No Final Decision, No Judicial Review

An applicant for a gambling license requested that the Louisiana Gaming Control Board amend its meeting agenda to include consideration of its application to be awarded a recently surrendered license. The Board refused to so do because of the deficiencies in the applicant's timely filed but incomplete application. The applicant filed a petition for judicial review of that decision in the 19th Judicial District Court, which was dismissed when the trial judge maintained the Board's exception for the lack of subject matter jurisdiction.

In *Tomorrow's Investors, L.L.C. ex rel Jones v. State*, 92 So.3d 364 (La. App. 1 Cir. 2012), 11-1616 (La. App. 1 Cir. 3/23/12), *writ denied*, 12-0886 (La. 6/1/12), 90 So.3d 444, the appeals court upheld the decision of the trial court because there was no "final decision or order" to be judicially reviewed, as required by La. R.S. 27:26 (which is similar in wording and intent to La. R.S. 49:964 A). The court rejected Tomorrow's Investors' (TI) claim that the Board's refusal to amend its agenda to include TI's application was properly before the trial court. TI based this argument on *Delta Bank & Trust Co. v. Lassiter*, 383 So.2d 330, 334 (La. 1980), which concerns a finding that if life, liberty or property deprivation is at stake, there is jurisdiction for judicial review. The Court found that TI suffered no actual deprivation of property when its deficient license application was not placed on the Board's agenda and considered by it.

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State Law Authorizing Confidential Arbitration Proceedings Violates First Amendment

Del. Coalition for Open Gov't v. Strine, ____ F.Supp.2d ____, 2012 WL 3744718 (D. Del. Aug. 30, 2012).

On Aug. 30, 2012, the United States District Court of Delaware handed down its decision in a lawsuit initiated by the Delaware Coalition for Open Government (DelCOG) against the Hon. Leo R. Strine, Jr. and the Court of Chancery. The plaintiffs in the case sought to challenge the confidential-dispute-resolution proceeding laws established by the State Legislature in April 2009 on the basis that they violated the First Amendment qualified right of public access to judicial proceedings. The controversial laws granted the Court of Chancery "the power to arbitrate business disputes when the parties request a member of the Court of Chancery, or such other person as may be authorized under rules

of the Court, to arbitrate a dispute." Even though arbitration is a very common dispute-resolution procedure and often conducted by former judges, the issue in the new Delaware laws was that *sitting* judges were performing the arbitrations.

The new confidential-dispute-resolution laws did not open such proceedings to everyone and were not available in every case. The laws required that the parties must consent either by arbitration agreement or stipulation in order to have the Court of Chancery arbitrate their dispute. Access was authorized only if at least one of the parties was a business entity and one a Delaware citizen; however, no party could be a consumer, meaning "an individual who purchases or leases merchandise primarily for personal, family, or household purposes." 6 Del. C. § 2731(1). The guidelines did not require a monetary minimum amount in controversy if the damages sought were for equitable relief; however, if only monetary damages were sought, then the amount in controversy had to be over $1 million. This was a significant change because before the Court of Chancery had limited jurisdiction to hear only equitable disputes. The new law now allowed the court to hear controversies involving monetary damages.

Many national corporations are based in Delaware, so the state courts are often the choice forum for many business disputes. The Delaware Legislature proposed the new laws as an attempt "to preserve Delaware's pre-eminence in offering cost-effective options for resolving disputes, particularly those involving commercial, corporate, and technology matters." They were meant to keep the Court of Chancery "at the cutting-edge in dispute resolution." Del. H.B. 49 syn., 145th Gen. Assem. (2009).

Attacking the arbitration laws, DelCOG argued that they denied the public its right of access to judicial proceedings granted by the First Amendment because the laws authorizing these arbitration proceedings were merely disguised litigation. They claimed that these arbitrations resembled bench trials in a civil suit in the following ways:

► the arbitrator is not privately retained by the parties, but rather a sitting judicial officer whose powers are granted by the state;

► the arbitrator functions similarly to a judge in a bench trial by analyzing evidence and hearing arguments;

► the costs and fees are paid to the court;

► the proceeding is conducted in a courthouse;

► the government pays the salary of the arbitrator and provides the resources needed in the courthouse; and

► the arbitrator's decision is legally binding without any further judicial confirmation. Finally, DelCOG argued that the importance of the public's right to access civil trials was necessary because it "enhances the quality and safeguards the integrity of the factfinding process" and "fosters an appearance of fairness, and heightens public respect for the judicial process." 457 U.S. 596, 606 (1982).

The defendants' position was that the First Amendment does not afford the public access to arbitration proceedings, and this has been true historically, both

nationally and internationally. The defendants also pointed out that the confidential dispute-resolution proceeding benefitted Delaware business entities by providing local confidential arbitration for commercial disputes, without which such businesses might choose to operate outside of Delaware altogether. They also pointed out that the new arbitration procedures could reduce the delays and costs of litigation, which would increase the appeal of conducting business within the state.

