Hostess, Inc. Mediates in Hopes of Avoiding Liquidation

In re: Hostess Brands, Inc., 2012 WL 5983096.

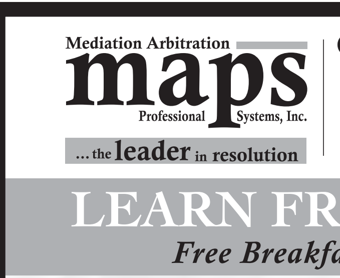
Hostess Brands, Inc. filed for Chapter 11 bankruptcy in January 2012. Struggling with large debts, Hostess needed to make extensive labor cuts in order to avoid liquidation. Stephen Greenhouse and Michael J. De. La Merced, "At Judge's Urging, Hostess and Union Agree to Mediation," Dealbook (Nov. 19, 2012), *http://dealbook.nytimes.com/2012/11/19/hostess-and-bakers-union-agree-to-mediation/*.

Hostess thus attempted to renegotiate contracts with its unions, including its two main unions, Bakers Union and the International Brotherhood of Teamsters. Both unions blamed Hostess' poor financial situation on its years of mismanagement, and both unions struggled with accepting any contract changes. Nevertheless, following eight months of negotiations, Teamsters agreed to settle on a new contract that cut pay and health contributions and suspended pension contributions until 2015. The Bakers Union and Hostess, however, were never able to agree on a new contract.

In October 2012, Hostess filed a motion in court to impose wage and benefit cuts to the Bakers Union contract, and the court granted the changes. *In re Hostess Brands, Inc.*, 2012 WL 5983096. The Bakers Union never objected to the changes in court. However, on Nov. 9, the union displayed its disapproval of the cuts by striking in 24 of 33 Hostess Bakeries. Nick Brown and Martinne Geller, "Twinkies Not Dead Yet, Judge Tries To Save Hostess Jobs," Reuter (Nov. 19, 2012), *http://www.reuters.com/article/2012/11/20/us-hostess-bankruptcy-hearing-idUSBRE8AI0XS20121120 and* Greenhouse, *supra*.

Hostess was not in a financial position to weather this strike. It was forced to immediately close its plants and went to court seeking liquidation. Jaqueline Palank, Rachel Feintzeig and Mike Spector, "Hostess, Bakers Union Agree to Mediation," *The Wall Street Journal* (Nov. 19, 2012), *http://online.wsj.com/article/SB10001424127887324307204578129282170898870.html*.

Before Judge Robert Drain of the Federal Bankruptcy Court of the Southern District of New York would grant the liquidation, he wanted both sides to try one last time to attempt to reach some sort of compromise. Judge Drain found the Bakers Union decision to strike following its silence in court regarding the contract changes "illogical." Troy Bennett, "Mediation Fails in Negotiations Between Hostess and Union Workers," *Bangor Daily News* (Nov. 20, 2012), *http://bangordailynews.com/2012/11/20/business/mediation-fails-in-negotiations-between-hostess-and-union-workers/*.



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Concerned about the potential loss of more than 18,000 jobs, Judge Drain believed it was "worthwhile for both the union and debtors to explore why this happened." *Id.* Judge Drain also stated that mediation would allow the Bakers Union and Hostess to work out their differences in private, avoiding a more public and expensive resolution. Brown*, supra*. Judge Drain believed a resolution was possible and served as the mediator himself. *Id.*; Rachel Feintzeig, "Hostess Plans to Liquidate after Mediation Fails," *The Wall Street Journal (*Nov. 20, 2012*), http://online.wsj.com/article/SB10001424127887323713104578131502378821868.html*.

Unfortunately, Hostess and the Bakers Union were unable to reach an agreement through this mediation, and Hostess was forced to proceed with liquidation. Feintzeig, *supra.*

Because of the confidentiality of the mediation process, it is unknown what exactly transpired during the mediation. Neither side has commented on why the mediation was unsuccessful, but a number of possible reasons could have contributed to the mediation's failure. The Bakers Union blamed mismanagement, large debt and big raises that Hostess executives got last year as the reasons that the company reached such financial failure, and did not seem interested in making any concessions prior to the mediation. Michael Winter, "Hostess Mediation Fails, So Twinkies Company To Liquidate," *USA Today* (Nov. 21, 2012), *http://www.usatoday.com/story/news/nation/2012/11/20/hostess-union-mediation-fail-liquidation/1718231/*; and Susan Adams, "Why Hostess Had to Die," *Forbes* (Nov. 21, 2012), *http://www.forbes.com/sites/susanadams/2012/11/21/why-hostess-had-to-die/*.

Hostess previously did not agree to any contractual changes because it was fearful that the debt of the company was already too deep, and taking any additional concessions would only delay liquidation and not ultimately save Hostess. Greenhouse, *supra.* Also*,* when the Teamsters Union agreed to new contract conditions, it agreed to work rules that the Bakers Union believed were inefficient for the company and would also lead to the company's downfall. Adams, *supra*. Though the Bakers Union remained "respectful of the judge's decision to mediate," the president of the Bakers Union also commented that he was not too optimistic about the mediation. Palank, *supra* and Winter, *supra.* Hostess also might have seen no room for compromise. Heather Lennox, an attorney for Hostess, said she thought the financial damage from the Bakers Union strike was beyond repair. Palank, *supra.* Likewise, Hostess CEO Gregory Rayburn said the strike was their "death knell." Winter, *supra.* Others speculated that, mediation or not, Hostess would still be liquidating, not because of poor administration, but because of its products and its lack of change and innovation over the years. Hand Cardello, "Mediation Could Never Have Saved Hostess: Its Problems Ran Much Deeper," *Forbes* (Nov. 21, 2012), *http://www.forbes.com/sites/forbesleadershipforum/2012/11/21/mediation-could-never-have-saved-hostess-its-problems-ran-much-deeper/*.

What exactly occurred during the mediation may never be known, but it is not unreasonable to conclude that, in this case, the effort to mediate was doomed before it began. Nevertheless, Judge Drain insisted on the mediation because to not do so "would have left a huge question mark in the case." Winter, *supra*. The use of mediation ensured that all avenues of resolution were explored before 18,500 jobs were put on the line with the liquidation of the company, showing the increasingly important role mediation plays in today's legal and business disputes.

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Professionals Bound by Compensation Agreements Approved at Bankruptcy Filing

ASARCO, L.L.C. v. Barclays Capital Inc. (In the Matter of ASARCO, L.L.C.), 702 F.3d 250 (5 Cir. 2012).

