Orleans Parish CDC Establishes New Family Mediation Program

The Orleans Parish Civil District Court has created a new family mediation program for child custody and visitation disputes. Under the program, contested child custody and visitation disputes will be ordered to qualified family mediators listed on the court-referred roster of mediators. All contested child custody and visitation cases are eligible for mediation, except for certain cases that are not appropriate for mediation such as those where there are allegations of domestic violence. A reduced fee schedule for mediators is being used by the court to assist litigants who cannot afford the full mediation fees. The court also is establishing lists of professionals to assist with the processing of family cases, including family mediators, custody evaluators, attorneys to prepare post-mediation consent judgments and parenting coordinators. For more information about the program, contact Mark A. Myers at (504)564-7014 or myers24ma@aol.com; or Stacey Williams Marcel at (504)581-9322 or aiswm@aol.com.

22nd Judicial District Court Sends Family Court Cases to Mediation

Hearing officers and social workers have been hired by the judges of the 22nd Judicial District Court to process preliminary family court matters in Washington and St. Tammany parishes. The hearing officers, who are licensed attorneys with experience in family court matters, hear

family court matters including divorce, child custody and support. Licensed social workers provide mediation and parental coordination services. After the hearings and conferences, hearing officers and social workers make recommendations to the Family Court judges. Matters may be resolved without the necessity of an appearance before a judge or may proceed to hearing or trial before a Family Court judge. *www.22ndjdc.org/FamilyJuvenile-Court.aspx* (visited June 9, 2013).

The court also has developed a list of private mediators interested in mediating cases ordered by the hearing officers. For more information about the program, contact Mark A. Myers at (504)564-7014 or myers24ma@aol.com.

Arbitration Agreement in Sales Contract Properly Incorporated by Reference into Promissory Note

Aeneas Williams Imports, L.L.C. v. Carter, 47,989, (La. App. 2 Cir. 12/13/12), ____ So.3d ____, 2012 WL 6621328.

The action was a suit for default on payment of two promissory notes. The promissory notes did not contain any language regarding mediation or arbitration. However, a previously executed sales agreement between the parties, and the basis for execution of the promissory notes, provided that any disputes arising from the sales agreement would be resolved by mediation, and, thereafter, if mediation was unsuccessful, binding arbitration. The maker of the notes filed an exception of lack of subject matter jurisdiction, arguing that the incorporated arbitration clause rendered the court without jurisdiction. The exception was overruled by the district court. The court of appeal granted the writ and held that the arbitration clause found in the sales contract should be incorporated into the promissory notes by reference. As a result, the district court lacked jurisdiction, and the matter should have been referred to arbitration.

Subcontractor's Consent to Arbitrate Vitiated by Error

French's Welding & Maint. Serv., L.L.C. v. Harris Builders, L.L.C., 12-0200 (La. App. 4 Cir. 12/12/12), 106 So.3d 716.

A subcontractor on a public-works contract brought an action against the contractor seeking damages for delayed payments for work on a project for renovation of a state wildlife-management area. The district court granted a permanent injunction prohibiting arbitration under the subcontract because the arbitration agreement signed by the subcontractor was "null, void, and unenforceable" as the contractor never signed the contract containing the arbitration agreement and the subcontractor's consent to arbitrate was vitiated by error when the contractor falsely represented that, under the state's public-works contract, the arbitration clause could not be deleted. Finding that not all arbitration provisions are valid under state law, the court of appeal affirmed the judgment of the district court and stated that one of the conditions of a valid contract is the consent of both parties and that consent can be vitiated by error. Because the subcontractor signed the contract in error and without valid consent, the court of appeal found that "the alleged secreting of the State's contract" under the circumstances of the case could result in irreparable harm. Consequently, the trial court did not commit manifest error in its factual findings that led to the issuance of a permanent injunction.

Failure to File Medical Malpractice Claim Within One Year Results in Dismissal

Howard v. Mamou Health Resources, 12-0820 (La. App. 3 Cir. 3/6/13), ____ So.3d ____, 2013 WL 811676, *writ denied*, 13-0614 (La. 4/19/13), 112 So.3d 227.

Plaintiff filed a claim against several defendants alleging that an employee of a health-care center attacked and beat her on her face, head and entire body, causing injuries. After plaintiff settled her claim with all initial defendants, she filed a supplemental petition naming the Patient Compensation Fund (PCF) as a defendant. The district court sustained the PCF's exceptions of prescription and no cause of action because plaintiff did not file her claim under the Medical Malpractice Act within one year from the date of the alleged malpractice as required by La. R.S. 40:1299.47. The court of appeal affirmed.

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Supreme Court Defines "Defalcation" in Section 523 Discharges

Bullock v. BankChampaign, 133 S.Ct. 1754 (2013).

Randy Curtis Bullock was appointed as trustee over a trust created by his father for the benefit of the five Bullock children. The trust contained a single life insurance policy on the father's life and permitted Bullock to borrow funds from the life insurer against the policy's value. Bullock, at his father's request, borrowed funds from the trust to repay the father's business debt, to buy a mill and to buy real property. Bullock's siblings sued him in state court alleging breach of fiduciary duty as trustee.

The state court determined that while Bullock had no malicious motive in borrowing from the trust, he nonetheless engaged in self-dealing. The state court imposed constructive trusts over Bullock's interest in the mill and the original trust to secure his judgment debt and appointed BankChampaign as trustee of all of the trusts. After Bullock unsuccessfully attempted to liquidate his assets to pay the judgment debt, he filed for bankruptcy and sought to have the judgment debt discharged. BankChampaign opposed the discharge and the bankruptcy court ruled that the judgment debt fell under the exception in 11 U.S.C. § 523(a)(4) — "a debt for fraud or defalcation while acting in a fiduciary capacity . . . ." The district court and 11th Circuit Court of Appeals affirmed.

As lower courts, scholars and judges have long disagreed over whether the term "defalcation" has a scienter requirement, the United States Supreme Court granted certiorari to settle the dispute. The Supreme Court turned to its prior interpretation of "fraud" under what is now Section 523. In *Neal v. Clark*, 95 U.S. 704 (1878), Judge Harlan stated that "fraud," as referred to in Section 523, involved a moral turpitude or intentional wrong. In considering this interpretation, the Supreme Court similarly determined that the term "defalcation" under Section 523 requires an intentional wrong or reckless conduct "of the kind that the criminal law often treats as the equivalent" such as in the Model Penal Code. *Id*. at 1759. The court stated:

> Where actual knowledge of wrongdoing is lacking, we consider conduct as equivalent if the fiduciary "consciously disregards" (or is willfully blind to) "a substantial and unjustifiable risk" that his conduct will turn out to violate a fiduciary duty. . . . That risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves a *gross deviation* from the standard of conduct that a law-abiding person would observe in the actor's situation.

