, the action may be considered proper under Rule 23(b)(3) even though other important matters will have to be tried separately, such as damages or some affirmative defenses peculiar to some individual class members.

The district court concluded that individualized questions of causation would be the central, or predominant, issue at trial. "[E]ach plaintiff will need to prove which activities performed by which defendants caused which damages to a particular property. Repeat that inquiry for the more than 1,000 houses that would make up the proposed class, and a 'series of mini-trials' would result." The 5th Circuit affirmed the denial of certification, finding that the district court did not abuse its discretion in concluding that individualized issues of causation and damages would predominate.

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U.S. Court of Appeals for the Federal Circuit

Best Key Textiles Co. Ltd. v. United States, ____ Fed. Appx. ____ (Fed. Cir. Aug. 15, 2016), 2016 U.S. App. LEXIS 14918.

The U.S. Court of Appeals for the Federal Circuit recently affirmed a Court of International Trade (CIT) remand decision dismissing for lack of subject matter jurisdiction a case involving an alleged improper customs classification. Appellant Best Key Textiles is a Hong Kong yarn maker involved in a dispute with U.S. Customs over the classification of, and resulting tariff applied to, its merchandise. Best Key initially filed suit challenging the customs classification at the CIT, invoking its residual subject matter jurisdiction under subsection 1581(i). The United States appealed the exercise of subject matter jurisdiction. The Federal Circuit had previously ruled that Best Key Textiles improperly invoked residual jurisdiction instead of the more specific subsection 1581(a) jurisdictional ground that grants the CIT exclusive jurisdiction over customs classification matters. The Federal Circuit remanded the case with a mandate to "dismiss for lack of jurisdiction." *See, Best Key Textiles v. U.S. (Best Key I)*, 777 F.3d 1356, 1357 (Fed. Cir. 2015).

On remand at the CIT, Best Key filed a motion to transfer the action to the U.S. District Court for the District of Columbia. The CIT denied the motion as foreclosed by the specific mandate of the appellate court. Best Key appealed the denial, and the Federal Circuit affirmed the CIT's denial on the ground that its mandate implicitly foreclosed any transfer because of the exclusive jurisdictional ground that Best Key should have invoked. While the specific issue on appeal involved the scope of the Federal

Circuit's mandate, the case is noteworthy because of counsel's improper invocation of the CIT's residual jurisdiction where a more specific and exclusive jurisdictional ground was available. Best Key was unable to save its case through a transfer to district court.

U.S. Court of Appeals for the District of Columbia Circuit

Sierra Club v. Fed. Energy Regulatory Comm'n, 827 F.3d 59 (D.C. Cir. 2016).

The D.C. Circuit Court of Appeals recently rejected environmental challenges in a consolidated case involving liquefied natural gas (LNG) export terminals in Freeport, Texas, and Sabine Pass in Cameron Parish, Louisiana. The Sierra Club challenged the Federal Energy Regulatory Commission's (FERC) authorizations of export activity at both facilities. Sierra Club challenged FERC's authorizations under the National Environmental Policy Act for failing to consider the projects' individual and cumulative environmental impacts, including the impact of increased fracking and related greenhouse gas emissions; increased coal consumption as a result of higher domestic gas prices; and the cumulative effects of these and other LNG export projects in the United States. Petitioner asserted that FERC should have included these "induced-production" problems in its environmental analysis before issuing permits.

The D.C. Circuit rejected the claims, finding petitioner's allegations too attenuated, and thus not a reasonable part of FERC's required environmental analysis. FERC's approval of the subject terminals is not the "proximate cause" of natural gas exports, and its approval analysis need not include consideration of the alleged impacts of the natural gas exports. The court offered no opinion on whether DOE should consider these "induced-production" concerns in its decision making process.

International Center for Settlement of Investment Disputes

Philip Morris Brand Sarl (Switzerland) v. Oriental Republic of Uruguay, ICSID Case No. ARB/10/7 (July 8, 2016).

A panel constituted under the auspices of the International Center for Settlement of Investment Disputes recently issued an award in a landmark case brought by Philip Morris International against Uruguay. Uruguay implemented significant anti-smoking legislation starting in 2008 to protect public health from the negative effects of smoking. The legislation included public smoking bans, increased taxes on tobacco products and labeling requirements on tobacco packages. Philip Morris International filed a complaint against Uruguay on Feb. 19, 2010, alleging that the anti-smoking legislation significantly diminishes the value of its investments in Uruguay, including the value of its cigarette trademarks. Philip

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Morris International is headquartered in Lausanne, Switzerland, and invoked the provisions of the Bilateral Investment Treaty between Switzerland and Uruguay. On July 8, 2016, the arbitral panel issued its decision rejecting Philip Morris' claims and ordering Philip Morris to pay Uruguay $7 million plus all fees and expenses of the proceeding. This was the first time a tobacco company sued a sovereign country in an international dispute-settlement forum.

