Administrative Law

Subcontract Termination Settlement Authority Under the Federal Acquisition Regulation

Appeal of Shavers-Whittle Construction, L.L.C., ASBCA No. 60025 (Feb. 9, 2016), available at *www.asbca.mil/Decisions/2016/60025%20Shavers-Whittle%20Construction,%20LLC%202.9.16.pdf*.

On July 29, 2008, the U.S. Army Corps of Engineers (Government) awarded a small business 8(a) multiple-award task-order contract to DQSI Corporation. On Sept. 30, 2010, the Government awarded Task Order 9 to DQSI, L.L.C., and Task Order 10 to DQSI Corporation. The contracts were for hurricane storm-damage-risk-protection systems in New Orleans.

In October 2010, DQSI, L.L.C., subcontracted with Shavers-Whittle Construction, L.L.C. (appellant), for task orders nine and ten. Three years later, on Oct. 24, 2013, appellant wrote the contracting officer, informing her that DQSI, L.L.C., owed about $500,000 to appellant resulting from the aforementioned subcontract. The letter made no demands of the Government, nor was it properly certified as required under the Contract Disputes Act (CDA). Therefore, the letter did not meet the elements of a claim under the CDA.

Almost two years later, on March 26, 2015, appellant's counsel wrote to the contracting officer asserting that DQSI, L.L.C., and appellant were in litigation and that DQSI, L.L.C., was not a small business 8(a) contractor and thus had committed fraud when it asserted itself as such to the Government. Further, appellant asserted that because of this, the Government had the authority to terminate the prime contract under Federal Acquisition Regulation (FAR) 49.108-8 and settle with the subcontractors, including appellant. This letter also did not meet the elements of a claim under the CDA.

In general, FAR 49.108-8 provides that when undergoing termination for convenience procedures, the Government may require the prime contractor to assign rights, titles and interests under any subcontract terminated because of the termination of the prime contract. However, the assignment is at the discretion of the contracting officer and must be in the interest of the Government.

In April 2015, the contracting officer notified appellant that the contract had been physically completed and to terminate the contract at that time was not in the best interest of the Government. The contracting officer directed appellant to continue in private litigation.

On June 1, 2015, appellant appealed to the Armed Services Board of Contract Appeals (ASBCA), requesting the voiding of the prime contract and payment of all monies due appellant. The Government moved for dismissal for lack of jurisdiction.

The ASBCA reviews administrative

appeals of a contracting officer's final decisions under the CDA, 41 U.S.C. §§ 7101-7109. The ASBCA is one of a handful of boards of contract appeals that are available to potential appellants dissatisfied with a contracting officer's final decisions as an alternative to pursuing litigation at the Court of Federal Claims for contract disputes that occur after contract award. A potential appellant's choice of board of contract appeals depends on the government agency involved. The ASBCA has jurisdiction to decide appeals regarding contracts made by the Department of Defense or an agency that has designated the ASBCA to decide the appeal. Of the boards of contract appeals, by far the ASBCA is the largest board and issues the vast majority of decisions. The ASBCA consists of 20 to 30 administrative judges who dispose of anywhere between 500 to 900 appeals a year.

After an evidentiary hearing, the ASBCA granted the Government's motion to dismiss for lack of jurisdiction. In support, the ASBCA pointed to the general rule that, under the CDA, an appeal of a contracting officer's final decision must be filed by a prime contractor for the ASBCA to have jurisdiction over the appeal. *See, SKE Tech. Servs. GmbH*, ASBCA No. 59711, 15-1 BCA ¶ 35,941 at 175,662. In this case, appellant admitted that it did not have a contract with the Government, but argued that FAR 49.108-8(b) created an implied-in-law contract between the Government and the subcontractor. The ASBCA did not find appellant's argument persuasive, noting that the ASBCA does not have jurisdiction to entertain any implied-in-law claims an appellant may assert. *See, ASFA Constr. Indus. & Trade, Inc.*, ASBCA No. 57269, 15-1 BCA ¶ 36,034 at 176,005.

Further, the ASBCA noted that it does not possess jurisdiction to order injunctive relief, such as the appellant's request to void or terminate the subject contract. *See, CDM Constructors, Inc.*, ASBCA No. 59524, 15-1 BCA ¶ 36,097 at 176,240. Additionally, the ASBCA clarified that it does have jurisdiction over requests for the payment of money; however, appellant first had to submit a proper claim to the contracting officer for a sum certain. *See, Al Bahar Co.*, ASBCA No. 58416, 14-1 BCA ¶ 35,691 at 174,689. Appellant conceded that the March 26, 2015, letter to the contracting officer did not request a sum certain, but asserted that the Oct. 24, 2013, letter did and, therefore, the ASBCA had jurisdiction. Again, the ASBCA did not find that argument persuasive, noting that even if the ASBCA treated the 2013 letter as part of a claim, appellant still failed to properly certify the claim as required under the CDA. *See, GSC Constr., Inc.*, ASBCA No. 59401, 15-1 BCA ¶ 35,887 at 175,445. Consequently, the ASBCA determined that the Subcontractor Termination Settlement Authority in FAR 49.108-8 does not in and of itself afford jurisdiction under the CDA.

—Bruce L. Mayeaux
Member, LSBA Administrative Law Section
Major, Judge Advocate
U.S. Army

LOUISIANA'S MOST POPULAR CLE EVENT

LAST CHANCE CLE Conference

December 15-16, 2016

Hyatt Regency New Orleans

The Ultimate CLE Experience

With more than 20 dynamic credit courses from which to choose, it's no wonder that LAJ's Last Chance CLE Conference is Louisiana's ultimate CLE experience. You can't help but be impressed with the highly acclaimed national and Louisiana faculty that's assembling for this conference. You choose the courses you want and earn 13 CLE credits, including Ethics and Professionalism. For additional information, including pricing and registration details, visit *www.lafj.org* or call 225-383-5554.

Review of Louisiana Law to include:

Judge Roland L. Belsome Jr.
Louisiana 4th Circuit Court of Appeal; New Orleans

Judge John W. deGravelles
U.S. District Court Middle District of Louisiana; Baton Rouge

Judge James T. Genovese
Louisiana 3rd Circuit Court of Appeal; Opelousas

Dean Thomas C. Galligan Jr.
LSU Paul M. Hebert Law Center; Baton Rouge

David J. Barczyk, D.C.
Barczyk Biomechanics Institute; Lafayette

Lawrence J. Centola III
Martzell, Bickford & Centola, APC; New Orleans

J. Lee Hoffoss Jr.
Hoffoss Devall, LLC; Lake Charles

Robert E. Kleinpeter
Kleinpeter & Schwartzberg, L.L.C.; Baton Rouge

Matthew E. Lundy
Lundy, Lundy, Soileau & South LLP; Lake Charles

Donald W. Price
Attorney at Law; Baton Rouge

J. Michael Veron
Veron, Bice, Palermo & Wilson, LLC; Lake Charles

Winning with the Masters Faculty to include:

John V. Cattie Jr.
Garretson Resolution Group; Charlotte, N.C.