The chapter 11 debtor, ASARCO, L.L.C., retained Lehman Brothers as its financial advisor and investment banker pursuant to 11 U.S.C. § 328(a). Section 328(a) allows a professional seeking to represent a bankruptcy estate to obtain prior court approval of its compensation agreement. Years later, ASARCO sought to retroactively increase the monthly amounts paid to Lehman under its engagement letter and for authority for Lehman to apply for additional fees based on the outcome of the bankruptcy. ASARCO also sought to pay $1 million for additional services relating to three pending fraudulent-transfer cases on which Lehman had worked. The bankruptcy court approved the $1 million compensation for additional services, but denied the requested changes to the engagement letter and the increase in fees.

Thereafter, Lehman filed its own bankruptcy and Barclays Capital Inc. bought Lehman's business. Barclays refused to proceed under the terms of the engagement letter with ASARCO, and the bankruptcy court permitted the revision to the engagement letter and the increase in compensation. Once ASARCO's bankruptcy plan was confirmed, the court praised Barclays for its work in "one of the most successful bankruptcies in U.S. history." After confirmation, Barclays requested approval for fees relating to additional unanticipated services, a success fee and an auction fee. The court awarded the unanticipated services fee, but denied the success fee and auction fee. Both ASARCO and Barclays appealed, and the district court affirmed.

In determining whether a professional

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can be compensated beyond what is agreed to at the onset of the case, the 5th Circuit interpreted section 328(a) to mean that:

> [a] professional may be retained on any reasonable terms; but, once those terms have been approved pursuant to section 328(a), the court may not stray from them at the end of the engagement unless developments subsequent to the original approval that were incapable of being anticipated render the terms improvident.

The 5th Circuit found that in order to meet this high burden, the professional must do more than show the adjustment in compensation is appropriate and must prove that subsequent developments were "incapable of being foreseen" such that an increase should be approved.

The 5th Circuit found Barclays could have discovered the poor management structure of ASARCO and the resulting increase in work. Barclays had unintentionally damaged itself in using section 328(a) rather than section 330(a), which offers less of a compensation guarantee, but more flexibility as the amounts are computed at the end of the representation. Under 328(a), Barclays was guaranteed payment, but the amount would and could not be adjusted at the end of the representation to reflect the value of the work actually completed. As to the success fee, since it was not provided for in the engagement letter, which also *prohibited* the use of section 330, the 5th Circuit determined the bankruptcy court did not err in declining to use section 330 to award the success fee.

Perdue Does Not Affect 5th Circuit Jurisprudence on Professional Fee Enhancements

CRG Partners Group, L.L.C. v. Neary (In re Pilgrim's Pride Corp.), 690 F.3d 650 (5 Cir. 2012).

The debtors, Pilgrim's Pride Corp. and its affiliates, filed for Chapter 11 bankruptcy and retained CRG Partners Group, L.L.C., to assist in it restructuring process. CRG and the debtors developed a plan under which there would be a 100 percent return to all creditors with new equity interests given to the debtors' prepetition shareholders. After the plan was confirmed, CRG sought to recover its fees based on the lodestar method and, upon the recommendation of the debtors' board of directors, an additional $1 million fee enhancement. While no party objected to the fees, the U.S. Trustee objected to the fee enhancement, arguing that CRG was adequately compensated under the fees alone.

The bankruptcy court denied the fee enhancement, finding that while CRG's services contributed to the outstanding result of the case, CRG had failed to satisfy the strict requirements of the United States Supreme Court case *Perdue v. Kenny A. ex rel Winn*, 130 S.Ct. 1662 (2010). In *Perdue*, the Supreme Court held that courts could increase compensation based on the lodestar method under the federal fee-shifting statute, 42 U.S.C. § 1988, because of superior performance under three exceptional circumstances: (1) when "the hourly rate employed in the lodestar calculation does not adequately measure the attorney's true market value;" (2) "if the attorney's performance includes an extraordinary outlay of expenses and the litigation is exceptionally protracted;" or (3) when there is an "exceptional delay in the payment of fees," especially "where the delay is unjustifiably caused by the defense."

The district court reversed and remanded, finding that the *Perdue* decision is not binding authority in a bankruptcy proceeding. On remand, the bankruptcy court awarded the fee enhancement and certified its order for direct appeal to the 5th Circuit.

The 5th Circuit held that *Perdue* did not overrule the 5th Circuit jurisprudence that "bankruptcy courts have discretion to enhance fees for professionals when their superior performance produce[s] outstanding results." Under the 5th Circuit case law, a bankruptcy court must first calculate the lodestar. Then the court may adjust the lodestar up or down based on the factors contained in section 11 U.S.C. § 330 and those listed in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5 Cir. 1974). The 5th Circuit found that while bankruptcy courts have "considerable discretion" when adjusting the lodestar amount, upwards adjustments should be rare and exceptional. As *Perdue* did not indicate that it was to extend beyond federal fee-shifting cases, the 5th Circuit concluded that it does not explicitly apply to bankruptcy cases. The court thus held that *Perdue* did not overrule the more liberal jurisprudential standards for professional fee enhancements in bankruptcy cases. Accordingly, the 5th Circuit affirmed the $1 million fee enhancement awarded by the bankruptcy court.

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Oilfield Legacy Lawsuits

State v. La. Land & Exploration Co., 12-0884 (La. 1/30/13), ____ So.3d ____, 2013 WL 360329.

The Louisiana Supreme Court held that plaintiffs in oilfield legacy lawsuits may recover damages in an amount greater than the cost of implementing the "most feasible plan" for remediation under Act 312, La. R.S. 30:29.

The State of Louisiana and the Vermillion Parish School Board sued various oil and gas exploration and production companies for remediation of alleged environmental damages caused by the defendants' operations. Defendants Union Oil Company of California and Union Exploration Partners moved for partial summary judgment, contending that Act 312 precluded recovery of damages in excess of the amount required to fund the most feasible remediation plan adopted by the court unless excess remediation damages were expressly allowed by contractual agreement. The trial court granted defendants' motion, and the 3rd Circuit reversed.

Defendants argued that the plain language of La. R.S. 30:29(D)(1) caps damages at the amount required to fund the most feasible plan. That provision reads:

> Whether or not the department or the attorney general intervenes, and except as provided in Subsection H of this Section, all damages or payments in any civil action, including interest thereon, awarded for the evaluation or remediation of environmental damage shall be paid exclusively into the registry of the court in an interest-bearing account . . . .