World Trade Organization

Russia—Tariff Treatment of Certain Agricultural and Manufacturing Products, WT/DS485/R (panel) (Aug. 12, 2016).

A World Trade Organization (WTO) panel issued its decision in the first WTO case against Russia since its accession in 2012. The European Union (EU) launched the complaint on Oct. 31, 2014, asserting that Russia violated its basic tariff obligations regarding paper and paperboard, palm oil, refrigerators, and refrigerator-freezers from the EU.

The EU challenged 12 tariff measures applied by Russia's customs authority leading to the application of customs duties in excess of those set forth in Russia's Schedule of Tariff Concessions. The panel found that 11 of the 12 measures at issue exceeded the bound levels in Russia's schedule and, therefore, violated Article II of the General Agreement on Tariffs and Trade 1994. The 12th measure, referred to by the EU as a Systematic Duty Variation (SDV), allegedly consisted of a common practice of systematically applying higher rates to certain EU goods. The panel rejected the EU's claim on the alleged SDV because the EU did not establish that it was applied systematically to the goods in question or that it constituted a general practice of Russia's customs authority.

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Risk Fee Statute

Acts 2016, No. 524 (S.B. No. 388), amends Louisiana's "risk fee statute," La. R.S. 30:10(A)(2). The Act revises the statute's language to make it clear that a unit operator can invoke the risk fee statute either before the start of drilling of a unit well, during the drilling process or after the drilling is complete. Prior to this revision, some of the language in the statute could be read as allowing the operator to invoke the statute before drilling began, but not after (though other portions of the statute suggested that it could be invoked before or after drilling had started). Under the amended statute, as under the pre-amendment version of the statute, an interested party that consents to participate in an operation, but then fails to pay its share of the estimated costs of drilling timely, will be deemed to have chosen not to participate. As amended, the statute provides that a payment is considered timely if the payment is made within 60 days of either the start of drilling or the party's receipt of the notice required by the statute, whichever is later.

Sale of Minerals by Mail Solicitation

Acts 2016, No. 179 (S.B. No. 404), creates the "Sale of Mineral Rights by Mail Solicitation Act," composed of La. R.S. 9:2991.1 through 9.2991.11. The Act applies to:

> the creation or transfer of a mineral servitude or mineral royalty, or the granting of an option, right of first refusal, or contract to create or to transfer a mineral servitude or mineral royalty, that is contracted pursuant to an offer that is received by the transferor through the mail or by common carrier and is accompanied by any form of payment.

La. R.S. 9:2991.2. But the Act does not apply to a transaction that is contracted "subsequent to a prior personal contract that included a meaningful exchange between the transferor and transferee." La. R.S. 9:2991.3. Further, the Act does not apply to mineral leases. La. R.S. 9:2991.2.

A transferor may rescind a transfer to which the Act applies within 60 days, provided that the offer is accompanied by a specified notice of the transferor's right to rescind. La. R.S. 9:2991.6. In the absence of such a notice, the transferor may rescind the transfer within a three-year preemptive period. *Id.* As between the transferor and transferee, the transferor can rescind by providing written notice to the transferee, but to be effective against third persons the notice must be filed for registry. La. R.S. 9:2991.7. If the act of transfer contains the notice required by the Act, a notice of rescission is effective against third persons if filed within 90 days of the filing of the act of transfer. *Id.* If the act of transfer does not contain the required notice, an act of rescission does not have effect against a third person unless filed for registry before the third person acquires an interest in the mineral rights at issue. *Id.* For the act of rescission to be effective against a third person who is obligated to make royalty or other production payments, a certified copy of the act must be provided to that third person. In such cases, the act of rescission will be effective against that third person 60 days after the certified copy is provided (the 60-day delay in effective date gives that third person time to make the required changes in its accounting system). La. R.S. 9:2991.8.

A transferor who rescinds a transfer must return to the transferee any money paid by the transferee to purchase the mineral right at issue, and the transferee must pay to the transferor any mineral royalties or production payments received. La. R.S. 9:2991.9. Any transfer to which the Act applies must be made by authentic act or act under private signature, signed by the transferor, and the transferor's acceptance of payment cannot satisfy the requirement of the trans-

feror's signature. La. R.S. 9:2991.4. Any provision that purports to waive the protections of this legislation will not be effective. La. R.S. 9:2991.10.