Ultimately, the federal judge assigned to hear the case ruled in favor of DelCOG and struck down the new Delaware laws. Her reasoning was that the arbitration procedures essentially resembled a civil trial, which the Constitution requires to be open to the public under the First Amendment. When there are state-paid judges presiding over the dispute in state-supported facilities, the public must have access to the proceedings.

In regard to Louisiana, while this case might not have immediate impact, it will discourage the Louisiana Legislature from enacting any future laws authorizing sitting judges to arbitrate disputes. Even though the U.S. 5th Circuit Court of Appeals has not seen a case where the arbitration proceeding resembles a civil trial, it is highly likely that the courts will hesitate to forbid access to the media or the public. The First Amendment right of public access is an integral part of our judicial system, ensuring the fair administration of justice. After this case, we can expect that any legislative attempt to cut costs or increase the efficiency of litigation will not involve the authorization of confidential judicial arbitration.

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"Specific and Unequivocal" Requirement for Claim Reservations Under the Plan

Compton v. Anderson, 701 F.3d 449 (5 Cir. 2012).

The debtor, MPF Holdings, sold its construction and supply contracts (the vendor contracts) to its largest vendor, Cosco, after filing for chapter 11. Under the plan, Cosco paid a lump sum toward the balance on the secured loan as consideration for the purchase of the vendor contracts and equipment. Soon thereafter, the litigation trustee began initiating avoidance actions, including actions against vendors that had participated in the Cosco transaction. The bankruptcy court *sua sponte* raised the issue of whether the plan's reservation of avoidance actions was sufficient under *Dynasty Oil & Gas, L.L.C. v. Citizens Bank*, 540 F.3d 351, 355 (5 Cir. 2008), which held that unless a debtor makes a "specific and unequivocal" reservation of a cause of action, the debtor will lack standing to bring the claim post-reorganization. The bankruptcy court found that the reservation language of the plan did not meet this standard and thus no causes of action were reserved to the trustee.

On direct appeal, the 5th Circuit held that under *Dynasty Oil*, a plan of reorganization must contain a specific and unequivocal reservation of a claim in order for a debtor to pursue the claim post-bankruptcy. Applying general contract interpretation rules, the court outlined that simply because one party's interpretation of a plan is reasonable, that fact alone is not sufficient to support a finding that a plan is ambiguous. While there was some disagreement as to which parties were released, that did not create an ambiguity as to whether the debtors retained the right to pursue released causes of action, which they unambiguously did not.

The 5th Circuit vacated and remanded

the decision of the bankruptcy court, holding that (1) to reserve avoidance actions, a plan could simply reserve claims that "may exist;" (2) the plan language was sufficiently specific and unequivocal as the exhibits identified each defendant by name; and (3) the reservation clause of the plan specifically carved out released claims and was, therefore, unambiguous. As to those claims not specifically carved out, the 5th Circuit found the trustee maintained standing to sue on those actions reserved in the plan.

Judicial Estoppel Does Not Require Creditors to Assert All Post-Petition Arrearages

Wells Fargo Bank, N.A. v. Oparaji, 698 F.3d 231 (5 Cir. 2012).

Debtor, Titus Oparaji, filed for chapter 13 bankruptcy, listing Wells Fargo Bank as a creditor holding a mortgage over his residential property. After falling behind on the post-petition mortgage payments, debtor modified his plan to add the past due amounts and Wells Fargo amended its proof of claim accordingly. Two years later, debtor amended his plan once more, providing only for the ongoing mortgage payments owed to Wells Fargo, not providing for prior post-petition mortgage payments already in default. One year later, the bankruptcy trustee had the bankruptcy dismissed as the debtor was in default.

Some time thereafter, the debtor filed for bankruptcy once more. In response, Wells Fargo filed a proof of claim including the pre-petition arrearages to cover all of the missed mortgage payments, as well as escrow advances paid by Wells Fargo to cover the property taxes and insurance. The debtor then sought to prevent Wells Fargo from asserting portions of its claim under the theory of judicial estoppel. The bankruptcy court granted summary judgment in favor of debtor, and the district court affirmed.

On appeal, the 5th Circuit stated the criteria used in evaluating a defense of judicial estoppel to include whether (1) the party against whom judicial estoppel is sought has asserted a legal position that is "plainly inconsistent" with a position asserted in a prior case; (2) the court in the prior case accepted that party's original position, thus creating the perception that one or both courts were misled; and (3) the party to be estopped has not acted inadvertently. Noting that the district court failed to identify any statute or judicial precedent that imposed a legal obligation on Wells Fargo to seek the total amount to which it was entitled in *each* amended claim, the 5th Circuit found that Wells Fargo was *not* required to include all of its post-petition arrearages in the amended claims. As Wells Fargo had not asserted legally inconsistent positions in the proceedings below, the 5th Circuit ruled the application of judicial estoppel was not warranted.

