Arbitration of Fee Disputes

Carleton Loraso & Hebert, L.L.C. v. Owens, (La. App. 1 Cir. 12/22/16), 2016 WL 7407402.

This case provides instruction for attorneys seeking to compel arbitration of fee disputes and malpractice claims.

Carleton Loraso & Hebert, L.L.C. (CLH) and Owens Collision entered into a fee agreement where the law firm would provide services to Owens for an hourly rate; Owens was to pay an initial advance deposit of $5,000. CLH drafted a fee agreement that included an alternative-dispute-resolution clause. The clause stated that (1) Owens agreed to have any dispute decided by neutral binding arbitration, (2) Owens gave up its right to have a jury trial or access to the courts, (3) Owens gave up its right to discovery and appeal, and (4) Owens had notice that it could be compelled to arbitrate under the Louisiana Arbitration Law. Both parties initialed and signed the fee agreement.

In August 2015, CLH filed a petition to force arbitration and sought an order requiring Owens to arbitrate the fee dispute through the Louisiana State Bar Association's (LSBA) Lawyer Fee Dispute Resolution Program. CLH also sought attorneys' fees under La. R.S. 9:4203(E). Owens argued that the dispute-resolution provision did not comply with the requirements set forth by the Louisiana Supreme Court in *Hodges v. Reasonover*, 12-0043 (La. 7/2/12), 103 So.3d 1069, 1077. CLH argued that *Hodges* was inapplicable as it dealt with a legal-malpractice claim, not a fee dispute between attorney and client.

The trial court denied CLH's petition. On appeal, CLH argued the trial court erred in its findings. The 1st Circuit noted that there was no rule against arbitration clauses in attorney-client retainer agreements but stated that, at a minimum, the attorney must disclose that binding arbitration waives the right to a jury trial, the right to appeal and the right to broad discovery under the Louisiana and federal codes and rules of civil procedure and that arbitration may involve substantial upfront costs as compared to litigation. The agreement also must explicitly disclose the nature of claims covered by the arbitration clause, such as fee disputes or malpractice claims, and must state that the arbitration clause does not impinge on the client's right to make a disciplinary complaint to appropriate authorities and that the client has the opportunity to speak with independent counsel before signing the contract.

The 1st Circuit specifically noted that the fee-arbitration provision did not explicitly state what types of claims were subject to arbitration, and the language of the arbitration clause conflicted as the first sentence referred to arbitration by the LSBA's Lawyer Fee Dispute Resolution Program while the second sentence stated that the parties were agreeing to have any dispute decided by neutral binding arbitration. Additionally, the first sentence stated that any dispute or disagreement would be submitted to the LSBA's Lawyer Fee Dispute Resolution Program. The 1st Circuit concluded that a valid contract to arbitrate did not exist due to the conflicting language.

The 1st Circuit's opinion should be instructive as it specifically lays out the acceptable and non-acceptable language in any attorney-client agreement seeking to arbitrate or resolve fee disputes and other specific legal matters. The CLH case recognizes the strong leanings of the appellate court in favor of the clients regarding the wording of these agreements, which are drafted by law firms.

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Bankruptcy Law

Chapter 11 and WARN Claimants

Czyzewski v. Jevic Holding Corp., 137 S.Ct. 973 (2017).

Jevic Transportation (debtor) filed a Chapter 11 petition. Former employees of the debtor filed a lawsuit against the debtor for violating the Worker Adjustment and Retraining Notification (WARN) Act. The WARN claimants obtained a judgment granting them a $8.3 million priority wage claim under 11 U.S.C. § 507(a)(4).

In addition, the unsecured creditors committee (UCC) filed a lawsuit asserting a fraudulent conveyance action in connection with the leveraged buyout of the debtor. The UCC and the parties to that litigation ultimately settled. As part of the settlement, the parties agreed to a structured dismissal of the Chapter 11 proceeding whereby the WARN claimants would receive nothing for their claims and the general unsecured creditors would receive an agreed-upon payment for their claims and legal fees. The bankruptcy court approved the settlement over the WARN claimants' objection that the terms of the settlement violated the Bankruptcy Code's priority scheme. The bankruptcy court reasoned that, unlike a Chapter 11 plan, a structured dismissal need not follow the priority scheme. The district court and 3rd Circuit affirmed.

On appeal, the Supreme Court first held that the WARN claimants had Article III standing. They rejected the argument that the WARN claimants would not suffer any injury because they could not receive any payment on their claims due to the debtor's insolvency and inability to reorganize. The Court found the injury could likely be redressed by an unwinding of the settlement judgment and potential for judgment or settlement in the fraudulent transfer case, which could have provided some type of distribution to the WARN claimants.

Next, the Supreme Court analyzed whether the bankruptcy court could authorize a "priority-skipping kind of distribution" in the specific context of a Chapter 11 dismissal, without the approval of the affected creditors. The Court noted that a Chapter 11 may produce three distinct consequences: (1) a confirmed plan; (2) a conversion of the case to a Chapter 7 liquidation; or (3) the dismissal of the case whereby the business is returned to its prepetition status quo. In scenarios where it is difficult or impossible to return to this status quo, the Bankruptcy Code allows a court to issue a structured dismissal, which alters a Chapter 11 dismissal's terms "for cause" to achieve the intended purposes.

The Supreme Court noted that Chapter 11 plans must follow the ordinary priority scheme in order to be valid pursuant to Congress' intent to affect an orderly, organized distribution of a debtor's assets. With this principle being so fundamental to the Bankruptcy Code's operation, the Court stated, "We would expect to see some affirmative indication of intent if Congress actually meant to make structured dismissals a backdoor means to achieve the exact kind of nonconsensual priority-violating final distributions that the Code prohibits in Chapter 7 liquidations and Chapter 11 plans." *Id.* at 984. The Court went on to note that "cause" under 11 U.S.C. § 349(b) is insufficient to grant a court authority to violate the priority scheme. While there are instances where courts may grant interim distributions that violate priority rules, the Supreme Court stated these are largely cases where distributions are critical to a debtor's successful reorganization and ultimately benefit all parties involved. The Court refused to uphold a "rare case" exception to the general priorities rule for fear that it would leave the issue too open-ended to contain and risk undermining the foundational principles of bankruptcy. Therefore, the Court held that there is no "rare case" exception to the priorities rule in approving structured dismissals, and such dismissals may not be approved over the objection of the affected parties. Justices Thomas and Alito dissented.