Preemption of Local Regulations

St. Tammany Parish Gov't v. Welsh, 16-0650, 16-0657 (La. 6/17/16), 194 So.3d 1108, 1109 (mem.)

In the June/July 2016 Recent Developments section (Mineral Law), it was reported that the Louisiana 1st Circuit had affirmed a district court's ruling against St. Tammany Parish in this case. In particular, the 1st Circuit held that a St. Tammany Parish ordinance that purported to ban certain oil and gas activity, including drilling, was preempted by La. R.S. 30:28, which provides that political subdivisions of the state are "expressly forbidden" from "prohibit[ing] or in any way interfer[ing] with the drilling of a well or test well in search of minerals by the holder of . . . a permit" to drill granted by the Louisiana Office of Conservation. St. Tammany Parish and an anti-drilling group each sought review by the Louisiana Supreme Court, but that court has now declined to hear the case. Accordingly, the lower court rulings — that the Parish ordinance is preempted and, therefore, not enforceable — remain in effect. Justices Knoll, Clark and Guidry voted to grant review, and Justices Knoll and Guidry each authored written dissents from the decision not to hear the case.

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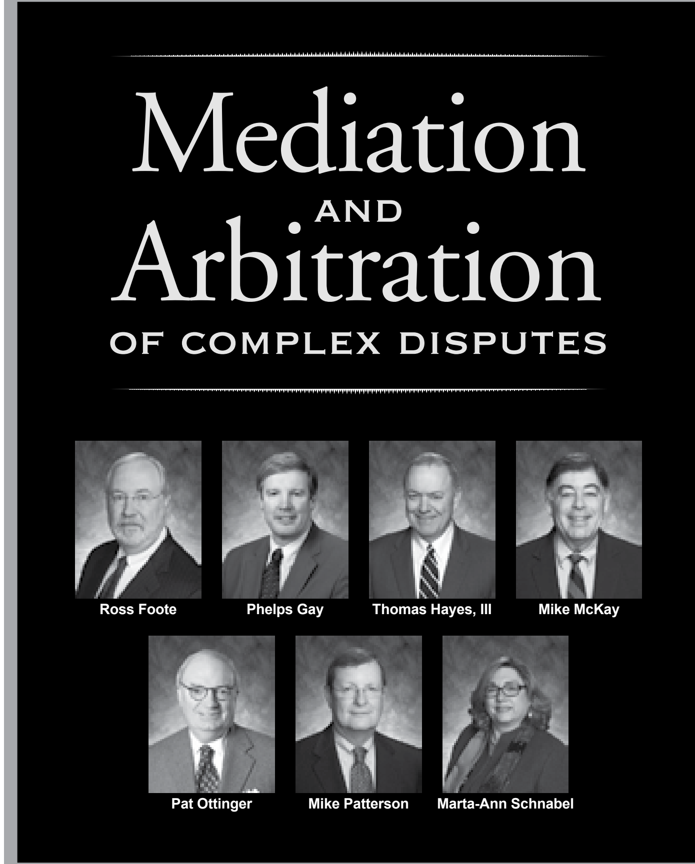
Panel Opinion

Magee v. Williams, 50,726 (La. App. 2 Cir. 6/22/16), ____ So.3d ____, 2016 WL 3416930.

Medical-review panelists issued an opinion in which they said that the defendant dentist did not breach any standard of care in his initial treatment of the plaintiff, but they also opined that a question of fact existed as to whether the defendant had obtained informed consent for follow-up procedures he performed. The plaintiff then filed a lawsuit contending that the defendant performed the follow-up procedures without her consent and alleging other negligence issues.

In response to the defendant's motion for partial summary judgment, the



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parties signed a consent judgment dismissing all claims except that for lack of informed consent. The defendant then filed a motion for summary judgment asking for dismissal of the informed-consent claim.

The defendant contended that he obtained verbal consent, which the court noted is allowed pursuant to La. R.S. 40:1299.131 F (now re-designated as R.S. 40:1161.1 F), in support of which he attached a portion of the plaintiff's deposition. The plaintiff opposed the motion, offering her own affidavit in which she said that the follow-up procedures were done without her consent, and she offered the medical-review panel opinion that found there was a "question of fact" as to this issue.

The trial court granted summary judgment, following which plaintiff's counsel withdrew from her representation. The *pro se* plaintiff then filed an extensive and complicated brief; however, the only issue recognized by the appellate court concerned informed consent, as the plaintiff had signed a consent judgment as to all other issues during the district court proceedings.