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Settlement Reached with EPA on Clean Air Act Violations

In November 2012, Louisiana Generating, L.L.C., agreed to a settlement with the Environmental Protection Agency (EPA) and the U.S. Department of Justice regarding Clean Air Act violations related to the company's Big Cajun II coal-fired power plant in New Roads, La. *See, United States v. Louisiana Generating, Inc.*, M.D. La., Case No. 3:09-cv-00100, Proposed Consent Decree filed Nov. 20, 2012 (Rec. Doc. No. 419).

According to EPA, this is the largest Clean Air Act settlement in Louisiana history. It also marks the 24th settlement under EPA's Power Plant Enforcement Initiative, the purpose of which is to reduce nitrogen oxide and sulfur dioxide emissions from coal-fired power plants under the Clean Air Act's New Source Review requirements. The Initiative began in 1999 when EPA filed seven lawsuits against electric utility companies in the Midwest and South for Clean Air Act violations. EPA describes the Initiative as "[p]erhaps the most comprehensive, coordinated enforcement effort under the Clean Air Act to date." *See* EPA, Coal-Fired Power Plant Enforcement Initiative, available at: *www.epa.gov/compliance/resources/cases/civil/caa/coal/index.html*.

EPA's investigation of the Big Cajun II plant began in 2004. In notices of violations issued to Louisiana Generating in 2005 and 2006, EPA claimed that the company had made several major modifications to the facility, including replacing major portions of the primary and high-temperature boiler reheaters at two of the facility's electrical generating units, without obtaining a Prevention of Significant Deterioration permit.

As part of the settlement, Louisiana Generating agreed to implement several pollution control measures at the Big Cajun II plant at a capital cost of approximately $250 million. These measures include:

► the installation of selective non-catalytic reduction (SNCR) technology, *i.e.*, pollution control technology that uses ammonia or urea injection into the boiler to reduce nitrogen oxide emissions, at all three of the facility's units;

► the continuous operation of dry sorbent injection at one facility unit to reduce sulfur dioxide emissions; and

► the operation of a particulate matter continuous emissions monitoring system (CEMS) at two facility units.

Louisiana Generating also agreed to pay a civil penalty of $3.5 million (half of which goes to the state of Louisiana) and to spend an additional $10.5 million on environmental-mitigation projects, including the installation of solar photovoltaic panels at local schools and government-owned facilities and the mitigation of nitrogen impacts in the False River area.

DNR Approves Second Act 312 Feasible Plan in *Savoie v. Richard*

On Nov. 10, 2012, pursuant to La. R.S. 30:29 (commonly referred to as

Louisiana Act 312), the Louisiana Department of Natural Resources, Office of Conservation (DNR) approved an Assessment, Evaluation and Remediation Plan (plan) in *Savoie v. Richard*, No. 10-18078, 38th Judicial District Court, Cameron Parish. *See,* DNR Doc. No. ENV-2012-L-002. This is the second assessment plan that has been approved by DNR since Act 312 was passed in 2006.

The plaintiffs in *Savoie* filed suit in 2007 alleging property damage related to oil and gas operations in the Kings Bayou Oil and Gas Field in Cameron Parish, La. The case is governed by the Act 312 procedure that was in place prior to the 2012 amendments to the statute. The trial in *Savoie* occurred in fall 2011. The jury found that Shell Oil Co. and SWEPI, LP were responsible parties under Act 312. According to the jury verdict form, the jury awarded $34 million in remediation damages and $18 million for "additional or excess remediation that may be required" under the terms of a surface lease.

Act 312 requires that the party liable for environmental damage submit a plan for remediation to applicable standards of the contamination that resulted in the environmental damage. *See,* La. R.S. 30:29(C)(1) (prior to 2012 amendment). Shell submitted a proposed remediation plan to DNR on April 13, 2012. DNR held a public hearing on Shell's proposed plan Aug. 7-13, 2012.

According to the plan, the site evaluation and cost estimate to implement the plan is $3,963,003. With regard to chlorides, DNR concluded: "The remedial goal for chlorides is background. Background concentrations will be determined in accordance with section 2.13 of [the Louisiana Risk Evaluation/ Corrective Action Program ("RECAP")]." Plan Exhibit B, p. 14. DNR's written reasons supporting its approval of the plan provide that the plan "is both reasonable and compliant with all regulatory standards and is therefore the most feasible plan." Plan Exhibit C, p. 2.

The approved plan is now before the court, which, under Act 312, must adopt the plan unless a party proves by a preponderance of the evidence that another plan is a more feasible plan to adequately protect the environment.

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Procedure/Discovery

Sercovich v. Sercovich, 11-1780 (La. App. 4 Cir. 6/13/12), 96 So.3d 600.

Although Mr. Sercovich allegedly sold his interest in two L.L.C.s to his sons, Ms. Sercovich was entitled to obtain business records from the entities in discovery on her rule for final spousal support. She presented documents at the hearing on the motion to quash showing that Mr. Sercovich may still have had an interest in the entities, despite his claims that he did not. The court of appeal, however, ordered that the documents be produced *in camera* for an inspection by the court to limit the documents to those relevant to Mr. Sercovich's income and means.