Robert L. Collins
Attorney at Law; Houston, Texas

Joseph A. Fried
Fried Rogers Goldberg LLC; Atlanta, Ga.

Michael J. Leizerman
EJ Leizerman & Associates, LLC; Toledo, Ohio

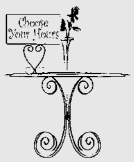
Zoe Littlepage
Littlepage Booth; Houston, Texas

Randi McGinn
McGinn, Carpenter, Montoya & Love, P.A.; Albuquerque, N.M.

Thomas McGrath
McGrath Law Firm; Huntsville, Ala.

Randall H. Scarlett
Scarlett Law Group; San Francisco, Calif.

Charles J. Zauzig III
Zauzig Trial Group; Woodbridge, Va.



CLE à la Carte

December 29-30, 2016

Offered concurrently in Baton Rouge and New Orleans, these highly attended two-day seminars are the most convenient way to squeeze in those last few remaining CLE requirements for 2016 or jump ahead for 2017.

Baton Rouge **New Orleans**

Call 225-383-5554 or visit www.lafj.org for more information.

Louisiana Association for JUSTICE

442 Europe Street • Baton Rouge, Louisiana 70802-6406 • 225-383-5554 • www.lafj.org • info@lafj.org

Bankruptcy Law

Supreme Court's Interpretation of "Actual Fraud"

Husky Int'l Elecs., Inc. v. Ritz, 136 S.Ct. 1581 (2016).

Chrysalis purchased nearly $164,000 in products from Husky International. Subsequently, Daniel Ritz, Chrysalis' director and partial owner, drained Chrysalis' assets and transferred large amounts of money to other companies he owned. Husky filed a lawsuit against Ritz to recover Chrysalis' debt, claiming the transfers constituted "actual fraud" under Texas law. Ritz then filed for Chapter 7 bankruptcy. Husky filed an adversary proceeding arguing the debt should not be discharged because the transfers constituted actual fraud pursuant to section 523(a)(2)(A) of the Bankruptcy Code, which excepts from discharge debts that were obtained by "false pretenses, a false representation, or actual fraud . . . ."

The bankruptcy court and the 5th Circuit found Ritz to be personally liable, but held that because he never made a misrepresentation to Husky, the debt was not obtained through "actual fraud" under section 523(a)(2)(A); therefore, the debt could be discharged.

The Supreme Court reversed, stating that by requiring actual misrepresentation by the debtor, the courts below failed to differentiate between "actual fraud" and "false pretenses or false representations." Congress' addition of "actual fraud" to the Bankruptcy Code in its 1978 amendment was not intended to have the same meaning as pre-existing terms in the Bankruptcy Code. Further, the common law interpretation of the terms "actual" and "fraud" support the holding that any conduct that counts as "fraud," *i.e.*, done with wrongful intent, constitutes "actual fraud." Behavior of the type that Ritz undertook, transferring assets to prevent debt collection, has consistently been described as fraud by courts and legislatures. The Supreme Court pointed out that a debtor in a fraudulent conveyance context has little opportunity to make a misrepresentation to the creditor, except where the creditor asks about the assets' whereabouts. The Supreme Court held the "concealment and hindrance" aspects of the debtor's conduct appropriately fell within the definition of "actual fraud," under section 523(a)(2)(A).

Authority of Puerto Rico to File Chapter 9

Puerto Rico v. Franklin Calif. Tax-Free Trust, 136 S.Ct. 1938 (2016).

Puerto Rico enacted the Puerto Rico Public Corporation Debt Enforcement and Recovery Act (the Act), which contains sections, namely Chapter 3, which mirror Chapters 9 and 11 of the Bankruptcy Code, enabling Puerto Rico's public utility corporations to restructure their debt. A group of investment funds and utility bondholders sought to enjoin the Act, arguing that 11

U.S.C. § 903(1) explicitly pre-empts it. The district court enjoined enforcement of the Act, and the 1st Circuit affirmed. The Supreme Court affirmed the 1st Circuit, reasoning that the Code's definition of a "State" excludes Puerto Rico for purposes of defining who can be a debtor, but does not exclude Puerto Rico from the scope of the pre-emption provision.

In reaching its ruling, the Supreme Court pointed to the clear language of the Code as the best indication of Congress' intent. The Code contains a "gateway" provision in section 109(c) requiring a Chapter 9 debtor to be an insolvent municipality that is "specifically authorized" by a State "to be a debtor." The pre-emption provision of section 903(1) bars states from enacting municipality bankruptcy laws, but section 101(52) defines "States" to include Puerto Rico, "except for purposes of defining who may be a debtor under Chapter 9." Holding that Congress clearly intended this language to apply only to the "who may be a debtor" section of Chapter 9, the Supreme Court rejected Puerto Rico's argument that the definition removed Puerto Rico from the scope of Chapter 9 entirely. The result of this interpretation is that Puerto Rico is barred from authorizing a municipality to proceed as a debtor, thereby preventing Puerto Rico's municipalities from seeking Chapter 9 relief. Because Puerto Rico is still subject to the rest of Chapter 9, including the pre-emption provision, it is not permitted to enact bankruptcy laws for its municipalities, and the Act violates this prohibition.

Justice Sotomayor dissented, joined by Justice Ginsberg. Justice Sotomayor would hold that Puerto Rico is excluded from the scope of Chapter 9 entirely. She reasoned that the Chapter 9 pre-emption provision necessarily presupposes that Chapter 9 would apply only to states that can authorize their municipalities to proceed as debtors. In order to seek relief under Chapter 9, the debtor must be a municipality that has been specifically authorized by the State to seek restructuring. Because Puerto Rico's municipalities are unable to pass through the Chapter 9 "gateway" laid out in this provision, she does not believe that any of the provisions of Chapter 9 apply, including the provision prohibiting the states from making municipality bankruptcy laws. Justice Sotomayor admonished the majority for abandoning the Court's "repeated exhortations to read statutes in context of the overall statutory scheme." She stated that, when read in context, Congress' amendment precluding Puerto Rico (and the District of Columbia) from seeking Chapter 9 relief removes them from the benefits of Chapter 9, as well as its burdens (the pre-emption clause). By preventing Puerto Rico's municipalities from attaining Chapter 9 relief, but also prohibiting Puerto Rico from enacting municipality-level bankruptcy laws, Justice Sotomayor argues that the Supreme Court has left Puerto Rico and its 3.5 million citizens powerless and without any legal recourse to seek relief until Congress steps in to help the crisis. She ended her dissent quoting a congressional letter to the Senate Committee on the Judiciary addressing Puerto Rico's Fiscal Crisis stating, "Statutes should not easily be read as removing the power of the government to protect its citizens."