The court found no genuine issue of material fact as to the essential element of causation, relying in large measure on the plaintiff's admissions in her deposition and, while that finding obviated the need to address the rest of plaintiff's arguments, the court decided to address them briefly "out of courtesy to the *pro se* litigant."

The court first found that there was no negligence in "failing to document, in writing, an act of consent that need not be in writing." To the medical-review panel's opinion that there was a question of fact concerning informed consent, about which it could not issue a medical opinion, the court noted that this established "only that a genuine issue existed on the record before the MRP," whereas the evidence before the court, *i.e.*, the subsequent lawsuit, discovery and evidence submitted on the two motions for summary judgment, showed that there was no genuine issue of fact. The trial court judgment was affirmed.

Recent Legislation

HB195 amends La. R.S. 40:1231.8(A)(1)(c) and (5) and 1237.2(A)(1)(c) and (5). The commencement of the period within which to pay fees due for the filing of a medical-review-panel request is changed from 45 days from the date the Division of Administration or Patient's Compensation Fund *mails* the confirmation of receipt of the request to 45 days from the date of *receipt* of the confirmation by the claimant.

HB 537 amends La. R.S. 40:1165.1(A)(2)(b)(i) and (ii). Copies of the entirety of medical records may be obtained in the form "in which they exist." If the records exist in both digital and paper form, "the maximum limit of one hundred dollars shall apply only to the portion of records stored in digital form."

HB 480 amends La. R.S. 37:1271(B)(2) and (3) and enacts La. R.S. 37:1271.1. Physicians who possess an unrestricted license and who practice telemedicine in licensed health-care facilities are allowed to prescribe controlled substances "without the necessity of conducting an appropriate in-person patient history or physical examination of the patient as would otherwise be required by R.S. 37:127(B)(2)."

HB 570 amends La. R.S. 37:1271(B)(2)(b) and (4) and La. R.S. 40:1223.3(5) and 1223.4(A), and enacts La. R.S. 37:1271(B)(6) and La. R.S. 40:1223.5.

The requirement that a "telemedicine physician" maintain an office in Louisiana is repealed. Telemedicine physicians may now "utilize interactive audio without the requirement of video" if, after reviewing the patient's medical records, "the physician determines that he is able to meet the same standard of care" as if the medical care were provided in person.

Venue for lawsuits that involve care

rendered via telehealth is proper in the district court:

> in which the patient resides or in the district court having jurisdiction in the parish where the patient was physically located during the provision of the telehealth or telemedicine service. The patient is considered located at the originating site as defined in R.S. 40:1223.3.

SB 107 amends La. R.S. 36:251(A), (B) and (C)(1), enacts La. R.S. 49:191(9)(b), and repeals La. R.S. 49:191(6)(d). The name of the Department of Health and Hospitals has been changed to Louisiana Department of Health.

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Partnership Held Not Liable for Failure to File Penalty

The Bankruptcy Court for the District of Delaware, in *In re Refco Pub. Commodity Pool, L.P.*, 14-11216 (BLS), 2016 WL 4150620 (Bankr. D. Del. Aug. 2, 2016), recently held that a partnership that did not file partnership returns for three years was not liable for a failure-to-file penalty because most of its income and other tax return information came from its investment in another partnership that did not provide Schedule K-1s for those years, and because, despite reasonable efforts, the taxpayer was unable to obtain that tax information from other sources.

A partnership that fails to timely and completely file the return (Form 1065) required by IRC § 6031(a) is subject to a penalty unless it is shown that the failure is due to reasonable cause. IRC § 6698(a). In addition, IRC § 6721(a) imposes a penalty for failure to file an "information return." The term "information return" is defined in IRC § 6724(d)(1), which does not include partnership returns. IRC § 6724(a) provides that penalties under the part of the Code that includes IRC § 6721(a) are not to be imposed if the failure is due to reasonable cause and not willful neglect.

To establish reasonable cause under IRC § 6724(a), a filer must prove that either (1) the failure was due to impediments beyond the filer's control, or (2) significant mitigating factors with respect to the failure to file existed. Reg. § 301.6724-1(a)(2)(i), Reg. § 301.6724-1(a)(2)(ii). One such mitigating factor is "that the filer has an established history of complying with the information reporting requirement with respect to which the failure occurred." Reg. § 301.6724-1(b).

In addition, a filer must prove it acted in

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a responsible manner both before and after the failure occurred. Reg. § 301.6724-1(a). Acting in a responsible manner means "(i) that the filer exercised reasonable care, which is that standard of care that a reasonably prudent person would use under the circumstances in the course of its business in determining its filing obligations, and (ii) that the filer undertook significant steps to avoid or mitigate the failure." Reg. § 301.6724-1(d)(1).