Interim Spousal Support

Short v. Short, 11-1084 (La. App. 5 Cir. 5/22/12), 96 So.3d 552.

On her request for interim spousal support, Ms. Short did not produce the documentation required by La. R.S. 9:326. Instead, she relied on her income-and-

expense form and on documents provided by Mr. Short regarding the family expenses. The trial court found, and the court of appeal agreed, that the expenses she listed were reasonable and in accordance with the parties' standard of living during the marriage. She also was not required to return to work after their physical separation because she was not working when they separated. He was entitled to credits for certain payments, but not toward payments on mortgages on their homes as those claims were more properly addressed in the community property partition and child support determinations and she did not list those expenses on her expense list. She also was entitled to interest on the support due even though it was an initial determination.

Custody

Schmidt v. Schmidt, 11-0833 (La. App. 5 Cir. 5/31/12), 96 So.3d 1276.

In allowing Mr. Schmidt physical custody on certain weekdays only from when the child got out of school until 7:30 p.m. when he had to go to work, the court of appeal seemed to agree with the trial court's reasoning not to allow him overnight visits because he was not home at night, even though his new wife was, and because there was "a preference for a biological parent to have custody."

Custody/Grandparents

Francis v. Francis, 11-2116 (La. App. 1 Cir. 6/13/12), 97 So.3d 1091.

The court of appeal held that visitation rights allowed to certain nonparents under La. Civ.C. art. 136(B) were limited to nonparents "not granted custody," which "presupposes a custody dispute pursuant to Article 133, in which one nonparent person was granted custody and one nonparent person was not granted custody." In this case, because the dispute was between a parent and her parents, who sought visitation with their grandchild, there was no custody dispute in which the parents were not granted custody but, instead, custody was granted to a nonparent. Thus, the grandparents did not meet the requirement of not having been granted custody, so the mother's exception of no right of action was sustained.

Custody/Relatives

Cathey v. Ogea, 12-0324 (La. App. 3 Cir. 8/22/12), 98 So.3d 953.

The parents of the minor child were unwilling and unable to care for the child, so this custody matter was between the paternal aunt who originally sought custody of the child and the maternal aunt and uncle who intervened. La. Civ.C. art. 132 regarding parents' agreement as to custody does not apply to allow the parents to designate a nonparent to have custody when another nonparent is seeking to divest the parents of custody of the child; that article requires that one of the parents "provoked the jurisdiction of the trial court to decide a custody issue." Here, the real parties to the action were the relatives of the child, not the parents. Thus, La. Civ.C. arts. 133 and 134 apply. However, article 133 does not establish a preference to a nonparent with whom the child has been living, but allows custody to be awarded to any person able to provide an appropriate environment.

In a *de novo* review of the record, the court of appeal affirmed the trial court's award of custody to the child's maternal aunt and uncle over the paternal aunt with whom the child had been living because, while she was in a stable relationship with her female partner, the aunt did not work and they lived in the partner's home. The court of appeal was concerned with the paternal aunt's financial stability, and the maternal aunt and uncle provided numerous advantages for the child. (Notably, the court of appeal did not comment on the two women's relationship.)

Child Support

Anderson v. Anderson, 11-0864 (La. App. 5 Cir. 5/31/12), 96 So.3d 1278.

Because Mr. Anderson lost his job and could not obtain a job at the same salary due to his taking narcotics from his employer and failing a drug test, he was found to be voluntarily unemployed. Further, he had agreed in a consent judgment after he lost his job to pay child support based on his prior income. Because she was found to be disabled by the Social Security Administration, she was unable to work and was not voluntarily unemployed. Further, her Social Security payment could not be used as income to calculate child support; however, it could be attributed as income to her for interim spousal support

purposes. Deposits to her account by her parents while Mr. Anderson was not paying monthly support were not included as income to her.

Community Property

Eustis v. Eustis, 11-0800 (La. App. 5 Cir. 3/27/12), 97 So.3d 1.

The parties' 50 percent undivided interest in a real estate development L.L.C. could be partitioned between them so that each individually owned a 25 percent membership interest, even though the other 50 percent was owned by Ms. Eustis's brother, and Mr. Eustis complained that he was subject to being taken advantage of by them due to his minority interest, the brother's sole management of the entity, and other restrictions and requirements in the Operating Agreement. The court of appeal distinguished between the allocation of community property interests in corporeal and incorporeal properties, finding that this asset could be fully partitioned by allocating each party a 25 percent membership interest.

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Jones Act Seamen: Maintenance and Cure

Jones v. Howard McCall, Inc., 12-0558 (La. App. 3 Cir. 11/7/12), ____ So.3d ____, 2012 WL 5423226.

