Alternative Dispute Resolution

New Orleans' Community Members and Police Mediate Conflict

Those who practice in the field of alternative dispute resolution know that mediation changes lives, transforms relationships and creates a space for healing and forgiveness. Seldom does a week go by where we do not hear alarming reports about alleged police misconduct. Many make national headlines; however, below the media's radar are less dramatic, though still troubling, encounters between police and community members in need of the same transformation and healing of relationships. At the root of many community-police conflicts are poor communication and a misunderstanding (or an incomplete understanding) of police work. With the new Community-Police Mediation Program, complaints such as lack of professionalism, discourtesy and neglect of duty may now be mediated in New Orleans.

The mediation program comes at a time when morale within the New Orleans Police Department (NOPD) is at an all-time low, crime rates rank among the nation's highest, high-profile officer convictions have led to public distrust, and a deep history of oppression strains relationships with communities of color. The City of New Orleans needs an alternate means of creating mutual understanding and transforming community-police relationships.

In New Orleans, complaints of officers' alleged misconduct may be filed with the Office of the Independent Police Monitor (OIPM) or the Public Integrity Bureau (PIB), the investigative arm of the NOPD. Investigations of police misconduct complaints have limited efficacy in some types of cases — particularly those that are "she said/he said" and discourtesy/attitude-based cases. Complaints can take

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up to 180 days to be investigated by the PIB, and residents often receive a letter in the mail stating that their complaint could not be sustained because it lacked physical evidence or witnesses. The complaint, however, remains on the officer's record, affecting promotions and other opportunities. Often, neither party is satisfied with the process. By contrast, a three-year study of police mediation programs in other U.S. cities revealed a 90-100 percent satisfaction rate from both civilian complainants and police officers after a mediation session.

The Community-Police Mediation Program is the first of its kind for New Orleans and one of the first in the U.S. South. The program was established with community and NOPD support to build mutual understanding and improve relationships between residents and officers. Mediation is a voluntary and confidential process that helps residents and officers share how their interaction affected each other and listen to the other person. It is a non-confrontational, participant-driven process facilitated by two professionally trained neutral mediators to help the resident and the officer reach a mutually agreeable solution.

Mediation allows the complainant to be fully heard and understood and to speak directly with the officer. The process also gives officers feedback and helps to prevent similar incidents from occurring in the future. The community member is able to regain confidence in police services and to play an active role in creating a solution. Officers have the opportunity to gain new understandings, improve community relationships and trust, explain why they may have acted the way they did on a certain day and share about their role. Mediation is powerful because both the complainant and the officer can gain an understanding of why the other person acted as he or she did. When the parties gain this knowledge, the other's behavior is put into a new context that is more understandable. The person may not approve of what happened, but he can understand why it happened. When mediation is successful, this understanding can, and often does, lead to forgiveness and healing. In the long term, mediation helps with resource efficiency in the handling of complaints, resolves complaints in a satisfactory manner for all involved and improves community-police relations.

Local commissions and federal bodies required the creation of a Community-Police Mediation Program in New Orleans: the Police-Civilian Review Task Force in 2001, the Department of Justice's Civil Rights Division in 2011, the New Orleans City Ordinance creating the OIPM, and the Memorandum of Understanding between the NOPD and the OIPM.

The OIPM administers and coordinates the program in accordance with the laws requiring such a program with a small temporary grant from the U.S. Department of Justice's Community-Oriented Policing Services. The OIPM has applied for public financing for the mediation program from Mayor Landrieu and the City of New Orleans to ensure the sustainability and success of the low-cost program with many benefits to public safety. The number one reason around the country for the failure of these programs is the lack of public financing.

The goal in police misconduct investigations is determining and correcting behavior that hurts the ability of each side to relate to the other. While traditional discipline is an important and necessary tool to achieve this goal, mediation is a more powerful tool to bring about a deeper and lasting change. Relationships deepen. Trust is gained. There is no losing side. Both participants come away with the gift of genuine understanding and a new ability to talk out conflict. The Community-Police Mediation Program offers the tools of incremental healing to a city urgently trying to rebuild its trust and confidence in the police department and bridge relationships between the community and the police to create a safer city.

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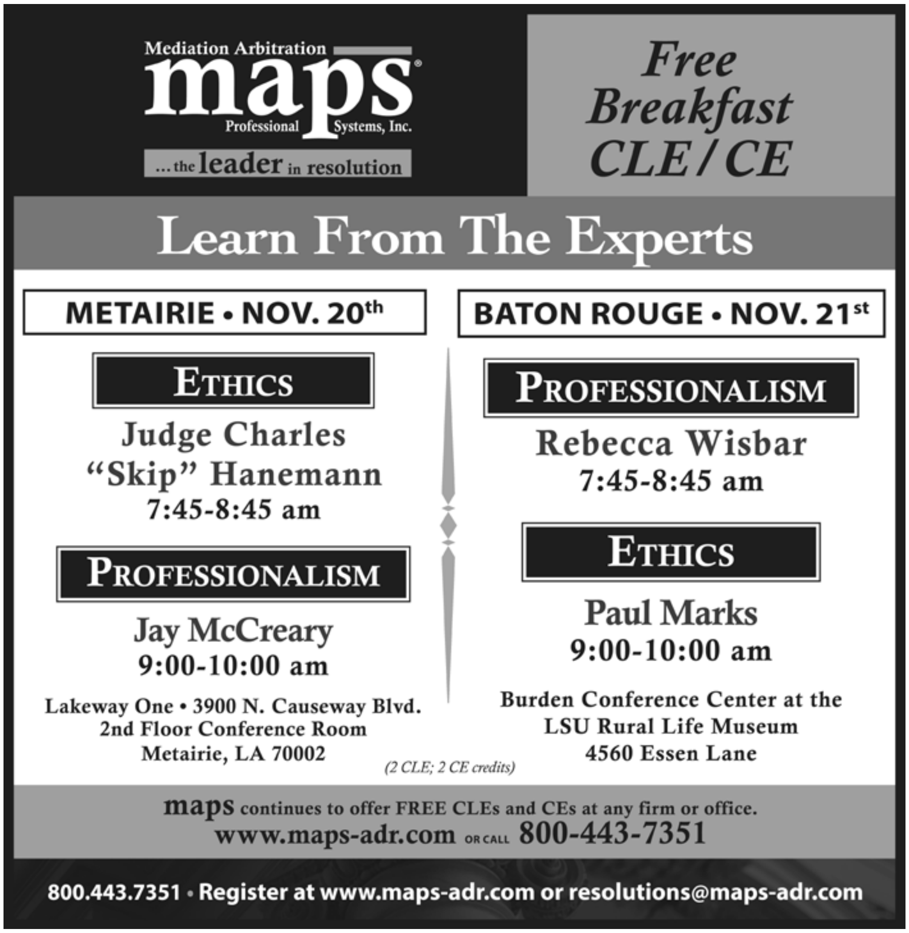

Bankruptcy Law

Federal Law, not State Law, Governs Distribution of Fees Pursuant to 11 U.S.C. § 506(b)

Wells Fargo Bank, N.A. v. 804 Congress, L.L.C., 756 F.3d 368 (5 Cir. 2014).

808 Congress, L.L.C. (debtor) owned an office building in Austin, Texas (property). Wells Fargo Bank financed the purchase of the property through a real-estate-lien note, which was secured by a deed of trust. Greta Goldsby became the substitute trustee under the Wells Fargo deed of trust. 804 Congress later obtained another loan from VIA Lending, secured by a second-priority lien on the property.

Sometime thereafter, 804 Congress defaulted on the note, abandoned the property, and Wells Fargo initiated foreclosure-sale proceedings on the property. In response, 804 Congress filed for bankruptcy. Wells Fargo sought relief from the stay, and Goldsby conducted a non-judicial foreclosure on the property. In order to distribute the proceeds among the creditors, the bankruptcy court ordered the creditors to file proofs of claim. The bankruptcy court subsequently ordered Goldsby to pay VIA Lending in full, to pay herself $7,500, and to pay Wells Fargo in full, except for its claim for attorneys' fees, which the court completely disallowed as being unreasonable. Wells Fargo appealed to the district court, which found that once the foreclosure sale occurred, the bankruptcy court ceased to have jurisdiction over the sale proceeds. Deciding that the sale proceeds were governed by Texas law, the district court remanded for further proceedings and ordered Goldsby to distribute the proceeds under Texas law.