The taxpayer in *Refco* had invested substantially all of its assets in SPhinX Managed Futures Fund, SPC (SMFF), part of a group of affiliated companies, the SPhinX Group, which voluntarily placed itself into liquidation in the Grand Court of the Cayman Islands in June 2006. The liquidators discovered serious accounting issues and advised Refco that the accounting work was inaccurate and incomplete.

In a declaration submitted with a U.S. Bankruptcy Court motion, the liquidators stated that they would not be filing partnership returns for any year after 2005, explaining that to prepare these returns would cost between $5 million and $7 million because an accounting firm would have to reconstruct thousands of records. IRS and the liquidators settled the matter, and SPhinX Group was absolved from having to file partnership returns for the years 2005 to 2007.

Refco did not file partnership returns (Form 1065) for 2006-2008. It filed an extension with respect to its 2006 Form 1065, but it did not file extensions for 2007 or 2008. The IRS assessed penalties for Refco's failures to file its 2006-2008 partnership returns.

The court, after noting that the relevant penalties were those under both IRC § 6698(a) and IRC § 6721(a), looked to IRC § 6724(a) and regulations and case law under that section with respect to reasonable cause and willful neglect, and held that Refco was not liable for penalties for failure to file, agreeing that the circumstances were entirely out of Refco's control.

The court's reasoning for considering IRC § 6721 is unclear; as noted above, while IRC § 6721 provides a penalty for failure to file an information return, the term "information return" is defined for this purpose in IRC § 6724(d)(1), and IRC § 6724(d)(1) does not include partnership returns, *i.e.*, returns required to be filed under IRC § 6031(a). Where IRC § 6698 applies and IRC § 6721 does not apply, a partnership is not required to prove no willful neglect to avoid the penalty for failure to file a partnership return.

The court's consideration of IRC § 6724(a) and the regulations and case law under that section with respect to reasonable cause may have been because little IRS-provided or case law precedent for what constitutes reasonable cause under IRC § 6698 exists. Because both IRC § 6724(a) and IRC § 6698 concern information returns, it would appear that such consideration by the court has value as to what constitutes reasonable cause under IRC § 6698. Moreover, the opinion explains what constitutes reasonable cause under IRC § 6724 in cases where, due to circumstances beyond its control, a taxpayer does not have accurate information for preparing an IRC § 6724(d)(1) information return.

The record reflected that Refco had serious concerns over filing with the information it possessed. Refco was on notice that it did not have accurate information with which to prepare its partnership returns: the liquidators repeatedly advised SMFF investors as early as 2006 that SPhinX Group's accounting records

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should not be relied on. The court found that based on this knowledge, a reasonable person would likely be concerned with signing the jurat clause at the bottom of Form 1065, which provides in relevant part, that "Under penalties of perjury, I declare that I have examined this return . . . and to the best of my knowledge and belief, it is true, correct, and complete." To the best of Refco's knowledge, the information it had to prepare the partnership returns was inaccurate.

Refco had reasonable cause to be concerned of exposure to accuracy-related penalties if it knowingly filed inaccurate returns. Refco was a partnership with approximately 1,600 partners. With inaccurate information, Refco would invariably have had to amend its partnership returns, and then its 1,600 partners would have to amend their own returns. Not only would this be an imposition on its partners, Refco, as a preparer and disseminator of Schedule K-1s, also risked prosecution for preparing inaccurate Schedule K-1s for use by its partners.

Instead of filing with the information it had, Refco tried to obtain better information from SMFF. Both before and after Refco failed to file its partnership returns, Refco undertook steps to avoid or mitigate the failure by attempting to obtain SMFF's Schedule K-1. Although Refco did not file extensions for the years 2007 and 2008, its attorney testified that Refco decided not to file these extensions because it had no intention to file its partnership returns, given the liquidators' refusal to send investors a Schedule K-1.

The court said that the inquiry under the responsible-manner standard was not whether Refco undertook, or even considered, every conceivable option; rather, it was whether Refco exercised reasonable care under the circumstances.

In finding that Refco proved that it carefully considered its filing obligations and undertook appropriate steps to avoid the failure, the court noted that significant mitigating factors were present under Reg. § 301.6724-1(a)(2)(i). Refco had an established history, although brief, of timely filing its partnership returns and had not previously been penalized for failure to comply with the Code. The first time Refco did not file its returns coincided with the first year the SPhinX Group stopped sending investors Schedule K-1s and filed for liquidation.

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