Wage Garnishments

Tower Credit, Inc. v. Schott (In re Jackson), 850 F.3d 816 (5 Cir. 2017).

In *Matter of Jackson*, Tower Credit obtained a judgment against Christon Jackson and began garnishing his wages pursuant to a 2012 judgment. Later that year, Jackson filed a Chapter 7 bankruptcy petition. The trustee initiated an adversary proceeding seeking to avoid the garnishments collected in the 90 days prior to the petition date as preferential transfers under 11 U.S.C. § 547(b). The bankruptcy court granted summary judgment in favor of the trustee, and the district court affirmed. On appeal to the 5th Circuit, Tower Credit argued that the garnished wages should be considered "transferred" as of the date of the garnishment order, before the 90-day period, and therefore the trustee should not be entitled to the payments.

The 5th Circuit pointed to § 547(e), which provides that a transfer is typically made at the time it is perfected, which for non-real property occurs "when a creditor on a simple contract cannot acquire a judicial lien that is superior to the interest of the transferee." This rule is qualified by § 547(e)(3), which provides that the transfer is not made until the debtor has acquired rights in the property.

It is this qualifying provision on which the 5th Circuit relied in affirming the lower courts' decisions. While no creditor on a simple contract could have acquired a lien superior to Tower's interest when Tower served the garnishment order, Jackson, the debtor, did not yet have a right to the property in question. The 5th Circuit, citing the Supreme Court, noted that a debtor's earning power does not become property until the earnings have been brought into existence. Thus, the 5th Circuit held that the trustee would be permitted to recover garnishments made within the 90-day period as preferential transfers because the debtor would not be deemed to have had a right in the wages until they were earned.

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Corporate and Business Law

Piercing the Corporate Veil of a Limited Liability Company

Fausse Riviere, L.L.C. v. Snyder, 16-0633 (La. App. 1 Cir. 2/15/17), ____ So.3d ____, 2017 WL 639396.

In 2009, Fausse Riviere, L.L.C., leased 40 acres of land to John River Cartage, Inc., a corporation solely owned by John K. Snyder, Jr. At the end of the initial term, the parties agreed to extend the lease under the name of a different entity owned by Snyder, John River Aggregate of Louisiana (omitting "L.L.C."), as lessee. During the extended term, Snyder filed personal bankruptcy and Fausse Riviere stopped receiving rental payments. By oral agreement, the parties changed the lessee to yet another entity owned by Snyder, Synthetic Aggregates of Louisiana, L.L.C. Subsequently, Synthetic Aggregates stopped making rental payments and Fausse Riviere terminated the lease.

In 2014, Fausse Riviere filed a petition naming John River Cartage, Inc., John River Aggregate, L.L.C., Synthetic Aggregates of Louisiana, L.L.C., and Snyder as defendants, seeking back rent, the cost of restoring the property, attorneys' fees and a writ of sequestration for the seizure of movables located on the leased premises. The trial court rendered judgment in favor of Fausse Riviere and against Synthetic Aggregates and Snyder for past due rent and against all defendants for the restoration of the property and attorneys' fees. The court further decreed that the defendants had forfeited the movable property on the leased premises under the terms of the lease and, thus, became the property of the lessor. The defendants appealed, arguing that the court erred in (1) piercing the corporate veil and holding Snyder personally liable for the debts of the defendant entities, and (2) finding that the defendants had abandoned the seized movable property.

The appellate court affirmed the trial court's piercing the veil of the defendant entities, finding that they were not operated as separate businesses and there was significant comingling of assets among them. The court noted that "only exceptional circumstances warrant disregarding the concept of a corporation or LLC as a separate entity," but that a court may pierce the veil of a corporation or an LLC under two circumstances—first, where the shareholders commit fraud or deceit on a third party through the corporation; and second, where shareholders fail to conduct business on a corporate footing, disregarding corporate formalities and operating the corporation as an "alter ego" of the shareholder. The facts that supported a finding that Snyder conducted the defendant entities as his alter ego include: (1) he commingled the debts and assets of the businesses, testifying that they all "ran together" and he "ran all of them;" (2) he operated the businesses with a lack of formality, failing to recognize the separate existence of entities owned by him; (3) he paid rent by personal check; and (4) when the lessee entity changed, the initial lessee did not transfer or lease its assets to the subsequent lessor. The court found that these facts presented a reasonable basis for the trial court's finding that exceptional circumstances existed to pierce the corporate veils of the defendant entities and hold Snyder personally liable for the debts incurred by them.

The appellate court reversed the trial court's ruling that the defendant lessees had abandoned their movable property under the forfeiture clause of the lease. The court recognized that the lease did contain a forfeiture clause, providing that the lessee forfeited any movable property left on the leased premises at the termination of the lease, but found no evidence that defendants abandoned the movable property. Rather, the property was seized under the writ of sequestration obtained by Fausse Riviere to secure payment of rent and other lease obligations. Thus, defendants were entitled to a credit equal to the value of the movable property seized.

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Family Law

Custody

Jaligam v. Pochampally, 16-0249 (La. App. 4 Cir. 12/7/16), 206 So.3d 298, *writ denied*, 17-0255 (La. 3/13/17), ____ So.3d ____, 2017 WL 1076474.

The trial court did not err, in two judgments, in changing the domiciliary status of the two children from Dr. Pochampally to Dr. Jaligam, and, further, in awarding Dr. Jaligam temporary sole custody and suspending Dr. Pochampally's communications with the children until she received professional therapy and written authority by the court to resume contact with the children.

After being allowed to relocate with the children to Jackson, Miss., Dr. Pochampally was found in contempt three times for interfering with and thwarting Dr. Jaligam's access to the children and for explicit violations of specific court orders. Although the court changed the domiciliary parent in accordance with La. R.S. 9:346(H), which allows custody to be modified where there is a pattern of willful and intentional violations of custody decrees, the court also considered the La. Civ.C. art. 134 factors and *Bergeron*. The court of appeal noted that the trial court's initial judgment modifying the domiciliary status did not modify the prior joint custody ruling, but only the domiciliary status and the physical custody arrangement, and was thus warranted under La. R.S. 9:346(H).