On appeal, the 5th Circuit was faced with the primary issue of "whether, after an automatic stay in bankruptcy has been lifted and a creditor is permitted to foreclose on real property, federal or state law governs an oversecured creditor's recovery of attorneys' and other fees from the sale proceeds." 756 F.3d at 371.

The 5th Circuit began by noting that while the majority of Wells Fargo's attorneys' fees were incurred post-petition, it did seek pre-petition fees as well. In reviewing the claim for pre-petition attorneys' fees, the 5th Circuit cited to its opinion in *Blackburn-Bliss Trust v. Hudson Shipbuilders, Inc.*, 794 F.2d 1051 (5 Cir. 1986), where the court held that 11 U.S.C. § 506(b) governs, rather than state law. In *Hudson Shipbuilders*, the 5th Circuit reasoned that bankruptcy courts have jurisdiction in regard to pre-petition attorneys' fees pursuant to section 506(b) because Congress "intended that federal law should govern the enforcement of attorneys' fee provisions, notwithstanding contrary state law." The 5th Circuit went on to find no discernible basis to treat post-petition attorneys' fee claims any differently.

Moving on to the issue of reasonable-

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ness as to the Wells Fargo attorneys' fees, the 5th Circuit again turned to *Hudson Shipbuilders*, in which it determined that a bankruptcy court has the power to decide whether attorneys' fees are reasonable even if the contractual attorneys' fee provisions are presumed valid under state law. The 5th Circuit agreed with the 11th Circuit decision in *Welzel v. Advocate Realty Invs., L.L.C.*, 275 F.3d 1308, 1314 (11 Cir. 2001), which found that the language of section 506(b) does not indicate that "just because a given fee arrangement is enforceable under state law, it should be exempt from the reasonableness standard." The 5th Circuit reasoned that the bankruptcy court was within its discretion to find Wells Fargo's fees unreasonable as the claims were entirely unsubstantiated.

As to the issue of "whether § 506(b) categorically forecloses recovery of fees or charges found to be unreasonable" or whether parties can seek fees under 11 U.S.C. § 502 as an unsecured claim, the 5th Circuit declined to make a determination due to the sparse factual record. Therefore, the 5th Circuit remanded the case to the bankruptcy court to consider whether Wells Fargo may seek to recover pre- or post-petition attorneys' fees under section 502, even though the bankruptcy court found the claims unreasonable under section 506(b).

Federal Rules of Civil Procedure Rule 60 not a Substitute for Timely Appeal in Bankruptcy Proceedings

Bell v. Bell Family Trust, No. 13-31219, 2014 WL 3058319 (5 Cir. July 8, 2014).

In 2002, the Bell Family Trust initiated Chapter 7 bankruptcy proceedings through its trustee, Mary S. Bell. In 2005, a ruling was entered that classified the Trust as a business trust, rendering it eligible to file for bankruptcy (the ruling). A final decree was entered in 2012, terminating the bankruptcy proceedings. In 2013, Bell moved to reopen the bankruptcy case under 11 U.S.C. § 350(b), "for other cause," to file a Federal Rules of Civil Procedure Rule 60 motion to vacate all orders and judgments entered. In the Rule 60 motion, Bell intended to petition the court to vacate the ruling by arguing that the Trust was ineligible to file for Chapter 7 relief as it should have been classified as a spendthrift trust.

The bankruptcy court denied the motion to reopen, finding that Bell would not have been able to obtain Rule 60 relief as the ruling was never appealed. The district court affirmed the bankruptcy court, reasoning that a Rule 60 motion is not a substitute for a timely appeal and, while Bell had ample opportunity to appeal the ruling, she failed to do so.

On appeal, the 5th Circuit reviewed the text of section 350(b), which states that a "case may be reopened in the court in which such case was closed to administer assets, to accord relief to the debtor, or for other cause." The 5th Circuit determined that the phrase "for other cause" grants discretion to the bankruptcy court to decide when to reopen a bankruptcy case. Such "discretion depends upon the circumstances of the individual case and accords with the equitable nature of all bankruptcy court proceedings." *In re Case*, 937 F.2d 1014, 1018 (5 Cir. 1991). While Bell argued that the bankruptcy court lacked subject-matter jurisdiction over the Trust, the 5th Circuit disagreed, stating that "[a] district court's exercise of subject-matter jurisdiction, even if erroneous, is *res judicata* and is not subject to collateral attack through Rule 60(b)(4) if the party seeking to void the judgment had the opportunity previously to challenge jurisdiction and failed to do so." Finding that Bell had sufficient opportunities to appeal the classification of the Trust and the bankruptcy court's exercise of jurisdiction but failed to do so, the 5th Circuit affirmed.

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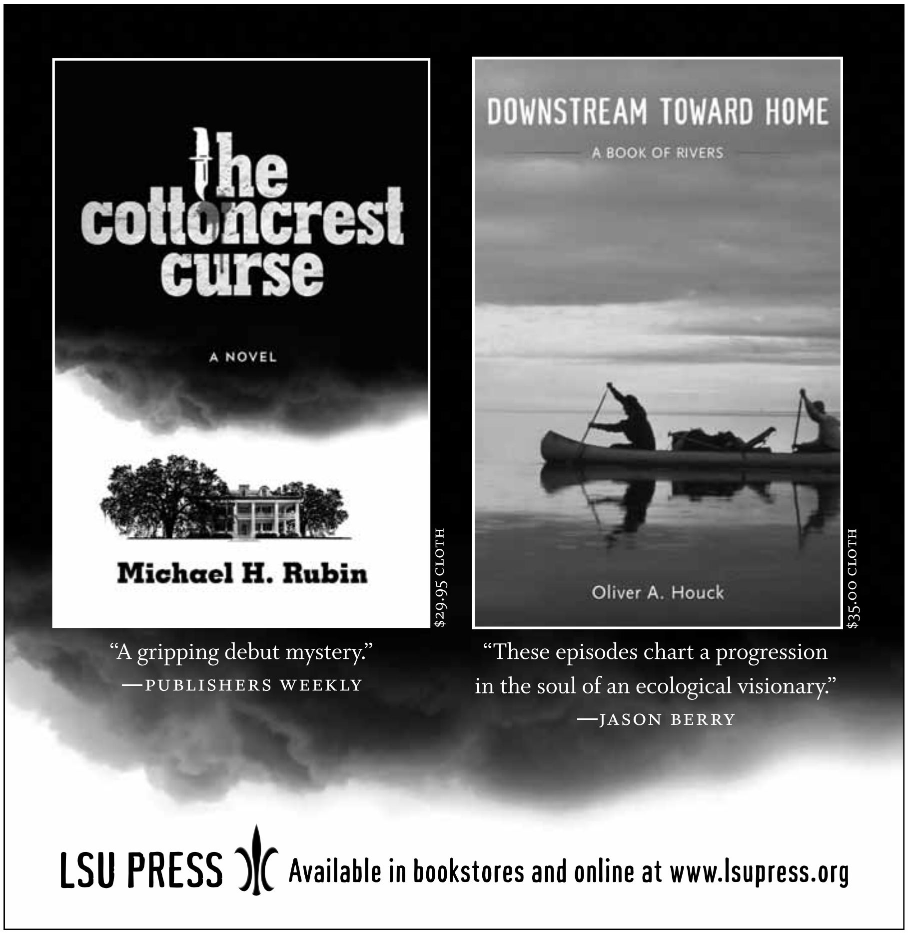

Corporate and Business Law

Exculpation of Directors and Officers for Personal Liability for Breach of Fiduciary Duty

A significant revision of the Louisiana Business Corporation Law, La. R.S. 12:1 *et seq.*, has been passed by the Louisiana Legislature and signed by Gov. Jindal (also discussed in this section in the August/September 2014 *Louisiana Bar Journal*). The amendments and revisions contained in Act No. 328 will go into effect on Jan. 1, 2015, after which time Louisiana's corporate statute will be renamed the Louisiana Business Corporation Act (the LBCA). While many aspects of Louisiana's corporate statutes currently in effect have been incorporated into the Model Act provisions that served as a drafting guide for the LBCA and will continue in effect after Jan. 1, 2015, several significant changes will impact both seasoned business lawyers and persons unfamiliar with the nuances of corporate practice. One significant change affects the minimum provisions required to be included in the articles of incorporation when forming a Louisiana corporation.