—**Tristan E. Manthey**
Chair, LSBA Bankruptcy
Law Section
and
Cherie Dessauer Nobles
Member, LSBA Bankruptcy
Law Section
Heller, Draper, Patrick, Horn
& Dabney, L.L.C.
Ste. 2500, 650 Poydras St.
New Orleans, LA 70130

Corporate and Business Law

Shareholders' No Price Buy-Sell Agreement

In re P.K. Smith Motors, Inc., 50,357 (La. App. 2 Cir. 3/9/16), 188 So.3d 324, *writ denied*, 16-0852 (La. 6/17/06), ____ So.3d ____, 2016 WL 3581693.

In 1984, all of the shareholders of a corporation signed a shareholders' agreement with various restrictions on the transfer of shares, including a provision that, on the death of a shareholder, within 60 days after qualification of the succession representative, the corporation was required to buy, and the deceased's estate was required to sell, all shares owned by the shareholder at death, to the extent the corporation lawfully could do so. To the extent it could not, the remaining shareholders had the option to buy the shares pro rata shortly thereafter. The purchase price per share was left blank in the agreement.

After 1997, two shareholders each held half of the shares. In 2009, one died. In 2013, his estate filed suit against the corporation and the other shareholder, seeking to discontinue the business and dispose of its assets under the former La. R.S. 12:143(C) (a special provision applicable only to a corporation with two 50 percent shareholders, essentially

SAVE THE DATES

Louisiana State Bar Association®

Serving the Public. Serving the Profession.

Register today at *www.lsba.org/CLE*

In the legal community the more you know, the faster you'll get ahead. That's why the Louisiana State Bar Association offers a variety of seminars on a wide range of legal topics. Enrolling in them will help you stay competitive and keep up with the ever-changing laws. The Continuing Legal Education Program Committee sponsors more than 20 programs each year, ranging from 15-hour credit seminars to one-hour ethics classes. Check online for the most up-to-date list of upcoming seminars at *www.lsba.org/CLE*.

2016-2017 LSBA CLE Calendar

23rd Annual Admiralty Symposium
Sept. 16, 2016 • New Orleans

Ethics & Professionalism
Sept. 23, 2016 • New Orleans

Expert Witnesses: What You Need to Know to Win Your Case - From the Experts
Sept. 30, 2016 • New Orleans

Energy & Environmental Law Summit
Oct. 7, 2016 • New Orleans

10th Annual Dispute Resolution Seminar
Oct. 14, 2016 • Baton Rouge

56th Bi-Annual Bridging the Gap
Oct. 18 & 19, 2016 • New Orleans

Military Law
Oct. 21, 2016 • New Orleans

Voodoo Fest CLE
October 28, 2016 • New Orleans

Ethics & Professionalism
Nov. 4, 2016 • Bossier City

Workers' Comp CLE
Nov. 2, 2016 • Baton Rouge

15th Annual Class Action/ Complex Litigation Symposium
Nov. 11, 2016 • New Orleans

In-House Counsel / Outside Practice CLE
Nov. 15, 2016 • New Orleans

New York, New York CLE
Nov. 19-21, 2016 • New York, NY

Ethics & Professionalism: Watch Your P's & Q's
Dec. 2, 2016 • New Orleans

25th Summer School Revisited
Dec. 8 & 9, 2016 • New Orleans

Trial Practice CLE
Dec. 13, 2016 • New Orleans

Quality of Life CLE
Dec. 13, 2016 • New Orleans

CLE Wrap Up
Dec. 16, 2016 • New Orleans

Dazzling Disney CLE
Feb. 27-March 1, 2017
Disney's Grand Floridian
Orlando, FL

French Quarter Fest CLE: 9th Annual White Collar Crime Symp.
April 7, 2017 (Tentative Date)
New Orleans

Medical Malpractice
April 7, 2017 • New Orleans

Immigration Law
April 21, 2017 • Shreveport

57th Bi-Annual Bridging the Gap
April/May, 2017 • New Orleans

Louisiana State Bar Association®

Serving the Public. Serving the Profession.

For more information, visit *www.lsba.org/cle*

providing that unless the shareholders agree on a plan of discontinuance and disposition, the court "may" proceed with involuntary dissolution). The defendants opposed, seeking specific performance of the shareholders' agreement and asserting other claims. The defendants proposed as the plan that the court hold a hearing to determine a fair price, after which the defendants would either pay that price to buy the estate's shares or else agree to a liquidation, and the trial court so ordered. The estate objected to the plan and moved for summary judgment seeking to proceed with dissolution. The estate filed another motion for summary judgment against specific performance of the shareholders' agreement on the grounds that it was unenforceable for lack of a price. The trial court denied both motions, held the hearing, found that the shareholders' agreement required determination of a "reasonable price," determined the "fair value" of the corporation to be $1 million and set the price for the estate's shares at $500,000.

The appellate court held that "[t]hough the estate argues that the agreement is a contract to sell that is unenforceable because it lacks a price, we find that the agreement is properly viewed as a transfer restriction." The court noted that "[t]ransfer restrictions applicable to the *mortis causa* sale of stock are valid" and that La. R.S. 12:143(C) used the word "may." Based on the law and some of the testimony of the parties, the appellate court held that the trial court appropriately found in favor of denying relief under La. R.S. 12:143(C) and in enforcing the shareholders' agreement, explaining that this result appeared to be the "best resolution" of the dispute, in accordance with the intent of the shareholders' agreement, and "equitable." The appellate court also found no error in the determination of the price, noting that both sides had testified they would agree to a fair price. One testified that the shareholders' agreement did not contain a price because of volatility in the industry at the time and that the shareholders intended a "fair market value or fair price" would be determined when needed, which testimony was uncontroverted.

In passing, the appellate court noted that the new Louisiana Business Corporation Act now provides that, in a dissolution proceeding brought by a shareholder, either the corporation or a shareholder may elect to purchase the shares of the petitioning shareholder at a fair value.

Shareholders' Noncompete Agreement

Pattridge v. Starks, 50,351 (La. App. 2 Cir. 2/24/16), 189 So.3d 1112.

In 2004, the investors in a Louisiana corporation all signed a noncompete agreement stating that if any of them were terminated as shareholders, they would not compete against the corporation in a five-parish area within 24 months after termination. One of them, Edwards, ceased to be a shareholder on July 31, 2013,

Code of Professionalism

► My word is my bond. I will never intentionally mislead the court or other counsel. I will not knowingly make statements of fact or law that are untrue.

► I will clearly identify for other counsel changes I have made in documents submitted to me.

► I will conduct myself with dignity, civility, courtesy and a sense of fair play.

► I will not abuse or misuse the law, its procedures or the participants in the judicial process.

► I will consult with other counsel whenever scheduling procedures are required and will be cooperative in scheduling discovery, hearings, the testimony of witnesses and in the handling of the entire course of any legal matter.