Dr. Pochampally's husband also had participated in interfering with Dr. Jaligam's access to the children, including having the police go to his home on more than one occasion. They also encouraged the children not to cooperate with their father. The trial court did not err in not allowing the children to testify because Dr. Pochampally did not identify them as witnesses until two days before the trial and because the court found that the children had been alienated and that involving them further in the proceedings would further traumatize them, particularly since they had already been adversely affected by the mother's inappropriate behavior.

In re Ben, 16-0453 (La. App. 5 Cir. 12/7/16), 206 So.3d 438.

After the mother's death, the trial court did not err in naming the maternal and paternal grandmothers as joint custodians, rather than the stepfather, who had previously been awarded interim custody. The court found that the grandmothers had been intimately involved with the children and that Sanchez did not really become involved until after the death of his wife, the boys' mother. The trial court also appropriately considered the children's preference. In response to Sanchez's argument that the court's judgment contradicted a judgment from a tutorship proceeding, which had appointed him the legal tutor for the children, the court of appeal found that that issue was not before it and had to be resolved in the lower courts. Because neither side prayed for physical custody, the trial court did not err in not awarding physical custodial time to the stepfather, but the court of appeal acknowledged that he could petition for access.

Prather v. McLaughlin, 16-0604 (La. App. 3 Cir. 11/2/16), 207 So.3d 581.

On McLaughlin's motion to modify a stipulated judgment of custody, the trial court found that although there had been no showing of a material change in circumstances, a modification to increase McLaughlin's custodial time was nevertheless in the child's best interest. The court of appeal affirmed, finding that she had shown a change of circumstances, despite the trial court's finding. The court of appeal stated that the real question was whether McLaughlin should be granted additional time with the child, even though it was "not essential to a decision in this case" whether there had been proof of a material change of circumstances. The court identified changes since the original judgment, when the child was only four months old, including the improvements in McLaughlin's health and ability to take care of the child, the child's increased age, and the overall change in her and the child's positions. It remanded for the court to consider McLaughlin's claim that she should be named domiciliary parent, since the court failed to address that issue.

Brown v. Chategnier, 16-0373 (La. App. 4 Cir. 12/14/16), 208 So.3d 410.

Brown failed to preserve her claim to the trial court's perceived bias when she failed to object contemporaneously in the trial court. In any event, the trial court's comments did not evidence bias. The custody evaluator's report was hearsay and was erroneously admitted as the evaluator did not testify, but that claim was also waived due to lack of a timely objection and could not be raised on appeal. The trial court did not err in naming Mr. Chategnier as the domiciliary parent, or in not ordering equal sharing of physical custody, which, in large measure, relied on the evaluator's report, but was also based on the parties' testimony, which showed their significant communication problems and the extreme conflict and non-cooperation between them. Shared custody was not feasible or in the child's best interest under these circumstances.

Property

In re Succession of Dysart, 50,927 (La. App. 2 Cir. 9/28/16), 206 So.3d 357.

In this succession contest between the decedent's mother and his wife, the court found that funds received by the wife as a result of a personal injury claim were her separate property, as was a mobile home/trailer purchased with funds from that suit, even though the decedent had received funds in the suit as well. The court employed the presumption that funds drawn from the account came from her separate funds. The court also found no manual donation of the trailer, as the wife had no intent to divest herself of ownership, even though an act of donation had been signed, albeit in improper form, and she had moved out of the trailer, prior to moving back in.

Licciardi v. Licciardi, 16-0289 (La. App. 5 Cir. 12/7/16), 207 So.3d 638, *writ denied*, 17-0015 (La. 2/10/17), 210 So.3d 797.

The trial court did not err in ordering that a community-property-partition equalizing payment owed by Ms. Licciardi to Mr. Licciardi of $43,077.49 be paid in installments of $416 per month for 120 months, and that that sum be offset against Mr. Licciardi's monthly child support payments by reducing them by $416 per month. Even though part of the child support payments were offset, the payment plan nevertheless did not affect Ms. Licciardi's ability to maintain a stable home environment for the children and allowed for their continued support. The court did provide that, if the child support sums were subsequently amended, the offset could be readdressed.

The trial court did not err by setting a fixed interest rate, rather than tying the equalization payment to the legal interest rate. Further, although she testified that he had received $20,000 in an inheritance, and that it had been spent during the marriage, the court of appeal affirmed the trial court's denial of a reimbursement claim to him for failure to provide sufficient proof, finding that her acknowledgment of the gift and expenditure was insufficient to allow the reimbursement claim because he failed to show compelling proof that the funds were available and how and when they were spent.

Belt v. Belt, 16-0136 (La. App. 3 Cir. 9/28/16), 209 So.3d 974, *writ denied*, 16-2247 (La. 2/3/17), ____ So.3d ____, 2017 WL 527679.

Upon his retirement, Mr. Belt elected a payment option that reduced the immediate benefits during his lifetime in order to provide a survivor benefit to Ms. Belt after his death. Upon their later divorce, and the community-property partition, he argued that he should be granted an offset from her share of the benefits in the amount of the reduction in the present monthly benefits to accommodate the survivor benefits after his death. The court rejected his arguments, finding that the cost of the survivor benefit was not a liability, that the election he made during the marriage could not be changed, that he was entitled to no reimbursement for that cost, and that she did not agree to relinquish her right to the survivor benefit.

Paternity

Succession of Younger, 50,876 (La. App. 2 Cir. 9/28/16), 206 So.3d 1088, *writ denied*, 16-2202 (La. 1/25/17), ____ So.3d ____, 2017 WL 462551.