Id. at 1759-60. The Supreme Court arrived at this definition of defalcation by

following *Neal*'s notion that the statutory context strongly favors such an interpretation. In *Neal*, the Supreme Court looked to the definition of embezzlement, a word describing conduct similar to fraud, and found that embezzlement requires a showing of wrongful intent. Therefore, the court concluded that fraud must require such intent as well. The Supreme Court reasoned that as words similar to defalcation, such as larceny and fraud, require a showing of intent, so to should the definition of defalcation itself.

The court rationalized that its interpretation of defalcation was proper as it does not make the word identical, and therefore superfluous, to its statutory neighbors of embezzlement, larceny and fraud. Moreover, the court found its interpretation consistent with the principle that "exceptions to discharge should be confined to those plainly expressed." *Id*. at 1760. Also, policy considerations support this interpretation as the presence of fault warrants the preservation of debt, favoring a broader exception to those whom the scienter requirement will benefit most — a nonprofessional trustee. As the imposition of this interpretation has yet to raise difficulties in those courts where utilized, and in an effort to create uniform interpretations of federal law, the court vacated the judgment of the 11th Circuit and remanded the case to permit the court to apply the defalcation standard imposing a scienter requirement.

Bankruptcy Court Credit Bidding, Debt Cancellation

In re Spillman Development Group, Ltd., 710 F.3d 299 (5 Cir. 2013).

The debtor, Spillman Development Group, Ltd., owed Fire Eagle, L.L.C., $9.3 million in secured loans that were guaranteed by Spillman's principals (the guarantors) and secured by a certificate of deposit. At a Section 363 auction of Spillman's assets, Fire Eagle successfully credit bid $9.3 million under Section 363(k). Fire Eagle's bid was accepted, and the bankruptcy court held the credit bid paid the loan debt in full. Therefore, Fire Eagle held no deficiency claim against Spillman's estate. The guarantors filed an adversary action in the bankruptcy court seeking a declaratory judgment that the guarantors were released from their obligations, and the certificate of deposit should be released. The bankruptcy court granted summary judgment in favor of the guarantors, and the district court affirmed.

On appeal, the 5th Circuit affirmed the decisions of the lower courts finding that Fire Eagle's credit bid had the effect of retiring the loan debt and that Fire Eagle could not collect against the guarantors. Fire Eagle asserted that the credit bid did not eliminate the right to recover against the guarantors as credit bidding a proof of claim in a bankruptcy auction affects only the claim in bankruptcy and not any underlying debt.

The 5th Circuit reasoned that if Fire Eagle had been outbid at the auction, or declined to credit bid, the cash proceeds from the sale would have been applied against the loan debt. If the loan debt were paid in full with these cash proceeds, it would be absurd to allow Fire Eagle to separately proceed against the guarantors because Fire Eagle would then be recovering in excess of the face value of the loan debt as the guaranties terminated upon full payment of the loan debt. Since Section 363(k) provides that credit bidders "may offset [their] claim against the purchase price of any property that is the subject of the Section 363(b) sale," it explicitly contemplates mixed bids of cash and claims and implicitly presupposes equivalency between cash and the value of the credit bid. The 5th Circuit agreed with the lower courts and found that Fire Eagle's credit bid of $9.3 million constituted a payment-in-full of the loan debt, just as if Spillman's assets had been sold for cash.

The 5th Circuit also declined to hold that an assessment of the fair-market value of the assets Fire Eagle had purchased was called for or would have been proper because while the Bankruptcy Code provides for such valuations in other contexts, its failure to do so in Section 363(b) is fatal to Fire Eagle's case.

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U.S. 5th Circuit Affirms Dismissal of Climate Change Lawsuit

The United States 5th Circuit Court of Appeals, in *Comer v. Murphy Oil*, ____ F.3d ____ (5 Cir. 2013), 2013 WL 1975849, affirmed the dismissal of an action brought by Mississippi Gulf Coast property owners against multiple defendants, including energy, fossil fuel and chemical companies. The plaintiffs alleged that defendants' greenhouse-gas emissions increased global warming, led to development of conditions that formed hurricanes, resulted in higher insurance premiums and caused sea level to rise. The 5th Circuit affirmed the district court's dismissal on the grounds that the plaintiffs' claims were barred by the doctrine of res judicata. The procedural history of the case is significant in understanding this ruling.

The plaintiffs first filed suit in 2005 in the Southern District of Mississippi. *Comer v. Murphy Oil USA, Inc.*, No. 05-436 (S.D. Miss. Aug. 30, 2007); *rev'd*, 585 F.3d 855 (5 Cir. 2009*), vacated on grant of reh'g en banc*, 598 F.3d 208 (5 Cir. 2010), *appeal dismissed*, No. 07-60756, 2010 WL 2136658 (5 Cir. May 28, 2010), *mandamus denied*, No. 10-294 (U.S. Jan. 10, 2011) (*Comer I*.) The district court dismissed the case on the ground that the case was nonjusticiable due to a lack of standing. The 5th Circuit reversed, ruling that the plaintiffs had standing to assert the public and private nuisance, trespass and negligence claims. The 5th Circuit relied on the Supreme Court's decision in *Massachusetts v. EPA*, 127 S.Ct. 1438 (2007), and found that it is accepted law that greenhouse-gas emissions contribute to global warming, which in turn worsens weather conditions such as hurricanes. Thus, the plaintiffs' injuries were "fairly traceable" to the defendants' emissions of greenhouse gases. The 5th Circuit also found that the state law claims did not present nonjusticiable political questions.

The defendants filed a motion for rehearing en banc. The 5th Circuit granted the motion and vacated the panel opinion. Before the en banc court reheard the case, an additional recusal left the court with no quorum. The court dismissed the appeal. The plaintiffs unsuccessfully sought mandamus from the Supreme Court, leaving in place the *Comer I* dismissal.

The plaintiffs then refiled their lawsuit. *Comer v. Murphy Oil USA, Inc.*, 839 F.Supp.2d 849 (S.D. Miss. 2012) (*Comer II*). *Comer II* focused on state law causes of action ostensibly in an attempt to avoid the question of whether federal common law applies in the global warming context. The plaintiffs also added strict liability and conspiracy claims and sought a declaratory judgment that federal law does not preempt state law claims.