The court disagreed with defendants' interpretation and found that subsection (D) should not be read in isolation from the rest of Act 312, particularly subsection (H), which states:

> This Section shall not preclude an owner of land from pursuing a judicial remedy or receiving a judicial award for private claims suffered as a result of environmental damage, except as otherwise provided in this Section. Nor shall it preclude a judgment ordering damages for or implementation of additional remediation in excess of the requirements of the plan adopted by the court pursuant to this Section as may be required in accordance with the terms of an express contractual provision. Any award granted in connection with the judgment for additional remediation is not required to be paid into the registry of the court. This Section shall not be interpreted to create any cause of action or to impose additional implied obligations under the mineral code or arising out of a mineral lease.

The court noted that Act 312 is procedural in nature and does not alter the substantive rights that were available to property owners before its enactment. Based on what it and the appellate court considered

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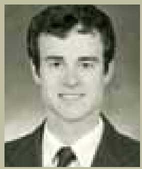

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the "clear language of the statute," the court affirmed the 3rd Circuit's decision and held that a plaintiff may recover damages above the cost of implementing the most feasible plan if it is otherwise entitled to such damages based on a defendant's contract, the Civil Code or Mineral Code obligations.

Justice Guidry, concurring, wrote separately to "question whether the legislature intended that a landowner, in the absence of a contract to the contrary, may recover remediation damages in excess of, or in addition to, those required to fund the feasible plan for remediation selected by the trial court pursuant to La. Rev. Stat. 30:29."

Justice Victory, dissenting, found that the plain language of Act 312 permits recovery of additional remediation damages only by express contractual agreement and would have reversed the 3rd Circuit's decision "because it is uncontested there was no private contract providing for any remediation which would have exceeded Rule 29B standards."

SCOTUS Finds No Exemption from Takings Clause Liability for Temporary Flooding

Ark. Game & Fish Comm'n v. U.S., 133 S.Ct. 511 (2012).

The Supreme Court held that there is no categorical exemption from liability under the Takings Clause for government actions that result in non-permanent but recurring flooding.

The Arkansas Game and Fish Commission filed suit against the United States for damage caused by temporary annual flooding of the Dave Donaldson Black River Wildlife Management Area due to the Army Corps of Engineers' intentional deviations from the Water Control Manual. The Manual, which established a plan for releasing water from the nearby Clearwater Dam, set seasonal release rates but permitted planned deviations for agricultural, recreational or other purposes. Between 1993 and 2000, the Corps deviated from the Manual and released water at a slower than usual rate in certain seasons to provide local farmers with a longer harvest time. To compensate for the accumulation of water behind the dam, the Corps also extended the period in which it would release larger volumes of water, resulting in long-term flooding of the downstream Management Area during the fall. The Commission maintained that the flooding destroyed timber in the Management Area, led to the growth of invasive plant species and required the Commission to undertake costly remediation efforts.

The government argued that Supreme Court jurisprudence classified flooding as a taking only when it is "permanent or inevitably recurring." The court disagreed, citing several cases recognizing that a taking need not be permanent to be compensable. However, the court recognized that a determination of whether temporary but recurring flooding requires compensation under the Fifth Amendment is a case-specific inquiry that depends upon several factors, including (1) the duration of flooding; (2) the degree to which flooding is an intended or foreseeable result of authorized government action; (3) the character of the land and the owner's "reasonable investment-backed expectations" regarding the land's use; and (4) the severity of flooding.

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Custody

Poole v. Poole, 12-0220 (La. App. 3 Cir. 10/3/12), 100 So.3d 352.

The court of appeal reviewed the facts, including the father's deafness, the mother's allegations that the father had used drugs, the mother's lack of credibility concerning her allegations against the father, and her thwarting of his access to the children, and affirmed the trial court's award of joint custody, equal physical custody based on his seven-day-on/seven-day-off work schedule and the designation of the mother as domiciliary parent. The court of appeal affirmed the trial court's award of $100 per month child support to be paid from the father to the mother, even though its calculation (done incorrectly) showed that the mother would owe the father child support, because the trial court's "deviation" was in her favor. The court of appeal also made the award retroactive to the date of her demand in her initial pleading, which the trial court had failed to do. Because, the court of appeal found, she was the domiciliary parent and Mr. Poole's child support obligation did not exceed 50 percent of the total child support obligation (although he was paying her, when she should have been paying him), it reversed the trial court's award alternating the tax-dependency deductions for the two children, and awarded them to her in each year. The court of appeal found no error in the trial court's order that all reimbursement issues for payments made by each pre-judgment were to be addressed in the community-property partition.

Rodriguez v. Wyatt, 11-0082 (La. App. 5 Cir. 12/12/11), 102 So.3d 109.

The court of appeal found that the parties' stipulation in an earlier consent judgment to be bound by *Bergeron* was against public policy, stating: "Thus, parties cannot shield themselves from custody modifications by stipulating to *Bergeron* in cases where there has been no judicial assessment of parental fitness." Applying the lesser standard applicable to consent judgments, it found that the mother failed to show a change of circumstances to modify the earlier judgment. Although the evidence showed that the child had been sexually abused, there was no proof that either parent or their family members were the abuser. Nevertheless, rather than resuming the prior physical-custody schedule, the court of appeal found that there should be a period of gradual reinstatement of the father's custodial access due to the passage of time since he had custody of the child because of the pending allegations.

Duplessy v. Duplessy, 12-0069 (La. App. 5 Cir. 6/28/12), 102 So.3d 209.

The trial court did not err in qualifying

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the custody evaluator as an expert even though she used the wrong standard of "best interest" rather than "substantial harm" in this custody case between a parent and a non-parent, because the trial court has the ultimate duty to apply the proper standard. The court of appeal affirmed the trial court's award of sole custody to the non-parent, reiterating the reasons stated by the trial court. The court of appeal remanded to the trial court for a determination of whether visitation with the parent would be in the child's best interest as the trial court did not rule on this issue.

Community Property

Gallaty v. Gallaty, 11-1640 (La. App. 4 Cir. 10/3/12), 101 So.3d 501.

