Importance of Confidentiality for Vitality of Mediation

In recent years, mediation has grown in popularity as a form of alternative dispute resolution. The mediation process has many benefits, one of which is confidentiality. The expectation of confidentiality promotes the use of mediation by providing parties with certainty that they will be able to earnestly discuss settlement without the risk of valuable information being disclosed to anyone not privy to the mediation. *See* Michael P. Carbone, "Confidentiality Revisited," mediate.com (June 2014), *www.mediate.com/articles/CarboneMbl20140613.cfm*.

Several recent cases across the United States have indicated that confidentiality rules are effectively ensuring that mediation will remain the preferred form of alternative dispute resolution, but some cases suggest otherwise.

A ruling by a Florida federal district court suggests that violations of mediation confidentiality rules lack a remedy. In *Procaps S.A. v. Patheon, Inc.*, 12-24356 (S.D. Dist. Fla. 10/22/14), the plaintiff, Procaps, filed a motion to compel return to mediation, which the defendant, Patheon, opposed. In its opposition, Patheon alluded to several aspects of the parties' previous confidential mediation by stating:

► there was a "monumental gap" at mediation;

► Procaps refused to "close the gap" during or after mediation;

► Procaps made "over the top" settlement offers;

► Patheon made a counteroffer to Procaps's settlement offer;

► Procaps refused to disclose a "rule of reason theory" to Patheon; and

► Procaps's counsel made no good-faith effort to settle.

Based on these statements, Procaps filed a motion to strike defendant's opposition, alleging that Patheon breached Florida's mediation confidentiality rules. *See* S.D. Fla. L.R. 16.2(g)(2). Procaps argued that the court should strike Patheon's opposition or, alternatively, that Procaps should also be able to disclose confidential information from the mediation.

The court first held that the statements referring to the monumental gap, Procaps's refusal to close the gap, and Procaps's lack of good faith were "relatively harmless" because they were responsive to the motion to compel return to mediation and "sufficiently generic to not constitute a violation of the confidentiality rule." It noted that a party should, "at least to some limited degree," be able to mention that the previous mediation did not succeed due to considerable differences.

Next, Patheon revealed in its opposition that Procaps's settlement demand was based on an expert's opinion that the venture would have generated billions of dollars in revenues and that Procaps "has no rule of reason theory, as evidenced by its refusal to disclose one to Patheon." The court found that these statements "did, in fact, go a tad too far" and that the statements were in violation of Florida's mediation confidentiality rules; however, the court opined that allowing the disclosures in this case would not be significant enough to chill mediation. The court further stated that the severity of Procaps's suggested remedies — to strike Patheon's opposition or to allow Procaps to also disclose confidential information — were disproportionate to Patheon's technical violations. Ultimately, the court denied Procaps's motion to strike defendant's opposition.

On the other hand, in *American Environmental Group, Ltd. v. H.M. Miller Construction Co.*, 2014-Ohio-4681 (Ohio Ct. App. Oct. 23, 2014), a recent case from Ohio, the court demonstrated that confidentiality rules are successful in protecting mediation materials from disclosure. The city of Fremont, Ohio, and H.M. Miller Construction Co. (Miller) participated in a series of mediations to settle claims based on a construction project. Another party to the litigation, American Environmental Group (AEG), was invited to attend the mediation but declined to do so. At the final mediation, Fremont and Miller settled their dispute. AEG subsequently filed suit against Miller and issued subpoenas duces tecum to Fremont seeking documents from the Fremont-Miller mediation. Miller filed a motion to quash subpoenas, or, in the alternative, a motion for a protective order against AEG, alleging that the documents were confidential mediation communications, which are privileged under Ohio's Uniform Mediation Act. *See* Ohio Rev. Code §§ 2710.01-2710.10.

The trial court denied Miller's motion to quash and the motion for protective order, stating that the issue was "not yet justiciable" and that the documents must be disclosed. The disclosure was strictly limited to AEG's counsel, and, once the documents were received, the defendants could then "file another motion for a protective order to prevent plaintiff from using privileged mediation communications in discovery or at trial and to 'claw back' any such communications." On appeal, the Ohio Court of Appeals reversed the trial court's ruling, stating that "the trial court abused its discretion in ordering the release of all the requested documents, including those that fall within the ambit of a mediation communication."

The court first found that there was evidence in the record that the documents were protected under Ohio's Uniform Mediation Act. AEG took the position that it was entitled to view the documents for three reasons:

► it was a party to the mediation through Miller;

► it was invited to attend the mediation; and

► its claims were compromised at the mediation.

Ruling that none of these arguments qualified as a valid exception to Ohio's Uniform Mediation Act, the court held that requiring disclosure was improper. Furthermore, the trial court's solution to limit disclosure to only AEG's counsel and to have the defendants "claw back" the confidential documents violated Ohio's Uniform Mediation Act.

The court specifically noted the importance of mediation's confidentiality, stating that it is "critical to the success of mediation." The court opined that disregarding confidentiality rules "threatens the vitality of mediation" and held that, when there are confidential mediation communications, a trial court should not order their release.

These cases illustrate that while the degree of disclosure may impact a court's enforcement of the confidential nature of mediation conferences, overall, confidentiality rules are an effective way to promote the continued vitality of mediation.

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Bankruptcy Law

Federal Income Taxes Exempted from Discharge

United States v. Stanley, No. 13-60704, 2014 WL 6997518 (5 Cir. Dec. 12, 2014), ____ Fed Appx. ____.

Dr. Markus B. Stanley failed to pay his tax liabilities to the United States from 1998 through 2010. In 2009, Stanley filed for Chapter 7 bankruptcy relief and, in 2011, was granted a discharge from his debts, including the tax liabilities. The government did not appeal the discharge. In 2011, the government brought a civil action against Stanley to reduce his tax liabilities to judgment. The government sought summary judgment from the district court to determine whether Stanley's tax liabilities for 1998 to 2010 were excepted from his bankruptcy discharge under 11 U.S.C. § 523. The district court found the following taxes were excepted from discharge and reduced them to judgment: (1) the 2009 and 2010 taxes because they accrued after the bankruptcy filing; and (2) the 2005-2008 taxes because they were assessed in the three years immediately before the bankruptcy filing. *See*, 11 U.S.C. §§ 507(a)(8)(A)(i) and 523(a)(1)(A).

With respect to the 1998 to 2004 tax liabilities, in order for those tax liabilities to be excepted from discharge, the government had to demonstrate that "the debtor made a fraudulent return or willfully attempted in any manner to evade or defeat such tax" pursuant to 11 U.S.C. § 523(a)(1)(C). At the trial, the government had the burden of proving the "willful attempt" standard, *i.e.*, the debtor's conduct was an attempt to "evade or defeat [a] tax" and that he had a "willful" mental state in doing so. Stanley did not contest the conduct requirement but argued that he suffered from bipolar disorder, which rendered him incapable of forming the requisite willful mental state. The district court ruled in favor of the government and denied the discharge of the 1998 to 2004 tax liabilities.

On appeal, the 5th Circuit discussed the three-pronged test used to determine willfulness in the tax-evasion context. This test considers whether the debtor (1) had a duty to pay taxes under the law; (2) knew he had that duty; and (3) voluntarily and intentionally violated that duty. *See*, *United States v. Coney*, 689 F.3d 365, 374-76 (5 Cir. 2012). Under this standard, the debtor does not have to specifically intend to defraud the IRS. The third prong will be considered satisfied by either an affirmative act or culpable omission. Reasoning that simple "non-payment" or an "ability to pay" are not alone sufficient evidence of intent, the 5th Circuit looked to the totality of circumstances surrounding Stanley's actions.

Between 1998 and 2004, Stanley entered into many complicated real-estate transactions, purchased a number of luxury items (including a motorcycle, a number of cars and expensive jewelry for his wife), established a wholly owned corporation and generally made timely payments on his other debts. Stanley also entered into an installment agreement with the IRS to pay his back taxes, but breached the agreement shortly thereafter. The 5th Circuit found these actions clearly indicated Stanley's willfulness in evading his taxes. In response, Stanley asserted that because of his mental health, he was unable to control his actions. The 5th Circuit held, however, that a debtor's ability to successfully carry out duties in a demanding profession, such as the practice of medicine, is evidence of a corresponding ability to form a willfulness mindset to evade tax obligations. Therefore, because Stanley demonstrated an ability to continue his medical practice, tended to other financial obligations and participated in complex financial transactions during the period in question, the 5th Circuit found Stanley willfully attempted to evade his federal income taxes and exempted the 1998 to 2004 taxes from discharge.