In *Comer II*, the district court held that the litigation was barred by the doctrines of res judicata and collateral estoppel and found that the new issues raised by the plaintiffs did not change that result. "Out of an abundance of caution," the district court reviewed the claims and provided supporting reasons that the case failed. The district court relied heavily on *AEP v. Connecticut*, 131 S.Ct. 2527 (2011), regarding standing, political question and preemption. In *AEP*, the Supreme Court ruled that corporations cannot be sued for their greenhouse-gas emissions under the federal common law of nuisance, largely because the Clean Air Act (CAA) delegates the regulation and management of those emissions entirely to the EPA; this delegation supercedes any rights under federal common law.

Reiterating the decision in *Comer I* that the plaintiffs failed to satisfy Article III standing requirements, the district court relied on language in *AEP* that the Supreme Court "had not yet determined whether private citizens . . . could file lawsuits seeking to abate out-of-state pollution" and held that plaintiffs, as private citizens, did not have standing.

The court embraced *AEP*'s political question discussion that if the "plaintiffs [are] dissatisfied with the outcome of the EPA's rulemaking, they should seek review from the Court of Appeals" on direct review of agency action and not judicial intervention in the first instance.

The district court also relied on the federal displacement reasoning found in *AEP* and concluded that the plaintiffs' "entire lawsuit [was] displaced by the Clean Air Act," in the same manner as the CAA displaces federal nuisance claims. The district court provided additional reasons, including the application of the Mississippi statute of limitations, to support its position that *Comer II* was not substantively or procedurally viable.

The 5th Circuit did not address any of the substantive reasoning posited by the district court. Instead, the 5h Circuit upheld the dismissal of *Comer II* strictly on the basis of res judicata. The 5th Circuit expressly rejected appellants' argument for an equitable exception to the application of res judicata on the basis that they did not receive meaningful appellate review in *Comer I*. The court found that such an exception is contrary to "the well-known rule that a federal court may not abrogate principles of res judicata out of equitable concerns." The 5th Circuit held that:

> [i]n sum, the district court correctly held that true res judicata bars Appellants' claims because the district court's judgment in *Comer I* was final and on the merits. Because true res judicata compels good repose and bars Appellants' claims, we do not need to address whether collateral estoppel applies.

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Community Property

Daigle v. Merrill Lynch, 12-1016 (La. App. 3 Cir. 2/6/13), 107 So.3d 901.

Because the parties' partition of community property judgment in the 16th Judicial District Court did not provide for legal interest on each yearly payment Mr. Daigle was to make to Ms. Daigle, the 15th Judicial District Court in her attempt to enforce the judgment could not modify it to award her interest on each payment from the date it was due.

Simmons v. Simmons, 47,416, (La. App. 2 Cir. 10/31/12), 109 So.3d 10, *amended on rehearing*, (1/17/13).

The trial court erred in awarding rent at the partition trial because it was not awarded or reserved when use and occupancy was granted. The trial court's awarding Ms. Simmons 5/12ths of the parties' one-quarter interest in a piece of immovable property was equitable, given the difficulty of partitioning the immovable property they owned and their debts, and also considering the cash, securities and mineral interests that she received.

Custody

McEachern v. Langley, 47,872 (La. App. 2 Cir. 1/16/13), 109 So.3d 938.

Although Mr. Langley did not file responsive pleadings to the petition for change of custody of Ms. McEachern, the maternal grandmother who had visitation, the pleadings were expanded at trial, and the trial court did not err in reducing her visitation with the child and requiring that visitation be supervised.

Child Support

Goutreaux v. Goutreaux, 47,769 (La. App. 2 Cir. 1/16/13), 109 So.3d 935.

The child support judgment from one parish could be made executory in another parish where the payee had moved, even though the payor remained in the original parish.

Hagen v. Hagen, 11-1130 (La. App. 1 Cir. 8/15/12), 110 So.3d 172.

La. R.S. 9:315.13(B)(1)'s directive that when the parties' combined income is above the highest guideline income figure, the child support award is "in no event" to be lower than the highest child support amount on the schedule is only the beginning step of the calculation. The various adjustments are then added or deducted to this base amount. La. R.S. 9:315.8(E)(1)'s allowance for a deviation based on the time the payor has the children can then be applied if applicable.

Rhymes v. Rhymes, 12-1184 (La. App. 3 Cir. 3/13/13), 110 So.3d 286.

The mother's decision to continue home schooling the two children was not a factor to be considered to determine the amount of final spousal support due to her because her voluntary unemployment was

not to be attributed to the father to increase the amount of final spousal support. The court stated: "Moreover, periodic support is based on the basic needs of the recipient party in order [to] sustain life and assist the spouse in returning to the workforce, not the desire to maintain the former lifestyle the party was accustomed to during the marriage." The dissent argued that the parties' history and the effect of custody on her earning capacity allowed for the home schooling to be considered.

Sharp v. Moore, 47,888 (La. App. 2 Cir. 2/27/13), 110 So.3d 1232.

The parties agreed (1) to change the domiciliary parent from the mother to the father, and (2) that the father would waive his demand for child support from the mother. His request for child support one year later was not restricted by this waiver because it did not fix her income at zero, it did not fix an award of support at all, and he did not have to state a change of circumstances, as his request was for an initial setting.

Paternity

State v. A.Z., 12-560 (La. App. 5 Cir. 2/21/13), 110 So.3d 1150.

On the state's rule for contempt for non-payment of child support, the trial court found A.Z. not to be the child's father, revoked his in-hospital acknowledgment on the child's birth certificate, voided the previous child-support judgment and ordered monies paid as child support to be returned to A.Z. The court of appeal reversed, finding that his acknowledgment was a legal finding of paternity and the obligation accruing under the judgment could not be voided without proper pleadings being filed to revoke the acknowledgment.

Final Spousal Support

Hindelang v. Hindelang, 12-1031 (La. App. 3 Cir. 4/17/13), 110 So.3d 1289.

Following the end of the one-year period for which Ms. Hindelang was awarded final spousal support, she filed another rule seeking final support based on a change of circumstances in her medical condition that supported a continuing need for additional support. The trial court granted Mr. Hindelang's exception of *res judicata*, and Ms. Hindelang appealed. The court of appeal reversed, finding that as there had been no extinguishment of his obligation to pay support, she was entitled to attempt to show a material change of circumstances to allow for support. The dissent argued that her medical condition had already been litigated in the first support ruling, and there were no new issues.