► I will not file or oppose pleadings, conduct discovery or utilize any course of conduct for the purpose of undue delay or harassment of any other counsel or party. I will allow counsel fair opportunity to respond and will grant reasonable requests for extensions of time.

► I will not engage in personal attacks on other counsel or the court. I will support my profession's efforts to enforce its disciplinary rules and will not make unfounded allegations of unethical conduct about other counsel.

► I will not use the threat of sanctions as a litigation tactic.

► I will cooperate with counsel and the court to reduce the cost of litigation and will readily stipulate to all matters not in dispute.

► I will be punctual in my communication with clients, other counsel and the court, and in honoring scheduled appearances.

Following approval by the Louisiana State Bar Association House of Delegates and the Board of Governors at the Midyear Meeting, and approval by the Supreme Court of Louisiana on Jan. 10, 1992, the Code of Professionalism was adopted for the membership. The Code originated from the Professionalism and Quality of Life Committee.

when his shares were acquired at auction by two of the others. His son formed a new company that commenced business in March 2014 in direct competition with the corporation, and Edwards helped by pledging funds to secure a loan to the new company and by referring some of the corporation's customers to the new company. An earlier case had concluded that Edwards breached the noncompete agreement; in this case, the trial court held a separate trial to determine the damages and awarded $600,000.

Edwards appealed, claiming among other things that the trial court erred by considering activities outside of the noncompete area and by awarding damages for lost profits after the expiration of the noncompete period. The appellate court affirmed, however, noting that the profits that the corporation lost from customers would have accrued to the corporation in Louisiana and that Edwards' actions to compete against the corporation were "primarily concentrated" in the noncompete area. The court upheld the trial court's award of lost sales through the end of 2016 (a year and a half beyond the end of the noncompete period) because the defendant's early entry into the market in violation of the noncompete agreement caused the corporation damages that could have been mitigated had the defendant abided by the agreement, and because customers prematurely lost were unlikely to return.

—**Michael D. Landry**
Reporter, LSBA Corporate and
Business Law Section
Stone Pigman Walther
Wittmann, L.L.C.
546 Carondelet St.
New Orleans, LA 70130

Family Law

Community Property

Fleece v. Fleece, 50,262 (La. App. 2 Cir. 1/4/16), 185 So.3d 90.

After being discharged from the military, Mr. Fleece withdrew his retirement contributions. Subsequently, after the termination date of the community, he bought back those years of service at the same value as his contributions, thus allowing him sufficient service years to be eligible for military retirement benefits. The repayment was to be paid in installments by deductions from the retirement benefits. The trial court held, and the court of appeal affirmed, that those years were community years for the calculation of the community's interest in the benefit, and that Ms. Fleece was entitled to 24.5 percent of the retirement benefits. The court of appeal reversed the trial court's order that Ms. Fleece had to reimburse Mr. Fleece for one-half of the funds being used to repurchase the service years, since that purchase was being made from the ongoing monthly retirement benefits, a portion of which were community. Because the years being repurchased were attributable to his employment during the community, they remained a community asset. Interestingly, the court held that Mr. Fleece might have a future claim if he could show that his separate funds were being used to pay the community portion of the repurchase.

Succession of Seal, 15-0855 (La. App. 1 Cir. 12/23/15), 185 So.3d 791.

Ms. Seal was entitled to the marital portion of Mr. Seal's estate under La. Civ.C. art. 2432. Her living in the home after his death was not an offset to her entitlement of the marital portion, as it was not an asset existing at the time of his death. Moreover, she had no obligation to reimburse Mr. Seal's heir for her use of the home. She was also entitled to the marital portion in ownership, rather than in a cash value.

Estate of Goss v. Estate of Goss, 15-0960 (La. App. 3 Cir. 3/9/16), 187 So.3d 570, *writ denied*, 16-0660 (La. 5/27/16), ____ So.3d ____, 2016 WL 3258363.

Mr. and Ms. Goss had confected a declaration of paraphernality during their marriage. The action by Mr. Goss's estate against Mrs. Goss's estate to have a piece of immovable property classified as community, rather than separate property, was prescribed after their deaths because even if Mr. Goss could have controverted the declaration during his lifetime, such a claim would have prescribed prior to his death and could not be resurrected by his heirs once it had prescribed.

Custody

Tracie F. v. Francisco D., 15-1812 (La. 3/15/16), 188 So.3d 231.

The Louisiana Supreme Court accepted this writ application to determine the standard when a biological parent seeks to modify a consent judgment where the biological parent shares joint custody with a non-parent who has been designated the domiciliary parent. The court held that La. Civ.C. articles 131 and 134 apply, not article 133, which applies only on an initial determination. On a change of circumstances to modify a prior custody arrangement, the party seeking the modification, even the biological parent, must show a change of circumstances since the prior award, and that a modification is in the child's best interest. The court found that the biological parent did not have to show that he had been "rehabilitated" since the last order, or that the significant or material change occurred in the situation of the domiciliary parent. Here, Francisco was able to show a change in circumstances in that he had begun to participate more extensively in the child's life. However, he failed to show that a modification would be in the child's best interest, as the child had primarily lived with the maternal grandmother in a continuing stable environment.

Coleman v. Manley, 15-0778 (La. App. 5 Cir. 3/16/16), 188 So.3d 395.

A judgment awarding custody under the Post-Separation Family Violence Relief Act is not a considered custody decree subject to the *Bergeron* standard to demonstrate a change of circumstances if evidence of parental fitness is not taken at that hearing, and only evidence of the alleged violence is taken. Testimony by Ms. Coleman in which she introduced certificates evidencing her completion of anger-management programs was sufficient to fulfill her burden of proof under La. R.S. 9:364 to show that she had completed the required treatment program. Although the trial court did not expressly review the La. Civ.C. art. 134 custody factors because they had been addressed sufficiently in the custody evaluator's report, on which the trial court relied, and, in large measure, incorporated into its judgment, the court of appeal found that the trial court had sufficiently considered those factors in changing domiciliary custody from Mr. Manley to Ms. Coleman.

Although the parties lived more than 75 miles apart, the relocation statute did not apply, as this was a custody, not a relocation proceeding; and, further, Ms. Coleman was not seeking to establish a new residence, nor was Mr. Manley, but both parties were continuing to live in their existing residences. The court found that the relocation statutes apply only when a custodial parent seeks to establish a new residence more than 75 miles from the current residence.

McGovern v. McGovern, 15-0737 (La. App. 5 Cir. 3/30/16), 189 So.3d 503.

The court of appeal affirmed the trial court's award of visitation with the minor child to the grandmother, after the child's mother died following the parties' divorce. The court found that La. Civ.C. art. 136 was applicable, that the grandmother was allowed to seek visitation under that article, and that she had demonstrated that visitation with her grandson was both reasonable and in the child's best interest. The court awarded her the second weekend of each month from Friday through Sunday; Mother's Day, Christmas Eve, Thanksgiving Eve and Easter Eve from noon to 6 p.m.; two consecutive weeks of vacation time during the summer; weekly telephone contact; and allowed her to participate in the child's school activities and extracurricular events. Although the father argued that the visitation was excessive and infringed on his primary parental rights, the court of appeal found that the schedule was reasonable, particularly given the grandmother's historical relationship and visitation with the child.