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Corporate and Business Law

Louisiana Business Corporation Act Modifies Merger Process

The Louisiana Business Corporation Act (effective on Jan. 1, 2015) contains slight, but significant, modifications to the merger process of one or more corporations or entities. La. R.S. 12:1-1101 through 1108. The process remains consistent with prior Louisiana law, but this update describes several changes that practitioners should keep in mind.

Adoption of Plan of Merger

The board of directors of each party to a merger must adopt a plan of merger that contains: (1) the name of each business corporation or "eligible entity" that will merge, and the name of the surviving entity; (2) the terms and conditions of the merger; (3) the manner and basis of converting shares of each merging corporation and/or entity into shares or other securities; eligible interests; obligations; rights to acquire shares or other securities or eligible interests; or into cash, other property or any combination of the foregoing; (4) the articles of incorporation or "organic documents" of any domestic or foreign entity to be created by the merger, or any amendments to the survivor's articles of incorporation or organic documents; and (5) any other provisions required by the law of the state where any party is organized or by which it is governed, or by the articles of incorporation or organic document of such party. La. R.S. 12:1-1102.

The plan may allow for its amendment after approval, but prior to filing articles of merger. However, if the shareholders of a corporation that is a party to the merger are permitted or required to vote on the plan, the plan may not be amended to change:

► the amount or kind of shares or other securities; eligible interests; obligations; rights to acquire shares or other securities or eligible interests; or cash or other property to be received under the plan by the shareholders or owners of eligible interests in any party to the merger;

► the articles of incorporation or organic documents of any unincorporated entity that will survive or be created by the merger; or

► any of the other terms or conditions of the plan if the change would adversely affect the shareholders in any material respect.

The plan must then be submitted to shareholders for approval, together with a recommendation of approval from the directors. If the board of directors determines it should not recommend approval because of a conflict of interest or some other special circumstance, the board must provide a statement explaining such conflict or circumstance.

If, pursuant to La. R.S. 12:1-1104(8), the corporation will survive the merger; its articles will not be changed by the merger; each shareholder of the corporation whose shares were outstanding immediately before the effective date of the merger will hold the same number of shares, with identical preferences, limitations, and relative rights immediately after the effective date of the merger; and the issuance in the merger of shares or other securities convertible into or rights exercisable for shares does not require a shareholder vote, the approval of the shareholders of such corporation is not required. If the merger is between a corporation or entity that owns at least 90 percent of the voting power of each class or series of outstanding shares of another corporation or entity that has voting power, the approval of either the board of directors or shareholders of the subsidiary is not required unless the articles of any corporations provide otherwise. La. R.S. 12:1-1105.

Written notice of a meeting to approve the plan of merger must be sent to each shareholder, whether or not the shareholder is entitled to vote for the merger.

Approval of the merger requires a majority of the votes entitled to be cast in favor of the plan of merger, and if any class or series of shares is entitled to vote as a separate group on the plan, the approval of each such separate voting group by at least a majority of the votes entitled to be cast by that voting group is required, unless a greater vote is required by the organic documents of any entity or the board of directors. This threshold requirement is a change from previous Louisiana law, which required approval of two-thirds of the voting power present.

Filing of Articles of Merger

Articles of merger must be filed with the Secretary of State after approval of the plan identifying the parties to the merger; any amendments to existing articles of incorporation, or new articles of incorporation of any entity formed by the merger; if shareholder approval was required, that the plan of merger was approved under law and the articles of incorporation, or a statement that shareholder approval was not required; and a statement that participation in the merger by a foreign corporation or entity was authorized pursuant to the organic law of the foreign corporation or entity.

Within 30 days of the articles of merger taking effect, a duplicate original or certified copy of the articles must be filed in the conveyance records of any parish in the state where a party to the merger owns immovable property. The requirement to file in the parish where any party to the merger has its registered office has been eliminated.

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Criminal Law

5th Circuit Denies Qualified Immunity for Prison Officials Accused of Due Process Violations

Wilkerson v. Goodwin, 774 F.3d 845 (5 Cir. 2014).

The U.S. 5th Circuit Court of Appeals recently upheld the decision of Senior Judge James J. Brady of the Middle District of Louisiana denying qualified immunity for prison officials at the Louisiana State Penitentiary at Angola and the David Wade Correctional Facility. Plaintiff-appellee Albert Woodfox is the last of the "Angola 3" who is still incarcerated. Woodfox, along with Robert King and Herman Wallace, were charged with the 1972 murder of an Angola prison guard.

The trio have been repeatedly tried and convicted only to be exonerated on appeal due to numerous revelations including the loss of potentially exculpatory DNA evidence, special favors (including a pardon recommendation) which were given to the State's serial rapist star witness in exchange for testimony, and various other forms of prosecutorial misconduct. Advocates for their release and reparation include Amnesty International, the United Nations High Commissioner for Human Rights, and even the widow of the slain prison guard who has attended rallies demanding their release and stated, "If I were on that jury, I don't think I would have convicted them."

Woodfox filed suit against prison officials alleging a procedural-due-process claim arising out of his 39 years of continuous incarceration in solitary confinement.

Prison officials sought summary judgment on the basis of qualified immunity, stating that the placement of prisoners into separate security classifications did not implicate a due-process right. The court first dismissed the semantic distinctions made by the State regarding "extended lockdown" at Wade Correctional, "closed-cell restriction" at Angola, and other forms of solitary confinement, noting that prisoners in each system endure 23 hours of solitary confinement each day in addition to restrictions on access to legal resources, visitation, personal property and religious services.

The State likewise failed to prove that Woodfox's due-process rights were protected by "sham" reviews held before a board of prison officials every 90 days, whose written decisions in "rote repetition" state "the Plaintiffs' placement in CCR *was and remains indefinite,*" which creates a situation with "no hope of release other than by death or release from prison." *Id.* at 856 (emphasis added). (The due-process claims of co-plaintiff Herman Wallace were originally part of these proceedings, but have since been settled with the family after Wallace died. He spent more than 40 years in solitary confinement in the same facilities.)

The original plaintiffs brought near identical arguments in 2000 regarding their extended solitary confinement at Angola. The State likewise brought a claim of qualified immunity, which was denied, and sought summary judgment, which was denied. *Wilkerson v. Stalder*, 329 F.3d 431, 436 (5 Cir. 2003). In March 2005, the protracted litigation came to an end with the issuance of an order declaring that "the extraordinary duration of the solitary confinement gave rise to a protected liberty interest." 745 F.3d at 850 (internal citations omitted).

After the 5th Circuit's decision, the plaintiffs were moved intermittently to a maximum-security dormitory between stints in solitary confinement until November 2010 when Woodfox was transferred to Wade Correctional and "immediately placed in a newly-created CCR unit, where he has remained ever since." Woodfox was given leave to amend his petition to include officials at the new prison, who immediately sought summary judgment asserting qualified immunity because "they made an initial independent decision that Woodfox should be housed in CCR." This argument was undercut by evidence showing that "there was no CCR tier at Wade prior to Woodfox's transfer, and that, at the time of transfer, no official had ever had any intention to house Woodfox anywhere other than at CCR." *Wilkerson v. Stalder,* No. 00-304-JJB, 2013 WL 6665452, at *7 (M.D. La. 12/17/13).

The court applied the *Sandin* test set forth by the U.S. Supreme Court, which established that a prisoner's liberty interest (for purposes of a due-process review) "will be generally limited to freedom from restraint which . . . imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." *Sandin v. Conner*, 115 S.Ct. 2293, 2300 (1995).

The court then noted that, generally speaking, prisoners have neither property nor liberty interests that are protectable in a prison-classification procedure, and that courts have repeatedly given the widest possible deference to prison officials in order to maintain the necessary level of security and internal order. However, constitutional requirements do not fall by the wayside, and a review of recent U.S. Supreme Court jurisprudence holds that, when a prisoner demonstrates such an "atypical and significant hardship," he will be able to maintain a due-process challenge to his custodial classification.