Jones was employed by ABCCO to sandblast and paint an offshore platform, a job that lasted five months. In late December, ABCCO, as was its practice, contracted with Cameron Charter to provide a vessel, the M/V Howard McCall, to transports its workers to the rig, provide a work platform, a storage site for equipment, a place for the workers to eat and sleep and to transport them back upon completion of the job. In mid-January, in accordance with the terms of its contract, ABCCO dispatched Jones and another worker to Grand Chenier to sandblast and paint portions of the M/V Howard McCall so that the vessel finished the contract in the same condition it began. On Jan. 18, while exiting the wheelhouse, Jones fell and sustained personal injury. Soon thereafter, Louisiana Workers' Compensation Corp. (LWCC), ABCCO's workers' compensation insurer, began paying benefits.

Jones filed suit in state district court alleging two causes of action. First, that as a Jones Act seaman, all three defendants were liable to him under federal general maritime law and the Jones Act, 46 App. U.S.C.A. § 688, or alternatively, under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C.A. § 901 *et seq*. Second, that as he was rendered unfit for duty as a result of his accident, he was entitled to maintenance and cure. These pleadings raised three claims for relief: negligence, unseaworthiness, and maintenance and cure. LWCC intervened, seeking recovery of the workers' compensation it had paid Jones on behalf of ABCCO. The trial court granted directed verdicts against all defendants on the negligence issue. The jury found that Jones was a Jones Act seaman, that he was injured, that he had reached maximum medical improvement and that he was entitled to awards of maintenance and cure. On appeal, ABCCO asserted two assignments of error: (1) the jury erred in finding that Jones was a Jones Act seaman; and (2) the court erred in failing to offset the jury's maintenance-and-cure awards by the amounts previously paid in workers' compensation benefits and medical expenses.

Any discussion of who is a Jones Act seaman necessarily begins with reference to the United States Supreme Court's decision in *Chandris, Inc. v. Latsis*, 115 S.Ct. 2172 (1995). Justice O'Connor's opinion, to state the matter briefly, established a two-pronged test. First, the employee's duties must contribute to the function of the vessel or to the accomplishment of its mission. Quoting *McDermott International, Inc. v. Wilander*, 111 S.Ct. 807, 817 (1991), the court stated: "'All who work at sea in the service of a ship' are *eligible* for seaman status." *Chandris*, 115 S.Ct. at 2189. Second, the seaman "must have a connection to a vessel in navigation . . . that is substantial in terms of both its duration and its nature." *Id.*

The determination of seaman status a mixed question of law and fact. "The Jones Act remedy is reserved for sea-based maritime employees whose work regularly exposes them 'to the special hazards and disadvantages to which they who go down to sea in ships are subjected.'" *Id.* at 2190, *quoting Seas Shipping Co. v. Sieraki*, 66 S.Ct. 872, 882 (1946).

Applying these jurisprudential standards

to Jones's undisputed testimony of his factual scenario, the appellate court found no manifest error (the standard of review) in the jury's finding that Jones was a Jones Act seaman.

As to ABCCO's assertion that maintenance-and-cure awards should be offset by amounts previously paid to Jones under its workers' compensation policy, the 3rd Circuit found no merit. Describing maintenance and cure as "an ancient duty imposed upon the owner of a ship to provide food, lodging and necessary medical services to seamen who become ill or injured during service to the ship," the court noted that recovery does not depend on the negligence of the vessel or its owner, and the burden of proof is "relatively light."

The judgment of the trial court was affirmed in all respects.

Tort: Immunity under Louisiana Workers' Compensation Act

Bougere v. Northrop Grumman Systs. Corp., 12-0181 (La. App. 5 Cir. 11/13/12), ____ So.3d ____, 2012 WL 5500497.

Fernand Bougere worked for Avondale for 41 years, retiring as a welding supervisor in 1986. He developed mesothelioma, allegedly caused by exposure to asbestos during his employment, from which he died in 2010. His family filed suit against Avondale's executive officers' insurers. They asserted survival and wrongful death claims under La. Civ.C. arts. 2315.1 and 2315.2 and alleged the officers' negligence in failing to provide a safe workplace. The trial court granted defendants' exception of no cause of action and dismissing plaintiffs' wrongful death claims, citing the officers' tort immunity under the exclusivity provision of the Louisiana Workers' Compensation Act, La. R.S. 23:1032, as amended by Act 147 of 1976. The amendment further extended tort immunity to any "principal, officer, director, stockholder, partner, or employee of the employer."

Plaintiffs asserted that because Bougere was exposed to asbestos and was subjected to the executive officers' negligence prior to the 1976 amendment, the pre-1976 law should apply. The leading case on the question is *Walls v. American Optical Corp.*, 98-0455 (La. 9/8/99), 740 So.2d 1262. Citing *Walls*, the court held:

> An action for wrongful death is authorized by La. C.C. art. 2315.2 and compensates beneficiaries for their own injuries suffered as a result of the victim's death. The Louisiana Supreme Court has consistently recognized that an action for wrongful death does not and could not arise until the date of the victim's death.

The 5th Circuit found that the plaintiffs' wrongful death action arose in 2010 when Mr. Bougere died. Thus, the post-amendment law applied, extending tort immunity to Avondale's executive officers and barring plaintiffs' wrongful death claims against them.