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Design Professionals

Handling projects in the remotest parts of Louisiana has its own built-in difficulties. In *Greater Lafourche Port Commission v. James Construction Group, L.L.C.*, 104 So.3d 84, 11-1548 (La. App. 1 Cir. 9/21/12), a general contractor involved in construction of a steel sheet piling bulkhead and mooring bits at Port Fourchon — the southernmost port in the state of Louisiana, located at the tip of Lafourche Parish — experienced a series of delays and ultimately was assessed by the owner with significant liquidated damages ($266,000). At the end of the project, the owner convoked a concursus proceeding, depositing in the registry of the court the balance of the contract funds that the owner believed was the maximum possibly due the general contractor. For its part, the general contractor filed claims against the owner for additional amounts and also sought similar relief against the project engineer, which had been hired by the owner. The contractor settled with the owner and proceeded thereafter against the engineer.

The contractor — seeking repayment of the liquidated damages it was assessed as well as other losses — alleged that during the course of the project the engineer misrepresented to the contractor certain facts concerning the construction project, including information regarding time for completion and the owner's intent to refrain from assessing liquidated damages under the circumstances of the job (including the engineer making representations that a certain liquidated damage clause had been completely eliminated from the contract). The contractor also contended that the engineer had otherwise caused delays, disruptions and interference on the job, increasing the cost of the work to the contractor.

At the trial court, the engineer successfully prosecuted a motion for summary judgment against the contractor on the basis that the contractor — lacking privity of contract with the engineer — had no cause of action against the engineer. The engineer had also asserted that the settlement between the general contractor and the owner effectively released any claims against the engineer, as the engineer was the owner's "disclosed agent." The judgment of the trial court did not get deeply into the matter of the negligence alleged against the engineer, but, in granting summary judgment, simply ruled (apparently on a "no evidence" standard) that the general contractor could not meet its burden of proof at trial. The contractor appealed.

The court of appeal took a deeper look into the aspect of the contractor's claims against the designer sounding in negligence. Citing the scant Louisiana jurisprudence on the topic wherein design professionals lacking privity with the contractor had nonetheless been held liable to a contractor, the court of appeal reversed the trial court on the dismissal of the negligence claims. The court noted that the engineer admitted in deposition testimony various matters that suggested that the engineer — by failure to investigate or other shortcomings in the plans and specifications — had indeed cost the general contractor significant sums on the project. For example, the contractor had to re-coat at its own expense certain pilings and other components that were admittedly blasted and coated by the contractor in the first instance exactly in conformance with the engineer's plans and specifications. As factual issues also remained regarding the alleged negligent misrepresentation concerning liquidated damages, the appellate court restored the contractor's negligence claims.

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Exclusionary Clauses: Determination of Subjective Facts

Estes v. St. Tammany Parish Sch. Bd., 12-1750 (La. App. 1 Cir. 6/7/13), ____ So.3d ____, 2013 WL 2476545.

Estes and Boyne are substitute teachers who were hotly contesting each other for a long-term teaching position at Fontainebleau High School in Mandeville, La., having previously exchanged heated words as to their respective qualifications. Following a school volleyball game attended by both men, Estes was conversing with a group when Boyne approached him. As Boyne approached, Estes removed his watch and glasses, handed them to a friend, and turned to confront Boyne, who punched him in the face, the only blow thrown during the altercation.

Estes sued, adding Boyne's homeowner's insurer, Encompass Insurance Company of America, claiming injuries to his jaw, neck and shoulder when Boyne attacked him without just cause. Boyne claimed that after Estes removed his glasses, he felt threatened because Estes had assumed a fighting posture and simply reacted by attempting to defend himself by throwing the first punch. Encompass answered, denying coverage and seeking summary judgment based on its policy's exclusionary clause for intentional acts, which states, in pertinent part:

Losses We Do Not Cover

1.h. Intended by, or which may be reasonably expected to result from the intentional acts or omissions of one or more covered persons . . . . However, this exclusion does not apply to bodily injury resulting from the use of reasonable force by one or more covered persons to protect persons or property.

Estes and Boyne both opposed Encompass's motion for summary judgment. Boyne filed an affidavit attesting that he felt threatened by Estes and that he acted spontaneously and instinctively in self-defense, with no intent to injure Estes. The court took the matter under advisement before granting judgment dismissing Encompass from the suit. Estes and Boyne appealed separately, each arguing that the trial court erred in granting summary judgment, because genuine issues of material fact remain as to whether Boyne's actions were intentional or spontaneous and instinctive and whether Boyne acted in self-defense.

The 1st Circuit noted that the general rule is "[s]ummary judgment is rarely appropriate for disposition of a case requiring judicial determination of subjective facts such as intent, motive, malice, good faith, or knowledge." The court found summary judgment was inappropriate, stating:

> Encompass's intentional act exclusion clearly does not apply to injuries "resulting from the use of reasonable force . . . to persons[.]" Thus, the question of whether Boyne used reasonable force for his protection is obviously determinative of the outcome of this litigation.

The court concluded that the case was not ripe for summary judgment, stating:

> We are unable to find that Encompass's policy unambiguously excludes coverage for this incident as a matter of law, because the subjective intent of Mr. Boyne is a critical factual issue — a genuine issue of material fact — that is still to be determined.

Judge McClendon dissented. Her entire dissent read: "It is clear that Mr. Boyne was the aggressor and could have walked away from the confrontation at any time prior to throwing the punch. Therefore, I find that the intentional act exclusion in the policy applies."

Admiralty: Burden of Proof in Allision

Mike Hooks Dredging Co. v. Marquette Transp. Gulf-Inland, L.L.C., 716 F.3d 886 (5 Cir. 2013).

The dredge, *Mike Hooks*, was moored for repairs in a narrow (400-800 feet) channel of the Gulf Intracoastal Waterway in violation of Inland Navigation Rule (INR) 9 when it was struck by a passing vessel, the *Pat McDaniel*, with barges in tow. The INRs established "rules of the road" for proper navigation based on long-standing principles, were intended to prevent collisions in inland waterways and "apply to all vessels upon the inland waterways of the United States." 33 C.F.R. § 83.01(a) (INR 1). INR 9 states, "Every vessel shall, if the circumstances of the case admit, avoid anchoring in a narrow channel." The INRs do not define "narrow channel," but the 5th Circuit has held that the term generally includes bodies of water that are less than 1,000 feet in width.

The district court found that there were not exigent circumstances that precluded movement of the *Mike Hooks* to a more suitable repair site; thus, it was in violation of INR 9 at the time of the allision. This finding triggered application of the rule of *The Pennsylvania*, established by the U.S. Supreme Court in a seminal admiralty case, creating a burden-shifting presumption for causation when a vessel, "at the time of a collision is in actual violation of a statutory rule intended to prevent collisions." *The Pennsylvania*, 86 U.S. 125 (1873). Hooks did not successfully rebut the presumption, and the district court thus found it 70 percent liable. The 5th Circuit affirmed.