The trial court's value of the community home in this partition was supported by Ms. Gallaty's expert's appraisal, especially because Mr. Gallaty failed to call an appraiser or offer evidence of a different value. Although both parties sought use and occupancy of the former matrimonial domicile, and each sought rent for the other's use, no hearing was held to award use and occupancy, and the matter was not addressed until the partition trial when the trial court awarded Ms. Gallaty 14 months of rent for Mr. Gallaty's use of the home. The court of appeal found that there was an agreement between the spouses that rent would be owed because each was "on notice" that the other had raised the claim, and the trial court had issued two previous judgments preserving her claim. She also had been paying the house note during his occupancy, so the potential prejudice *McCarroll* warned against was not present. The trial court could award Ms. Gallaty in the partition funds from Mr. Gallaty's share of insurance proceeds to satisfy a judgment of past-due child support he owed her. She was properly denied reimbursement for her share of insurance proceeds he received on a vehicle because she failed to establish the amount of the insurance he received. She also failed to prove that her separate property funds from a lawsuit were not commingled during the community.

Goutierrez v. Goutierrez, 12-0428 (La. App. 3 Cir. 11/7/12), 102 So.3d 1047.

The trial court did not exceed its authority in determining in the community-property-partition trial the ownership of the former matrimonial domicile that each spouse claimed as separate property. The court of appeal affirmed the trial court's finding that the parties' written agreement by authentic act to transfer sole ownership of the matrimonial domicile from her to him was voided by a subsequent oral agreement that she would retain sole ownership of the house. The trial court found her testimony to be credible, and his not to be.

Child Support

State v. Charles, 11-1012 (La. App. 5 Cir. 5/31/12), 102 So.3d 179.

The parties had joint custody of the minor child, with the mother designated as the domiciliary parent. Even though the child was with Mr. Charles 56 percent of the time, the court found that they did not have shared custody. Thus, Worksheet A was appropriate for the child support calculation. Further, the trial court did not err in not giving him a credit for his time with the child. The trial court has discretion to determine what counts as a day of physical custody for child support purposes. The child's school uniforms and school field trips were to be paid for by Mr. Charles, in addition to the child support he was providing. He was entitled to credits against arrearages for child-care payments he made directly to the provider.

Final Spousal Support

Rusk v. Rusk, 12-0176 (La. App. 3 Cir. 6/6/12), 102 So.3d 193.

The evidence supported the trial court's finding that Ms. Rusk was free from fault in the breakup of the parties' marriage and that its cause was her deteriorating health, which changed the activities she could do. Her statement during an argument that she would "blow his head off" did not support a finding of fault because there was no evidence offered that he believed her or that she had the ability to do so, and it was made out of frustration in the heat of an argument. Her evidence of her inability to work was persuasive, and he did not offer evidence sufficient to contradict it. The trial court's admission of documents from her physician and her retirement system was "at most, harmless error," as there was other evidence submitted to show that she was disabled. The record supported an award of $600 per month final spousal support.

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Admiralty: What is a Vessel?

Loman v. City of Riviera Beach, Fla., 113 S.Ct. 735 (2013).

The Supreme Court interpreted Section 3 of the Rules of Construction Act, which defines a vessel, as including "every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water." 1 U.S.C. § 3. The question before the court was whether a non-self-propelled "floating home" fell within the terms of that definition. The district court and the 11th Circuit Court of Appeals found the home to be a vessel. Their rulings centered on the fact that the home was capable of movement over water and that the owner's subjective intent to moor the home indefinitely was not relevant. The Supreme Court's analysis also focused on the term "capable." In reversing the 11th Circuit's ruling, the Supreme Court held that a structure does not fall within the statute's purview "unless a reasonable observer, looking to the home's physical characteristics and activities, would consider it designed to a practical degree for carrying people or things over water." The court distinguished its earlier decision in *Stewart v. Dutra Construction Co.*, 125 S.Ct. 1118 (2005), on the basis that the dredge at issue in that case was regularly, although not primarily, used and designed to be used to transport workers and equipment over water.

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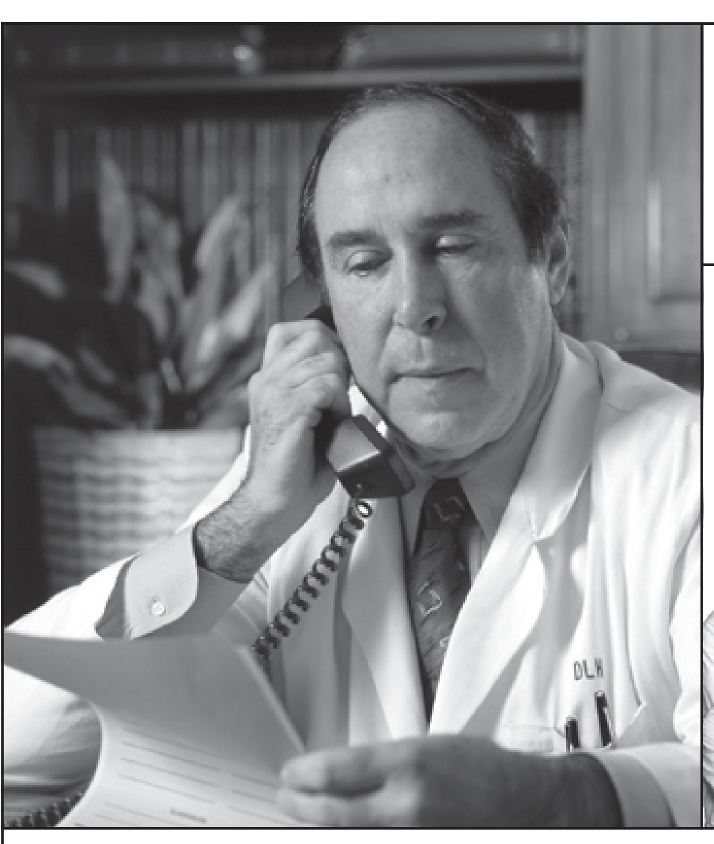
Tort: How Much is That Doggy . . . ?

An article in the Jan. 10, 2013, issue of *The Wall Street Journal* raised interesting questions concerning damages for emotional anguish in the tortious loss of a pet. It reported the sad story of Avery, a 7-year-old spotted, mixed-breed mutt that escaped from his backyard enclosure and was picked up by Fort Worth Animal Control. Despite the shelter's assurance to the Medlens, Avery's owners, that the dog would be held for eight days to allow his reclamation, he was euthanized the next day. The Medlens sued the shelter worker responsible for their dog's death in Tarrant County Court, seeking damages for Avery's "sentimental or intrinsic value," recognizing that he had little or no market value but was irreplaceable. The trial judge granted the defendant's special exception that the Medlens had not pleaded a claim for damages recognized at law, dismissing the suit.