The court compared several cases from around the country and found that there was no reason to dwell on whether Woodfox's confinement was "atypical and significant," given that his 39 years in solitary is almost five times as long as what other courts have found sufficient to establish a liberty interest. Arguments from the State included assertions that Woodfox's conditions were not extreme because he was able to take correspondence courses and his placement in the new CCR at Wade Correctional was a different term of confinement that began in November 2010 and should be analyzed without regard to the fact that he has been in near-continuous solitary confinement since 1972.

Rebuffing these arguments, the 5th Circuit held that "no reasonable prison official could conclude that continuing four decades of indefinite solitary confinement would not implicate a liberty interest protected by due process," and, therefore, affirmed the denial of summary judgment based on qualified immunity of state officials. *Wilkerson v. Goodwin*, 774 F.3d at 858.

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Environmental Law

Federal Judge Rejects Asbestos Plaintiffs' "Every Exposure" Causation Expert

In *Comardelle v. Pennsylvania General Ins. Co.*, No. 13-6555 (E.D. La. Jan. 5, 2015), 2015 WL 64279, ____ F.Supp.3d ____, plaintiff was allegedly exposed to a variety of asbestos products that were asserted to be the cause of his cancer and mesothelioma. Plaintiff's proposed expert witness planned to use an "every exposure" theory, arguing that every asbestos fiber inhaled by an individual that reached the target organ contributed to causing mesothelioma.

Judge Africk granted a defense motion to exclude this expert testimony, noting that although there may be no known safe level of asbestos exposure, this does not support the proposed expert's leap to the conclusion that every single asbestos exposure must have been a substantial contributing cause of the plaintiff's mesothelioma: "The Court is not persuaded that such a one-size-fits-all approach is reliable expert testimony." The judge pointed out the "impermissible gap in [the expert's] reasoning" from the more general causation principle that exposure to asbestos increases the risk of mesothelioma, to the specific causation opinion that, in this case, the plaintiff's exposure to a specific product was a cause of his mesothelioma. The judge accordingly barred the plaintiff's proposed expert witness from giving any testimony based on the every-exposure theory. The case settled and was dismissed shortly thereafter.

District Court Lacks Jurisdiction to Review Air Permit Issued Without Public-Comment Period

The Louisiana Department of Environmental Quality (LDEQ) approved an air permit on behalf of RAM Terminals for a proposed coal terminal to be located in Ironton, La. A coalition of environmental groups filed a petition for judicial review, arguing that the LDEQ breached its duty by failing to perform an environmental assessment prior to issuing the permit. The LDEQ filed a motion to dismiss, arguing that a petition for review must be filed with the court within 30 days of notice of the action. The district court agreed with the agency, and the 1st Circuit affirmed. *Christian Ministers Missionary Baptist Ass'ns v. La. Dep't of Envtl. Quality*, 14-0421 (La. App. 1 Cir. 12/10/14), 2014 WL 7003903.

The court focused on the question of its own jurisdiction. District courts have subject matter jurisdiction over administrative decisions only as provided by the Legislature or Constitution. La. R.S. 30:2050.21 provides that "[a] petition for review must be filed in the district court within thirty days after notice of the action or ruling being appealed has been given."

Although no public-comment period was held for this permit, the LDEQ contended that the plaintiffs could have requested notice of permit application in Plaquemines Parish, perused the LDEQ's website to see the application under review or submitted their concerns with the RAM Terminals facility at any point during the permit-application-review process. Because plaintiffs took none of those steps, they did not get direct notice from the LDEQ about the final issuance of the permit.

The court did not speculate on whether it was realistic for community members to constantly review the LDEQ's website to look for local permit applications in the absence of public notice. Instead the court simply noted that "[t]he statutes and law do not envision an unlimited amount of time in which to appeal the grant of a permit." Thus, because the petition for judicial review was not filed within 30 days of the LDEQ's notice to others of the issuance of the permit, the district court had no jurisdiction over the petition.

No Insurance Coverage After Well Blowout Under Property Damage and Pollution Exclusions

An oil-and-gas exploration company, Pioneer Exploration, L.L.C., was sued and fined following a blowout of a well in Cameron Parish. The blowout contaminated more than 12 acres of land, including neighboring property. Pioneer requested coverage from its insurer, Steadfast, for costs associated with the cleanup, suits and fines under a commercial general-liability policy and an umbrella policy. Steadfast denied coverage, and Pioneer sued but lost in district court. Pioneer then appealed, pursuing claims under its umbrella policy. The 5th Circuit, in *Pioneer Exploration, L.L.C. v. Steadfast Ins. Co.*, 767 F.3d 503 (5 Cir. 2014), upheld the decision to dismiss the suit.

The court looked at the "Blended Pollution" exclusion and the "Property Damage" exclusion. Specifically, the Blended Pollution exclusion excludes or limits coverage of damages arising from actual, alleged or threatened pollution — specifically, the policy did not cover the costs of cleanup, removal or containment of pollution on any location "*owned, rented or occupied* by any insured."

Pioneer argued that the owned, rented or occupied language was inapplicable here because it did not own, rent or occupy the surface property; rather, it had only a mineral lease. The 5th Circuit disagreed, noting that Pioneer had "broad rights to the land" under the standard mineral-lease provisions that give the lessee the right to enter and use the surface of the property for exploration and drilling purposes. Pioneer argued that it actually used only a small limestone pad on the property, but the court noted that Pioneer had the right to use all of the property, regardless of how large a section it had actually used.

Pioneer also argued that its containment costs were not to enhance or repair the owned, rented or occupied property but rather to prevent the spread of contamination onto neighboring property. The court disagreed on language in the Property Damage exclusion that specifically excluded coverage for the repair of property for any reason, "including prevention of injury to a person or damage to another's property."

Based on the "owned, rented or occupied" language in the Blended Pollution exclusion and the "another's property" language in the Property Damage exclusion, the 5th Circuit concluded that the costs of containment were excluded. Thus, the damage resulting from the blowout and subsequent contamination — and subsequent regulatory fines and lawsuits — were not covered by the umbrella policy.

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Family Law

Custody

Steele v. Ashworth, 14-0527 (La. App. 3 Cir. 11/12/14), 151 So.3d 177.

The father filed a petition for change of custody, alleging that the child had lived with him for the last year, although the prior considered decree had designated the mother as the domiciliary parent. The child's letter to the court stating that he was "hit" by the mother appeared to have been considered by the court, although the court appeared not to give it much weight. His allegation that he did not have to meet *Bergeron* because the parties had already changed custody by agreeing that the child would reside with him was rejected, as that was a temporary arrangement for the child to attend school for one year. Moreover, the court of appeal stated: "We will not allow the domiciliary parent's decision to allow the child to have more liberal access to his non-domiciliary parent to serve as the basis for a change of custody." The court of appeal also stated: "However, a slightly lower reading grade, a minor injury to his eye, mildly inappropriate comments, and physical restraint of the child during a physical altercation between the parents, which caused no injury to the child, are not such harmful circumstances as to justify a modification of the custody decree." Finally, Mr. Steele's own testimony indicated that he was not attempting to change custody, as much as he simply desired a greater part in his child's life.

Sole Custody

Barlow v. Barlow, 14-0361 (La. App. 3 Cir. 10/1/14), 149 So.3d 856.

Even though Mr. Barlow did not receive written notice from the clerk of court 10 days in advance of the trial date, because he had actual notice of the trial date, having discussed it with his attorney more than 10 days before the date, his motion for new trial, after he failed to appear at trial, was properly denied. The trial court did not err in modifying the parties' joint custody regime to sole custody in favor of the mother because she met *Bergeron*, showing that the father's instability was detrimentally affecting the child. Although she did not expressly plead for sole custody, because she sought "any and all just and equitable relief" and because La. C.C.P. art. 862 allows the court to award "any relief warranted by the facts," the trial court could award sole custody as it was merited under the facts.

McCartney v. McCartney, 14-0396 (La. App. 3 Cir. 10/1/14), 149 So.3d 894.

The trial court did not err in changing the parties' joint-custody regime to sole custody in favor of the mother after the father was sentenced to 10 years in prison because visitation was impractical, particularly as he had little relationship with the children prior to his incarceration, and because it was impractical for her to attempt to confer with him regarding decision making. The trial court also did not err in continuing his child-support obligation, but in allowing the child-support arrears to accrue.

Procedure

Mahfouz v. Davenport, 14-0358 (La. App. 3 Cir. 10/1/14), 149 So.3d 845.