After Jan. 1, 2015, a statement indicating whether, and to what extent, the protection against personal liability of directors and officers against monetary damages to the corporation and its shareholders for breaches of fiduciary duty will be a mandatory provision of the articles of incorporation. Articles of incorporation submitted for filing to the Secretary of State that lack such a statement regarding the exculpation of directors and officers will be rejected.

Under the currently existing Louisiana Business Corporation Law, provisions limiting or eliminating the personal liability of a director or officer to the corporation or its shareholders for monetary damages for breaches of fiduciary duties are not required to be stated in the articles of incorporation, leaving it to the discretion of the incorporator and/or legal counsel drafting the articles of incorporation. La. R.S. 12:24 C(4). While seasoned corporate attorneys routinely advise the inclusion of exculpation provisions, persons forming a Louisiana corporation via the forms on the Secretary of State's website who may not seek legal counsel beforehand usually do not provide such provisions, unaware of the possible pitfalls and benefits associated with them. In view of the routine practice of corporate lawyers to include such provisions, and in order to provide the benefits of exculpation of directors and officers to persons who may not seek legal counsel, in drafting the LBCA, the Corporate Laws Committee of the Louisiana State Law Institute opted to require an express election to be made and to be described in the articles of incorporation.

Like Section 91 currently in effect, the LBCA provides a "default" rule of exculpating directors and officers from personal liability for monetary damages for breaches of the fiduciary duties those persons owe to the corporation and its shareholders.

In order to keep this default rule consistent and avoid disrupting settled practice relating to it, the Corporate Laws Committee broadened the exculpation provision of the Model Business Corporation Act by including features of Section 91 currently in effect. Therefore, the Corporate Laws Committee included among the limitations on the exculpation from personal liability afforded to directors and officers of a Louisiana corporation an exclusion for monetary damages for breaches of the director's or officer's duty of loyalty to the corporation or its shareholders. On this point, Louisiana law as it currently exists afforded greater protection to corporations and shareholders than the Model Act, under which directors and officers retain personal liability only for the amount of a financial benefit improperly received by the director or officer.

Accordingly, persons forming a Louisiana corporation will need to describe the extent to which the default rule of exculpation in the LBCA applies by indicating whether the exculpation protection is accepted, rejected or accepted with limitations. A statement that the exculpation provision is accepted will mean that the protections against personal liability for monetary damages under the LBCA will be afforded to corporation's directors and officers to the fullest extent. Likewise, a statement that the exculpatory provision of LBCA is rejected means that the corporation's directors and officers will not be protected against personal liability for monetary damages in any way. A statement that purports to limit the application of the LBCA's protection against personal liability must be accompanied by an express description of the manner of limitation in order to be effective. A statement limiting the protection against liability that is not accompanied with a description of the manner of the limitation will be ineffective, and the protection against liability will be applicable to the corporation's directors and officer without any limitation whatsoever.

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Family Law

Spousal Support

King v. King, 48,881 (La. App. 2 Cir. 2/26/14), 136 So.3d 941.

Ms. King had justifiable legal cause to leave the matrimonial domicile and thus was not at fault for abandonment, and, in any case, Mr. King did not ask her to return. His lack of support of her during her serious medical issues, accusations of her having an affair, the decision to terminate the marriage, cutting off the television service, removing her from a checking account and terminating her Internet service all made their living together insupportable. The final spousal support award of $500 per month was reduced to $421.58 per month because that was the gap between her income and her expenses. Internet and television services were considered as necessary expenses since she had medical issues and was not able to leave her house often. Costs for Medicare coverage, although not to be incurred until one month after the hearing, were also appropriately included in her expenses as the court accepted her testimony that these expenses would definitely occur. Net income for spousal support purposes is distinguishable from "disposable income."

Stephens v. Stephens, 48,957 (La. App. 2 Cir. 4/9/14), 137 So.3d 1242.

Ms. Stephens filed a claim for post-divorce spousal support in January 1996. The parties were divorced on Oct. 26, 2004. In April 2009, she filed an amended and supplemental rule for final spousal support. He then filed an exception of peremption under La. Civ.C. art. 117. The trial court granted the exception, and the court of appeal affirmed, finding that her 1996 claim was abandoned for failure to take any step in its prosecution and, further, that all of the time delays provided in article 117 had run.

Child Support

State, Dept. of Social Servs. v. F.P., 13-0894 (La. App. 5 Cir. 4/23/14), 140 So.3d 328.

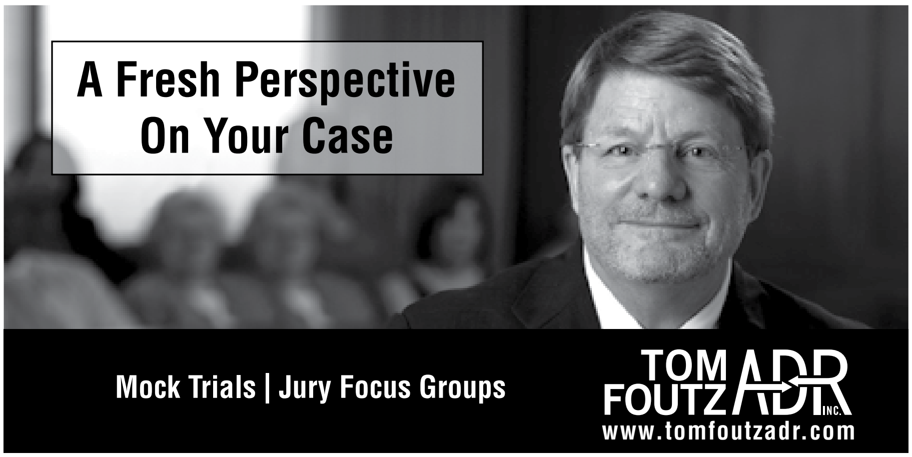
Because Mr. Payne's driver's license was administratively suspended for nonpayment of child support, the juvenile court judge could not order the license restored to him. He was required to proceed by the proper statutory administrative procedures.

Custody

Wootton v. Wootton, 49,001 (La. App. 2 Cir. 5/14/14), 138 So.3d 1253.

When Mr. Wootton filed for divorce in Caddo Parish in 1998, the mother and children were living in Mississippi. Their 2009 consent judgment provided for joint custody, with the mother as domiciliary parent, and the mother's residence as the children's legal domicile. The judgment also provided that Louisiana would retain jurisdiction over all future custody litigation.

The father subsequently moved to



Ouachita Parish and filed a motion to transfer and change the venue, which was granted. He then filed to modify the prior custody judgment, and the mother filed exceptions of prematurity, lack of jurisdiction, no cause of action and *forum non conveniens*, primarily on the grounds that Mississippi was the children's home state and that Louisiana was an inconvenient forum. The trial granted her exceptions of prematurity and lack of jurisdiction, and Mr. Wootton appealed. The court of appeal affirmed the judgment, finding that Mississippi was the children's home state, that Ouachita Parish did not have jurisdiction and that the continuing jurisdiction provision of the prior consent judgment was unenforceable as subject matter jurisdiction cannot be conferred by agreement of the parties. Moreover, while Caddo Parish might have had jurisdiction, it had divested itself of that jurisdiction by transferring the matter to Ouachita Parish on the grounds that none of the parties continued to live there. Louisiana was also an inconvenient forum as the evidence regarding the children was in Mississippi.