The Medlens appealed, arguing that



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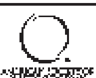

the Texas Supreme Court "has repeatedly held that where personal property has little or no market value, damages can be awarded based on the intrinsic value of the personal property . . . . Dogs are personal property under Texas law." Therefore, they should be able to recover the intrinsic value of their dog. The court agreed, holding, "Because an owner may be awarded damages based on the sentimental value of lost personal property, and because dogs are personal property, the trial court erred in dismissing the Medlens' action against Strickland." *Medlen v. Strickland*, 335 S.W.3d 576 (Ct. App. 2 Dist. Tx. 2011).

The case is now before the Texas Supreme Court. The Medlens state that they "considered Avery a member of their family [and] brought this case to try to create a legal incentive for people to take good care of animals."

Wallace Jefferson, chief justice of the court, expressed concern that insurance rates would skyrocket if the court allowed sentimental damages for pet loss. Elizabeth Choate, general counsel for the Texas Veterinary Medical Association, mused, "My dog may be worth $1 million to me — should that much money go to an owner for pain and suffering . . . . Should cats be valued more than dogs, or hamsters or goldfish?"

The most recent and relevant Louisiana case on point is *Barrios v. Safeway Ins. Co.,* 11-1028 (La. App. 4 Cir. 3/21/12), 97 So.3d 1019. Seventeen-year-old Matthew Barrios was walking the family dog, Yellow, a 12-year-old Labrador retriever, when they were struck by an admittedly negligent driver, injuring Matthew and killing Yellow. The trial court found the driver negligent and Matthew's claim was settled, leaving only his parents' claim for damages for the loss of Yellow pending. The court awarded Sonny and Ellen Barrios $5,000 each for "the value of [their] pet and the mental anguish which [they] suffered."

On appeal, the 4th Circuit noted:

> In Louisiana, a domestic animal is considered corporeal movable property. An award for mental anguish, allegedly resulting from property damage, is permissible only when the property is damaged 1) by an intentional or illegal act; 2) by an act for which the tortfeasor will be strictly or absolutely liable; 3) by acts constituting a continuing nuisance; or 4) when the owner is present or nearby and suffers psychological trauma as a result. (Citations omitted.)

In deciding the damages award, the trial judge noted that the plaintiffs were nearby and immediately arrived at the accident scene to find their beloved dog deceased. In affirming the decision, the court stated, "Although a pet is considered corporeal moveable property in Louisiana, clearly pets are not inanimate objects. This court takes judicial notice of the emotional bond that exists between some pets and their owners and the 'family' status awarded some pets by their owners."

For a comprehensive overview on the state of this developing area of tort law in various jurisdictions, review "Fido is a Member of the Family: Collecting Emotional Damages for Wrongful Death of Pets," Stacy L. Sklaver, *http://dcbalaw.com/fido-is-a-member-of-the-family-collecting-emotional-damages-for-wrongful-death-of-pets/* (Jan. 22, 2013).

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U.S. Court of International Trade

GPX Int'l Tire Corp. v. United States, Ct. Int'l Trade No. 2013-2, slip op. 2013-2 (Jan. 7, 2013).

The U.S. Court of International Trade (CIT) addressed several constitutional challenges to a 2012 statute allowing U.S. international trade agencies to apply countervailing duty laws to non-market economies. The statute was adopted by Congress primarily in response to a decision by the Court of Appeals for the Federal Circuit previously reported in this column. The case, *GPX Int'l Tire Corp. v. United States*, 666 F.3d 732, 745 (Fed. Cir. 2011), held that U.S. countervailing duty laws could not be applied to non-market economies based on the unambiguous language of the countervailing duty provisions at issue.

The statutory fix for the Federal Circuit's opinion requires, *inter alia*, countervailing duties on identifiable subsidies from non-market economies, except where the appropriate U.S. international trade agency is unable to identify and measure the subsidies because the economy of that country consists of a single entity under state control. GPX asserted statutory unconstitutionality on three grounds: (1) *ex post facto*; (2) due process; and (3) equal protection. The CIT upheld the

constitutionality of the statute, rejecting all challenges. The decision is now subject to appellate review by the Federal Circuit. In the meantime, the Department of Commerce is fully authorized to countervail identifiable and measurable subsidies in non-market economies, provided that the International Trade Commission finds requisite injury or threat of injury to the domestic industry.

International Trade Commission

Countervailing Duty Investigation on Certain Frozen Warmwater Shrimp from the People's Republic of China, Ecuador, India, Indonesia, Malaysia, Thailand and Vietnam, (Inv. Nos. 701-TA-491-497(P)) (Feb. 7, 2013).

In a case that in part would not have been viable without the statutory fix referenced in the preceding report, the U.S. domestic shrimp industry successfully obtained approval to investigate alleged illegal subsidies from seven foreign countries. The International Trade Commission (ITC) voted 5-1 on Feb. 7 that there is a reasonable indication that the U.S. shrimp industry is materially injured by reason of illegally subsidized imports from seven countries. The ITC

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preliminary determination paves the way for a full investigation of injury by the ITC. The ITC preliminary decision also allows the U.S. Department of Commerce to launch a full investigation of the illegal subsidies identified by the U.S. shrimp industry in its petition. The two agencies share responsibility for applying the U.S. countervailing duty laws. A final decision is not expected until late 2013.

President of the United States

President Obama announced during his State of the Union address on Feb. 12 that the administration plans to launch negotiations on a Transatlantic Trade and Investment Partnership with the European Union. The announcement follows the Feb. 11 release of the Final Report of the High Level Working Group on Jobs and Growth, which unequivocally calls for a comprehensive agreement addressing a broad range of transatlantic trade and investment issues. According to the U.S. Chamber of Commerce, transatlantic trade has surpassed $5 trillion, accounting for 30 percent of world trade and 50 percent of world Gross Domestic Product (GDP). Elimination of tariffs alone would increase bilateral GDP by a combined $180 billion in five years.

The benefits of eliminating transatlantic tariffs and lowering non-tariff trade barriers are numerous, but the negotiations will likely prove difficult. Agriculture will undoubtedly require delicate positioning on both sides of the Atlantic. Both the EU's Common Agricultural Policy and the U.S. Farm Bill are highly sensitive domestic policy areas that must be addressed if any meaningful agreement can be reached. Turning the transatlantic into a free trade area also has wide-ranging implications on the entire international economic system, and the WTO in particular. The Most Favored Nation and other benefits offered by the WTO could become immensely watered down, with the organization transitioning into little more than a forum for resolution of trade disputes.