Following custody and child-support proceedings, Mr. Mahfouz sued the child's mother, her attorney, her attorney's law firm and her attorney's insurance company seeking damages for malicious prosecution, abuse of process, wrongful collection/seizure regarding a judgment for attorney's fees, defamation, false/light invasion of privacy, intentional infliction of emotional distress and violation of the Rules of Professional Conduct. The trial court did not err in striking Mr. Mahfouz's "global statement of facts," because, on defendant's exception of no cause of action, the court could consider only the facts in the petition. Defendant's exceptions of no cause of action regarding claims related to Mr. Davenport's representation of his client were maintained because his claims did not establish sufficient facts showing malice or an intent to harm Mr. Mahfouz. However, his claims against Mr. Davenport separate from his representation of his client were sufficient to state a cause of action for defamation, although the comments were not defamatory per se. Mr. Mahfouz failed to state a cause of action for invasion of privacy and intentional infliction of emotional distress. The trial court did not err in ordering Mr. Mahfouz to pay costs, since the court can assess the costs in any equitable manner.

Adoption

In Re JDH, 14-0621 (La. App. 3 Cir. 11/5/14), 150 So.3d 651.

The father consented to an intrafamily adoption by the mother and the mother's new husband, including a provision that he would have visitation with the minor child three full 24-hour days per month, but that his visitation was conditioned on his making payments toward child-support arrearages he owed the mother. He subsequently filed a rule to enforce the agreement because the mother and stepfather were not allowing him visitation. The trial court found, and the court of appeal affirmed, that the provision tying his visitation to his payment of the arrearages was against public policy "in this case." Further, the trial court did not err in revising the visitation provision to provide, specifically, that his visitation would be the second weekend of each month from Friday at 5 p.m. to Sunday at 5 p.m. The mother's failure to act in good faith and the resulting unfairness to the father supported the court's finding that the agreement was against public policy.

Community Property/ Prenuptial Contract

Deshotels v. Deshotels, 13-1406 (La. App. 3 Cir. 11/5/14), 150 So.3d 541.

Although the parties' prenuptial matrimonial agreement for a separate-property regime was executed neither as authentic act nor as an act under private signature duly acknowledged, the trial court found that because Ms. Deshotels admitted in court that she had signed the document and that she had knowledge of its purpose, her acknowledgment created a "natural obligation" of the parties to be separate in property, and that the agreement was enforceable. The court of appeal reversed, finding that she had not acknowledged the contract prior to the parties' marriage and that her admission in court could not "retroactively resurrect the defective marriage agreement." Moreover, there was no testimony that she believed she had a moral obligation, nor was there any testimony that she had performed or promised to perform any obligation pursuant to the agreement. Because she had never expressed an intent to bind herself to perform the agreement, neither a moral nor a natural obligation existed.

Divorce

Hightower v. Schwartz, 14-0431 (La. App. 4 Cir. 10/15/14), 151 So.3d 903.

During Ms. Hightower's testimony on the rule to show cause under article 102, Mr. Schwartz's attorney attempted to cross-examine her regarding reconciliation. Ms. Hightower's counsel objected that Mr. Schwartz had not filed any pleading raising an affirmative defense of reconciliation, to which Mr. Schwartz's attorney argued that, as a summary proceeding, no answer or affirmative defense was required. After the court sustained the objection, Mr. Schwartz's attorney failed to proffer the testimony. The court of appeal affirmed the judgment of divorce because the failure to proffer the testimony did not preserve the matter for the court's review. The court of appeal discussed that regardless of whether the defense of reconciliation is raised as an affirmative defense, by testimony, by a peremptory exception, by a motion to dismiss or by some other procedural vehicle, the party asserting the defense bears the burden of proof. Additionally, regardless of the method of raising the defense, once Ms. Hightower testified that they lived separate and apart "without reconciliation," she became subject to cross-examination on that issue and, further, the trial court is required to find that the parties did not reconcile.

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Health Law

Bayou Health

On Feb. 1, 2015, the new contract period began for Louisiana's Bayou Health Plans, which are the health plans chosen by the Louisiana Department of Health and Hospitals to coordinate health-care services and payment for most Medicaid recipients, including adults with disabilities who do not receive Medicare, children under age 19, their parents and pregnant women.

The most significant change in the new contract period is the elimination of the shared-savings payment model option that existed under the prior contract. Under the shared-savings model, the health plan received a monthly fee for each enrolled member to provide care-management services, with the opportunity to share in any savings to the State that resulted from the improved coordination of care. The State (not the plan) ultimately processed and paid provider claims. In the new contract period, all Bayou Health Plans participate under the prepaid-payment model, in which the plan is paid a monthly flat fee for managing the care of Medicaid recipients and will process claims and pay providers directly for services.

The five Bayou Health Plans chosen for the new contract period are Aetna Better Health of Louisiana; Amerigroup Louisiana, Inc.; AmeriHealth Caritas Louisiana, Inc.; Louisiana Healthcare Connections; and UnitedHealthcare Community Plan. Aetna Better Health is a new entrant; the other plans participated in the prior Bayou Health contract. All of the health plans will operate statewide.

Medicaid recipients not covered through Bayou Health include nursing home residents, Medicare dual eligibles and recipients enrolled for some specialty-service Medicaid programs. Individuals not enrolled in Bayou Health will continue receiving care through the legacy fee-for-service system. Additionally, dental care and specialized behavioral-health services remain separately managed. Doctors and other medical providers can sign contracts with as many plans as they wish and may remain Medicaid fee-for-service providers to treat any patients who are not included in Bayou Health.

RAC Program Improvements

On Dec. 30, 2014, the Centers for Medicare and Medicaid Services (CMS) published an updated list of Recovery Audit Program improvements intended to reduce provider burden and increase transparency in the program. Under the Recovery Audit Program, recovery audit contractors (RACs) audit Medicare claims submitted by hospitals, physicians and other health-care providers. RACs are paid a commission on each claim they deny.

Notably, CMS will limit the look-back period for patient status reviews to six months after the date of service if the hospital has submitted its claim within three months of the date of service. CMS believes this addresses concerns regarding its policy that limits a hospital's ability to resubmit certain denied Medicare Part A claims under Part B to one year after the date of service.

Additionally, RACs will have a limit on the number of document requests they can make to a provider, depending on provider type and practice setting. To address concerns about providers unfamiliar with the program becoming overwhelmed by document requests, CMS is now instructing RACs to let these providers transition into the program by not requesting the maximum number of documents immediately, but by reaching document limits through incremental requests.

Other changes include a reduction in the time period RACs have to complete complex reviews from 60 days to 30. To address concerns regarding accuracy of automated reviews, RACs will be required to maintain an accuracy rate of 95 percent. Failure to maintain this rate will result in a progressive reduction in document limits for RACs. In response to concerns that RACs focus too much of their efforts on inpatient claims, CMS will require RACs to broaden their review to topics that include all claims/provider types.

The improvements will be effective with each new RAC contract awarded after Dec. 30, 2014, beginning first with a new contract awarded to identify improper Medicare payments nationwide made to suppliers of durable medical equipment, prosthetics and orthotics and to home health and hospice providers.

IRS Requirements for Charitable Hospital Organizations

On Dec. 29, 2014, the Treasury Department and the IRS released final regulations under Internal Revenue Code Section 501(r), added by the Patient Protection and Affordable Care Act in 2010, which impose additional requirements on charitable hospital organizations. Section 501(r)(1) provides that a hospital organization will not be treated as a Section 501(c)(3) tax-exempt organization unless the organization meets the requirements of Sections 501(r)(3) through 501(r)(6), which require a hospital organization (1) to conduct a community-health-needs assessment at least once every three years and to adopt an implementation strategy to meet the needs identified through the assessment; (2) to establish a written financial-assistance policy and a written policy relating to emergency medical care; (3) to not use gross charges and to limit amounts charged for emergency or other medically necessary care provided to individuals eligible for assistance under the organization's financial-assistance policy to not more than the amounts generally billed to individuals who have insurance covering such care; and (4) to make reasonable efforts to determine whether an individual is eligible for the financial-assistance policy before engaging in extraordinary collection actions. The hospital organization must meet each requirement separately with respect to each hospital facility it operates.

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Insurance, Tort, Workers' Compensation & Admiralty Law

Negligence, Unseaworthiness and *McCorpen* Rule

Meche v. Doucet, 777 F.3d 237 (5 Cir. 2015).