Parental Rights

State ex rel. K.C.C., 15-1429 (La. 1/27/16), 188 So.3d 144.

After surveying the codal history and jurisprudence, the Louisiana Supreme Court ruled that "private counsel in a particular case may be specially appointed, by approval of the court, to pursue the termination of parental rights due to abandonment under La. Ch. Code art. 1015(4)." Here, the parties seeking to adopt the child had obtained an order from the trial court designating their attorney as special counsel to seek to terminate the biological parents' rights regarding the child. The court's granting that authority "cured" private counsel's lack of authority to seek termination.

—David M. Prados
Member, LSBA Family Law Section
Lowe, Stein, Hoffman, Allweiss
& Hauver, L.L.P.
Ste. 3600, 701 Poydras St.
New Orleans, LA 70139-7735

Insurance, Tort, Workers' Compensation & Admiralty Law

Jurisdiction Over Foreign Entities

Patterson v. Aker Solutions, Inc., ____ F.3d ____ (5 Cir. 2016), 2016 WL 3254605.

Patterson, a U.S. citizen, was working aboard the M/V SIMON STEVIN, a Luxembourg-flagged vessel installing subsea production equipment in a gas and condensate field off the coast of Russia, when he was struck by a cable and injured. He filed a personal injury suit against four foreign corporations, owners or operators in the endeavor. Aker Subsea AS (Aker) moved to dismiss for lack of personal jurisdiction. The district court found neither specific nor personal jurisdiction existed over Aker under FRCP

Rule 12(b)(2) and granted the motion, the subject of this appeal.

Patterson argued that Aker had sufficient contacts with the United States to establish jurisdiction under FRCP 4(k)(2) in that, over a three-year period, it entered into 11 secondment agreements whereby it would assign its employees to an American affiliate in Houston, Aker Solutions, while they remained Aker Subsea employees. Was this sufficient contact?

The court stated that due process in federal cases governed by Rule 4(k)(2) is measured with reference to the 5th, rather than the 14th, Amendment. To assert general personal jurisdiction under Rule 4(2)(k), Aker's "contacts with the United States must be so continuous and systematic as to render it essentially at home in the United States." Both Aker Subsea's place of incorporation and its principal place of business are in Norway. Aker's only business contacts with the United States were the 11 secondment agreements.

The court then looked for what the Supreme Court has described as the "exceptional case," *i.e.*, it compared this case to the only other in which that court found a sufficient basis for the exercise of general jurisdiction over a non-resident defendant — *Perkins v. Benguet Consol. Mining Co.*, 72 S.Ct. 413 (1952). There, a Philippine corporation was found to be subject to general personal jurisdiction in Ohio based on extensive contacts within the state. During World War II, Benguet moved certain operations to Ohio, including maintaining an office, keeping company files there, corresponding from Ohio about business and employees, paying salaries to the company's president and two secretaries, maintaining company bank accounts, using an Ohio bank as a transfer agent for stock of the company, holding several director's meetings, managing company policies concerning rehabilitation of company property in the Philippines and sending funds to pay for projects in the Philippines.

The court found that Aker's contacts fell "well short of effectively operating its business within the United States." Its limited contacts with the United States, *i.e.*, the 11 secondment agreements, were insufficient to satisfy due process concerns.

Damage Award: *Housley* Presumption

Bush v. Mid-South Baking Co., L.L.C., 15-0540 (La. App. 5 Cir. 5/26/16), ____ So.3d ____, 2016 WL 3031634.

Bush was a guest passenger in a car that struck a gate extended from defendant's delivery truck in a McDonald's parking lot, sustaining injuries. The trial court found the car's driver negligent in failing to see the gate, and the defendant liable for not strictly following company guidelines in marking the hazard, assessing 25 percent liability to the defendants, and 75 percent to the car's driver. The appellate court found no manifest error in the trial court's apportionment of fault.

In his remaining assignment of error, Bush contended that the trial court erred in failing to apply the *Housley* presumption, in finding that his neck injury was not related to the accident and in failing to award all related medical expenses. In *Housley v. Cerise*, 579 So.2d 973, 980 (La. 1991), the court stated that a claimant's disability is presumed to have resulted from an accident, if before the accident he or she was in good health, "but commencing with the accident the symptoms of the disabling condition appear and manifest themselves afterwards, providing that the medical evidence shows there to be a reasonable possibility of causal connection between the accident and the disabling condition."

The court found that Bush failed to show he was healthy before the accident. To the contrary, Bush admitted that he was receiving workers' compensation at the time of the automobile accident, which indicated he had some kind of injury that made him unable to work. Thus, the *Housley* presumption was inapplicable.

—**John Zachary Blanchard, Jr.**
Past Chair, LSBA Insurance, Tort, Workers' Compensation and Admiralty Law Section
90 Westerfield St.
Bossier City, LA 71111

Supreme Court Rules Against Tyson Foods in Class Action Case

Tyson Foods v. Bouaphakeo, 136 S.Ct. 1036 (2016).

On March 22, 2016, the U.S. Supreme Court upheld class certification — and a $2.9 million jury verdict — in a donning and doffing case brought under Iowa law and the federal Fair Labor Standards Act (FLSA). The Court addressed the question of when statistical sampling evidence may be used to establish class-wide liability. Departing from recent decisions, the Court specifically limited its ruling to the facts of this case, holding that representative, statistical evidence may be used to certify a class action if the same sampling could be used to establish liability in an individual action.

Tyson employee Bouaphakeo brought a class action and collective action on behalf of herself and other plant employees seeking compensation for time spent donning and doffing protective gear to perform their jobs. The employees contended that they were either not paid for their donning and doffing time or were paid for a small, fixed amount of time that was much less than the time actually required. Under both the FLSA and Iowa law, an individual employee bringing such an action needs to show that the time spent donning and doffing combined with the time spent working totaled more than 40 hours a week and that the employer did not pay for all of the work time. Before the district court, Tyson did not argue whether the compensability of time spent donning and doffing was a question common to the class. It argued, rather, that because employees spent different amounts of time donning and doffing gear, some of which was less than the time for which they were paid, and some of which would not bring their time to 40 hours in a week even if added to their paid work hours, the case could not fairly be tried on a class basis.

Because Tyson did not maintain records of the time employees spent donning and doffing, the employees hired an expert to estimate the average time workers in various departments spent donning and doffing their gear. Then, using the time records Tyson had for each employee, another expert calculated whether each class member should have been paid overtime in any given week and, if so, how much. Remarkably, Tyson neither objected to the employees' experts' methodology nor offered any rebuttal expert. Instead, it contended that the variance in time spent donning and doffing made the claims too speculative for class-wide recovery.