Link v. Link, 13-1441 (La. App. 3 Cir. 5/7/14), 139 So.3d 659.

An award of sole custody pursuant to a default judgment obtained when the mother did not appear at the custody trial is not subject to the *Bergeron* burden of proof, even though the court heard some testimony from the father regarding parental fitness. The burden of proof to modify a default judgment is the low evidentiary standard of prima facie evidence, and "a considered decree in the best interest of the children mandates a higher evidentiary consideration of the circumstances of the litigants that is simply not met by a default judgment proceeding."

Community Property

Barker v. Barker, 13-0116 (La. App. 1 Cir. 12/18/13), 137 So.3d 16.

Ms. Barker had her retirement contributions to the Baton Rouge City Police Department Retirement System refunded to her during the marriage, and the parties spent the funds. She later went back to work for the Department and repurchased the credits by withdrawals from her paychecks during and after the termination date of the parties' matrimonial regime, with the final lump-sum payment coming after the termination of the community. The credits earned during the community and those repurchased were community property because they were earned during the community regime, even though some were repurchased with her separate property. She was entitled to a reimbursement for her separate property used to repurchase community credits.

Olson v. Olson, 48,968 (La. App. 2 Cir. 4/23/14), 139 So.3d 539.

Because the parties obtained a court-approved, post-nuptial separation-of-property agreement, they were co-owners of certain entities formed thereafter and owned other property as separate property. Following Ms. Olson's petition for divorce and for partition of co-owned property, Mr. Olson petitioned to declare the post-nuptial contract null and sought a jury trial. In contrast to *Brumfield*, 477 So.2d 1161 (La. App. 1 Cir. 1985), a jury

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trial was not available because the petition to declare the agreement null was filed after a petition for divorce had been filed, whereas in *Brumfield* no separation or divorce proceedings had been filed. The contract was valid, even though a single attorney represented both parties in confecting and entering the post-nuptial agreement, because they appeared before the court, who rendered a judgment finding that the parties understood the agreement and that it served their best interests. Both parties had consented to the attorney's dual representation.

Although the court stated that the two co-owned condominium units were to be partitioned in kind, both were partitioned to her, which was inappropriate under the articles controlling partition of co-owned property. As the units could not be divided in kind, they had to be partitioned by licitation and sold. Moreover, the court could not partition movable property between the parties, as such property was their separate, not co-owned, property. The court could not partition a corporation and LLCs owned by the corporation or the property owned by the entities as the parties owned their shares in the corporation as separate property, not co-owned property. As such, there was nothing to partition as each already had a separate ownership. The vehicle to obtain ownership of the property was by dissolving the entities and having the assets liquidated. Ms. Olson's claims regarding the entities' debts to her were not subject to partition proceedings.

Goines v. Goines, 13-0981 (La. App. 5 Cir. 4/23/14), 140 So.3d 314.

Because the parties' community property was not fully partitioned, their respective appeals from rulings on rules to show cause regarding particular property issues were dismissed because the judgments were interlocutory and not appealable because no irreparable harm was shown. The court's ruling on a QDRO was interlocutory because the order had not been qualified by the plan administrator per La. R.S. 9:2801(B).

Adoption

In re Puckett, 49,046 (La. App. 2 Cir. 4/17/14), 137 So.3d 1264.

The trial court granted an intrafamily adoption, and Mr. Puckett, who had been serving in the military, appealed. The court of appeal reversed, finding that the mother and her new husband failed to show by clear and convincing evidence that the biological father refused or failed to visit, communicate or attempt to communicate with the child without just cause for a period of at least six months. The court of appeal noted that the burden of showing that the failure to communicate was "without just cause" rested on the petitioners and that their obstruction of Mr. Puckett's communication with the child contributed to their failure to prove that he did not communicate with the child. He had made numerous attempts, through numerous avenues, to communicate and to establish a relationship with the child, but was thwarted by the mother and step-father at almost every turn. The restrictions upon him due to his military service were also a consideration in finding that his lack of communication was not without just cause. Although he raised the Service Member's Civil Relief Act, the court of appeal found that it did not have to address whether that Act suspended the tolling of all deadlines, based on its other findings.

Procedure

Okechukwu v. Okechukwu, 13-1421 (La. App. 3 Cir. 5/21/14), 139 So.3d 1135.

The court of appeal reversed the trial court's granting of Mr. Okechukwu's exception of no cause of action to Ms. Okechukwu's petition for protection from abuse, finding that her allegations had to be accepted as true, and, even though the alleged abuse was remote in time, "although La. R.S. 46:2135 requires that the danger of abuse be immediate and present, there is no statutory requirement that the abuse itself be recent, immediate, or present." The court declined to adopt a bright line rule of how recent any abuse must have occurred in order to qualify a petitioner for relief under La. R.S. 46:2135(A). In this case, it gave credence to the allegations made in the petition and found that Ms. Okechukwu's fear of the danger of being abused was real and sufficient to entitle her to a protective order despite that no actual abuse had occurred in the 11 months before she filed the petition. The court of appeal remanded for the trial court to issue a protective order and to proceed under La. R.S. 46:2136.

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Duty to Defend: The Eight-Corners Rule

Wisznia Co. v. Gen. Star Indem. Co., No. 13-31125, ____ F.3d ____, 2014 WL 4199555 (5 Cir. 7/16/14).

Wisznia, an architecture firm, contracted with Jefferson Parish to design a building, the Performing Arts Center, an ongoing construction project. Jefferson Parish brought suit against Wisznia, claiming improper design and inadequate coordination with the builders during its construction. General Star, Wisznia's general liability insurer, refused to defend, asserting that the relevant insurance policies excluded coverage for damages resulting from the rendering of professional services. The district court granted summary judgment for General Star, and Wisznia appealed.

