Administrative Law

Read the Cases Upon Which You Rely

The Innocence Project New Orleans submitted a public records request to the New Orleans Police Department through its records custodian, Superintendent Ronal W. Serpas. The request sought records relative to the 1991 conviction of Mr. Brown, which was a final judgment as of 1993. Serpas, through counsel, notified the requestor 65 days later that the records would not be produced because they were statutorily exempt. Suit was filed and the trial judge ordered that (1) the records be produced, (2) the defendant pay attorneys' fees and costs, and (3) the custodian pay penalties of $5,000 ($100 per day) as provided by law. The custodian appealed.

In *Innocence Project New Orleans v. New Orleans Police Dept.*, 13-0921 (La. App. 4 Cir. 11/6/13), the appeals court held that the trial court judgment be affirmed in all respects.

The court noted that the custodian's argument that he was in "good faith" was not supported by the jurisprudence he cited. In fact, he relied on a case which supported the opposite contention. The court went on to reject the custodian's argument that police reports are exempt from disclosure, again noting that the custodian relied on jurisprudence which did not support that contention; *i.e.*, such records are subject to disclosure if the conviction of the person named in them is final. Finally, the court noted that the custodian is *personally* liable for payment of the civil penalty (in this case pegged at $5,000), which amount was affirmed.

The court went on to deny the Innocence Project's claim for damages for frivolous appeal because it did not answer the appeal as required by La. C.C.P. art. 2133.

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Alternative Dispute Resolution

Mediation is Making a Difference in Detroit

Municipal bankruptcy proceedings can be contentious, lasting several years and involving intense courtroom battles. However, the use of mediation in Detroit's municipal bankruptcy has put the city on a faster road to recovery. Confidential mediation sessions convened by Chief U.S. District Judge Gerald Rosen have produced positive results. Judge Rosen was appointed by U.S. Bankruptcy Judge Steven Rhodes to lead mediations between Detroit and its creditors. Breakthroughs in Detroit's bankruptcy process include an agreement to set aside $800 million of private and state money to rescue the city's pension fund. Mediation agreements also have helped to significantly reduce the city's debt and long-term liabilities and assisted in restructuring the city's government. Legal experts credit much of the progress in Detroit's bankruptcy proceedings to the use of quick rulings and aggressive mediation. Some legal experts project, based on the timetable set by Judge Rhodes, that Detroit could resolve its bankruptcy approximately one year after it filed for protection from creditors, which would be a significant accomplishment. In comparison, it took Orange County, California, one year and six months to emerge from its 1996 declaration, which at the time was the largest municipal bankruptcy in U.S. history.

Municipal bankruptcies rarely involve mediation. However, the estimated $18 billion to $20 billion of debt at issue in Detroit's bankruptcy called for a unique solution. Detroit's bankruptcy is now the highest valued municipal bankruptcy in U.S. history. Detroit's problems were not created by a single debt issue, but rather by extensive infrastructure issues, insolvent pension plans and many other difficulties. Patton Hahn, an attorney who worked on the municipal bankruptcy of Jefferson County, Alabama, believes that the use of mediation has given the bankruptcy court in Detroit the resources it needs to move Detroit's bankruptcy case along. Tresa Baldas, Matt Helms and Alisa Priddle, "How mediation has put Detroit bankruptcy on the road to resolution" (Feb. 2, 2014), *www.freep.com/article/20140202/NEWS01/302020063/Orr-Snyder-Rosen-Detroit-bankruptcy*.

While Detroit's use of mediation is expediting the bankruptcy process overall, the process is considerably more confidential than the average municipal bankruptcy. All mediation proceedings are confidential and only the terms of the settlement are presented to the bankruptcy court for approval. Michael Bathon, "Detroit Judge Rosen Named Mediator in City's Bankruptcy" (Aug. 13, 2013), *Bloomberg Business Week*, retrieved Aug. 13, 2013.

Patton Hahn noted that the mediation process could rub some taxpayers the wrong way because "Detroit is a public entity. Its true stakeholders are its citizens, and there's a clash between the goals of mediation — which is to simply get to a result — and the public interest, which is to know the content of [negotiations]." Tresa Baldas, Matt Helms and Alisa Priddle. Additionally, the high legal fees for attorneys representing parties in the bankruptcy process could cause citizens to ask exactly what they are paying for, which could intensify the demand for disclosure in the mediation process.