The decedent's alleged daughter's claim of paternity would have been prescribed under prior La. Civ.C. art. 209 as she did not file a claim for filiation prior to her 19th birthday. That statute was replaced by La. Civ.C. art. 197, which allowed, for succession purposes, a prescriptive period of one year to institute an action to prove paternity from the death of the alleged father. Her claim was thus timely, as it was filed within one year of his death. The court of appeal rejected the argument of the decedent's acknowledged children that her claim had prescribed on her 19th birthday and could not be resurrected, finding that the Legislature in enacting article 197 must have intended, as a public policy matter, to allow filiation suits to be brought one year from the death of the decedent when the claim was filed in the context of a succession, even though such claim may have been perempted under the prior article.

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Fidelity, Surety and Construction Law

Arbitration Ruling Refusing Pay-if-Paid Clause Defense Affirmed

Favalora Constrs., Inc. v. Grillot Elec. Co., 16-0550 (La. App. 4 Cir. 11/30/16), 204 So.3d 1064.

Favalora Constructors, Inc. contracted with Grillot Electric Co. for the performance of electrical work. Upon conclusion of the construction work, Favalora submitted final invoices of all services, including those of its subcontractors, to the property owner. Because the cost of the finished project exceeded the original estimate by $230,000, the property owner disputed the amount over the original estimate, and the matter went to arbitration. The arbitrator found that Favalora failed to submit timely "control estimates" as required by the prime construction contract between the parties and, accordingly, Favalora did not receive the $230,000 claimed in excess of the construction contract estimate. In turn, because Favalora did not receive the disputed $230,000, Favalora did not pay Grillot in full. Grillot then filed for arbitration of the disputed amount ($16,484.88) and, after a hearing, the arbitrator awarded Grillot the sum of $16,484.88. Favalora then filed a petition for vacatur in the district court. After a hearing on the petition, the district court found in favor of Grillot, denied Favalora's petition for vacatur, and confirmed the arbitration award. Favalora appealed.

On appeal, Favalora contended that the district court manifestly disregarded the law because the subcontract between Grillot and Favalora contained a "pay-if-paid" clause. Favalora averred that the district court erred in failing to apply the judicially created doctrine that an arbitration award may be overturned when the arbitrator commits an error "which is obvious and capable of being readily and instantly perceived by an average person qualified to serve as an arbitrator," thereby implying that "the arbitrator appreciates the existence of a clearly governing legal principle but decides to ignore it." *Id.* at 1066.

In affirming the district court's ruling, the 4th Circuit looked to the findings of the arbitrator. The arbitrator noted that the subcontract between Favalora and Grillot contained typical language setting forth the incorporation of the terms of the prime contract and various contract documents. However, the arbitrator found that the requirement in the prime contract that Favalora submit control estimates could only be applicable to the general contractor—Favalora—and not the subcontractors. The arbitrator held that the language incorporating in each subcontract all contract documents is read to include only such provisions of the prime contract that are applicable to all subcontractors and such provisions that are applicable only to each subcontractor's trade or specialty. Thus the arbitrator found that an electrical subcontractor could not be bound to assume the risk of payment for failure of the prime contractor to submit control estimates. Further, the arbitrator found the pay-if-paid provision, in the context of this case, was a harsh and unconscionable defense where Favalora's breach of the contract is imputed to Grillot, which had fully performed its scope of work. Based upon its *de novo* review of the record, the 4th Circuit held that Favalora did not meet its burden of establishing that the arbitrator made an obvious legal error or ignored a governing legal principle.

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Insurance, Tort, Workers' Compensation & Admiralty Law

Tort: Jambalaya, Crawfish Pie, Summary Judgment

In re Louisiana Crawfish Producers, 852 F.3d 456 (5 Cir. 2017).

Louisiana Crawfish Producers Association-West and some 80-plus crawfishermen filed suit against several oil and gas companies whose dredging activities allegedly damaged their fisheries. The district court granted summary judgment in favor of, *inter alia,* Southern Natural Gas Co., finding that plaintiffs did not create a genuine issue of material fact as to whether its activities constituted "dredging" so as to support maritime tort claims. Prior to the court's deliberation, the parties agreed on a case-management order that required plaintiffs to file "any dispositive motions or supplemental oppositions necessitated by factual information learned during the deposition" within 30 days from receipt of the transcript of the Southern Natural Gas Co. deposition.

Southern Natural filed a motion for summary judgment and dismissal. While the motion was pending, Southern Natural's corporate representative was deposed on Sept. 22, 2015, his earliest available date. He testified that Southern Natural engaged in dredging in connection with the subject fishing ground's spoil banks. Plaintiffs also forwarded requests for admissions ahead of the agreed-upon discovery cutoff date. In its response, Southern Natural admitted to using dredge vessels in the construction of the canal.

On Nov. 12, 2015, while plaintiffs were still awaiting the official deposition transcript, the district court granted summary judgment in favor of Southern Natural, finding that plaintiffs did not provide evidence that created a genuine issue of material fact as to whether Southern Natural had engaged in dredging activities. Plaintiffs moved for reconsideration under Federal Rule of Civil Procedure 59(e), arguing that the ruling was procedurally erroneous because they did not have an opportunity to supplement their opposition under the terms of the case-management order with new evidence obtained at Southern Natural's deposition and in its response to requests for admissions. The district court denied plaintiffs' motion for reconsideration, and plaintiffs appealed the court's original order granting summary judgment as well as its order denying reconsideration.

The 5th Circuit reviewed the district court's denial of plaintiffs' Rule 59(e) motion for abuse of discretion, finding that the trial court declined to reconsider its grant of summary judgment in favor of Southern Natural despite plaintiffs' providing three types of new evidence — (1) Southern Natural's deposition transcript; (2) documentary evidence offered during Southern Natural's deposition; and (3) Southern Natural's responses to requests for admission.

The court stated that the district court should have considered several factors when determining whether to grant plaintiffs' motion for reconsideration in light of plaintiffs' new evidence. The court gave the following "simply illustrative and not exhaustive" list of factors — (1) the probative value of the evidence; (2) plaintiffs' reason for default; (3) whether the evidence was available to plaintiffs at the time of the summary judgment motion; and (4) the potential prejudice to Southern Natural.