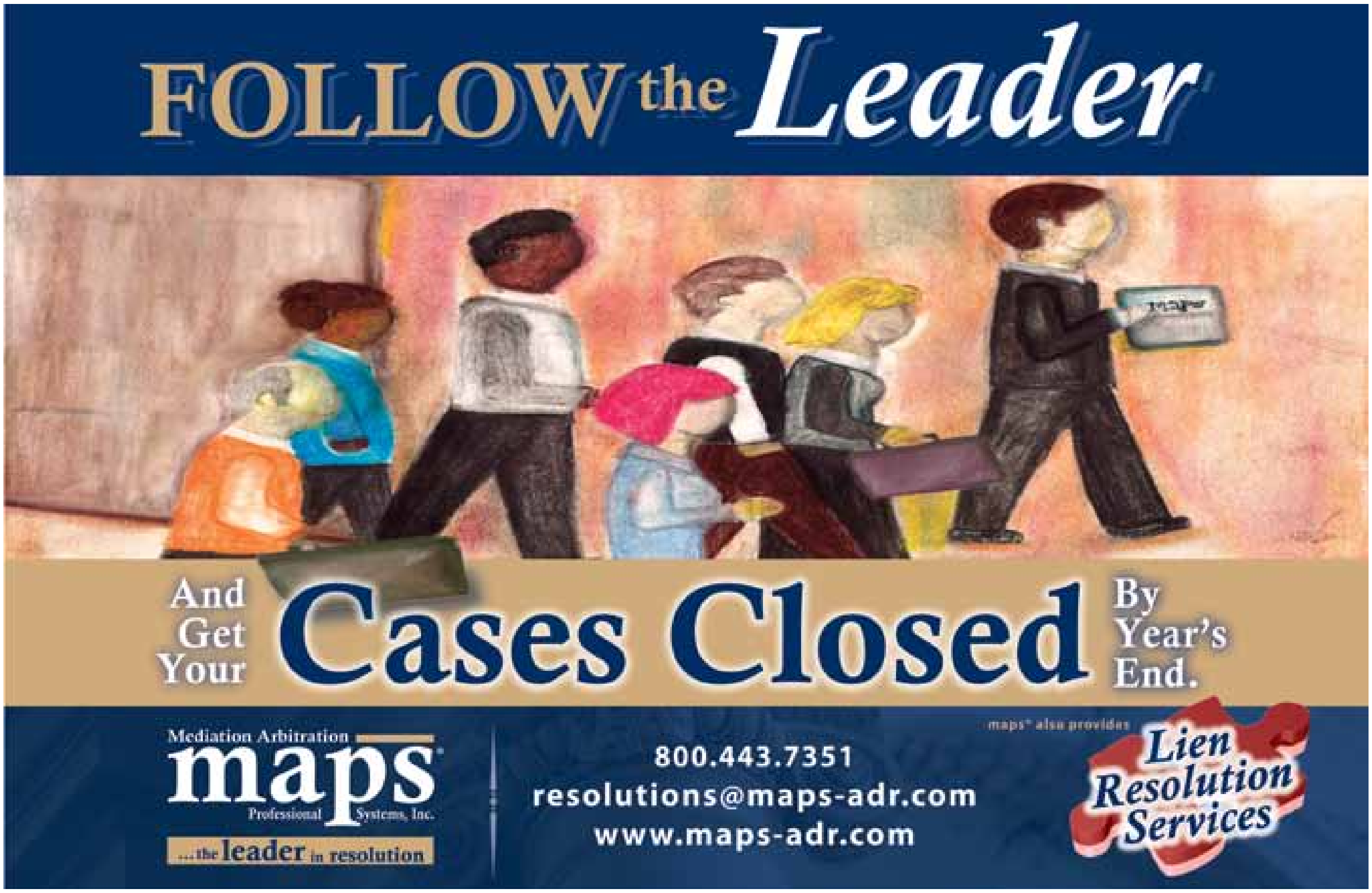
The 5th Circuit, lacking a Louisiana Supreme Court decision on point, recognized it should "predict how, in our best judgment, that court would decide the question," deferring to Louisiana's civil law tradition of first examining "'primary sources of law' — the constitution, codes, and statutes — because '[j]urisprudence . . . is a secondary law source in Louisiana.'" Under Louisiana law, the insurer's duty to defend suits brought against its insured "is broader than its liability for damage claims." Thus, the insurer's duty to defend is determined by comparing the insurance policy to "the allegations [in] the injured plaintiff's petition, with the insurer being obligated to furnish a defense unless the petition unambiguously excludes coverage." Louisiana courts apply the "eight-corners rule," in which they "compare the four corners of the petition with the four corners of the insurance policy without resort to extrinsic evidence."

Jefferson Parish's petition alleged that Wisznia was liable for both professional liability and ordinary negligence. General Star countered that no possible claim existed that Wisznia breached any general duty of care to report unsafe conditions or protect persons. The petition alleged, *inter alia*, that Wisznia was negligent and breached its contractual and warranty obligations to Jefferson Parish by:

- ► designing and preparing a defective set of plans and specifications;
- ► failing to coordinate the design with its consultants effectively and professionally;
- ► failing to design the Performing Arts Center with any accurate and sufficient structural detailing, requiring the modification of the building;
- ► failing to provide specifications that were definite in concept; and
- ► under-designing the project.

The petition further alleged the parish's damages were caused by Wisznia's "negligence, failure of professional skill, breach of contract and breach of warranty in the faulty design."

General Star's policy excluded coverage for "'bodily injury,' 'property damage' or 'personal and advertising injury' arising



out of the rendering of or failure to render any professional services by you or any engineer, architect or surveyor who is employed by you or performing work on your behalf in such capacity." The policy defined "professional services" to include "preparing, approving, or failing to prepare or approve, maps, shop drawings, opinions, reports, surveys, field orders, change orders or drawings and specifications," and "[s]upervisory, inspection architectural or engineering activities."

Applying the standard mandated by the Louisiana Civil Code in interpreting insurance contracts "to ascertain the common intent of the parties to the contract by construing words and phrases using their plain, ordinary and generally prevailing meaning," La. Civ.C. arts. 2045 and 2047, and using the eight-corners rule, the court concluded that Jefferson Parish allegedly hired Wisznia "for its expertise." Thus, "it is not far-reaching to find that all of the services it rendered in connection with [the performing arts center] project were professional in nature." The court affirmed the district court's decision because it correctly concluded that General Star owed no duty to defend Wisznia as the insurance policies unambiguously excluded coverage for professional liability.

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International Law

Primer on Committee on Foreign Investment in the United States

Louisiana is an increasingly popular destination for foreign direct investment. The combination of generous state tax and income incentives, easy access to raw materials and an expansive transportation network are enticing foreign investors into the state. Recent notifications of significant inbound foreign direct investment include Yuhuang Chemical's (China) $1.85 billion methanol project in St. James Parish; Sasol's (South Africa) estimated $16-21 billion ethane cracker and gas-to-liquids project in Lake Charles; and EuroChem's (Russia) $1.5 billion ammonia and urea production plant in either St. John the Baptist Parish or Iberville Parish. While the net economic benefit of inbound foreign direct investment tied to economic incentives is oft-debated, the legal nuances of these projects are equally complex. One little known committee in Washington has the authority to stop any of these projects in their tracks, either before or after the foreign companies have closed on local investments. Counsel representing parties in what are known as "covered transactions" should carefully consider the potential of the Committee on Foreign Investment in the United States (CFIUS) to scrap or unwind an investment transaction.

What is CFIUS?

CFIUS was created by the Defense Production Act of 1950 to conduct national security reviews of foreign direct investment transactions. *See* 50 U.S.C. app. § 2170. The committee consists of the secretaries of Treasury, Homeland Security, Commerce, Defense, State and Energy, along with various other *ex officio* members. 50 U.S.C. app. § 2170(k)(2). CFIUS scrutinizes covered transactions, statutorily defined as transactions that "could result in foreign control of any person engaged in interstate commerce in the United States." *Id.* at § 2170(a)(3). Covered transactions include mergers, acquisitions and takeovers by a foreign individual or entity in the United States. CFIUS must determine whether "the transaction threatens to impair the national security of the United States" and recommend appropriate mitigation or prohibition of the transaction. *Id.* at § 2170(b)(2)(A), (B).

Any party to a covered transaction may initiate CFIUS review before or after conclusion of the underlying transaction. *Id.* at § 2170(b)(1)(C)(i); 31 C.F.R. § 800.401(a). CFIUS has authority to scrutinize covered transactions *sua sponte*. *Id.* at § 2170(b)(1)(D). If CFIUS determines that the transaction poses a potential threat to national security, it initiates a 45-day formal investigation of the transaction's effects on national security, using 11 statutory factors as guidance. *Id.* at § 2170(b)(2)(A), (B) & § 2170(f). CFIUS may impose Interim Mitigating Measures on the subject transaction during the course of the investigation in order to alleviate any potential national security concerns. *Id.* at § 2170(I)(1)(A). If the committee determines that the national

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security impact of the transaction has been mitigated and is otherwise not prohibited, the entire proceeding is closed and CFIUS submits a final investigative report to the U.S. Congress. *Id.* at § 2170(b)(3)(B); 31 C.F.R. § 800.506(d)

If CFIUS concludes the transaction poses a national security threat and should be prohibited, it issues a report to the President of the United States requesting presidential action on the covered transaction. 31 C.F.R. § 800.506(b), (c). The President has ultimate authority and may prohibit or unwind the transaction where there is "credible evidence that leads [him] to believe that the foreign interest exercising control might take action that threatens to impair the national security." 50 U.S.C. app. § 2170(d)(4). Presidential action under the Defense Production Act is statutorily immune from judicial review. *Id.* at § 2170(e). The scope of this immunity and its due process implications are at issue for the first time in the *Ralls* case, discussed *infra*.

CFIUS Annual Report to Congress

CFIUS publishes an annual report summarizing its activity in the prior calendar year. The 2013 report on activities for the 2012 calendar year discloses 114 total reviews in 2012. Chinese nationals and entities led the way with 23 total covered transactions under review in 2012. Only 10 of the 114 transactions reviewed in 2012 failed to garner approval and were rejected by the United States due to security concerns. This failure rate is somewhat misleading as the vast majority of CFIUS reviews in 2012 were resolved after extensive negotiations and implementation of mitigating measures. Most of the prohibited transactions involved cases where the parties closed the investment deal before notifying CFIUS.