In a 6-2 decision, the majority opinion, written by Justice Kennedy, stated the plaintiffs were entitled to rely on statistics to prove their case. Justice Kennedy affirmed the judgment based on the premise that any individual could have used the expert's study to raise a reasonable inference of the amount of time he or she spent donning and doffing. Justice Kennedy wrote: "A representative or statistical sample, like all evidence, is a means to establish or defend against liability. Its permissibility turns not on the form a proceeding takes — be it a class or individual action — but on the degree to which the evidence is reliable in proving or disproving the elements of the relevant cause of action." *Id.* at 1046.

Justice Kennedy further explained that this ability for individuals to rely on statistical evidence in their individual cases distinguished this case from *Wal-Mart Stores, Inc. v. Dukes*, 131 S.Ct. 2541 (2011), where the Court held that the purported sample could not properly be used by any individual outside the sample to determine individual liability. Justice Kennedy contrasted *Wal-Mart*, where the employees' experiences bore little relationship to one another, with *Tyson*, where the employees worked in the same facility, performed similar work and were paid under the same policy to clarify that a representative sample is not always an impermissible means to establish class-wide liability.

The workers should not suffer because Tyson failed to keep accurate records, Justice Kennedy added, citing as precedent *Anderson v. Mt. Clemens Pottery Co.*, 66 S.Ct. 1187 (1946), a decision allowing statistical sampling in the absence of accurate time records.

In dissent, Justice Thomas, joined by Justice Alito, said the decision gives employers an "untenable choice" — either they must track any time employees spend doing uncompensated work to deflect "an innovative lawsuit," or face the threat of a class action based on statistical sampling later.

Tyson also argued that awarding damages based on averages would result in payments to employees who had not been injured, but the Court said that this issue could not be addressed until the district court approved a plan to allocate the awarded damages among class members. In his concurring opinion, Chief Justice Roberts addressed this issue in detail, concluding that allocating the money could prove impossible and that the plaintiff's proposal for allocating the award would not weed out uninjured plaintiffs. "[I]f there is no way to ensure that the jury's damages award goes only to injured class members, that award cannot stand," he wrote.

Tyson gives employees another tool for bringing class action lawsuits against employers. The fact that the Supreme Court declined to categorically exclude such evidence in the class action context may indicate a growing willingness on the part of the courts to admit such evidence, provided it bears certain indicia of reliability.

—**Kevin R. Mason**
Chair, LSBA Labor and
Employment Law Section
Robein, Urann, Spencer, Picard
& Cangemi, A.P.L.C.
Ste. 400, 2540 Severn Ave.
Metairie, LA 70002

Mineral Law

2016 Regular Session

Act No. 277 provides for a monthly fee to dispose of waste that is generated by exploration and production activities. The law, signed by the Governor on May 27, 2016, requires a $0.02 per barrel fee to be paid to the Office of Conservation for exploration and production waste delivered to certain facilities: (1) any Office of Conservation-permitted, off-site commercial facilities; (2) any transfer stations permitted by Conservation for waste transfer to an out-of-state treatment or disposal facility; or (3) any other legally permitted Louisiana off-site waste-storage, treatment or disposal facility approved by Conservation for the receipt of exploration and production waste. "Waste" does not include brine, produced water or salvageable hydrocarbons.

House Bill No. 632 relates to financial security that must be posted by applicants (1) applying for a permit to drill, or (2) seeking to amend a permit to drill because of a change of operator. For a permit to drill, an applicant shall provide financial security 30 days after the date of completion or 30 days from the date the operator is notified by Conservation that financial security is required. For an amendment, financial security must be paid in accordance with La. R.S. 30:4.3 or by establishing a site-specific trust account prior to the change of operator. The amount of financial security is set by the Commissioner of Conservation and may be based on an individual-well or multiple-well basis and may depend on the well's location. For a well that is 3,000 feet or less, financial security shall be $2.00 per foot. Financial security is not required for (1) orphaned wells, or (2) any well where an operator has an agreement with Conservation to plug a well that has been declared orphaned and the proposed well is similar in depth and location to the orphaned well. This bill was sent to the Governor for executive approval as of June 6, 2016.

Operating Agreement; Arbitrability of Claims

LeBlanc v. Texas Brine Co., L.L.C., ____ F.Supp.2d ____, (E.D. La. May 10, 2016), 2016 WL 2849506.

This case arises from the Bayou Corne sinkhole litigation and presents a number of issues relating to the "arbitrability of claims" pursuant to a 1975 operating agreement and its amendments (operating agreement). Two motions to stay are at issue — one filed by Occidental Chemical Corp. (Occidental) and one filed by OXY USA, Inc., an affiliate of Occidental.

Occidental's motion sought to stay litigation brought by Texas Brine Co., L.L.C., in federal court pending an arbitration panel's decision as to which of Texas Brine's claims were arbitrable. The parties had been in arbitration since September 2013. Texas Brine opposed the motion and maintained that none of its tort claims against Occidental were arbitrable because none of its claims related to the operating agreement. Occidental, conversely, argued that all of Texas Brine's claims were arbitrable pursuant to either the operating agreement or one of the many other contracts between the parties over the years.

As a preliminary matter, the court had

to decide whether the issue of arbitrability was to be determined by it or a panel of arbitrators. Texas Brine argued that it was the duty of the court to decide arbitrability. Occidental contended that 5th Circuit precedent required that a panel of arbitrators decide.

In its analysis, the court noted, first, that arbitrability is governed by Louisiana (contract) law. As such, there must be "clear and unmistakable" evidence that the parties agreed to arbitrate. Second, the court noted that it has plenary power to decide the question of arbitrability unless the agreement states "clearly and unmistakably" that an arbitrator must do so.

The operating agreement incorporated by reference the American Arbitration Association (AAA) rules. Those rules state in part that "[t]he arbitrator shall have the power to rule on his or her own jurisdiction *including any objections with respect to the existence, scope, or validity of the arbitration agreement or to the arbitrability of any claim or counterclaim.*" (Italics added.) Louisiana law provides that incorporating AAA rules is enough to show "clear and unmistakable" evidence of the parties' intent to allow an arbitrator to decide arbitrability. Based on this, the court found that it was the arbitration panel's role to decide arbitrability.

As to scope — whether Texas Brine's tort claims were arbitrable — the court looked at whether the claims were "wholly groundless" (*i.e.*, do the claims relate to the operating agreement?). Here, the court found that Texas Brine's claims were not "wholly groundless" because the language of the arbitration agreement was broadly worded and there is a strong federal policy in favor of arbitration.

Regarding OXY USA's motion — whether a non-signatory (OXY) could compel a signatory (Texas Brine) to arbitrate — the court held that the doctrine of equitable estoppel requires that all claims between a signatory and non-signatory must be arbitrated where those claims are so intertwined with the contract (here, the operating agreement) that it would be unfair to deny the arbitration of those claims.