World Trade Organization

United States-Measures Affecting the Cross-Border Supply of Gambling and Betting Services (DS 285).

A dispute settlement case between the United States and the small Caribbean nation of Antigua and Barbuda (AB) dating back to 2003 has reached a boiling point. AB obtained a favorable ruling against various U.S. domestic measures prohibiting AB service suppliers from providing gambling and betting services in the United States. The WTO Appellate Body confirmed that the U.S. laws violated U.S. services commitments under the General Agreement on Trade in Services (GATS). After years of failed negotiations to amicably resolve the adverse decision, AB received approval on Jan. 28 to retaliate against the United States. WTO rules require the losing Member to either bring its domestic laws in conformity with the decision, or suffer retaliation in the form of revocation of Most Favored Nation tariff privileges and similar discriminatory retaliation. The rules generally require retaliation on par with the amount of economic harm caused by the inconsistent law and retaliation in the same general economic area (in this case, services).

AB claimed that the U.S. ban on gambling services costs the island economy $3 billion a year. AB does not have a sufficiently large services economy to retaliate effectively in that area, so it sought to "cross-retaliate" against the United States by revoking privileges under the Agreement on Trade Related Aspects of Intellectual Property (TRIPS), which governs copyrights, patents and other forms of intellectual property. AB received approval to "cross-retaliate" under TRIPS and AB announced its intention to launch a pirate website that ignores U.S. copyrights by offering protected movies, television shows, music and software to customers worldwide.

The WTO dispute settlement system operates *sui generis* with each dispute treated on its own merits. The WTO Appellate Body does not operate under *stare decisis*, but nevertheless acts collegially in an effort to maintain consistency throughout its decisions. Many observers believe the decision to allow AB to cross-retaliate by infringing on U.S. copyrights will have significant consequences in other cases. Many smaller WTO Members that are generally unable to effectively retaliate in sufficient amounts against larger WTO Members will cite this result in future disputes. The United States has signaled that it will not allow any nation to blatantly violate copyright laws, irrespective of whether it is part of a WTO dispute.

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Royalties Claim on Hedging Profits

Cimarex Energy Co. v. Chastant, ____ F. Supp. 3d ____, 2012 WL 6652360 (W.D. La. 11/18/12).

The parties disputed whether Cimarex Energy (lessee) owed royalties to Chastant (lessor) on profits Cimarex earned through "hedging," a type of transaction in which a company protects itself against the risk that a commodity will drop in price by purchasing futures contracts for that commodity. The lease required royalties to be paid based on the market price f.o.b for oil and the market value at the mouth of the well for natural gas. Chastant argued that royalties were owed because Cimarex included hedging profits in the commodity prices it reported in certain filings with the Securities and Exchange Commission. Chastant also cited *Frey v. Amoco Production*, 603 So.2d 166 (La. 1992), in which the Louisiana Supreme Court held that a lessee owed royalties on a take-or-pay case settlement because the settlement was an "economic benefit accruing from the leased land, generated solely by virtue of the lease, and which is not expressly negated." *Id.* at 174. Chastant's arguments were rejected by the court, which held that Cimarex did not owe royalties on its hedging profits.

Alternate Unit Wells

Walker v. J-W Operating Co., 2012 WL 6677913 (La. App. 1 Cir. 11/21/12) (unpublished).

The Commissioner of Conservation established units in Caspiana Field following the discovery of natural gas there in the 1970s. The commissioner's orders determined that each unit could be efficiently drained by one well. Beginning in the 1990s, companies requested approval for various "alternate unit wells" to be drilled as additional wells within existing units that already had a unit well. The companies asserted that newer geologic evidence showed that the existing unit wells were not economically and efficiently draining their units. After public hearings, the commissioner approved numerous alternate unit wells, several of which were drilled on land that is owned by the plaintiffs, but burdened by a mineral servitude.

The plaintiffs filed suit, seeking a declaratory judgment that the commissioner lacks authority to approve alternate unit wells because La. R.S. 30:9 defines a unit to be "the maximum area which may be efficiently and economically drained by one well." The court noted, however, that the issue was not the initial establishment of a unit well, but what the commissioner has authority to do when evidence shows that an existing unit well is not efficiently

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draining the unit. The plaintiffs argued that the commissioner's only option is to reconfigure units, but the Louisiana 1st Circuit disagreed, holding that the commissioner has discretion to approve alternate unit wells in order to prevent the waste of resources.

Representation of State by Attorney General When Agency Seeks Damages

State v. Gulfport Energy Corp., ____ So.3d ____, 2012 WL 5417051 (La. App. 3 Cir. 11/7/12).

The Louisiana Department of Wildlife and Fisheries (DWF) filed suit on its own behalf, without being represented by the Louisiana attorney general, seeking a money judgment for damages to oyster beds allegedly caused by the dredging and drilling activity of Gulfport Energy. Gulfport filed an exception of no right of action, arguing that DWF lacked the capacity to sue for tort damages. The trial court granted the exception, holding that the attorney general is the proper representative of the state of Louisiana in such cases. DWF appealed.

DWF asserted various arguments in support of its contention that it had capacity to bring suit. For example, DWF noted that La. R.S. 36:602 states that "[DWF] is created and shall be a body corporate with the power to sue and be sued." The Louisiana 3rd Circuit rejected each of DWF's arguments. As to R.S. 36:602, the 3rd Circuit stated that suit can be brought on behalf of DWF by the attorney general, but DWF cannot "file suit on its own behalf in the absence of representation by the Attorney General."

Surface Restoration Duties of Mineral Servitude Owner and Mineral Lessee

Walton v. Burns, ____ So.3d ____, 2013 WL 163739 (La. App. 2 Cir. 1/16/13).

These consolidated legacy litigation cases raise issues at the intersection of Louisiana Mineral Code articles 11 (correlative rights), 22 (obligation of mineral servitude owner) and 122 (obligation of mineral lessee) as they relate to the duty to restore.

In the decision discussed here, the 2nd Circuit merely granted supervisory writs to resolve certain procedural issues, including whether the trial court erred in denying plaintiffs' leave to amend their petition to add mineral servitude owners as defendants. But the decision contains a noteworthy pronouncement that the duty to restore at the cessation of oil and gas operations may not be the same for a mineral servitude owner as it is for a mineral lessee. Mineral Code art. 22 requires a mineral servitude owner to restore the surface to its original condition at the earliest reasonable time; whereas, the duty of the mineral lessee is to act as a reasonably prudent operator, which may include restoration duties if the lessee has operated "unreasonably or excessively," and such duty may arise "immediately" if the contamination is interfering with the lessors' surface use. Act 312 of 2006, although not at issue, emphasizes that lessees, operators and servitude owners may have different obligations to evaluate and remedy contamination.