The annual report indicates that CFIUS continues to actively scrutinize foreign direct investment projects. Parties to international mergers, acquisitions and takeovers should carefully weigh the CFIUS national security statutory factors and determine whether prior CFIUS notification is strategically beneficial. Pre-closing modifications can be done to mitigate potential CFIUS scrutiny where prior notification is not sought.

The following case is one of the 10 covered transactions that failed to secure CFIUS approval in 2012. That outcome may very well change in light of the Court of Appeals for the District of Columbia Circuit's opinion imposing for the first time a measure of participatory due process in CFIUS investigations.

Ralls Corp. v. Comm. on Foreign Inv., 2014 U.S. App. LEXIS 13389 (D.C. Cir. July 15, 2014).

The national security issues and classified information permeating "covered transactions" necessitate confidential deliberations between officials with the appropriate level of security clearance. Legal practitioners have long sought access to the opaque CFIUS process. The recent U.S. Court of Appeals for the District of Columbia Circuit decision in *Ralls Corp. v. Comm. on Foreign Inv.*

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provides a narrow measure of access to the CFIUS process. The decision requires CFIUS to provide foreign companies with access to, and the opportunity to rebut, unclassified information regarding its determination. If the decision withstands potential appeals after remand, it imposes a narrow measure of due process to the system for the first time.

The *Ralls* case involves a series of transactions surrounding the development of windfarms in Oregon. 2014 U.S. App. LEXIS 13389, at *1. Ralls Corp. is an American company owned by two Chinese nationals. *Id.* at *9. The company purchased four American limited liability companies that were previously established to effectuate the development of the windfarms. *Id.* at *11. The windfarms at the root of the covered transaction are located in and around restricted airspace and a bombing zone maintained by the U.S. Navy. *Id.* at *11-12.

CFIUS self-initiated review after the transactions were complete. *Id.* at *9, *12 at note 7. CFIUS concluded the acquisition poses a national security threat and issued its report and recommendation to the President. *Id.* at *14-15. President Obama subsequently issued a Presidential Order prohibiting and retroactively unwinding the transaction in light of "credible evidence that leads [the President] to believe that Ralls . . . might take action that threatens to impair the national security of the United States." *Id.*

Ralls filed suit against CFIUS and President Obama in the U.S. District Court for the District of Columbia challenging the exclusion order, *inter alia*, as contrary to the Due Process and Equal Protection Clauses. *Id.* at *16-17. The district court rejected Rall's Equal Protection claim, but not the due process claim, for lack of subject matter jurisdiction based on the Defense Production Act's grant of Presidential immunity. *Id.* at *17; 50 U.S.C. app. § 2170(e). The district court granted a Rule 12(b)(6) motion dismissing the Due Process challenge. *Id.* at *17-18. The court found that the President's Order did not deprive Ralls of any constitutionally protected property interest and that Ralls waived its opportunity to obtain prior consent from CFIUS by failing to notify the transaction in advance. *Id.* at *18. Even if Ralls had a protected interest, the court surmised that CFIUS provided due process of law through notification of its review and investigation. *Id.* at *18-19.

The D.C. Circuit appellate court devoted the vast majority of its opinion to the due process claim. The court first reviewed the statutory bar to judicial review. The relevant portion of the Defense Production Act states that the "actions of the President . . . shall not be subject to judicial review." *Id.* at *20, quoting 50 U.S.C. app. § 2170(e). CFIUS and President Obama argued that the statutory immunity permeates all activities in the process, including the President's decision "not to confide in Ralls his national security concerns, and his judgment about the appropriate level of detail with which to publicly articulate his reasoning." *Id.* at *28, quoting Br. for the Appellees, 27. Statutory bars to judicial review must be clear and convincing and expressed with unequivocal congressional intent. *Id.* at * 21-22. The court concluded "neither the text of the statutory bar nor the legislative history of the statute provides clear and convincing evidence that the Congress intended to preclude judicial review of Ralls' procedural due process challenge to the Presidential Order." *Id.* at 31.

CFIUS and President Obama also asserted that Ralls' due process claim presents a non-justiciable political question within the scope of the President's Executive Branch authority. *Id.* at *36-37. After discussing the political question doctrine and framework of judicial review set forth in *Baker v. Carr*, 82 S.Ct. 691 (1962), the court found that Ralls did not ask it to "exercise judgment in the realm of foreign policy and national security" but rather "whether the Due Process Clause entitles it to have notice of, and access to, the evidence on which the President relied and an opportunity to rebut that evidence before he reaches his non-justiciable (and statutorily unreviewable) determinations. *Id.* at *41. Ralls' claim does not present a potential judicial encroachment on the political branch of government, and therefore the matter is justiciable before the courts. *Id.*

On the merits, the court found that Ralls had a constitutionally protected state property interest in the windfarm projects. *Id.* at *43-50. Moreover, a minimum measure of adequate due process is required with respect to that protected interest. The measure of process due requires that Ralls receive notice of the Presidential action, access to the unclassified evidence upon which the action is based, and an opportunity to rebut that evidence. *Id.* at *56-57.

The appellate court reversed the district court and remanded the case with direction to provide appropriate due process as set forth in the opinion. To the extent this due process holding prevails after any further post-remand appeals, it represents the first crack in the otherwise impenetrable shield of CFIUS investigations. While the opening is narrow insofar as it allows access only to unclassified information, it creates a quasi-judicial process of review for covered transactions.

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Labor and Employment Law

Employment 2014 Legislative Update

Two of the 800-plus acts passed during the 2014 Louisiana Legislature Regular Session are particularly relevant to employers based out of, or doing business in, Louisiana.

Act 165, the "Personal Online Account Privacy Protection Act," regulates employer's access, or lack thereof, to an employee's or job applicant's "personal online account." Act 750 amends Louisiana's wage-payment statute to address differential pay between genders. Both statutes, effective as of Aug. 1, 2014, afford additional rights and protections to employees.

Act 165

The Personal Online Account Privacy Protection Act, codified at La. R.S. 28:1951-1955, provides that no employer may "request or require" any employee or job applicant to disclose the user name, password or other authentication information related to a "personal online account." Personal online account includes any kind of online account — social media, personal blogs, personal email accounts — that an employee uses "exclusively for personal communications unrelated to any business purpose." In the event that an employer inadvertently learns an employee's or applicant's user name or password, it cannot use that information to access the personal online account. (The act also applies to schools and similar institutions *vis-a-vis* their students).

The law also sets forth a number of narrow exceptions for employers, including:

► An employer may request the employee's personal email address, but not the password, in order to facilitate communication in the event that the employer's system fails (for instance, in the event of a hurricane or mandatory evacuation).

► An employer may request the user name and password for any electronic communication device paid for or supplied by the employer (such as a company-issued phone or computer).

► The employer may request the user name and password of any online account provided by the employer, used for business purposes, or obtained through the employment relationship.

► The employer may discipline or discharge the employee for wrongfully transferring confidential or proprietary information to his or her personal online account (although an employer may *not* access the account just to "fish" for confidential information).

► The employer may review any information that is in the "public domain" and that can be accessed without using the employee's user name or password.

An employer also may conduct an investigation if it is aware of specific information on the employee's personal online account that may run afoul of the law or evidences work-related misconduct, or if the employer has specific information that the employee transferred confidential, proprietary or financial data to a personal online account. The statutory language regarding these exceptions is somewhat vague, and their precise contours will likely have to be developed

through the courts. Employers also should be aware that the National Labor Relations Board has taken an active interest in social-media policies of late, and the board is not limited by Louisiana state law in determining whether a particular policy constitutes an "unfair labor practice."