Willie Meche was employed by Key Marine Services, L.L.C., under supervision of Alex Doucet, as captain of the crew boat MISS CATHERINE, owned by Key and serving a drilling rig off the coast of Louisiana. While the vessel was tied to the rig, which was under tow to a new location, Meche allegedly injured his back lifting a hatch cover to check the oil on the vessel. Meche claimed that stormy conditions caused a five-foot wave to hit the vessel and throw him over a railing.

Meche filed suit against Key and Doucet (toolpusher on the rig under tow at the time), asserting claims under the Jones Act and general maritime law, including a claim for maintenance and cure against both defendants. The defendants denied that the incident ever happened and argued that Meche forfeited his right to maintenance and cure by lying about his preexisting spinal injuries on his employment application and medical questionnaire. The district court found Meche's testimony regarding being washed over the railing by a wave incredible, as it conflicted with his contemporaneous account of straining his back lifting a hatch cover and expert testimony that the seas were calm at the time. The court did find that Meche aggravated his preexisting spinal injury by lifting the hatch cover and thus was entitled to recover maintenance and cure from Key and Doucet, and that they had acted in bad faith in wrongfully refusing such relief, thus entitling Meche to punitive damages, attorney fees, interest and costs from both defendants. Meche appealed, and Key and Doucet cross-appealed.

On appeal, Meche argued that the vessel was unseaworthy in several respects, including that it was poorly lighted and that lifting the hatch was a two-man operation that he was ordered to perform alone. These arguments were rejected outright as being false or irrelevant. He further contended that the vessel was unseaworthy because it was leaking oil, requiring him to perform the task leading to his injury. The district court properly rejected this but-for argument as not bearing directly on the injury.

The standards for maintenance and cure were established in the seminal case of *McCorpen v. Central Gulf Steamship Corp.*, 396 F.2d 547 (5 Cir. 1968), and its progeny.

> Maintenance and cure is a contractual form of compensation afforded by the general maritime law to seamen who fall ill or are injured while in the service of a vessel. . . . Maintenance is a daily stipend for living expenses, (whereas) cure is the payment of medical expenses.
>
> The vessel owner's obligation to provide this compensation does not depend on any determination of fault, but rather is treated as an implied term of any contract for maritime employment. A seaman may recover main-

tenance and cure even for injuries or illnesses pre-existing the seaman's employment unless that seaman knowingly or fraudulently concealed his condition from the vessel owner at the time he was employed.

Meche, 777 F.3d at 244 (footnotes omitted).

The 5th Circuit summarily vacated the maintenance and cure, punitive damages, attorney fees, interest and costs award against Doucet, as the duty extends only to the seaman's employer, which Doucet clearly was not. Key raised a *McCorpen* defense, claiming that Meche had intentionally failed to disclose his preexisting condition to a prior employer, Moncla Marine, from whom Key purchased its marine division and thereby "acquired all of its assets and all of its liabilities," including Meche's employment contract.

The district court found that Meche sustained three prior work-related low back and neck injuries between 1984 and 1994, before he applied to work for Moncla. Meche received disability payments and sued his former employers for damages, settling two lawsuits for a total of $170,000. The 5th Circuit held that Meche was aware of his prior spinal injuries at the time he applied to work for Moncla and concealed information about those injuries from Moncla, and by extension, from Key.

The 5th Circuit found Meche's argument that he had made oral disclosure of the preexisting injuries and lacked requisite literacy skills to comprehend and respond to the written employment questionnaire disingenuous. The "intervening asset sale" of Meche's employment contract made all of Moncla's defenses against such claims available to Key. The court limited its decision, however, with the following language:

> The rule we announce today only applies when a company purchases the division and keeps the predecessor's seaman in its employ. It would not, for example, punish a seaman who leaves his or her employer for an entirely unrelated company.
>
> Therefore, an intervening asset sale does not automatically relieve a seaman from the consequences of his or her prior intentional concealment of material medical information.

The district court's judgment rejecting Meche's Jones Act negligence and unseaworthiness claims against Key and Doucet was affirmed. The awards against Doucet and Key were vacated, and judgment was rendered in their favor.

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Intellectual Property Law

Recent Legislative Changes to U.S. Patent Law

The Leahy-Smith America Invents Act (AIA) and more recent legislation have changed U.S. patent law both in practice and procedure. Perhaps the best known and most significant change is the conversion from a first-inventor patent system to a first-inventor-to-file patent system, which results in the U.S. system aligning with the global patent standard. AIA Sec. 3; 35 U.S.C. §§ 100, 102, 103 (effective March 16, 2013). Generally the filing date of a patent application is considered to be the invention date for prior art. This change results in yet another reason to file a patent application as soon as possible. Failure to do so may result in the loss of all patent rights, and possibly the granting of a U.S. patent to a later inventor (which could then prevent the earlier inventor from practicing the invention).

All patent practitioners should be aware of a number of other significant changes.

A version of the Act can be found at: *www.uspto.gov/aia_implementation/bills-112hr1249enr.pdf*.

A summary of the effective dates of different provisions of the Act can be found at: *www.uspto.gov/sites/default/files/aia_implementation/aia-effective-dates.pdf*.

AIA Highlights

Below are highlights of some of the other important changes resulting from the AIA:

► There is a prioritized-examination option for a fee with no difficult requirements (unlike prior provisions), which allows an inventor to get a final disposition of the patent application within about 12 months. AIA Sec. 11; 37

C.F.R. § 1.102(e).

► A new class of entity — micro entity — is established. Under the prior scheme, government fees were assessed between large entities and small entities. Large entities are for-profit companies with more than 500 employees, whereas small entities are nonprofits or companies having fewer than 500 employees. Small entities pay most fees at one-half the rate paid by large entities. Now, micro entities will pay most government fees at one-half the rate paid by small entities. Many independent inventors will qualify for this micro-entity status, as will nonprofit universities. AIA Sec. 10; 35 U.S.C. § 123.

► The inventor's oath or declaration can be included in an assignment or replaced with a substitute statement by someone else, such as an assignee. The oath or declaration may now be submitted any time prior to paying the issue fee. AIA Sec. 4; 35 U.S.C. §§ 115, 118 (effective Sept. 16, 2012).

► A patent claim can no longer be found to be invalid or unenforceable in litigation due to a failure to disclose the best mode contemplated by an inventor for carrying out the invention. AIA Sec. 15; 35 U.S.C. §§ 112, 282.

► Derivation proceedings are established and limited to allegations that one alleged inventor derived the invention from another alleged inventor. AIA Sec. 3; 35 U.S.C. §§ 134, 135, 146, 291 (effective March 16, 2013).

► Supplemental examination post-issuance proceedings are established, which allow one to cure apparent inequitable conduct that might otherwise render a patent unenforceable. AIA Sec. 12; 35 U.S.C. § 257 (effective Sept. 16, 2012).

► A party's failure to obtain the advice of counsel with respect to any alleged patent infringement may not be used in court to prove that the accused infringer willfully infringed the patent or that the infringer intended to induce infringement of the patent. AIA Sec. 17; 35 U.S.C. § 298.

► Tax strategies are deemed within the prior art — applicable to any pending patent applications or future patent applications, but not prior-issued patents. AIA Sec. 14 (Uncodified Law, present in the USPTO copy of 35 U.S.C. following § 376).

► There are significant changes to the patent-marking statute. Among these, virtual marking (*i.e.*, marking a reference to a web page on a product) is now possible. AIA Sec. 16; 35 U.S.C. §§ 287, 292.

Other Changes

In addition to the AIA, other changes to U.S. patent legislation are worth noting.

First, in general, the 12-month period to file a U.S. patent application claiming priority of another patent application may be extended by up to an additional two months if the delay in filing the application in this country within the 12-month period was unintentional. 35 U.S.C. § 119.

Second, a new provision allows for the delayed payment of a maintenance fee at any time if the delay is unintentional (there is no longer a two-year deadline to file after patent expiration). 35 U.S.C. § 41. The previous "unavoidable" delay standard has been eliminated in favor of a single standard of "unintentional" delay. Abandoned patent applications also may be revived solely on the basis of the "unintentional" standard. 35 U.S.C. § 27.