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The Cap

Arrington v. ER Physician Group, Inc., 12-0995 (La. App. 3 Cir. 2/6/13), ____ So.3d ____, 2013 WL 440142.

The *Arrington* case has a long procedural history — the case itself began in 1996. A recurring issue, again before the 3rd Circuit, involved the constitutionality of the MMA's cap on damages. Following a *Sibley* evidentiary hearing in this most recent iteration, the trial court determined that the cap was unconstitutional as violative of the equal protection and adequate remedy guarantees of the Louisiana Constitution. The trial court relied on the 3rd Circuit's opinion in *Oliver v. Magnolia Clinic*, 09-0439 (La. App. 3 Cir. 8/31/11), 71 So.3d 1170, which concluded that the cap was unconstitutional to the extent it included nurse practitioners within its coverage. The Supreme Court subsequently reversed that ruling, *Oliver v. Magnolia Clinic*, 11-2132 (La. 3/13/12), 85 So.3d 39, and in a *per curiam* "declared" that the cap "is constitutional as it applies to all qualified health care providers, including nurse practitioners."

Following the trial court's ruling in *Arrington* and the Supreme Court's opinion in *Oliver*, the defendant sought direct review from the Supreme Court, which, in another *per curiam*, noted that at the time of the district court's ruling,

"it did not have the benefit of our recent opinion in *Oliver v. Magnolia Clinic.*" The court proceeded to vacate the district court's judgment and remanded to allow the district court to reconsider its ruling "in light of *Oliver*."

On remand, the trial court, following the edict of the Supreme Court, found the cap constitutional, stating, "Although *Oliver* involves nurse practitioners, the Supreme Court's analysis begins with considering the statute's constitutionality 'as applied to any health care provider.'"

Thus, the court maintains the constitutionality of the statute without qualification. The trial judge wrote that "La. R.S. 40:1299.42(B) is fully constitutional." From the trial court's ruling, the plaintiffs appealed and requested an *en banc* hearing. The *en banc* hearing request was denied.

The appellate court viewed the plaintiff's case as focusing on the "correctness" of the Supreme Court's ruling in *Butler v. Flint Goodrich Hosp.,* 607 So.2d 517 (La. 1992), *cert. denied,* 113 S.Ct. 2338 (1993), and whether that 1992 decision "appropriately addressed the question of adequacy of damages and whether it sufficiently considered the difficulties malpractice plaintiffs face in recouping losses."

The 3rd Circuit noted that all lower courts "are bound to follow the last expression of law of the Louisiana Supreme Court. *Oliver*, 85 So.2d at 44." The Supreme Court had in *Oliver* revisited *Butler* to "remind courts of this State of the last of expression of law relative to the cap's constitutionality" in reiterating its holding in *Butler*. *Id.*

The *Arrington* plaintiffs predicated their appeal on a number of bases, all of which the 3rd Circuit rejected. The plaintiffs asserted that neither *Butler* nor *Oliver* was applicable in this case because the Supreme Court did not specifically analyze their designated constitutional arguments. While the 3rd Circuit admitted that the *Oliver* court focused on due process and equal protection considerations, it also "ruled in broad constitutional terms, [when] referring to the underlying policy considerations of the Medical Malpractice Act."

The court of appeal commented on the "breadth" of the Supreme Court's pronouncements, as well as its affirmance of the trial court's decree in *Oliver* that the cap was "fully constitutional" and that it "maintained the constitutionality of the statute without qualification." Hence, the trial court's judgment in *Arrington* was affirmed. One judge, "specially concurring," maintained his position that the cap was unconstitutional as violative of the constitutional guarantees of "equal protection, due process, and separation of powers," but conceded that he "must sacrifice [his] intellectual independence and judicial beliefs to what is the clear pronouncement of the Louisiana Supreme Court in *Oliver v. Magnolia Clinic.*" Thibodeaux concurrence available at: *http://www.la3circuit.org/Opinions/2013/02/020613/12-0995opi.pdf.*

Tainted Panel Opinion

Fanguy v. Lexington Ins. Co., 12-0136 (La. App. 5 Cir. 11/13/12), 105 So.3d 848.

Fanguy first learned after a panel rendered its opinion that the defendant physician (Dr. Graham) and one of the panelists (Dr. Carriere) failed to disclose their financial relationship, in violation of La. R.S. 40:1299.47, a disclosure that she claimed would have disqualified the panelist. Fanguy asked the trial court to preclude the opinion from evidence as it "would be highly prejudicial to her case due to Dr. Carriere's taint." She also argued that the opinion did not meet the requirements of La. C.C.P. art. 1425 because it failed to comply with the minimum legal standards for an expert report and did not contain sufficient information to assist the trier-of-fact and thus could not be deemed reliable. She further argued that because the opinion was contaminated, the admission of the testimony of the remaining two panel members would be improper.

The defendant's answer was that there

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was no evidence to suggest any bias or contamination. It argued that because Dr. Carriere signed an oath swearing he could be impartial, this proved that he could act faithfully and without partiality, further adding that there was no evidence to establish that he violated his oath. It also argued that panel opinions are not judged by C.C.P. art. 1425, but rather by the MMA and La. R.S. 40:1299.47(H).

The trial court had granted Ms. Fanguy's motion in limine to exclude Dr. Carriere as a witness but had denied the exclusions of the panel opinion and testimony of the two other panelists. The court of appeal said:

> If the trial judge agreed with Ms. Fanguy's position that Dr. Carriere was ineligible to serve on the panel, then it is illogical to allow the Panel's opinion, in which Dr. Carriere participated, to be entered into evidence at trial because the entire medical review process was tainted by Dr. Carriere's participation.

In granting Ms. Faguy's writ application, the appellate court ruled that the trial court committed error in denying the motion to exclude the panel opinion and in denying the motion to exclude the testimony of the remaining two members of the panel "due to Dr. Carriere's taint of the entire medical review."

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IRS Simplifies Home Office Deduction

On Jan. 15, the IRS announced a simplified option that owners of home-based businesses and home-based workers may use to figure their deductions for the business use of their homes effective for taxable years beginning on or after Jan. 1, 2013. The new optional deduction, capped at $1,500 per year based on $5 a square foot for up to 300 square feet, will reduce the paperwork and recordkeeping burden on small businesses.