Act 750

Act 750 contains two significant, distinct amendments that directly affect employers. First, it amends Louisiana's employment discrimination statute, La. R.S. 23:332, to state: An employer may not "intentionally pay wages to an employee at a rate less than that of another employee of the opposite sex for equal work on jobs in which their performance requires equal skill, effort, and responsibility, and which are performed under similar working conditions." The insertion of the adverb "solely" is important because it means the statute applies only if the pay gap is based *solely* on sex or gender, as any pay differential based on "any other differential based on any factor other than sex" is not unlawful discrimination. Of additional importance is the fact that an employer may not reduce the wages of a higher-earning employee solely to comply with this new law.

In addition, this amendment is substantively similar — though not identical — to last year's Equal Pay for Women Act, La. R.S. 23:661 *et seq.*, which applies only to governmental employees. The amendments to § 23:332 expand the reach of the law to all Louisiana employers, including private employers, who intentionally pay women less than similarly situated men based solely on gender (or vice versa). Employees may enforce § 23:332, as amended, through a private right of action, and may seek both back pay and injunctive relief. As the case law develops, courts will presumably clarify what showing a plaintiff must make to prove that any pay gap is based on gender rather than some other factor, what it means for two positions to "require equal skill, effort, and responsibility," and whether any equitable or other defenses apply. Both the amendments to the Louisiana wage statute and Louisiana's "Equal Pay for Women Act" reflect the national attention on gender-pay issues raised by President Obama in his much-cited but controversial claim that women are paid 77 cents on the dollar relative to men. (Sarah Wheaton, "Obama Promotes Women's Economic Prospects," *N.Y. Times*, March 21, 2014, p. A15).

Second, Act 750 codifies the "good faith" defense to Louisiana's wage-payment statute, La. R.S. 23:632, to state that an employer is not subject to statutory penalties for nonpayment of wages if there is a good faith dispute regarding the amount of wages owed. This provision does not effect a true change in the law, as Louisiana courts have long applied an equitable good faith defense to claims for penalties under § 23:632. *See, e.g., Carriere v. Pee-Wee's Equip. Co.*, 364 So.2d 555, 556-57 (La. 1978). Rather, the amendment codifies judicial doctrine and solidifies a significant affirmative defense for employers, crucial in light of the newly increased employer obligations under Louisiana's discrimination and wage statutes.

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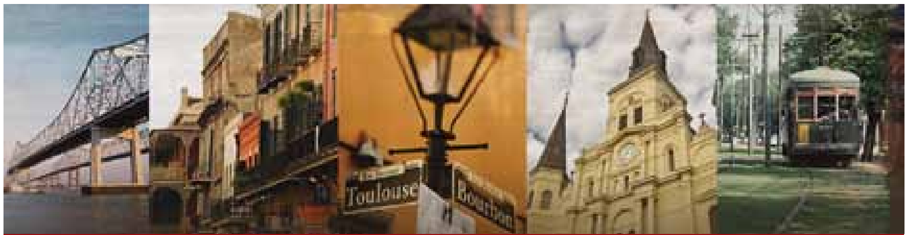
Mineral Law

Act No. 766 (Senate Bill 585)

Act No. 766 adds a new section (Sec. N) to La. R.S. 30:4. The Act prohibits the issuance of any permits to: (1) drill or operate a new solution-mined cavern in Iberia Parish, or (2) expand or convert an existing cavern in Iberia Parish until a public hearing is held. The hearing cannot occur before Aug. 15, 2015. Also, an operator must provide notice to the public in advance of the hearing on at least three different occasions within a 30-day period. Notice must be published in the *Louisiana Register* and the official journal of Iberia Parish. Thirty days prior to the hearing, an operator must also provide:

► a report to the Commissioner of Conservation, Save Lake Peigneur, Inc. and



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the parish providing a baseline analysis of groundwater levels and salt content of nearby groundwater wells;

► a plan for monitoring groundwater while the cavern is being created, converted or expanded;

► a third-party geologic analysis as to the structural analysis of the salt dome; and

► results of any testing that attempts to determine the source and composition of any foaming or bubbling in Lake Peigneur.

The Act also prohibits the issuance of any permits prior to Jan. 31, 2016.

Proposed rules implementing the Act were issued on Aug. 20, 2014.

Act No. 691 (Senate Bill 209)

Act No. 691 provides for reimbursement of costs to state or political subdivisions of the state for reasonable and extraordinary costs in responding to or mitigating a disaster due to a cavern collapse or other violation of any rule, regulation or order promulgated pursuant to La. R.S. 30:4(M)(6). Costs are to be approved by the Governor's Office of Homeland Security. However, payment of those costs does not amount to an admission of liability or responsibility.

The Act also provides for payment of the "replacement value" of noncommercial, residential immovable property in an area under forced evacuation for more than 180 days. The replacement value must be based on an appraisal (*i.e.*, the value of the property before the disaster). Pursuant to the Act, a property owner would be reimbursed within 30 days after accepting an operator's offer to pay the replacement value, provided the owner can show proof of continuous ownership before and during the evacuation. All transfers of title would be free and clear of any liens, mortgages or other encumbrances to the operator.

Proposed rules implementing the Act were issued on Aug. 20, 2014.

Breach of Fiduciary Duty; Exception of Prescription

Norwood v. Mobley Valve Servs., Inc., 49,064 (La. App. 2 Cir. 6/25/14), ____ So.3d ____, 2014 WL 2875008.

The Norwoods purchased a 10 percent working interest in the Hunter-Mannies No. 1 lease operated by Mobley Valve Services (owned by Mark and Kimberly Mobley, collectively Mobley) in DeSoto Parish in 2005. Pursuant to their agreement, the Norwoods paid 10 percent of actual drilling costs and would receive 10 percent of any revenue generated by production. Mobley acted as mandatary for all purposes relating to the lease. In 2006, the Norwoods and Mobley transferred their interests in the lease to J.A. Lanza, L.L.C. In return, the Norwoods and Mobley received a cash payment and a 25 percent option to participate in future drills from 0 to 4,100 feet and an option up to 9.375 percent in new drills below 4,150 feet.

Thereafter, litigation ensued between Mobley and two other working interest owners, claiming that Mobley mismanaged the lease. The litigation was settled by a revised agreement in which Mobley conveyed to Lanza a 75 percent working interest in the lease from 0 to 4,100 feet and a 37.5 percent interest below 4,150 feet. In return, Mobley received modified well participation option rights, which provided that it shall have the right as to future wells to purchase a 12.5 percent working interest. Mobley presented this modified option to the Norwoods in a document and stated that the Norwoods would be paid in monthly installments and that Mobley and the Norwoods would split the 12.5 percent option. Later, Mobley sold the option rights to Lanza for $150,000 without telling the Norwoods.

In 2008, the deep rights (below 9,000 feet) were sold to Chesapeake. Chesapeake paid Mobley and Lanza $17,500 per net mineral acre; Mobley received $5,725,091.98 in proceeds. Mobley did not tell the Norwoods about the sale. Subsequently, the Norwoods sued Mobley for breach of contract, fraud and breach of fiduciary duty, among other claims. The trial court dismissed plaintiffs' claims for lack of evidence. The Norwoods appealed. Mobley filed a peremptory exception of prescription, arguing that a one-year prescriptive period applied because the Norwoods' claims were delictual in nature. The Louisiana 2nd Circuit disagreed and denied the exception, finding that Mobley's obligation to the Norwoods arose from Mobley's agreement to manage their lease interest. Thus the obligation was *ex contractu* (10-year prescriptive period), not *ex delicto* (one-year prescriptive period). In addition, the Louisiana 2nd Circuit found that Mobley breached its fiduciary duty to the Norwoods by not disclosing to them the sale to Chesapeake and awarded the Norwoods 10 percent of the $5,725,091.98 received from the sale to Chesapeake. The court found further that Mobley charged the Norwoods $169,409 in undocumented lease charges. As for the other claims — fraud, piercing the corporate veil, declaratory relief and intentional interference — the court found these assignments of error lacked merit.

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Professional Liability

PCF's Indemnity Rights

Willis v. Ochsner Clinic Found., 13-0627 (La. App. 5 Cir. 4/23/14), 140 So.3d 338.