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Russia and Moldova Jackson-Vanik Repeal & Sergei Magnitsky Rule of Law and Accountability Act of 2012 (H.R. 6156).

President Obama signed groundbreaking legislation on Dec. 14, 2012, repealing a Cold War-era law prohibiting normal trade relations with Russia. The legislation grants Russia and Moldova Permanent Normal Trade Relations (PNTR) status, allowing the United States to take full advantage of the tariff cuts and market access opportunities negotiated in Russia's Aug. 22, 2012, accession to the World Trade Organization (WTO). The legislation passed the Senate by a vote of 92-4, with an equally overwhelming 365-43 vote by the House. Russia criticized the legislation as it continues to allow the United States to sanction Russian officials for human-rights violations. Russia is an important growing market for Louisiana. The state's exports to Russia increased by 64 percent in the third quarter of 2012, compared to 8 percent for the rest of the world. PNTR not only opens the Russian market but provides American businesses with access to the WTO dispute-settlement system to resolve trade disagreements.

NML Capital, Ltd. v. Argentina, 699 F.3d 246 (2 Cir. 2012).

The 2nd Circuit issued an important ruling on a sovereign debt default generating international headlines and resulting in the seizure of an Argentine naval-training vessel docked in Ghana. The Republic of Argentina defaulted on roughly $80 billion of its public sovereign external debt in 2001 by issuing a temporary moratorium on principal and interest payments. The moratorium has renewed annually with no payments made to bondholders since 2001. Two exchange offers were made in 2005 and 2010, allowing bondholders to exchange defaulted debt for new unsecured and unsubordinated debt. Many bondholders accepted the exchange and waived various bondholder rights and remedies.

NML Capital declined the exchange and filed suit in the Southern District of New York against Argentina seeking specific performance of the equal-treatment provision of the bonds, which prevents the issuer from discriminating against original bonds in favor of new, unsecured and unsubordinated bonds. NML Capital alleged breach of contract and sought an injunction preventing payments on the reissued 2005 and 2010 debt. The district court granted permanent injunctions preventing Argentina from making the payments without issuing comparable payments to the original debtholders under the equal-treatment provision. The 2nd Circuit affirmed, upholding the equal-treatment provision and declining to find violations of the Foreign Sovereign Immunities Act. The court remanded for a determination on how the payment formula fashioned by the district court will operate and impact third parties.

While the decision is a victory for NML Capital and similarly situated hold out bondholders, it is not without its detractors. Many nations and credit markets criticized the court for interfering with international relations and the sovereign ability to restructure debt for the public good. President Kirchner of Argentina continues to reject the claims of the so-called "vulture" funds that purchased much of the defaulted debt. In the meantime, the sailing vessel Liberty remains in a Ghanian port awaiting a ruling from either the Law of the Sea tribunal or the International Court of Justice.

Resource Guide to the U.S. Foreign Corrupt Practices Act

On Nov. 14, 2012, the Criminal Division of the U.S. Department of Justice and the Enforcement Division of the U.S. Securities and Exchange Commission issued long-awaited guidelines on the U.S. Foreign Corrupt Practices Act (FCPA). FCPA prosecutions have skyrocketed in the past five years, resulting in some of the largest fines in U.S. history. The guidance provides an in-depth examination of what constitutes bribery under the FCPA and what affirmative defenses are available to businesses caught in the crossfire of an investigation. Both external and in-house counsel should familiarize themselves with the publication before advising clients on overseas business practices.

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Judicial Ascertainment Clause

B.A. Kelly Land Co., L.L.C. v. Questar Exploration & Prod. Co., 47,509 (La. App. 2 Cir. 11/14/12), ____ So.3d ____, 2012 WL 5503665.

After the primary term of a mineral lease, there was a period of several consecutive months in which the lessees did not produce minerals or conduct operations. The lessor sought a declaration that the lack of production had caused the lease to terminate.

The lessees contested the lessor's claim, arguing that the lease had not terminated for two independent reasons. First, the lease's habendum clause provided that the lease would remain in effect for the primary term "and as long thereafter" as minerals were produced or the lease was "maintained in any other manner provided." The lessees asserted that the lease's shut-in clause provided one of the "other manners" for maintaining the lease and that the lease had been maintained pursuant to that clause.

Second, the lease contained a clause stating that, once the lessee had produced minerals:

> [T]his lease shall not be subject to forfeiture or loss, either in whole or in part, for failure to conduct operations in compliance with this contract except after judicial ascertainment that Lessee has failed to conduct such operations and has been given a reasonable opportunity after such judicial ascertainment to prevent such loss or forfeiture by complying with and discharging its obligations as to which Lessee has been judicially determined to be in default.

The lessees argued that this "judicial ascertainment clause" prevented lease termination because the lessor had never obtained the required "judicial ascertainment" or given the lessees a chance to cure any default.