Southern Natural's deposition transcript and responses to requests for admissions were clearly probative. Plaintiffs, relying on the terms of the case-management order, had no reason to believe the district court would grant the defendant's motion while they were still awaiting Southern Natural's official deposition transcript. While plaintiffs had much relevant documentary evidence in their possession before Southern Natural moved for summary judgment, the admission made by Southern Natural at deposition that the company dredged the canal was information learned by plaintiffs, carrying considerably more weight than inferences drawn from documentary evidence. The court noted, "Indeed, an admission by a party 'is conclusively established' as fact in the case."

In reversing and remanding, the court concluded:

> There are "two important judicial imperatives" relating to a motion for reconsideration: "(1) the need to bring litigation to an end; and (2) the need to render just decisions on the basis of *all* the facts." . . . The district court's failure to reconsider its grant of summary judgment as to Southern Natural in light of this new evidence amounted to an abuse of discretion.

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International Law

United States

Presidential Executive Orders 13785 (82 Fed. Reg. 16719) and 13786 (82 Fed. Reg. 16721).

President Trump issued two Executive Orders (EO) on March 31 that could set the stage for significant action on international commerce.

EO 13785 calls for enhanced collection and enforcement of anti-dumping and countervailing duties. The United States is purportedly owed $2.3 billion in uncollected anti-dumping and countervailing duties. The EO requires the Department of Homeland Security to conduct a risk assessment and develop a plan within 90 days to identify importers posing a risk of non-payment and recommend additional security measures to ensure payment. One of the suggested measures is additional bonding. The United States previously imposed enhanced bonding requirements and lost a dispute at the World Trade Organization regarding the imposition of enhanced bonding requirements on imported shrimp. *See, U.S. Measures Related to Shrimp from Thailand*, WT/DS343/AB/R (16 July 2008) and *U.S.-Customs Bond Directive for Merchandise Subject to Anti-Dumping/Countervailing Duties*, WT/DS345/AB/R (16 July 2008).

EO 13786 requires an "omnibus report on significant trade deficits." The EO notes that the U.S. annual trade deficit in goods exceeds $700 billion and looks to address the "challenges to economic growth and employment that may arise from large and chronic trade deficits and the unfair and discriminatory trade practices of some of our trading partners." The Secretary of Commerce and the United States Trade Representative (USTR) are required to issue the omnibus report within 90 days that identifies each trading partner where the United States runs a significant trade deficit, and for each identified partner, identify any import practices impairing the national security and assess (1) the major causes of the trade deficit; (2) whether the trading partner is imposing unequal burdens on, or unfair discrimination against, U.S. commerce; and (3) the effects of the trade relationship on the production capacity of the United States and wage-and-employment growth. In accordance with the EO, Commerce and the USTR issued a request for public comments regarding the order. *See,* 82 Fed. Reg. 1810 (April 17, 2017). The Federal Register notice specifically identifies 13 trading partners with which the United States had a significant goods-trade deficit in 2016, including the European Union, China, Canada, Mexico, India, Thailand and Japan. This entire process could be an effort to build a record supporting Presidential unilateral action under Section 122 of the Trade Act of 1974, which authorizes the President to deal with "large and serious United States balance-of-payments deficits" through the use of temporary import tariffs of up to 15 percent ad valorem. Any such duties are subject to a 150-day time limit, unless extended by Congressional action.

United States and World Trade Organization

A very significant issue percolating under the radar that could impact not only the United States' economic but also political relations with China involves its status as a Non-Market Economy (NME) under U.S. laws. China has notified the World Trade Organization (WTO) by written request for consultations with the United States and the European Union (EU) regarding the continuing propriety of using an NME methodology with respect to China in anti-dumping and countervailing duty investigations. China's position is based on the Dec. 11, 2016, expiration of Paragraph 15(a)(ii) of its Protocol of

Accession to the WTO. China believes that this provision's expiration now prevents WTO members from treating it as an NME for purposes of determining dumping margins. This unprecedented move could potentially conflict with U.S. domestic law that provides six factors for determining whether a country qualifies as a market economy for purposes of U.S. anti-dumping and countervailing duty investigations. Nearly all commentators believe that China fails the U.S. domestic test as its home market prices and costs are not set by market forces. As such, and without further direction from the WTO or U.S. agencies, the United States will continue to use surrogate values from third countries when determining Chinese margins.

China decided not to bring a WTO dispute-settlement challenge on this issue against the United States, instead selecting the EU as its initial target. China launched its dispute against the EU on March 9, 2017. In *European Union-Measures Related to Price Comparison Methodologies,* WT/DS516/9, China identifies provisions in EU dumping law that purportedly violate its rights as set forth in the now-expired paragraph 15(a)(ii) of its Protocol of Accession. The United States has indicated that it will participate in this dispute as a third-party participant.

The United States also is not sitting idly by back home and has taken action to preemptively address the China NME issue. As part of a recently filed anti-dumping case against certain aluminum foil from China, the Department of Commerce has issued public notice of its intent to inquire into the status of China as an NME under U.S. AD/CVD laws. *See,* 82 Fed. Reg. 16162 (April 3, 2017). The Department is seeking public comment regarding the six aforementioned factors that U.S. law uses to make a market/non-market economy determination.

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Labor and Employment Law

Prevent the Mess of Emotional Distress Under the FLSA

On Dec. 19, 2016, the 5th Circuit Court of Appeals set new standards concerning potential recovery under the Fair Labor Standards Act (FLSA). In a ruling on matters of first impression for the circuit, the court's holding in *Pineda v. JTCH Apartments, L.L.C.*, 843 F.3d 1062 (5 Cir. 2016), will allow retaliation victims suing under the FLSA to recover emotional-distress damages.

How might this holding affect employers and employees? How are other circuits ruling? This article provides a summary of the practical implications of the decision.

FLSA Plaintiffs May Now Seek Emotional Damages in the 5th Circuit

Pineda may mean employers could now pay greater penalties in the face of retaliation claims. Santiago Pineda was an employee of JTCH Apartments, L.L.C., performing maintenance work in and around the apartment complex. Pineda and his wife, Maria Pena, were allowed to live in the complex at a discounted rate as part of Pineda's compensation. After Pineda filed suit against JTCH and its owner/manager under the FLSA regarding overtime pay, the couple was served with a notice to vacate their apartment for nonpayment of rent. The notice claimed unpaid rent equal to the amount of the rent discount over the course of Pineda's employment. In response, Pineda amended his complaint to include a retaliation claim. Pena also joined the suit.