In response to the plaintiffs' petition for court approval of a $100,000 settlement with a qualified health-care provider (Ochsner), the PCF filed a cross-claim for indemnity and/or contribution from the manufacturer of a pump that malfunctioned during heart surgery, also alleging that the manufacturer was jointly, severally and solidarily liable with it. The plaintiffs then amended their petition to include the manufacturer (Abbott) as a defendant.

Before trial, the plaintiffs reached a confidential settlement with Abbott, following which they moved to strike the PCF's cross-claim against Abbott, contending the PCF was prohibited from maintaining an indemnity claim against Abbott because the PCF and Abbott were not joint tortfeasors, pursuant to La. Civ.C. art. 2323, and each could be liable only for its respective percentage of fault. The PCF responded that it was entitled to indemnity pursuant to La. R.S. 40:1299.44(D)(2)(b)(xi) because Abbot was not a qualified health-care provider, and its fault contributed to the damages.

At the hearing on the plaintiffs' motion to strike, the PCF argued its indemnity claim and asserted that Abbott violated its lease agreement concerning the pump by breaching the warranty Abbott gave Ochsner. The trial court denied plaintiffs' motion to strike.

A jury decided that Ochsner caused damages in excess of $100,000 and that the pump was unreasonably dangerous under the Louisiana Products Liability Act. It assessed 35 percent fault to the PCF and 65 percent to Abbott and awarded the PCF $400 for Abbott's breach of the warranty provisions of its contract with Ochsner. The trial court's judgment reduced the general damages to the PCF's $400,000 cap, reduced the judgment against the PCF for past medical expenses to 35 percent of the total, reduced the future medical expenses award against the PCF to 35 percent of the total, and awarded the PCF $400 on its indemnity/cross-claim.

The PCF, plaintiffs and Abbott filed separate appeals. Among the issues presented to the appellate court was the denial of the plaintiffs' pretrial motion to remove the indemnity cross-claim from the jury's province and have it decided post-trial. The PCF had opposed the motion to sever its cross-claim; this led the appellate court to rule that the PCF could not on appeal argue in favor of what it had before trial opposed. Yet, because the plaintiffs preserved on appeal the indemnity issue, the court said it had to determine whether the PCF had indemnity rights.

The plaintiffs argued that the MMA's indemnity statute applied only when the PCF was held liable for damages attributable to a nonqualified health-care provider, whereas in the case at bar, it sought a reduction of its liability under comparative fault principles; thus the trial court's refusal to strike the PCF's indemnity claim improperly allowed it to obtain a further reduction of its liability. The PCF countered that the MMA's indemnity statute gave it broad powers to recover against a nonqualified provider for "any and all damages" assessed against it.

The court of appeal noted that the PCF's right to indemnity is limited with respect to whom it can pursue (only nonqualified providers), as well as the amount of indemnity for which a nonqualified provider "may be held liable," which "shall be limited to that amount that the fund may be cast in judgment." But the jury's verdict apportioned fault between the PCF and Abbott under the comparative fault statute (La. Civ.C. art. 2323), and the judgment did not cast the PCF in judgment for any amount attributable to Abbot; instead it cast the PCF only for its proportionate share of fault, rendering the indemnity statute inapplicable.

The appellate court relied, in part, on *Hall v. Brookshire Bros.*, 02-2404 (La. 6/27/03), 848 So.2d 559, 568, in which the Supreme Court noted that the Legislature's intention was to hold the PCF liable "only for acts constituting medical malpractice." When the trial court rendered judgment, reducing the PCF's liability to 35 percent of damages, the PCF had "only been cast in judgment for an amount proportionate to the PCF's percentage of fault, and, therefore, the indemnity provision of the (statute) is not applicable." To hold otherwise would not make sense, concluded the court, as it would allow the PCF first to ask the jury to apply comparative fault to its responsibility and then to receive an indemnity from Abbott for the PCF's fault for malpractice. Once the verdict was reduced by comparative fault, the PCF was not at risk to pay damages caused by a nonqualified provider, and the appellate court ruled that the trial court erred by refusing

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to strike the PCF's indemnity claim after it sought and received the reduction for its liability under comparative fault principles.

The trial court's judgment was affirmed in all respects, except for the PCF's $400 cross-claim award, which was reversed, because the PCF was "more in the nature of statutory intervenor than a defendant, and it does not stand in the shoes of Ochsner," which was a health care provider-defendant that was party to the contract with Abbott.

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Taxation

Economic Development Deal Not Subject to Ad Valorem Tax

Pine Prairie Energy Ctr., L.L.C. v. Soileau, 14-0005 (La. App. 3 Cir. 6/11/14), 141 So.3d 367.

The 3rd Circuit Court of Appeal affirmed a trial court's decision to grant summary judgment in favor of Pine Prairie Energy Center, L.L.C. (PPEC) to hold that industrial development board property is exempt from ad valorem property tax.

PPEC operates a natural gas storage facility and associated facilities and pipelines in Evangeline Parish (the project property). In May 2005, an application was filed with the Evangeline Parish Police Jury for the establishment of Evangeline Parish Industrial Development Board Number 1 (the IDB) with the purpose to acquire, own and lease property to PPEC as a means of encouraging PPEC to locate in the parish. IDB entered into a memorandum of understanding, which was affirmed, with PPEC agreeing to issue bonds to finance the acquisition and construction of the project property. Pursuant to that agreement, the project property would be owned by the IDB and leased to PPEC, and it was agreed that the property would not be subject to ad valorem property taxes. The police jury approved the issuance of the bonds.

In 2006, PPEC conveyed the project property to the IDB, and IDB leased it back to PPEC. In 2011, the assessor for Evangeline Parish placed the PPEC project property on the tax rolls. PPEC objected and paid the taxes under protest. PPEC asserted that, because the property is owned by the IDB, a public entity, and the property is used for economic development, the property is exempt from ad valorem tax in Louisiana pursuant to Article VII § 21(A) of the Louisiana Constitution.

The assessor challenged the economic development deal by asserting that PPEC actually owned the property, not the IDB. The 3rd Circuit affirmed the district court's finding that the IDB owned the project property. In addition, the assessor argued that because the facility was operated by a private for-profit entity, it could never be for a "public purpose" as required by the Louisiana Constitution for the exemption. In rejecting this argument, the 3rd Circuit looked to prior jurisprudence, which held that any allocation to a use resulting in advantages to the public at large will suffice to constitute a public purpose. In addition, the 3rd Circuit accepted the uncontested affidavit of the president of the IDB of the substantial economic impact the project has had on the parish.

The 3rd Circuit held that the project property is properly characterized as public property used for a public purpose and is, therefore, exempt from Louisiana ad valorem tax under the Louisiana Constitution. The 3rd Circuit enjoined the assessor from further assessing or taxing the project property during the term of the lease back between PPEC and IDB.

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IRS Makes Important Changes to Offshore Voluntary Disclosure Program

On June 18, the Internal Revenue Service announced major changes to its offshore voluntary compliance programs, providing new options to taxpayers living overseas and taxpayers residing in the United States. The changes include an expansion of the streamlined filing-compliance procedures and modifications to the offshore-voluntary-disclosure program, often referred to as the "OVDP." The expanded program is intended to help those U.S. taxpayers whose failure to disclose their offshore assets was non-willful.

The changes to the streamlined filing-compliance procedures are now available to certain U.S. taxpayers residing in the United States. The changes eliminate both the requirement that the tax liability be $1,500 or less and the requirement of a risk questionnaire from the taxpayer. The changes now require the taxpayer to certify that his or her previous failures to comply with the law were non-willful.

When a taxpayer intends to take advantage of the new streamlined disclosure, he must amend the most recent three years of personal income tax returns, complete a certification form and submit full payment of the tax liability, including interest and the miscellaneous offshore penalty. This miscellaneous offshore penalty is now equal to 5 percent of the highest aggregate balance/value of the taxpayer's total foreign financial assets. The taxpayer is also required to electronically file the most recent six years of overdue FBAR reports.

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