The lessor replied that the shut-in clause did not apply under the circumstances that had existed during the period of non-production. Further, the lack of production was a resolutory condition that caused automatic termination of the lease. Thus, the judicial ascertainment clause did not apply. Moreover, the lessees were not entitled to an opportunity to cure because once the lease has terminated for non-production, subsequent production cannot retroactively revive the lease.

The district court dismissed the lessor's claims on summary judgment and denied the lessor's request to amend its petition to request a judicial ascertainment. The lessor appealed.

The Louisiana 2nd Circuit concluded that the judicial ascertainment clause would prevent automatic termination, provided there was a bona fide dispute regarding termination, and that there was a bona fide dispute regarding whether the shut-in clause had prevented termination of the lease. Accordingly, the lessor's suit seeking a declaration that the lease had terminated was premature. But instead of affirming the dismissal, the appellate court remanded, holding that the district court had erred when it denied the lessor's request for leave to amend its petition to seek a judicial ascertainment.

Usufructs

Quantum Res. Mgm't, L.L.C. v. Pirate Lake Oil Corp., 12-0256 (La. App. 5 Cir. 11/13/12), ____ So.3d ____, 2012 WL 5500501.

Mr. and Mrs. Jones had three children. Mrs. Jones died testate, bequeathing to Mr. Jones all her property, including certain land that was separate property and subject to a mineral lease. But the children were forced heirs, and in a succession proceeding, the legacy to Mr. Jones was reduced to a one-half interest in the property and a usufruct over the remaining one-half interest. No oil or gas well existed on the property at the time Mrs. Jones died, but a well was drilled between the time of her death and the time of the order reducing Mr. Jones's legacy. Mr. Jones and a daughter disputed who was entitled to royalties from the well, so the operator of the well filed a concursus.

Mineral Code article 190(B) governs the extent to which a usufructuary of land has a right to proceeds from minerals when the "usufruct is that of a surviving spouse," but the Louisiana 5th Circuit concluded that article 190(B) did not apply. The court reasoned that Mr. Jones had inherited the usufruct in the capacity of a legatee, not as a "surviving spouse."

The court determined that Mr. Jones's usufruct was a conventional usufruct and that Mineral Code article 190(A) applied. It provides that:

> if there is no provision including the use and enjoyment of mineral rights in a conventional usufruct, the usufructuary is entitled to the use and enjoyment of the landowner's rights in minerals as to mines or quarries actually worked at the time the usufruct was created.

With respect to oil and gas, Mineral Code article 191 explains that this means the usufructuary is entitled to "the landowner's rights in minerals as to all pools penetrated" by any wells that were producing or capable of producing when the usufruct was created.

The daughter argued that the father's usufruct was created at the time of his wife's death (before any wells existed) because a legatee's right to inherited property arises at the time of a testator's death, but the court disagreed. The mother's testament had granted the father full ownership. The succession proceeding court reduced his legacy (and substituted a usufruct) because it impinged on the children's rights as forced heirs, but forced heirs can waive their rights, and such rights do not affect a succession until asserted and recognized by a court. Thus, the father was entitled to proceeds from the well that was drilled after his wife died and before the judgment reducing his legacy.

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90-Day Suspension and Failure to Appoint an Attorney Chair

Turner v. Willis Knighton Med. Ctr., 12-0703 (La. 12/4/12), ____ So.3d ____, 2012 WL 6015598.

Mrs. Turner filed a medical-review-panel request on Aug. 20, 2009, claiming negligent care caused the death of her husband on Aug. 20, 2008, and naming as respondents a hospital and four doctors. On Aug. 27, 2009, the PCF acknowledged receipt of the panel request, advised that the hospital was a qualified health-care provider under the private MMA, but reported it did not have enough information to qualify the doctors. On April 1, 2010, the Division of Administration acknowledged that the doctors were qualified health-care providers under the public MMA.

On May 24, 2010, Turner was notified her panel request would be dismissed unless an attorney chairperson was appointed "within one year from the date of filing as indicated above." The PCF's letter showed the date of filing to be Aug. 20, 2009, and stated that the chair had to be appointed from that "file date."

On July 14, 2010, new counsel enrolled for Turner and requested that claims against the private and public health-care providers should proceed as a "joint medical panel."

By Aug. 20, 2010, no attorney chair having been appointed, the PCF sent a certified letter dated Aug. 25 to newly enrolled counsel advising that the failure to appoint a chair within one year caused it to close the claim and deem the Medical Review Panel to have been waived. It also advised that a lawsuit must be filed within 90 days after the dismissal in accordance with the MMA. The PCF's letter was received by counsel on Aug. 27, 2010.

Turner's lawsuit was filed on Nov. 23, 2010, alleging malpractice against the same providers. The hospital filed an exception

of prescription, claiming the suit was filed beyond the one-year anniversary of the initial complaint plus the 90-day statutory suspension of prescription. The doctors also filed an exception of prescription and alternatively an exception of prematurity. Turner responded that the claim was filed within 90 days after the PCF's August letter notifying her that her claim had been dismissed. The trial court granted the exceptions of prescription, following which the doctors withdrew their exception of prematurity. The 2nd Circuit Court of Appeal reversed the decision on prescription and ruled that the parties' prematurity exception should also be dismissed.