Finally, a nonprovisional application (other than a design application) may now be filed without claims and still be granted a filing date (a claim has never been required for a provisional application to be entitled to a filing date). 35 U.S.C. § 111. A nonprovisional application also may be filed "by reference" to a previously filed patent application in place of filing the specification and drawings. 37 CFR § 1.57(a). However, the patent application will not be placed on a Patent Examiner's docket until the patent application includes a specification including at least one claim.

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International Law

Office of the U.S. Trade Representative

On Feb. 13, 2015, the Office of the U.S. Trade Representative (USTR) announced that it was pursuing dispute-settlement consultations with the Government of China at the World Trade Organization (WTO) regarding a purported massive export-contingent subsidies program providing support to several industries, including textiles, agriculture, medical products, light industry, special chemical engineering, new materials, and hardware and building materials. A total of 179 industrial clusters are at issue, with some sectors receiving at least $635,000 worth of annual benefits. Exports from sectors receiving export subsidies are significant, including the textiles sector, which accounts for 14 percent of China's textile exports, and the seafood industry, accounting for 20 percent of China's seafood exports.

Consultations are the first step in the WTO dispute-settlement process. If the United States and China are unable to reach a satisfactory resolution, the United States may request the establishment of a dispute-settlement panel to resolve the dispute. This announcement comes as the President seeks approval of his broader international trade agenda, including Trade Promotion Authority and the Trans-Pacific Partnership Agreement.

U.S. Senate

Leveling the Playing Field Act, S. 2994 (113th Congress, 2d Session).

Sen. Sherrod Brown (D-OH) introduced the Leveling the Playing Field Act to implement certain changes and clarifications to existing U.S. trade remedy Antidumping and Countervailing Duty laws. Many of the changes seek to promote administrative efficiency at the Department of Commerce, the U.S.

agency charged with administering the U.S. trade remedy laws. The bill also delineates additional factors the International Trade Commission should consider when assessing injury to the U.S. domestic industry. In short, the bill makes the following changes/clarifications to U.S. Antidumping and Countervailing Duty law:

▶ maintains Commerce's discretion to use adverse facts available when a mandatory foreign respondent fails to cooperate with an investigation;

▶ increases the number of factors and the length of time the International Trade Commission should use to evaluate the injury or threat of injury to U.S. producers;

▶ closes the "new shipper" loophole used by many foreign companies to evade or circumvent antidumping or countervailing duties;

▶ increases the penalties for failure to provide, or for falsifying, a country of origin certificate for merchandise covered under an antidumping or countervailing duty order;

▶ clarifies that Commerce has the statutory authority to determine whether to include voluntary respondents in an investigation; and

▶ clarifies Commerce's statutory authority to assess whether a country's non-market economy status should be maintained.

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SOX Affords Noneconomic Compensatory Damages

The anti-retaliation provision of the Sarbanes-Oxley Act (SOX), 18 U.S.C. § 1514A(a), provides that certain public companies may not "discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment because of" having engaged in certain protected whistleblowing activity. When an employee prevails in an anti-retaliation action, SOX provides that the employee "shall be entitled to all relief necessary to make [him] whole," including reinstatement, back pay (with interest) and "compensation for any special damages sustained as a result of the discrimination . . . ." 18 U.S.C. § 1514A(c).

In *Halliburton, Inc. v. Administrative Review Board, United States Department of Labor*, 771 F.3d 254 (5 Cir. 2014), the 5th Circuit considered for the first time whether noneconomic compensatory damages, such as damages for emotional distress and reputational harm, are available under SOX. There, an employee of Halliburton lodged a complaint with management, in accordance with company procedures, about what he perceived as questionable accounting practices. He also filed a confidential complaint with the SEC. When the SEC provided notification of its investigation into the company's accounting practices, the company's general counsel surmised that claimant/employee was the source of the complaint to the SEC, as general counsel had also seen the internal complaint. General counsel then sent an email to claimant's boss and others in his work group, identifying claimant as the whistleblower. Claimant also received the email and was "horrified" that he had been identified as the source of the SEC complaint. *Id*. at 257. His work relationships and performance immediately began to decline, and he ultimately was granted paid administrative leave.

After claimant successfully pursued his claim through the administrative process and was awarded compensatory damages for emotional distress and reputational harm, Halliburton sought the 5th Circuit's review. Halliburton challenged both the conclusion that claimant suffered an "adverse action" and that his protected activity was a "contributing factor" in the adverse action (two of the four elements of a SOX anti-retaliation claim), as well as the damages award. *Id*. at 259.

While the 5th Circuit's discussion of the "adverse action" and "contributing factors" elements is instructive, the decision is most notable in its discussion of the damages available under SOX. Citing 18 U.S.C. § 1514A(c), the court noted that the forms of relief specifically listed in the statute — reinstatement, back pay and certain "special damages" — are not exhaustive, as indicated by the phrase "[r]elief for any action . . . shall *include*." 18 U.S.C. § 1514A(c)(2) (emphasis provided). As the court explained, "We read the entitlement to 'all relief necessary to make the employee whole' in § 1514A(c)(1) to have a broader scope than the three enumerated forms of relief in § 1514A(c)(2)." *Id*. at 264. In other words, the court found that reading these two provisions together indicates that "shall include" must also mean "but is not limited to."

The 5th Circuit supported its conclusion with *Lockheed Martin Corp. v. Administrative Review Board*, 717 F.3d 1121 (10 Cir. 2013), noting that the 10th Circuit is the only other circuit court that has confronted the issue of whether SOX affords noneconomic compensatory damages. The court also examined near-identical language in the anti-retaliation provision of the False Claims Act and decisions of the 7th and 8th Circuits concluding that the False Claims Act provides noneconomic compensatory damages. In addition, the 5th Circuit found persuasive the Secretary of Labor's argument:

> that because the text of SOX's anti-retaliation provision proscribes certain employer conduct, namely "threat[s]" and "harass[ment]," *see* 18 U.S.C. § 1514A(a), that in the usual case will cause only noneconomic harm such as emotional distress, rather than economic harm, it would be anomalous to construe the statute to fail to afford a corresponding remedy for such.

See Halliburton, 771 F.3d at 266. For these reasons, and others discussed in the opinion, the 5th Circuit concluded that the anti-retaliation provision of SOX "affords noneconomic compensatory damages, including emotional distress and reputational harm." *Id*.

Fatally Defective Pleadings Cannot Be Corrected by Proof Taken at a Default Judgment Hearing

In *Wooten v. McDonald Transit Associates, Inc.*, 775 F.3d 689 (5 Cir. 2015), the 5th Circuit confronted the question it left open in *Nishimatsu Construction, Ltd. v. Houston National Bank*, 515 F.2d 1200, 1206 n.5 (5 Cir. 1976): whether "otherwise fatal defects in the pleadings might be corrected by proof taken by the court at a hearing"?

In *Wooten*, plaintiff asserted claims under the Age Discrimination in Employment Act, but his "complaint contained very few factual allegations," *id.* at 691, and the facts he did allege were "inextricably bound up with legal conclusions." *Id.* at 696. When defendant failed to appear and answer, the district court entered default judgment, and at a hearing on damages plaintiff testified in detail regarding the elements of his claim that were absent from the pleadings.

On defendant's appeal, the majority vacated the default judgment, noting that the complaint, standing alone, failed to meet the Rule 12(b)(6) "plausibility" standard and concluding that it was not "well-pleaded" for default judgment purposes. *Id.* Although the plaintiff's live testimony provided sufficient factual detail to support each element of the ADEA claim, the court concluded "that a fatally deficient complaint cannot be cured by testimony at a prove-up hearing." *Id.* at 703.

The dissent expressed concerns that the majority's decision "will eviscerate the role of default judgments in the efficient administration of civil litigation," *id.* at 704, and that the "practical consequence" will require district courts to rule *sua sponte* on the sufficiency of complaints. *Id.* at 705.

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Mineral Law

Termination of Lease; Commencement of Lawsuit; Mineral Servitude Owner

Crooks v. Louisiana Pac. Corp., 14-0724 (La. App. 3 Cir. 12/10/14), 155 So.3d 686.

This case involved a lawsuit by a landowner against a mineral servitude owner, seeking to recover money for alleged surface damage even though the lease had not yet terminated. The property encompasses 200 acres in LaSalle Parish. Over time, the property was bought and sold by various companies, but the original owner, Louisiana Pacific, reserved a mineral servitude. The mineral servitude was transferred among a number of entities. In 2012, the Crooks, the then-owners, filed a lawsuit for environmental contamination. The Crooks sued all of the entities that at one time owned all or a portion of the mineral servitude.