While the district court denied recovery for plaintiffs' claimed emotional distress damages, the 5th Circuit viewed the issue in a different light. The 5th Circuit's *de novo* review found that the 1977 amendment to the FLSA contemplated recovery not just for wages and liquidated damages, but also for "such legal or equitable relief as may be appropriate." *Id.* at 1064, citing 29 U.S.C. § 216(b). The 5th Circuit found this language contemplated emotional distress damages, relying on precedent in other circuits holding the same.

For example, the 7th Circuit found the amended language encompassed emotional distress damages for intentional torts, like retaliatory discharge. *See, Travis v. Gary Cmty. Mental Health Ctr.,* 921 F.2d 108, 112 (7 Cir. 1990). The *Pineda* court relied on *Travis*, reasoning that whereas a failure to pay minimum wage or appropriate overtime under the FLSA may be a mistake by an employer, retaliation by its very nature is *intentional*, and thus warrants additional damages. *Id.*

The 6th Circuit also has looked to *Travis*, expressly holding that the 1977 FLSA amendment did away with the old limitations on recovery, without establishing new ones. *Moore v. Freeman*, 355 F.3d 558, 563 (6 Cir. 2004). The amendment was targeted to allow any legal or equitable relief appropriate to further the purpose of 29 U.S.C. § 215(a)(3), which is to ensure that employees feel free to report grievances under the FLSA. *Id.* The 1st, 8th and 9th Circuits also have allowed damages for emotional distress to stand without directly addressing the issue on appeal. *See, Travers v. Flight Servs. & Sys., Inc.,* 808 F.3d 525, 539-42 (1 Cir. 2015) (affirming a $50,000 award for emotional distress); *see also, Broadus v. O.K. Indus., Inc.,* 238 F.3d 990, 992 (8 Cir. 2001); *Lambert v. Ackerley,* 180 F.3d 997, 1011 (9 Cir.1999) (finding an emotional distress damages award of $75,000 to each plaintiff employee on a successful FLSA retaliation claim was not excessive).

In *Pineda*, the 5th Circuit offered some guidance as to what specific factual circumstances may justify a jury instruction on emotional damages. The court found sufficient facts were established in the trial court to allow such an instruction, where Pineda had testified to experiencing marital discord, sleepless nights and anxiety about where his family would live if they were expelled from JTCH Apartments. *Pineda*, 843 F.3d at 1066 (citing *Salinas v. O'Neill*, 286 F.3d 827, 832 (5 Cir. 2002) ("Damages for emotional distress may be appropriate, however, where the plaintiff suffers sleeplessness, anxiety, stress, marital problems, and humiliation."))

The Take-Away*:* The *Pineda* holding may leave employers liable for additional damages for an employee's retaliation claim brought pursuant to the FLSA. Unlike claims for back pay of wages, which are capped by formulas contained within the statutory framework of the FLSA, or damages that are capped under other statutes, such as Title VII of the Civil Rights Act, retaliation claims could present relatively boundless recovery to FLSA plaintiffs. Most essentially, this means the cost of settlement may rise, as employers must consider the broader scope of potential liability.

Even so, the factual scenario in *Pineda* is unique; it is not every circumstance in which an employer can retaliate by evicting an employee from his residence. In that sense, the *Pineda* holding arose from the "perfect factual storm," offering a relatively extreme example of retaliation to allow for an award of emotional distress damages. Yet, all employers must remain vigilant in the face of this precedent. Even a frivolous claim can lead to real problems for employers who do not react with care in the face of a lawsuit. To limit exposure, employers must avoid transferring an employee who has filed suit to an unfavorable position or demoting that employee.

Claimants for Retaliation Under the FLSA Are Restricted

Although settlement costs for employers may be on the rise in light of *Pineda*, the 5th Circuit did restrict recovery for retaliation claims in one aspect. The court found Pineda's wife, Ms. Pena, could not also recover emotional distress or other damages by way of a retaliation claim because she herself was not a JTCH employee. Because the FLSA explicitly uses the word "employee," a non-employee spouse is not within the zone of interest protected by the statute. *Pineda*, 843 F.3d at 1067 (citing 29 U.S.C. § 215(a)(3)).

The Take-Away*:* *Pineda* shrinks the zone of potential plaintiffs for FLSA retaliation claims, indicating that only *employees* may file suit successfully.

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Coastal Land Loss Litigation

Board of Comm'rs of Southeast La. Flood Prot. Auth.-East v. Tenn. Gas Pipeline Co., 850 F.3d 714 (5 Cir. 2017).

In July 2013, the Southeast Louisiana Flood Protection Authority (SLFPA) filed suit in state court against 97 defendants from the oil and gas industry, alleging that the defendants were responsible for coastal land loss off southern Louisiana. SLFPA asserted that such land loss would increase the risk that future storms would cause flooding and that, in response to the increased risk, SLFPA would spend more money on preventative measures. SLFPA's factual theory was that canals drilled by the defendants in coastal areas — canals that the defendants drilled in order to facilitate access to drilling sites — have caused coastal land loss. SLFPA's legal theories were based on several causes of action, including negligence, strict liability, the natural servitude of drainage, public nuisance, private nuisance and breach of contract.

The defendants removed the case to the U.S. District Court for the Eastern District of Louisiana based on federal question jurisdiction. After denying SLFPA's motion to remand, Judge Nannette Jolivette Brown granted the defendants' Federal Rule of Civil Procedure 12(b)(6) motion to dismiss. SLFPA appealed.

The U.S. 5th Circuit affirmed the district court's denial of the motion to remand. The 5th Circuit reasoned that, although SLFPA asserted only state-law causes of action, federal question jurisdiction existed because deciding SLFPA's claims would require resolution of substantial, disputed federal issues, and because the exercise of federal jurisdiction would not disturb the balance of federal and state judicial responsibilities.