La. R.S. 40:1299.47(2)(C) is the controlling statute. It requires the selection and appointment of the attorney chair within one year from the date a Request for Review is filed. In Turner's case, that was Aug. 20, 2009. The statute also provides for two warning notices to be sent by the PCF, the first sometimes referred to as the "nine-month letter" to be sent within nine months of the filing date, advising the parties by certified or registered mail that the claim is to be dismissed in 90 days absent the appointment of an attorney chair. The letter sent to Turner's counsel warned that the entire appointment process had to be completed within a year from the "file date" of Aug. 20, 2010, in the absence of which the PCF would "close the claim," further advising that even if the "strike process" was used, the appointment must nevertheless be complete by the one-year file date.

The second-notice provision requires the PCF to "promptly send notice" to all parties that the claim has been dismissed, that the medical-review-panel requirement has been waived and that prescription is suspended for 90 days after the dismissal of the panel request. This notice to Turner's lawyer was dated Aug. 25 and received by him on Aug. 27.

The Supreme Court stated that the issue presented centered around the date of the PCF's dismissal of the claim "because that is what statutorily commences the statutory 90-day grace period, the completion of which recommences the running of prescription."

For instance, here, the date of the nine-month letter was May 24, 2010, and 90 days from that date was Aug. 22, 2010. However, even if the statutory 90-day grace period began on that date, this suit would still be prescribed as it was filed on Nov. 23 — more than 90 days from Aug. 20. The court set forth the issue as "whether notice of dismissal or actual dismissal commences the statutory 90-day grace period continuing suspension of the prescriptive period."

The court concluded that irrespective of possible confusion over whether dismissal "actually occurs 90 days after the nine-month letter, or one year after the request for review is filed, there is no question that dismissal, not notification, triggers the 90-day grace period in which prescription continues to be interrupted."

The court's holding was that failing to appoint a chair within one year from filing is deemed a waiver of the panel process and leaves the plaintiffs 90 days (plus time remaining on the one-year prescriptive period of La. R.S. 9:5628(A)) in which to sue. The court also said that while the statute requires the parties to be notified of the consequences for failing to appoint nine months after filing the claim, and that they must also be "properly" notified after the claim has been dismissed, neither of these notifications initiates the running of the 90-day grace period. The court held: "As dismissal, not notification, begins the 90-day grace period, Mrs. Turner's suit, filed more than 90 days after the suit was dismissed, has prescribed."

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Servient Estate Owner's Right to Relocate a Right of Passage

Thibco Investments, L.L.C. v. Thibodeaux, 12-0427 (La. App. 3 Cir. 11/7/12), ____ So.3d ____, 2012 WL 5417133.

The Louisiana 3rd Circuit Court of Appeal held that the relocation clause in a deed to the owner of an enclosed estate that attempted to limit the servient estate owner's right to relocate the right of passage and the roadway and that shifted the allocation of costs to the owner of the dominant estate was not enforceable as a predial servitude.

The servitude in dispute was originally created on Aug. 9, 1982, in an act between the predecessors in title to the properties at issue. The act provided certain obligations and stipulations regarding the exercise of the servitude. Specifically, the act reserved the right of the owner of the servient estate to require the owner of the servitude of passage to move the servitude one time at his expense.

After concise and clear recitation of the applicable law, the appellate court affirmed the trial court's finding that the plaintiff had no right of action, reasoning that the relocation clause impermissibly altered the Louisiana Civil Code articles addressing rights of passage and was, therefore, unenforceable. The court first noted that pursuant to La. Civ.C. art. 689, the owner of an enclosed estate may claim a right of passage over neighboring property to the nearest public road. However, "[t]he owner of the enclosed estate has no right to the relocation of this servitude after it is fixed. The owner of the servient estate has the right to demand relocation of the servitude to a more convenient place at his own expense, provided that it affords the same facility to the owner of the enclosed estate." La. Civ.C. art. 689.

Citing Yiannopoulos, *Predial Servitudes* § 159 at 440, the court further noted that "[t]he right of the owner of the servient estate to demand relocation of the servitude is imprescriptible." Additionally, "[p]redial servitudes are perpetual in the sense that, if properly used, they do not terminate upon the lapse of any period of time." *Id.*, § 10 at 35.

Reasoning that the Civil Code articles on right of passage clearly meant for the servient estate to retain the right, at its own expense, to relocate the right of passage as often as necessary with the only limitation being that the new location afford the same facility to the owner of the dominant estate, the court held that the clause restricting relocation of the right of passage and the private road and shifting the allocation of costs to the owner of the dominant estate was unenforceable as a predial servitude. As a result, the court held that plaintiff did not have an interest in enforcing the provision and upheld the trial court's grant of the exception of no right of action.

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