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U.S. Court of Appeals for the District of Columbia Circuit

Center for International Environmental Law v. Office of the United States Trade Representative, No. 12-5136, 2013 U.S. App. LEXIS 11477 (D.C. Cir. June 7, 2013).

The Court of Appeals for the District of Columbia (D.C.) Circuit recently resolved an action brought by the Center of International Environmental Law (CIEL) under the Freedom of Information Act (FOIA). CIEL sought documents from the Office of the United States Trade Representative (USTR) memorializing negotiations from the now-dormant Free Trade Agreement of the Americas (FTAA). CIEL specifically sought the release of documents concerning sessions of the Negotiating Group on Investment for the FTAA. As is common in free-trade-agreement negotiations, FTAA parties maintained an understanding that all documents produced or received during negotiations were confidential and not subject to public release absent agreement of all parties. Several of the negotiating documents at issue were derestricted by the FTAA parties, but the dispute involved one document (the so-called "white paper") that USTR refused to produce on the grounds

that it is a classified national security document protected from disclosure under FOIA exemption 1. Exemption 1 protects from disclosure information that is properly classified in the interest of national defense or foreign policy. *See* 5 U.S.C. § 552(b)(1).

The white paper document contained USTR's commentary and interpretation of the phrase "in like circumstances," which is a key element of two fundamental non-discrimination principles in all free-trade agreements: Most Favored Nation status and National Treatment. The USTR submitted that disclosure of its interpretation of that phrase would "limit the United States' flexibility to 'assert a broader or narrower view of the meaning and applicability of the phrase in interpreting existing agreements and in negotiating future agreements.'" *CIEL*, 11477 at *7.

The district court concluded the risk of adverse interpretation or harm to negotiating positions was insufficiently substantiated by the USTR. *CIEL,* 11477 at *10. The D.C. Circuit reversed, adopting a broad and deferential view of the USTR's position.

> The government has determined that it would "damage [the] ability of the United States to conclude future trade agreements on favorable terms." That determination has the force of history behind it. It echoes what George Washington wrote more than two centuries ago. Courts are "in an extremely poor position to second-guess" the Trade Representative's predictive judgment in these matters, . . . but that is just what the district court did in rejecting the agency's justification for withholding the white paper.

CIEL, 11477 at *13-14.

Office of the U.S. Trade Representative

2013 Special 301 Report (May 2013).

The USTR issued its annual review of the state of worldwide intellectual property rights (IPR) protection and enforcement. The review examined IPR protection and enforcement in 95 countries, with 41 countries being placed on various levels of "watch" for problems with IPR protection and enforcement. Only one country was placed on the Priority Foreign Country (PFC) watch list: Ukraine. This is the first time in seven years that a country was named a PFC. Citing severe deterioration of enforcement in the areas of government use of pirated software and piracy over the Internet, as well as denial of fair market access through copyright collecting societies, the USTR named Ukraine a PFC and will consider initiating further investigations and consultations with Ukraine. This is not Ukraine's first stop on the PFC list. Ukraine was listed in 2001 and lost its preferential market access to the United States under the General System of Preferences (GSP) for failure to correct the alleged deficiencies. Ukraine subsequently regained GSP eligibility in 2005 after addressing the IPR issues.

The second-tier Priority Watch List countries include, *inter alia*, Argentina, Chile, China, India, Russia, Thailand and Venezuela. The USTR cited "grave" concerns over China's misappropriation of

trade secrets, as well as the growing theft of private business data primarily by military and government-owned enterprises. Thirty countries were included on the third-tier Watch List, with Brazil, Italy, Mexico and Turkey retaining their status and Canada being added to the Watch List. The USTR cited the continuing flow of pirated and counterfeit goods from Canada into the United States as grounds for its inclusion.

United Nations

United Nations Conference on Trade & Development (UNCTAD), Recent Developments in Investor-State Dispute Settlement (May 2013).

The UNCTAD released a report on April 10, 2013, chronicling the number and nature of formal investor-state dispute settlement proceedings in 2012. Fifty-eight new cases were instituted in 2012, by far the largest number of treaty-based dispute settlement cases filed in a single year. Developing or transition economies were respondents in 68 percent of the new cases. Thirty-nine of the 58 cases were lodged with the International Center for Settlement of Investment Disputes (ICSID), seven under the United Nations Commission on International Trade Law (UNCITRAL) arbitration rules and five under the Stockholm Chamber of Commerce.

Venezuela responded to the largest number of cases — nine — while Pakistan faced four new claims. The investors have challenged a broad array of government measures, including license revocations, irregularities in public tenders, withdrawal of prior subsidies and direct expropriations. The year 2012 also saw the largest award in ICSID history. As previously reported in this column, an ICSID tribunal awarded $1.77 billion to Occidental Petroleum against Ecuador for expropriation of assets in 2006.

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5th Circuit: Lactation is Pregnancy-Related Medical Condition Protected by Title VII

EEOC v. Houston Funding II, Ltd., 717 F.3d 425 (5 Cir. 2013).

The 5th Circuit Court of Appeals recently held that discharging a female employee because she is lactating or expressing breast milk violates the Pregnancy Discrimination Act (PDA) provisions of Title VII. By reaching this determination, the 5th Circuit becomes the first federal appellate court to explicitly hold that discrimination on the basis of lactation or breastfeeding gives rise to an actionable claim of sex discrimination under Title VII.

Background

Donnicia Venters worked for Houston Funding as an account representative from March 2006 until her employment was terminated in February 2009. In December 2008, Venters requested and received a leave of absence to have her baby. While on leave, Venters stayed in constant contact with her supervisor. In one conversation, Venters advised that she was breastfeeding and asked if she would be permitted to use a breast pump at work after she returned. According to Venters's supervisor, he raised the issue with Houston Funding's limited partner, Harry Cagle, and Cagle responded with a "strong NO."

Shortly thereafter, Venters called Cagle to tell him that her physician had released her to return to work. Venters again mentioned that she was lactating and asked Cagle whether she could use a back room to pump breast milk once she returned. According to Venters, after a "long pause," Cagle told her that her position had been filled.

Venters subsequently filed a charge of gender discrimination with the EEOC. After investigating Venters's allegations and finding them to have merit, the EEOC commenced a Title VII action against Houston Funding on behalf of Venter. The EEOC's complaint alleged that Houston Funding had discriminated against Venter based on her sex, including her pregnancy, childbirth or related medical conditions, when it terminated her employment.