In defense of this lawsuit, one defendant raised the dilatory exception of prematurity, arguing that because the mineral lease had not yet expired, any end-of-lease restoration obligations were not yet due. The Crooks stated there was no law preventing them from suing for environmental contamination before the lease ended. The trial court granted the exception, and the lawsuit was dismissed.

The Crooks appealed to the Louisiana 3rd Circuit Court of Appeal. The 3rd Circuit reversed and remanded the case, finding that nowhere in the Mineral Code or Civil Code is there a requirement that a landowner wait until a mineral lease has expired before he can file a lawsuit for restoration damages. Also, there are no prohibitions against filing a lawsuit against a mineral-servitude owner before the lease expires. Thus, the 3rd Circuit found that the timing of the lawsuit did not bar it.

Dismissal of Levee Board Lawsuit

Bd. of Comm'rs of the S.E. La. Flood Protection Authority-E. v. Tenn. Gas Pipeline Co., ____ F. Supp. 3d ____, 2015 WL 631348, Civ. No. 13-cv-05410 (E.D. La. Feb. 13, 2015).

On Feb. 13, 2015, Judge Nannette Jolivette Brown dismissed the "Levee Board Lawsuit" in its entirety because plaintiff failed to state a claim upon which relief could be granted.

This case was filed by the Board of Commissioners of the Southeast Louisiana Flood Protection Authority-East (plaintiff) on July 24, 2013, in state court in New Orleans. Defendants removed the case to federal court on June 27, 2014. On Sept. 5, 2014, defendants filed a motion to dismiss pursuant to Federal Rule of Civil Procedure Rule 12(b)(6), arguing that plaintiff failed to state a claim based upon the allegations in its petition. Oral argument was heard on Nov. 12, 2014, and supplemental briefs were filed.

Through this lawsuit, plaintiff sought to hold practically the entire oil and gas industry accountable for alleged damages to the "Buffer Zone." The lawsuit was originally filed against 96 oil and gas companies; 88 companies remained at the time of the dismissal. Plaintiff asserted that defendants allegedly caused damage to Louisiana's wetlands by conducting certain dredging and maintenance activities in the Buffer Zone. Defendants, however, maintained that those activities were lawfully conducted pursuant to various permits issued by the State of Louisiana and the federal government.

In dismissing the suit, Judge Brown found that no federal or state law provided any recourse by which plaintiff could successfully bring its lawsuit. Judge Brown rejected plaintiff's arguments, ruling that the levees were too far from, or too indirectly affected by, the alleged damage. Judge Brown also said the plaintiff had no right to sue under any of the permits issued by the State of Louisiana or the U.S. Army Corps of Engineers because those permits sanctioned the operations conducted by defendants.

Moreover, Judge Brown did not find that any of the federal laws that plaintiff contended defendants had violated were intended to create a legal duty in favor of plaintiff. Simply put, the court stated “oil and gas companies do not have a duty under Louisiana law to protect members of the public ‘from the results of coastal erosion allegedly caused by [pipeline] operators that were physically and proximately remote from plaintiffs or their property.’”

Regarding the natural servitude of drainage, the court found that plaintiff did not state a claim because a servitude of drainage cannot exist between non-adjacent estates with respect to coastal storm surge. The court refused to extend articles 655-656 of the Louisiana Civil Code to fit the circumstances presented by plaintiff here. The court felt the expansion of such laws was better left to the Louisiana Legislature.

Regarding the nuisance claims, Judge Brown held that they also failed because plaintiff did not allege that it was a neighbor to any property of any defendants. Plaintiff did not allege any physical proximity of the servient and dominant estates. Thus, its claim under article 667 of the Civil Code could not survive.

As to plaintiff’s third-party-beneficiary claims viz. the dredging permits authorized by the Corps of Engineers, the court held that (1) a permit is not a contract under federal common law and (2) even if permits were contracts, plaintiff could not establish that it was an intended beneficiary, which is required by federal common law.

No doubt this ruling will be appealed by plaintiff to the U.S. 5th Circuit Court of Appeals in the near future.

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Professional Liability

Can PDR Evidence Alone Establish a Prima Facie Case?

McCorkle v. Gravois, 13-2009 (La. App. 1 Cir. 6/6/14), 152 So.3d 944, *writ denied*, 14-2179 (La. 12/8/14).

Plaintiff alleged the defendant physician did not adequately inform a patient of drug-related information that was included in the PDR and (presumptively) accompanies the drug when it is prescribed. The patient killed himself shortly after taking the medication (Lunesta) for three consecutive days.

The defendant supported his motion for summary judgment (MSJ) with a unanimous panel opinion in his favor and with the testimony of the plaintiffs' own expert that he had not breached the applicable standard of care. The plaintiffs' only opposing evidence was Lunesta's PDR and package-insert information. The ultimate question was whether the product information alone constituted evidence sufficient to defeat an MSJ.

The *McCorkle* court reviewed jurisprudence from other jurisdictions concerning the evidentiary value of the PDR, whose product information is "substantially similar, if not identical" to the information the Food and Drug Administration requires in all drug-package inserts. The court noted that the question of whether the "PDR, either alone or where contradicted by expert testimony, may be used to establish the applicable standard of care and breach thereof is more complex and more problematic" than when it is offered in conjunction with expert testimony to prove standard of care and breach.

The *McCorkle* court referenced *Terrebonne v. Floyd* and observed that the evidence in that case proved that physician's use of a medication was "in direct contradiction" to PDR instructions. 99-0766, (La. App. 1 Cir. 5/23/00), 767 So.2d 758. *Terrebonne* had "considered and cited with favor" a factually similar Minnesota Supreme Court opinion that reversed a directed verdict for a physician defendant because the PDR contained a "warning section" about the particular risk of harm at issue, which it held is "prima facie evidence of negligence if there is competent medical testimony that his patient's injury or death resulted from the doctor's failure to adhere to the recommendations." *Mulder v. Parke Davis & Co.*, 181 N.W. 2d 882, 887 (Minn. 1970) (*per curiam* on rehearing). *Terrebonne* noted that it (the *Terrebonne* court) may have been presented with the first instance in Louisiana where a plaintiff sought to rely solely on the PDR's specific warning to establish the standard of care. 767 So.2d at 763.

McCorkle then cited *Pfiffner v. Correa's* holding that expert testimony is not necessary to establish standard of care and breach when the medical and factual issues can so obviously be perceived by a jury as negligence. *Pfiffner v. Correa,* 94-0924 (La. 10/17/94), 643 So.2d 1228, 1234. *McCorkle* concluded that *Pfiffner* and *Terrebonne*, together with other cases referenced throughout the opinion, soundly point in favor of admitting PDR information as evidence sufficient to establish a *prima facie* showing of breach. However, the court then quoted *Terrebonne:* "whether plaintiffs may use the evidence they intend to offer as *prima facie* proof of [the physician's] negligence is itself a matter seriously unresolved; and the granting *of* summary judgment under the circumstances was inappropriate." *McCorkle*, 152 So.3d at 954, quoting *Terrebonne*, 767 So.2d at 763.

McCorkle also quoted *Christiana v. Sudderth,* which in part relied on *Fournet* and *Terrebonne*: "A health-care provider's deviation from a manufacturer's warning may be negligence for which expert testimony is not required to establish the applicable standard of care, because such evidence may be sufficient to make a *prima facie* showing of negligence." *McCorkle,* 152 So.3d at 954, *quoting Christiana v. Sudderth,* 02-1080, (La. App. 5 Cir. 2/25/03), 841 So.2d at 911, 916.

The *McCorkle* court then took into account *DeRoche v. Tannenbaum*, which contrastingly granted summary judgment in favor of a defendant physician and specifically ruled that "a manufacturer's labeling and package insert standing alone is insufficient to establish a prevailing medical standard of care required by La. R.S. 9:2794." The court further held that a "physician's medical decision to deviate from a manufacturer's labeling also does not *ipso facto* establish a breach of the applicable standard of care." *McCorkle*, 152 So.3d at 955, quoting *DeRoche v. Tannenbaum*, 13-0979 (La. App. 4 Cir. 12/18/13), 131 So.3d 400, 411-12.