Based on these rulings, the court ultimately stayed the litigation as between Texas Brine and Occidental and Texas Brine and OXY USA, *et al.*

—**Keith B. Hall**
Member, LSBA Mineral Law Section
Louisiana State University
Paul M. Hebert Law Center
1 E. Campus Dr.
Baton Rouge, LA 70803
and
Colleen C. Jarrott
Member, LSBA Mineral Law Section
Baker, Donelson, Bearman, Caldwell
& Berkowitz, P.C.
Ste. 3600, 201 St. Charles Ave.
New Orleans, LA 70170

Professional Liability

Manifest Error

Montz v. Williams, 16-0145 (La. 4/8/16), 188 So.3d 1050.

A jury decided that the plaintiffs had failed to prove the applicable standard of care for obtaining informed consent; thus, no other jury interrogatory was answered. The court of appeal concluded that this finding was clearly wrong and was without a reasonable factual basis because expert testimony from both sides, together with the medical-panel opinion, presented the jury with adequate information to establish "that the standard of care . . . was to obtain informed consent." *Montz v. Williams*, 15-0221 (La. App. 5 Cir. 12/23/15), 182 So.3d 1149.

The Supreme Court granted writs and summarily reversed. The Court recognized the need for expert testimony to aid the factfinder in determining the applicable standard of care, but also noted that expert witnesses often disagree on standard-of-care issues. The Court referenced the oft-quoted tenets of *Rosell v. ESCO*, 549 So.2d 840, 844-45 (La. 1989), "Where there are two permissible views of evidence, the factfinder's choice between them cannot be manifestly erroneous or clearly wrong;" and *Bellard v. American Cent. Ins. Co.*, 07-1335, P.27, (La. 4/18/08), 980 So.2d 654, 672, when that determination "is based on a decision to credit the testimony of one of two or more witnesses, that finding can virtually never be manifestly erroneous . . . ."

Both sides of this litigation agreed that the standard of care required Dr. Williams to obtain Mrs. Montz's informed consent, which led the court of appeal to decide that the jury's decision that the Montzes had not proved the applicable standard of care was clearly wrong. The Supreme Court acknowledged that all the experts agreed that informed consent was mandated, but it decided that the jury had arrived at its opinion based on the language required to obtain informed consent under the circumstances presented, which was a matter the court determined was "reasonably contested." In choosing to accept one side's expert testimony over the other's, the jury could not have been manifestly erroneous.

Noticeably absent from the *Montz* opinion was reference to a case the court decided four months earlier: *Hayes Fund for First United Methodist Church of Welsh, L.L.C. v. Kerr-McGee Rocky Mountain, L.L.C.*, 14-2592 (La. 12/8/15), ____ So.3d ____, 2015 WL 8225654.

Hayes involved the "classic battle of experts," which was resolved in the trial court in favor of the defendants based on factual findings and credibility determinations. The court of appeal reversed. The Louisiana Supreme Court accepted the case and determined that the single issue before it was to determine whether the trial court committed manifest error in ruling for the defendants. The court noted in its 68-page opinion that it had "meticulously analyzed this case employing the manifest error doctrine to further demonstrate, as guidance, the proper analysis the reviewing court should employ."

After determining that the trial court made it clear that it found neither the plaintiffs' evidence credible nor their exhibits supportive and had concluded, as a factual finding, that the plaintiffs failed to prove their case, the Supreme Court reversed the court of appeal, reinstated the trial court's judgment, and announced:

> The function of the Court of Appeal is to correct errors, not make choices it prefers over the District Court when there are two or more permissible

views of the evidence. . . . *Rarely* should a District Court's choice of expert(s) be found clearly wrong because it is so difficult to find a reasonable basis does not exist for the expert's opinion relied upon by the District Court. It is destructive to the manifest error analysis for a reviewing court to make its choice of the evidence rather than look for clear error in the reasonable basis found by the trier of fact. . . . We set forth this manifest error analysis at length in this opinion to give guidance to the appellate courts in analyzing evidence under the manifest error doctrine when there are two or more permissible views of the evidence.

Fax Filing Requests for Review

In Re Med. Rev. Panel Claim of Tillman, 15-1114 (La. 3/15/16), 187 So.3d 445.

This case was first reported in 63 La. B.J. 152 (2015) when the court of appeal ruled that the Division of Administration's (DOA) administrative rule was the legal standard for fax filings of medical-review-panel requests, which is that fax filings are permissible but that those received after 5 p.m. will be considered to have been filed on the following day.

In *Tillman*, the request for a panel was faxed on the day prescription tolled (May 22), and it was received by the DOA that same day, but after 5 p.m.; thus, it was date-stamped by the DOA as having been received on May 23. The defendant filed an exception of prescription, which the trial court denied. The appellate court reversed. Its interpretation of La. R.S. 40:1299.47(A)(2)(b) was that a request for review is timely filed at any time of day on the date of mailing *only* when it is sent by certified or registered mail, which meant that Tillman's fax filing did not interrupt prescription.

The Supreme Court granted writs to review the appellate court's interpretation of La. R.S. 40:1231.8(A)(2)(b). The Court observed that, as to other methods of delivery of medical-review-panel requests (certified or registered mail), paragraph (A)(2)(b) (to-wit, a panel request "shall be deemed filed on the date of receipt of the request stamped and certified by the division of administration") is ambiguous as applied to fax-filed requests.

The Court discussed Louisiana's Uniform Electronic Transmission Act (UETA), La. R.S. 9:2601, *et seq.*, and decided that the fax filing of documents occurs when the electronic record "[e]nters an information processing system," which encompasses a fax machine. As to the defendant's argument that the DOA's rule, *i.e.*, its authority to postdate panel requests was controlling, the court noted that administrative rules "may not exceed the authorization delegated by the legislature." In this instance, the DOA's postdating policy circumvented paragraph 8(A)(2)(a), which directs that it is "the filing" of the panel request that suspends prescription. The lower court also ignored the UETA's rule that "receipt occurs when the document reaches the designated system." When the DOA decided that the document it received on May 22 would be deemed received on May 23, thus shortening the one-year prescriptive period, it was attempting to overrule La. R.S. 9:5628 and La. Civ.C. arts. 3454, 3456 and 3492, a result the Legislature could not have intended; ergo, the court ruled that the fax filing was timely.

—**Robert J. David**
Gainsburgh, Benjamin, David,
Meunier & Warshauer, L.L.C.
Ste. 2800, 1100 Poydras St.
New Orleans, LA 70163-2800

Taxation

Duty of Taxpayers to Keep Suitable Records

Yesterdays of Lake Charles, Inc. v. Calcasieu Parish Sales & Use Tax Dep't, 15-1676 (La. 5/13/16), 190 So.3d 710.