The 5th Circuit also affirmed the district court's dismissal of SLFPA's claims. The court concluded that neither federal law nor state law creates a duty that required the defendants to protect SLFPA from increased flood protection costs that might arise from coastal land loss. The absence of such a duty required dismissal of SLFPA's negligence and strict liability claims. Further, the district court properly dismissed the claim for breach of the natural servitude of drainage because SLFPA had not alleged any facts showing either that the defendants' properties constituted dominant estates or that any lands that SLFPA oversees constitute "[a]n estate situated below" a location where the defendants had altered the flow of water.

For similar reasons, the district court's dismissal of SLFPA's nuisance claims was proper. Louisiana nuisance law provides a remedy for circumstances when the "proprietor" of an estate engages in activities on his estate that either "deprive a neighbor of the liberty of enjoying his own estate" or cause damage to the neighbor's estate. But SLFPA had not alleged any facts showing that it was a "neighbor" to any of the defendants. The 5th Circuit stated that a party's estate need not be contiguous to a defendant's estate in order to be a "neighbor," but that "*some* degree of propinquity" is necessary. SLFPA, however, did not plead facts showing any degree of propinquity.

The 5th Circuit did not expressly address the merits of SLFPA's breach of contract claims, but it affirmed the dismissal of the contract claims as well. SLFPA argued that (1) the defendants had breached permit conditions, (2) the permits were analogous to contracts and (3) SLFPA was a third-party beneficiary. The district court had disagreed, rejecting SLFPA's third-party beneficiary theory.

Production Payments Dispute

Hackett v. Murphy Exploration & Prod. Co. USA, 16-0707 (La. App. 3 Cir. 3/15/17), 2017 WL 1002926.

Ownership of a disputed strip of land

turned on an ambiguous 1921 deed. In 2012, the plaintiffs brought suit, asserting ownership of the strip, which was located within a production unit operated by Murphy Exploration. The plaintiffs also sought several years' worth of production payments from Murphy, which had been making payments to certain other persons who claimed ownership of the strip. After trial, the district court determined that the plaintiffs owned the strip and that they were entitled to the sum of each of the production payments that had accrued since 2002, along with interest on that sum, running from 2002 until paid.

On appeal, the 3rd Circuit affirmed most of the lower court's judgment. It affirmed the ruling that the plaintiffs owned the strip. It concluded that the plaintiffs' failure to join the rival claimants to ownership of the strip was improper, but that the failure had been mooted by Murphy's joinder of those individuals. It stated that an unleased owner's claim for production payments is subject to a 10-year prescriptive period, and it affirmed the portion of the judgment holding that the plaintiffs' claims for pre-2002 production payments had prescribed. It rejected an argument that the running of prescription had been suspended because of Murphy's erroneous assertion that the plaintiffs did not own the strip. It reasoned that prescription would almost never run if such a good faith (though erroneous) assertion would be sufficient to suspend prescription.

The 3rd Circuit held, however, that the district court erred by awarding interest starting from 2002 on the sum of all production payments that accrued from 2002 through 2012. Instead, interest would accrue on each payment owed from the time that it became due.

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Professional Liability

Pleading Requirements of a Request for Panel Review

Coulon v. Endurance Risk Partners, Inc., 16-1146 (La. 3/15/17), ____ So.3d ____, 2017 WL 1034626.

Mr. Coulon developed a post-operative infection, following surgery by Dr. Juneau. The patient and his wife file a *pro se* panel request against the surgeon and the Surgery Center, alleging, with respect to the Surgery Center:

> [The Surgery Center] failed to develop, maintain, and enforce proper policies and procedures to prevent surgical infections. [The Surgery Center is] responsible under the theory of *respondeat superior* for the actions of its employees acting within the course and scope of their employment.

The Coulons filed a "Submission of Evidence," attaching to it medical records, their affidavits and photographs of the patient.

The medical-review panel found no breach of any standard of care by any respondent as charged in the complaint and no evidence to indicate that the Surgery Center failed to maintain proper procedures to prevent surgical infections, and it added that the Surgery Center's personnel properly monitored the patient and performed all duties in an appropriate and timely fashion.

The Coulons then filed a lawsuit against the Surgery Center, alleging the failure of the Center to do what was necessary to prevent and/or treat infections, including ensuring a sterile surgical environment. Additionally, they alleged failure to supervise and train the nurses who treated Mr. Coulon.

The Surgery Center followed with a partial exception of prematurity, contending that the allegations concerning training and supervising were "premature," as the plaintiffs did not allege these claims in their panel request. The plaintiffs countered that the language in their panel request was broad enough to encompass the claims in their lawsuit.

The trial court sustained the Surgery Center's exception of prematurity and dismissed the plaintiffs' petition in part, commenting (as noted in the hearing's transcript) that while the language in the lawsuit need not be identical to that in a request for panel review, "the plaintiffs cannot bring 'entirely new theories of liability.'" The court of appeal then denied plaintiffs' writ for supervisory review because:

1. The plaintiffs made a general allegation that the Center was responsible under the theory of *respondeat superior* for its employees but did not specify which employees.
2. In their submission of evidence, they alleged only that Dr. Juneau was negligent "in various way while employed" by the Center.
3. Their submission of evidence did not brief any argument regarding the Center's alleged failure to train or supervise its nurses.
4. The panel found nothing in the evidence presented to it to indicate any negligence.
5. The panel did not specifically address any allegation against the Center concerning any alleged failure to train or supervise personnel.

These points convinced the appellate court that the plaintiffs failed to present sufficient information to determine whether the Center "was entitled to protection under the Medical Malpractice Act."

The Supreme Court granted the plaintiffs' writ application. It noted that defendant healthcare providers often use exceptions of prematurity when there are questions as to whether claims against them fall "within the definition of medical malpractice" and are thus required first to be submitted to a medical-review panel. In the case at bar, the parties did not dispute that the failure to train or supervise nurses sounded in malpractice as defined by La. R.S. 40:1231.1(A)(13). The Surgery Center argued, however, that the claims concerning supervising and training were "new and separate claims from those raised in the complaint" that were not first presented to the panel and therefore should be dismissed.