McCorkle then observed that *Robin v. Hebert* held that product information alone, without expert testimony, was not sufficient to establish a breach. *Robin*, however, involved cardiology-specific and complex medical issues; thus, *Robin* held that the PDR was not of weight adequate to defeat summary judgment. 12-1417 (La. App. 3 Cir. 5/1/13), 2013 WL 1809821, ____ So.3d ____.

McCorkle's last case reference was to an admonition by the New Jersey Supreme Court in a judgment affirming a jury verdict in favor of a physician: "Allowing the admission of PDR warnings without accompanying expert testimony could transform drug manufacturers into judges of acceptable medical care. The effect would be to force doctors to follow the PDR's recommendations or run the risk of liability for malpractice." *Morlino v. Med. Ctr.*, 706 A.2d 721, 730 (1998).

The *McCorkle* court ultimately granted the defendant's motion for summary judgment, deciding that, because Lunesta's product information did not provide any specific warning or contraindication that clearly and explicitly directed the physician to take any action different from what was taken, the plaintiffs could not establish a *prima facie* case of negligence by relying solely on the product information.

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Taxation

Waste Removal Services "Not" Part of the Taxable Gross Proceeds of Leases

Pot-O-Gold Rentals, L.L.C. v. City of Baton Rouge, 14-2154 (La. 1/16/15), 155 So.3d 511 (*per curiam*).

The Louisiana Supreme Court reinstated a trial court's decision granting Pot-O-Gold Rentals, L.L.C.'s motion for summary judgment. The Court held that waste-removal services were not taxable as gross proceeds derived from the lease or rental of portable toilets and ordered the City of Baton Rouge to refund taxes that had been paid under protest. The Court reversed the Louisiana 1st Circuit Court of Appeal's holding that Pot-O-Gold's charges for cleaning and sanitation services were subject to the City's sales-and-use tax because they were provided in connection with, and incidental to, the lease or rental of tangible personal property.

Pot-O-Gold owns portable toilets and holding tanks that it leases to customers and offers cleaning and sanitation services for these rented toilets and tanks. Pot-O-Gold also offers cleaning and a sanitation service for portable toilets and tanks owned by others and does not require rental customers to purchase its sanitation or cleaning service. If a rental customer chooses to reject sanitation or cleaning services, the customer is charged a higher rental fee. A compliance audit revealed that, although Pot-O-Gold collected taxes on its rentals, it had not collected taxes for the cleaning or sanitization services it provided in connection with these rentals. The City issued an assessment for additional sales taxes, which Pot-O-Gold paid under protest and filed suit to recover.

The City's ordinance imposed a tax on the lease or rental of tangible personal property. Such taxes are levied on the gross proceeds derived from the lease or rental of tangible personal property, where the lease or rental of such property is an established business, or part of the same is incidental or germane to the business.

In reaching its decision, the 1st Circuit held the "true object" of the transactions at issue was the furnishing of toilets and tanks and held that the cleaning and sanitation services were provided in connection with, and incidental to, the rental of such tangible personal property. However, the Louisiana Supreme Court disagreed, finding that it was just as reasonable that the true object of the portable-toilet transaction was the removal of human waste. The Court held that the true object of the transaction was at least debatable, requiring the Court to adopt the interpretation urged by Pot-O-Gold as the least onerous to the taxpayer. The Court also stated that an absurd result would be created if it found that providing cleaning services for portable toilets is not a taxable event if the toilet is owned by someone else, but is a taxable service if the toilet is owned by the lessor.

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Video on Demand, Pay-Per-View Programming Not Subject to Sales Tax

In *Normand v. Cox Communications Louisiana, L.L.C.*, 14-563 (La. App. 5 Cir. 12/23/14), ____ So.3d ____, a case not yet released for publication, the Jefferson Parish tax collector sought to collect sales tax on Cox's Video on Demand (VOD) and Pay-Per-View (PPV) programming. The trial court rendered judgment in favor of the taxpayer, finding that Cox's VOD and PPV programming are nontaxable services rather than tangible personal property. On appeal, the tax collector argued that the VOD and PPV programming constitute computer software and are, therefore, tangible personal property, and also argued that, even if the VOD and PPV programming are not computer software, they are still considered tangible personal property subject to sales tax because the data comprising the VOD and PPV programming manifests itself in the customers' televisions as visual images and sound. The taxpayer argued that the VOD and PPV programming are considered nontaxable services and presented testimony to support its arguments that the VOD and PPV programming are neither computer software nor are they tangible personal property because they are data streams that no longer exist once they reach the customers' televisions. The court of appeal agreed with the taxpayer that the VOD and PPV programming are not computer software as defined by Louisiana sales tax law and found that the evidence supported the trial court's finding that the VOD and PPV programming are not tangible personal property.

On appeal, the tax collector also took

the position that Cox's VOD and PPV programming are subject to sales tax by virtue of being considered a lease or rental under La. R.S. 47:301(7), but the court held that, since Jefferson Parish only imposes sales taxes on the lease or rental of tangible personal property, the programming could not be subject to sales tax as a lease or rental because the transaction did not involve tangible personal property. Finally, the court considered whether VOD and PPV programming are subject to sales tax as "sales of services" pursuant to La. R.S. 47:301(14). While the court of appeal determined that VOD and PPV programming are considered sales of services, such services were exempt from sales tax pursuant to La. R.S. 47:305.16 and 47:301(29)(x)(vii). Under the first provision, stating that "state and local sales and use taxes shall not apply to necessary fees incurred in connection with the installation and service of cable television," VOD and PPV programming were part of the regular services offered by the provider and transmitted in the same manner. The latter provision also covered VOD and PPV programming in the definition of exempt cable service. Therefore, the court agreed with the trial court's finding that the programming is a nontaxable service and affirmed the trial court's judgment in favor of the taxpayer.

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Trusts, Estate, Probate & Immovable Property Law

When There's a Will, There's Not Always a Way: 4th Circuit Finds Testament Invalid

Succession of Duskin, 14-0236 (La. App. 4 Cir. 11/19/14), 153 So.3d 567.

The issue before the court was whether a document purporting to bequeath certain rights belonging to the president and vice president of a corporation was a valid testament.

In his last will and testament, Manuel Duskin bequeathed his 20 percent ownership interest in the Mahalia Jackson Residual Corp. (the corporation) to his daughters. Duskin passed away on March 19, 2004, and his will was probated shortly thereafter. A final judgment of possession was signed on Sept. 27, 2004, putting Duskin's daughters in possession of his estate and giving each daughter a 10 percent interest in the corporation.

After Duskin's death, Bishop Frank E. Lott filed suit, asserting that he owned the exclusive rights to the residue of Jackson's estate, including her publicity rights and intellectual property. In support of his claims, Lott relied on a two-page, handwritten document titled "Irrevocable and Last Will and Testament" (the 1994 document) that purportedly bequeathed to Lott the rights relative to the Mahalia Jackson name, proceeds and book. The "testators" to the 1994 document were Duskin and Edison Lazard, president and vice president, respectively, of the corporation, each owning 20 percent. The 1994 document was not dated, but was notarized, and also signed by Duskin, Lazard and one witness.

The 4th Circuit held that the 1994 document was not a valid testament because the two testators purportedly attempted to bequeath their property in one document. Relying on La. Civ.C. art. 1571, the court explained that a valid testament can be executed by only one testator, regardless of whether it is olographic or notarial.

The court also determined that the 1994 document did not meet the formality requirements of either an olographic or a notarial testament. The court noted that an olographic testament must be entirely written, dated and signed in the handwriting of the testator. La. Civ.C. art. 1575. Although the 1994 document was handwritten and bore the testators' signatures, the only date present was from the notary stamp. The court noted that this precise issue had been addressed by the Louisiana Supreme Court in *Succession of Aycock*, 02-0701 (La. 5/24/02), 819 So.2d 290, which reversed a ruling that upheld an olographic testament written entirely in the hand of the testator, but the only date appearing on the document was filled in by the notary. Because the 1994 document did not contain a date written in the hand of the testator, the court found that it failed to satisfy the formality requirements of an olographic testament.

The 1994 document also did not comply with the formalities prescribed for a notarial testament. A notarial testament must be in writing and dated, and if the testator knows how to and is physically able to sign his name and read, the testator must declare or signify in the presence of a notary and two witnesses that the instrument is his last will and testament. La. Civ.C. art. 1577. Because the 1994 document was signed by only one witness and was not dated, the court found that it failed to comply with the formalities prescribed for a notarial testament.

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