Though homeowners using the new option cannot depreciate the portion of their home used in a trade or business, they can claim allowable mortgage interest, real-estate taxes and casualty losses on the home as itemized deductions on Schedule A to their return. These deductions need not be allocated between personal and business use, as is required under the regular method. Business expenses unrelated to the home, such as advertising, supplies and wages paid to employees, are still fully deductible.

Current restrictions on the home-office deduction, such as the requirement that a home office must be used regularly and exclusively for business and the limit tied to the income derived from the particular business, still apply under the new option. Further details on the new option can be found in IRS Revenue Procedure 2013-13.

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S Corporation Built-In Gains Tax

The American Taxpayer Relief Act of 2012 extended the shortened five-year recognition period for computing built-in gains. Under I.R.C. § 1374, a built-in gains tax is imposed if an S corporation has a net recognized built-in gain for any taxable year beginning in its recognition period, which is generally defined as the 10-year period beginning with the first day of the first taxable year for which a corporation became an S corporation. As a result of the American Recovery and Reinvestment Tax Act of 2009, the recognition period was reduced from 10 to seven years for the tax years 2009 and 2010, and the Creating Small Business Jobs Act of 2010 reduced the recognition period from 10 years to five years for tax years beginning in 2011. For tax years beginning in 2012 and 2013, the recognition period will continue to be five years rather than reverting to 10 years.

State Department of Revenue Audit Protest Bureau

In Revenue Information Bulletin No. 13-007, the Louisiana Department of Revenue announced the phase-out of the Audit Protest Bureau (APB), effective June 30, 2013. The APB discontinued hearing new protests as of Jan. 18, 2013, although APB staff will continue to work on protests it currently has. In a press release on June 28, 2010, the Department announced the APB as a new forum for dispute resolution in order to "resolve tax-related disputes at the earliest opportunity" and "find an equitable solution for both the Department and taxpayers without resorting to costly and time-consuming litigation." The Department stated its decision to discontinue the APB was "difficult, but fiscally responsible" and is a "continuation of strategic series of decisions that will result in greater efficiency across the agency." The Department's Field Audit Service Division will once again conduct the audit-protest process.

Local Taxation: Timeliness of Appeals

In a recent decision of consolidated

cases concerning sales-and-use-tax assessments in Caldwell and Tensas parishes, the Louisiana Supreme Court determined that the tax collector's writ application and the taxpayer's underlying appeal to the court of appeal were not timely filed. *Caldwell Parish Sch. Bd. v. La. Machinery Co.*, 12-1383 (La. 1/29/13), 94 So.3d 1039, 144. Louisiana Supreme Court Rule X, § 5(a) provides that an application seeking to review a judgment of a court of appeal must be filed within 30 days of the mailing of the notice of the original appeal court judgment or, in instances in which a rehearing is allowed and a timely application for rehearing has been filed, within 30 days of the mailing of the notice of denial of rehearing or the judgment on rehearing. Because La. R.S. 47:337.61(3) prohibits rehearings in summary proceedings to collect taxes, the 30-day period for applying for a writ of certiorari runs from the date the court of appeal issues notice of the judgment. The Supreme Court determined it lacked jurisdiction to consider the validity of the decision of the court of appeal because the tax collector filed its writ application less than 30 days after the court of appeal refused rehearing, but more than 30 days after the court of appeal's opinion in each case.

Also, under La. R.S. 47:337.61(3), suspensive appeals in summary proceedings to collect taxes may be granted, but they must be perfected within five calendar days from the rendition of the judgment. The Supreme Court determined the court of appeal erred in holding that the taxpayers' suspensive appeals were timely perfected because the taxpayers' appeals were filed within five days of the mailing of notice of judgment, but more than five days from the signing of the judgment and therefore were untimely.

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Lack of Proper Notice to Debtor of Tax Sale Results in Absolute Nullity

Cititax Group, L.L.C. v. Gibert, 12-0633 (La. App. 4 Cir. 11/7/12), ____ So.3d ____.

In the case of *Cititax Group, L.L.C. v. Gibert*, the 4th Circuit Court of Appeal reversed the trial court and annulled the tax sale of property located on Iberville Street in New Orleans. The subject property was bought by Gibert in June 1995. After the taxes on the property became delinquent in 2000 and 2001, Cititax bid on and acquired the property at a tax sale in November 2002.

Cititax filed suit to quiet title on March 2, 2010, well over the five-year statutory requirement. On Jan. 14, 2011, Gibert filed his own suit for redemption/annulment of tax sale. The two cases were consolidated and tried at a bench trial. The trial court ruled in favor of Cititax, finding that the service on Gibert was reasonable, the sale was advertised in the newspaper as an additional notice, and the notice met the standard of *Mennonite Board of Missions v. Adams*, 103 S.Ct. 2706 (1983).

Service of notice of the tax sale was attempted on Gibert by certified mail, but the return receipt produced at trial had the wrong address for Gibert (38 Newcomb Blvd. instead of his correct address of 30 Newcomb Blvd.) and did not have a true signature.

The appellate court reversed the trial court on its factual finding that notice to Gibert was sufficient and met the due process requirements established in *Mennonite*. The appellate court explained that notice of a tax sale published in a newspaper alone is insufficient to comply with due process requirements. While the appellate court recognized that certified mail is a reasonable method of notifying the debtor, it reasoned that it also follows that the address to which the certified mail is sent must be correct. As the notice was sent to the wrong address, the appellate court held that the tax sale violated Gibert's due process rights and was null.

The court also reversed the trial court's ruling that even if the tax collector failed to properly notify Gibert of the tax sale, this failure was a relative nullity that was cured by the prescriptive period of five years, citing Article 7, Section 25(C) of the Louisiana Constitution, La. R.S. 47:2266(4)(2), and *Crain v. Vanderdoes Estate*, 307 So.2d 157 (La. App. 1 Cir. 1974). While the appellate court recognized that the 1st Circuit in *Crain* held the lack of notice of a tax sale to be a relative nullity that is cured by the applicable prescriptive period, it explained that *Crain* was decided well before the Supreme Court issued its opinion in *Mennonite* in 1983, which elevated the lack of notice in a tax sale to a due process violation rendering the tax sale null and of no effect. Accordingly, the appellate court reversed the trial court's judgment in favor of Cititax, holding that the tax sale deed was null and void in its entirety due to the failure to provide proper notice of the tax sale to Gibert.

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