The court observed that R.S. 40:1231.8(A)(1)(b) sets forth the seven minimum requirements to establish a statutorily acceptable request for panel review, the first five of which pertain to initiating the panel process by identifying the parties and the dates of the alleged malpractice and the seventh requiring a brief description of the alleged injuries. The Surgery Center contended that the plaintiffs had not satisfied the sixth subpart, *i.e.*, they did not provide in their complaint "a brief description of the alleged malpractice as to each named health care provider." The plaintiffs countered that their panel request alleged a failure to prevent the infection, which "*was*" the malpractice, and it encompassed all causes of action listed in their lawsuit.

The court referenced *Perritt v. Dona*, 02-2601 (La. 7/2/03), 849 So.2d 56, a case it decided prior to the amendment of the MMA, which now requires a brief description of the alleged malpractice as to each named defendant. The court explained that a panel claim is not a fact pleading that required the same specificity as a petition in a lawsuit:

> Rather, "the claim need only present sufficient information for the panel to make a determination as to whether the defendant is entitled to the protection of the Act." *Id.* at 65. We see nothing in the amendment to La. R.S. 40:1231.8(A)(1)(b) that makes the pleading requirement any more onerous. It is still the duty of the medical review panel to specify the health care provider's standard of care and determine thereafter if such standard was breached. *Perritt*, 849 So. 2d at 65 . . . . The requirement of a "*brief* description of the alleged malpractice" supports this conclusion and is in line with the history of the LMAA, which favors a layman plaintiff's access to medical expertise as a "filtering" or "pre-screening" process against "frivolous" and "worthless" claims. . . . . Thus, the pertinent question is whether the claims raised in the complaint contain enough information for the medical review panel to consider and conclude that the [defendant] was entitled to the protection of the LMMA, as opposed to claims that sound in tort. *Perritt*, 849 So. 2d at 65.

The court reasoned that in alleging both direct and vicarious liability, it was a "natural conclusion" that the plaintiffs were asking the panel to review all of the policies and procedures and employees' conduct that could have caused the patient's injuries. Furthermore, the medical panelists understood the scope of their review as evidenced by their opinion, which found no negligence on the part of the Surgery Center "*and/or* its employees." The court wrote that the allegations in the panel request, "taken separately, under direct *or* vicarious liability, are sufficient to encompass the causes of action at issue," adding that "*coupling* the two allegations renders the complaint more than sufficient to satisfy the pleading requirements of the Act." The ruling that sustained the exception of prematurity was reversed and the case was remanded.

Part of Panel Opinion Ruled Inadmissible

Jones v. Jefferson Parish Hosp. Dist. No. 1, 16-2030 (La. 1/9/17), ____ So.3d ____.

The patient's injury was caused by the use of a surgical instrument that was temperature-hot and which therefore should not have been used. The patient claimed in her panel request that both the surgeon and the hospital were at fault. One issue that put the defendants at odds with each other was whether the surgeon knew or should have known that the instruments were "hot" when she used them.

The medical-review panel exculpated the surgeon, noting:

> Dr. Taylor, in preparation for the surgery, used a weighted speculum that was on the surgical table appearing to be ready for use. At no time was Dr. Taylor informed that the instrument was hot and should not be used.

The panel also opined, however, that the hospital did breach the standard of care, specifically commenting that hospital personnel "failed to follow proper protocol by putting out an instrument that was not ready to be used."

The hospital's motion to strike from evidence the entirety of the panel opinion, because it answered a question of fact, was granted by the trial court. The court of appeal granted the surgeon's supervisory writ and vacated the trial court's judgment because the evidence submitted with the writ application gave no indication that the surgeon "was specifically told that the instruments on the table were not ready for use;" thus the panel "did not make an impermissible finding of fact" in exculpating the surgeon, nor did it make an impermissible finding of fact in deciding that the hospital *did* fail to follow proper protocol when it made available to the surgeon an instrument not ready for use. The court of appeal ruled that the entire panel opinion was admissible.

The Supreme Court granted the hospital's writ and reversed the court of appeal. However, while reinstating the judgment of the district court, it amended that judgment:

> to provide that only the portion of the medical review panel's opinion addressing Dr. Taylor is inadmissible; in all other respects, the panel opinion is admissible. *See*, *McGlothlin v. Christus St. Patrick Hospital*, 2010-2775 (La. 7/1/11), 65 So.3d 1218.

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Taxation

Taxpayer's Duty to Keep Records and Burden of Proof

Barfield v. Diamond Constr. Inc., 51,291 (La. App. 2 Cir. 4/5/17), ____ So.3d ____, 2017 WL 2017WL1244132.

The Louisiana Department of Revenue conducted a sales-and-use-tax audit of Diamond Construction, Inc. Diamond was a construction business that performed various services and sold equipment, which resulted in taxable transactions, including welding, fabrication, repairs, rentals, gate guards and hauling. The Department determined that Diamond failed to charge state sales tax on taxable sales and that it had failed to provide any information demonstrating that the additional sales or the customers were tax-exempt.

The Department filed a motion for summary judgment arguing that there were no genuine issues of material fact as Diamond was unable to carry its burden of disproving the allegations of the petition for collection of taxes, which were prima facie true under La. R.S. 13:5034. In opposition, Diamond filed affidavits asserting that a portion of the work was performed out of state or was exempt from tax. The Department replied that the affidavits were self-serving, conclusory and irrelevant unsupported statements and that Diamond failed to provide any evidence of the sales, their amounts, the dates they took place or that any sales-and-use taxes were paid in other states. The Department argued Diamond's affidavits were not adequate to meet its burden of proof and, because Diamond failed to keep records, it would be unable to disprove the Department's estimated audit findings. The district court granted the Department's motion. Diamond appealed.

The court held all of Diamond's transactions are subject to tax under La. R.S. 47:302, and it was incumbent on Diamond to keep records. Because the Department could not determine from Diamond's records which transactions were taxable, the court found it was appropriate for the Department to exercise its authority under La. R.S. 47:307 to audit the company and make an estimate of the amount of taxes due. The court found no genuine issues of material fact remained, and Diamond's affidavits were not sufficient to create any genuine issue of material fact because there was not sufficient proof to support the positions raised therein. The court affirmed the granting of the Department's motion for summary judgment.

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