District Court's Decision

After discovery, Houston Funding moved for summary judgment on the ground that discharging a female employee for lactating did not amount to gender discrimination prohibited by Title VII, and the district court agreed. In granting Houston Funding's summary judgment motion, the district court held that Venters's allegations did not give rise to a viable Title VII claim because "[f]iring someone because of lactation or breast-pumping is not sex discrimination." The district court further held that lactation is not a related medical condition of pregnancy because any pregnancy-related conditions ceased after Venter gave birth.

5th Circuit's Decision

The 5th Circuit reversed the district

court's summary judgment order and expressly held that lactation is a medical condition related to pregnancy because it "is the physiological process of secreting milk from mammary glands and is directly caused by hormonal changes associated with pregnancy and childbirth." In further support of its holding, the 5th Circuit relied on *Harper v. Thiokol Chemical Corp.*, 619 F.2d 489 (5 Cir. 1980), which suggested that menstruation was a condition related to pregnancy and childbirth for purposes of the PDA. According to the 5th Circuit:

> Menstruation is a normal aspect of female physiology, which is interrupted during pregnancy, but resumes shortly after the pregnancy concludes. Similarly, lactation is a normal aspect of female physiology that is initiated by pregnancy and concludes sometime thereafter. . . . And as both menstruation and lactation are aspects of female physiology that are affected by pregnancy, each seems readily to fit into a reasonable definition of "pregnancy, childbirth, or related medical conditions."

Notwithstanding its determination that lactating and breastfeeding are pregnancy-related medical conditions protected by the PDA, the 5th Circuit limited the reach of its holding by specifically noting that the PDA does not require employers to provide accommodations for women affected by pregnancy or related conditions: "Nothing in this opinion should be interpreted as precluding an employer's defense that it fired an employee because that employee demanded accommodations." In a concurring opinion, Judge Edith Jones further underscored this point by emphasizing that "the PDA does not mandate special accommodations to women because of pregnancy or related conditions," such as special facilities or work breaks.

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Mineral Servitude; Ambiguity in Deed

Franklin v. Camterra Resources Partners, Inc., (La. App. 2 Cir. 5/22/13), ____ So.3d ____, 2013 WL 2217324.

In 2000, Franklin owned separate property in DeSoto Parish. As part of his divorce, Franklin transferred the property to a family-named educational trust, reserving his mineral rights. In 2001, the Arbuckles offered to purchase the property and ultimately obtained it. Franklin's mineral servitude was not discussed.

In 2008, Haynesville Shale was an attractive play. The Arbuckles granted a mineral lease to Camterra Resource Partners, who later assigned it to Petrohawk. A few months later, Franklin transferred his "reserved" mineral rights to his current wife. She later sought a declaratory judgment as to who owned the mineral rights. Franklin intervened. Defendants filed motions for summary judgment that the Arbuckle deed conveyed both the mineral and surface rights to the Arbuckles. The trial court agreed.

On appeal, the Louisiana 2nd Circuit Court of Appeal affirmed the trial court's ruling and found that the deed was not ambiguous. In the first part of the deed, Franklin and his ex-wife appeared together as trustees and transferred what the trust owned subject to any mineral reservation. In the second part, however, Franklin appeared alone and quitclaimed "all interest" in the property. The court further found that because Franklin had experience transferring mineral interests and he had his attorney review the transfer at issue, error could not absolve them from overlooking the "all interest" language.

Oilfield Contamination; Battle of the Experts

Andrepont v. Chevron USA, Inc., 12-1100 (La. App. 3 Cir. 4/3/13), 113 So.3d 421.

Several plaintiffs filed an oilfield contamination (legacy) lawsuit against a number of oil companies claiming that defendants' ongoing operations polluted their property. One defendant, Radke Oil & Gas, an independent oil and gas company, filed a motion for summary judgment on the basis that the wells it operated were not near the property and that it did not use earthen pits for storage. Radke attached plaintiffs' discovery responses and an affidavit from Lee Day, a senior geologist with TEA, Inc., to its motion.

Day determined that Radke never operated any of the wells set forth in plaintiffs' petitions and that Radke could not have caused any contamination because Radke did not use open pits and, given the natural drainage of the property, contamination could not have flowed from Radke's wells onto plaintiffs' property. In opposition, plaintiffs filed an affidavit from Greg Miller with ICON. Miller noted that defendants (including Radke) used open earthen pits to store oilfield waste and that flowlines used to transport oil across plaintiffs' property "appeared" to have originated from Radke wells. A supplemental affidavit from Day showed that the use of open pits along the Gulf Coast was discontinued in the 1920s, and that, by the 1940s, steel storage tanks were used to store oil.

The trial court ruled in favor of Radke. Plaintiffs appealed. The Louisiana 3rd Circuit Court of Appeal affirmed the trial court's ruling and found that plaintiffs could not prove that Radke was liable for any contamination, based on Miller's assertion that the flowlines "appeared" to originate from Radke's wells.

"Calculate-and-Pay" Clause and the Deep Water Royalty Relief Act

Total E&P USA, Inc. v. Kerr-McGee Oil & Gas, 711 F.3d 478 (5 Cir. 2013); *vacated & superseded by Total E&P USA, Inc. v. Kerr-McGee Oil & Gas Corp.*, ____ F.3d ____ (5 Cir. 2013), 2013 WL 3104943.

In 1995, the United States adopted the Deep Water Royalty Relief Act (DWRRA) to encourage drilling in deep waters on the outer continental shelf. DWRRA authorized the Department of Interior to suspend collection of certain royalties for deep water production under federal offshore leases

between 1996 and 2000. The suspension would apply until a certain threshold amount of production was obtained.

In 1998, the federal government issued an offshore lease to Mariner Energy and Westport Oil and Gas. Westport assigned overriding royalty interests (ORRIs) to several persons. The assignments contained a "calculate-and-pay" clause that stated: "The overriding royalty interest assigned herein shall be calculated and paid in the same manner and subject to the same terms and conditions as the landowner's royalty under the Lease." Westport and Mariner later assigned their interests to Chevron, Total E&P and Statoil.

In 2009, the new owners established production. Because their well qualified for a royalty suspension, the owners did not pay royalties to the federal government, but Chevron began making payments to the ORRI owners and continued to do so. In contrast, Total and Statoil took the position that, for purposes of the calculate-and-pay clause, the royalty suspension was a "term and condition" of their obligation to make royalty payments to the "landowner." Accordingly, their obligation to make ORRI payments was also suspended. The ORRI owners disagreed and litigation ensued.

The district court granted summary judgment for Statoil and Total, but the 5th Circuit reversed, concluding that the calculate-and-pay clause was ambiguous. The 5th Circuit stated that the clause could be interpreted as incorporating the federal regulations that define how royalties are calculated, without interpreting the clause as also incorporating the DWRRA suspension of royalty payment obligations. Because of the ambiguity, the 5th Circuit remanded for further proceedings.