Yesterdays of Lake Charles, Inc. and Cowboy's Nightlife, Inc. (clubs) were selected for a sales tax audit by the Calcasieu Parish School System Sales and Use Tax Department (collector). The clubs were cash-based businesses that sold alcohol and collected cover charges for admission. To account for cash sales, the bartenders would bring the drawer from their register along with the register's "z-tape" to their managers. The z-tape is a printed tape produced by the cash register that reflects the amount of all sales transactions recorded on a particular machine. The managers would count the cash and match the total against the z-tapes to balance the registers at the end of the night. The z-tapes were neither printed nor retained after their use. The clubs kept no record of the number of people who entered the bars or the cover charges collected and deposited. The clubs used undocumented amounts of cash revenue to pay undocumented expenses (payments to bands, off-duty sheriff's deputies and bouncers) before making bank deposits. The clubs admitted that the bank deposit slips were imprecise records of actual gross sales because an unreported portion of the money collected was not deposited in the bank.

As a result of the audit, the collector issued a Notice of Collector's Intent to Assess additional taxes due based on an examination of the clubs' sales tax returns and bank statements that indicated a discrepancy in the reporting of sales transactions. The collector notified the clubs that it was not able to reconcile the sales taxes due on the returns because of the lack of support such as z-tapes, shift-change reports, etc. The collector issued final notices of assessment to the clubs, which the clubs paid under protest. The trial court and court of appeal ruled in favor of the clubs. The Louisiana Supreme Court granted the collector's writ application.

The Court held the lower courts erred in effectively concluding the bank statements and deposits alone, reflecting at best net sales, were sufficient to meet the record-keeping requirements of La. R.S. 47:337.29(A)(1). The Court found that La. R.S. 47:337.29(A)(1) and its implementing regulation, La. Admin. Code, Title 61, Part 1 § 4359, are clear and unambiguous and do not lead to absurd consequences. The statutes clearly provide that, for the purpose of reporting and paying sales taxes, the dealer must "keep and preserve suitable records of the sales . . . and such other books of accounts as may be necessary to determine the amount of tax due hereunder . . . ." The Court also held that the statutes do not require that the collector tell the dealer or taxpayer exactly what records he or she should keep and preserve, nor does the lack of explicit guidance transfer the burden of proving what constitutes suitable records to the collector.

Based on the clubs' lack of records, the collector estimated the amount of taxes due and used a sampling methodology to do so. The clubs asserted the amount of taxes alleged to be due was erroneous because the clubs had not agreed in writing to the sampling methodology used by the collector and the method used was arbitrary. The Court held that La. R.S. 47:337.45(B) does not require that such agreement must be in writing to be binding on the parties, nor is there any requirement by the collector to prove the clubs' reports were false or fraudulent, or filed with intent to defraud or evade taxes. The Court held that the collector's assessment cannot be considered an arbitrary assessment if the taxpayer fails to comply with the records requirements of La. R.S. 47:337.29. Finding the collector's sampling procedure was done in accordance with generally recognized sampling techniques, the Court reversed the decisions below and upheld the collector's estimated assessment.

—**Antonio Charles Ferachi**
Member, LSBA Taxation Section
Director, Litigation Division
Louisiana Department of Revenue
617 North Third St.
Baton Rouge, LA 70821

Tax Sale Null for Failure to Provide Proper Presale Notice

Adair Asset Mgmt., L.L.C. v. Turney, (La. App. 2 Cir. 5/4/16), ____ So.3d ____, 2016 WL 2342353.

In an action to quiet title on property sold at a tax sale, the 2nd Circuit reversed the trial court's order, finding the tax sale null and of no effect due to the City of Shreveport's failure to provide proper presale notice. Specifically, the 2nd Circuit held:

> The possibility that a tax sale could be invalidated at any time as an absolute nullity under the old tax sale regime created a system of persistent uncertainty. It was undoubtedly the aim of the Louisiana Legislature to correct this confusion and create a regime that reconciles the requirements of due process under *Mennonite*, with a system that both provides a fair process for the redemption of tax sale properties and encourages the return to commerce of such properties subject to tax sale. La. R.S. 47:2121; La. R.S. 47:2286.

The plaintiff brought an action to quiet title on property for which it held a tax-sale certificate acquired during the 2010 City of Shreveport tax sale. The trial court ruled for the defendant, finding the tax sale null and of no effect due to the City's failure to provide proper presale notice. The plaintiff maintained that the trial court erred because the defendant had not proved that the tax sale was null under the three exclusive causes for relative nullity pursuant to La. R.S. 47:2286. The 2nd Circuit agreed and reversed the earlier judgment and entered a judgment to quiet and confirm the title held by the plaintiff.

The key notice relied on by the plaintiff in this appeal occurred nine months prior to the expiration of the three-year period for redemption for the 2010 tax sale. The plaintiff sent several notices of the right to redeem the property and the applicable deadlines to all interested parties, but received no response. The plaintiff then filed a petition to quiet title. The defendant answered and subsequently filed a reconventional demand to annul the 2010 tax sale pursuant to *Mennonite Board of Missions v. Adams*, 103 S.Ct. 2706 (1983).

In this case, the 2nd Circuit held that the trial court's reliance on *Mennonite* did not amount to a finding that the relevant statutes are per se unconstitutional. The court found that the City complied with its statutory duties under the prior versions of section 2161 and subsection 2153(A). Furthermore, under the new act, the failure to give presale notice to any tax sale party does not render a sale an absolute nullity. La. R.S. 47:2121; La. R.S. 47:2286; La. Civ.C. art. 2030. The 2nd Circuit found that after the 2008 revision, *post-sale notice is now the important notice for due process in tax sales and redemption.* Under Section 2122(4) of the new act, it does not matter whether a tax debtor, mortgagee or other tax-notice party receives notice from the tax collector or the tax purchaser, and under Section 2122(12), it does not matter how the notice is sent (regular or certified mail). If the post-sale notice of the right to redeem is received by the tax-sale parties more than six months before the end of the redemption period, due process is satisfied. La. R.S. 47:2156.

The court also agreed with the plaintiff's argument that the new act abolished the practice of invalidating tax sales as absolute nullities based on deficient presale notice because failure by the taxing authorities to give notice is a relative nullity and, unlike an absolute nullity, a relative nullity is capable of being cured. La. Civ.C. art. 2031. The result is that only three exclusive causes now exist that render a tax sale a relative nullity — redemption nullity (La. R.S. 47:2122), payment nullity (La. R.S. 47:2122) or sale to a prohibited buyer (La. R.S. 47:2162). The 2nd Circuit rejected the argument that a redemption nullity occurred because the plaintiff timely mailed redemption notices to all parties, in the proper form. La. R.S. 47:2122(4),(10), 47:2156(B)(3), 47:2286.

—**Rachael A. Arteaga**
Member, LSBA Taxation Section
McGlinchey Stafford, P.L.L.C.
601 Poydras St., 12th Flr.
New Orleans, LA 70130