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PCF Notice Requirements

Howard v. Mamou Health Resources, 12-0820 (La. App. 3 Cir. 3/6/13), ____ So.3d ____, *writ denied*, 13-0614 (La. 4/19/13), 112 So.3d 227.

Howard filed a lawsuit in district court alleging defendants' negligence but mentioning nothing concerning medical malpractice. She later amended her petition to add new parties and again made no mention of a medical malpractice claim.

More than one year after the date of filing the original lawsuit, Howard settled her claims with the defendants and filed a "Petition for Approval of Settlement of Medical Malpractice," which the district court granted. The PCF appeared and claimed it had no prior knowledge of the filing of the petition to settle because it was not served until after the district court had signed the order approving the settlement.

The plaintiff then filed a supplemental petition naming the PCF as a defendant, in response to which the PCF filed exceptions of prescription and no cause of action, claiming that the action was prescribed because the plaintiff did not file a claim with the PCF within one year from the date of the alleged malpractice (La. R.S. 40:1299.47) and that the cause of action was lost when the plaintiff did not serve it with a copy of the petition to approve the settlement 10 days prior to its filing as required by La. R.S. 40:1299.44(C). The trial court granted the PCF's exceptions, and the plaintiff appealed.

The plaintiff asserted that the exception of prescription was granted in error because

of the trial court's misplaced reliance on *LeBreton v. Rabito*, 97-2221, (La. 7/8/98), 714 So.2d 1226, and its progeny. Plaintiff argued that *LeBreton* was not applicable to her case because it did not "initially" involve a claim for medical malpractice and she "agreed to convert her damages to a medical malpractice claim by way of arbitration reserving her rights against the [PCF]." The PCF countered, and the court agreed, that no mechanism within the MMA allows a plaintiff to make such a conversion. The only mechanism within the MMA for pursing a medical malpractice claim is set forth in La. R.S. 40:1299.47(B)(1)(a)(i), which requires the timely filing of the claim with the Division of Administration, which plaintiff failed to do.

The court wrote in a footnote that while affirmance of the ruling that the case was prescribed rendered moot the exception of no cause of action, it "elect[ed] to discuss" the issue because the trial court had ruled on it, and it "wish[ed] to explain why Plaintiff is unable to breathe life into a 'dead' claim by relying on a second faulty interpretation of the Medical Malpractice Act and its mandatory requirements."

The court cited La. R.S. 40:1299.44(C), which establishes the rules that must be followed if the insurer of a health-care provider (or a self-insured health-care provider) has agreed to settle its liability and the claimant seeks excess damages from the PCF, *i.e.*, a petition for approval of settlement must be served on the PCF, the settling health-care provider and/or his insurer at least 10 days before it is filed. Citing *Horil v. Scheinhorn*, 95-0967 (La. 11/27/95), 663 So.2d 697, the court found the failure strictly to comply with that provision warranted a dismissal of the claim against the PCF. The plaintiff's failure to serve the PCF with a copy of the petition at least 10 days before filing warranted the trial court's granting the PCF's exception of no cause of action.

Waiver of Panel

Alexander v. Acadian Ambulance Servs., Inc., 12-1236 (La. 3 Cir. 5/22/13), ____ So.3d ____.

The plaintiff was injured in the process of being unloaded from defendant's ambulance. He filed a lawsuit but did not request a medical-review panel. The defendant answered the lawsuit.

More than three years after the time of the incident, Acadian filed an exception of prescription, claiming that the suit was prescribed because the claimed acts of negligence were medical malpractice and that the lawsuit had been filed without first being submitted to a medical-review panel.

The trial court overruled the exception. Acadian appealed, alleging that the claims fell under the ambit of the MMA, the claims were not first presented to a medical-review panel and more than three years had elapsed since the incident occurred.

The plaintiff agreed the tort sounded in medical malpractice and Acadian was a qualified provider but argued that Acadian waived its right to a medical-review panel by answering the lawsuit before filing an exception of prematurity, citing La. R.S. 40:1299.47(B)(1)(c) (a panel may be waived if all parties agree) and *Barraza v.*

Scheppegrell, 525 So.2d 1187 (La. App. 5 Cir. 1988) (failing to file an exception of prematurity before answering a malpractice lawsuit waives the right to a panel).

Acadian argued that its prescription claim was different from a prematurity claim, citing as authority *LeBreton v. Rabito*, 97-2221 (La. 7/8/98), 714 So.2d 1226, and its offspring. The court of appeal noted the *LeBreton*-type cases involved health-care providers who filed exceptions of prescription and/or prematurity before answering the lawsuit. The court referenced Louisiana Code of Civil Procedure articles 926 (prematurity exceptions are dilatory) and 928 (dilatory exceptions "shall be pleaded prior to or in the answer").

The appellate court then examined *Barrie v. V.P. Exterminators, Inc*., 625 So.2d 1007 (La. 1993), and noted that the Louisiana Supreme Court had addressed the issue in a different context. *Barrie* involved the failure of a plaintiff to comply with a contractual provision for filing a claim, and the court ruled that the prematurity exception filed after the lawsuit had been answered was waived, and "[o]nce waived, the prematurity argument could not be resurrected by camouflaging it as a substantive issue." *Id.* The court commented that "camouflaging" an exception of prematurity as an exception of prescription was "exactly" what Acadian was attempting to do.

Another of Acadian's arguments relied on *Farve v. Jarrott*, 04-1424 (La. App. 4 Cir. 10/13/04), 886 So. 2d 594, *writ denied*, 05-0007 (La. 3/11/05), 896 So.2d 74. The court remained unconvinced, observing that the *Farve* court had not analyzed the differences between its facts and those in *LeBreton* and had not considered the Supreme Court's discussion of prematurity in *Spradlin v. Acadia-St. Landry Medical Foundation*, 98-1977 p.4 (La. 2/29/00), 758 So.2d 116, 119, which contrasted exceptions of prematurity, which seek only to delay medical malpractice suits, against exceptions of prescription, which seek to defeat them.

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Tobacco Tax: Invoice Price and Its Constitutionality

McLane Southern, Inc. v. Bridges, 10-1259 (La. App. 1 Cir. 3/21/13), 110 So.3d 1262.

The 1st Circuit Court of Appeal affirmed a trial court's decision upholding the Louisiana Department of Revenue's interpretation of "invoice price" upon which the excise tax on tobacco products is based and found that such interpretation did not discriminate against interstate commerce to violate the Commerce Clause.

The first issue for review was the proper interpretation of "invoice price" as the benchmark that sets the tax base for the tobacco tax on smokeless tobacco products. La. R.S. 47:841(E) provides that the amount of tax levied on smokeless tobacco is "twenty percent of the invoice price as defined in this Chapter." Pursuant to La. R.S. 47:842(12), invoice price is defined, in part, as "the manufacturer's net invoiced price as invoiced to the Louisiana tobacco dealer, by the manufacturer, jobber, or other persons engaged in selling tobacco products."

McLane purchased its smokeless tobacco products from a supplier, U.S. Smokeless Tobacco Brands, Inc. (UST-Sales), which is an affiliate of U.S. Smokeless Tobacco Manufacturing Company (UST-Manufacturing). UST-Manufacturing sells to UST-Sales the smokeless tobacco products that UST-Sales then sells to McLane. All of these sales occur outside of Louisiana. McLane sells the products to its customers in Louisiana.

McLane argued that the smokeless tobacco tax applies to the manufacturer's net invoiced price, which in its distribution chain is the price at which UST-Sales purchased the smokeless tobacco from UST-Manufacturing. McLane asserted that UST-Sales is not a manufacturer and, thus, the price at which it sells the products to McLane cannot be the manufacturer's net invoiced price. McLane also argued that any ambiguity in La. R.S. 47:842(12) must be construed in its favor.

The Department of Revenue (Revenue) asserted, and the trial court agreed, that the "invoice price" as defined in La. R.S. 47:842(12) is the price McLane paid to UST-Sales, not the price UST-Manufacturing charged UST-Sales. Revenue argued that the Legislature clearly intended that the price that sets the base can be a sale from either (1) a manufacturer, (2) a jobber or (3) other persons engaged in selling tobacco products. Importantly, before UST-Sales sold the product in question to McLane, it purchased the product from UST-Manufacturing. UST-Sales then resold the product to McLane at a higher price. This, Revenue argued, brought UST-Sales clearly within the classification of a "jobber, or other [person] engaged in selling tobacco products" as is contemplated in La. R.S. 47:842(12).

The 1st Circuit held that the base for the tax on smokeless tobacco products is the price McLane paid to UST-Sales, not the price UST-Sales paid to UST-Manufacturing. The court found that the language in La. R.S. 47:842(12) is clear and unambiguous that the price as invoiced to the Louisiana tobacco dealer by the manufacturer, jobber or other persons engaged in selling tobacco products sets the tax base.

The second issue for review was McLane's argument that under the trial court's interpretation of La. R.S. 47:842(12), the "'shifting tax base' rewards the location of economic activity in Louisiana and penalizes the location of the activity in other states," thus discriminating "against interstate commerce in violation of the Commerce Clause." The 1st Circuit looked to *McLane Western, Inc. v. Department of Revenue*, 126 P.3d 211 (Colo. App. 2005), *writ denied*, 2006 WL 349738 (Colo. 2006), *cert. denied*, 127 S.Ct. 42 (2006), where the Colorado Court of Appeals found that the tobacco tax statutes, as they applied to the transactions between McLane Western and UST-Sales, were constitutional under the Commerce Clause as "[a]ll taxable distributors of [other tobacco products] are taxed at the same rate and on a tax base determined in the same fashion." In addition, the 1st Circuit looked to *McLane Minnesota, Inc.*

v. Commissioner of Revenue, 773 N.W.2d 289 (Minn. 2009), where the court held "[a]ll tobacco products are taxed at the same rate and all are taxed at the time of the first wholesale transaction in Minnesota, regardless of the origin of the products" and "McLane's increased tax obligation is not the result of a tax that discriminates against out-of-state products or favors in-state products, but rather the result of [UST-Sales'] business decisions to sell its tobacco products at a higher price than [UST Manufacturing] sold them."

The 1st Circuit held that Louisiana's excise tax on tobacco products is assessed against the first dealer who causes tobacco products to be in Louisiana for sale or distribution, and the tax is assessed at the same rate. This is true regardless of where the products originate, *i.e.*, whether the person manufacturers the products for sale in the state, brings the products into the state or causes the products to be brought into the state. The 1st Circuit also held that:

> [m]uch like the scenario in *McLane Minnesota, Inc.*, McLane's increased tax obligation is "not the result of a tax that discriminates against out-of-state products or favors in-state products," but rather due to the change in pricing by McLane's supplier, UST-Sales. *McLane Minnesota, Inc.*, 773 N.W.2d at 300.

"It is [UST-Sales'] business model, and not the statutory structure, that causes McLane's higher tax obligation. The Commerce Clause does not protect particular structure[s] or methods of operation in a retail market." *McLane Southern*, 110 So.3d 1269.

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Succession Rights: The Change in Law of Forced Heirship Considered

In re Succ. of Dean, 12-0832 (La. App. 4 Cir. 4/3/13), ____ So.3d ____.

Decedent's will, executed in 1983, left his "beloved children" the "forced portion" of his estate. However, due to the change in the law of forced heirship, the children, who were all of age of majority, were not forced heirs at the time of their father's death. Thus, the issue before the court was the interpretation of Mr. Dean's will, specifically whether the decedent's three children were entitled to 50 percent of the estate, *i.e.*, the forced portion, even though they were no longer "forced heirs" under the law at the time of their father's death. Reversing the trial court's ruling that the children were entitled to nothing, the Louisiana 4th Circuit Court of Appeal held that the children were entitled to their 50 percent of the estate because they were forced heirs when the will was made. The decision came from a five-judge court, with Judge Belsome dissenting and Judge Bonin dissenting in part.

The trial court ruled that Mr. Dean's children were entitled to nothing because succession rights are governed by the law in effect on the date of decedent's death. The court noted that by using language such as "forced portion" and "disposable portion" rather than a numerical value, the decedent employed language that had a specific legal meaning and that such language should be interpreted according to the law in effect at the time of his death. The court further reasoned that because the testator used the language "forced portion," there was no intent to leave his children anything more than required by the law. As a result, the trial court found that the children were entitled to nothing because they were no longer forced heirs at the time of their father's death. The children appealed.

The 4th Circuit reversed the trial court's interpretation of the decedent's intent. The court concluded that La. Civ.C. art. 1611(B) expressly authorized it to consider the law in effect at the time decedent made his will in order to ascertain his intent toward his children. Noting that the cardinal principle of the interpretation of acts of a last will is to ascertain and honor the intent of the testator and ascribe meaning to the disposition so that it can have effect, the court found that there was no evidence or other indication that Mr. Dean intended to leave nothing to his children if the law had not required him to leave them their forced portion. Accordingly, the court reversed the lower court's ruling and held that the children were entitled to what would have been their forced portion at the time the decedent made the will.

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