Detroit's emergency manager, Kevyn Orr, allocated $62.5 million to pay the fees and expenses of Detroit's consultants and lawyers. Law firms and consultants could earn up to $36 million in legal fees for just the last quarter of 2013. Matt Helms, "Detroit bankruptcy costs hit $36M in 2013, expected to soar in 2014" (May 7, 2014), *www.freep.com/article/20140507/NEWS01/305070141/detroit-bankruptcy-expenses-cost*.

The Jones Day Law Firm submitted more than $16.6 million in fees and nearly $734,000 in other expenses as of December 2013. *Id*. The Dentons Law Firm, hired to represent the official committee for Detroit's retirees, billed $4.4 million in fees and $185,550 in expenses. *Id*. The city's restructuring consultant, Conway MacKenzie, billed $5.3 million in fees and almost $17,000 in expenses. *Id*. These costs are high even though many of the law firms and consultants have agreed to discount their hourly rates. For example, court-appointed fee examiner Robert Fishman has agreed to reduce his typical hourly rate of $675 to $600 an hour. *Id*. Overall, experts expect final legal costs to exceed $100 million.

While the price tag may be high, the use of mediation may be restraining even higher costs. Many people questioned Detroit's ability to modify any of its pension obligations in a bankruptcy process. There were 109 filed objections to Detroit's eligibility for Chapter 9 bankruptcy protection. "Order Regarding Eligibility Objections Notices of Hearings and Certifications Pursuant to 28 U.S.C. § 2403(a) & (b)," U.S. Bankruptcy Court for the Eastern District of Michigan, Aug. 26, 2013, retrieved Sept. 4, 2013. The use of mediation brought Detroit past those concerns and also brought about substantive progress. For example, on May 2, 2014, the board of directors of the Detroit Retired City Employees Association (DRCEA) supported a 4.5 percent cut in pension benefits for retired city workers as well as a reduction of their Cost of Living Allowance (COLA). DRCEA's loss of COLA can be restored depending upon the performance of the General Retirement System under the Plan of Adjustment that must be presented to the bankruptcy court. *Associated Press*, "Detroit Retired City Employees Association supports bankruptcy plan," *www.myfoxdetroit.com/story/25415548/detroit-retired-city-employees-association-supports-bankruptcy-plan#ixzz333EzYnbb*. This type of successful mediation result may encourage remaining parties to re-double their efforts to reach agreements on other issues that can be incorporated into a fair, balanced and fully agreed-upon Plan of Adjustment to be presented to the bankruptcy court for confirmation.

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Bankruptcy Law

Proper Procedural Treatment of "*Stern* Claims"

Executive Benefits Ins. Agency v. Arkison, 12-1200, 2014 WL 2560461 (U.S. June 9, 2014).

Nicolas Paleveda and his wife owned and operated Bellingham Insurance Agency, Inc. (BIA). In 2006, BIA became insolvent and Paleveda used BIA funds to incorporate Executive Benefits Insurance Agency, Inc. (EBIA) and "initiated a scheme to transfer assets from BIA to EBIA." Later in 2006, BIA filed for Chapter 7 bankruptcy and Pete Arkison was appointed as the trustee. The trustee subsequently filed a complaint in the Bankruptcy Court for the Western District of Washington alleging fraudulent conveyance of BIA assets to EBIA. The trustee filed a motion for summary judgment against EBIA and the bankruptcy court granted the motion for the trustee on all claims, including the fraudulent conveyance claims. On appeal, the district court conducted *de novo* review and affirmed.

During the pendency of EBIA's appeal to the 9th Circuit, the U.S. Supreme Court decided *Stern v. Marshall*, 131 S.Ct. 2594 (2011), which held that "Article III of the Constitution did not permit a bankruptcy court to enter final judgment on a counterclaim for tortious interference, even though final adjudication of that claim by the bankruptcy court was authorized by [28 U.S.C. § 157(b)]." In light of *Stern*, EBIA moved to dismiss its appeal for lack of jurisdiction arguing that the bankruptcy court did not have the authority to finally decide the trustee's fraudulent conveyance claims. The 9th Circuit rejected EBIA's motion and affirmed the district court, finding that because EBIA had impliedly consented to the bankruptcy court's jurisdiction, the bankruptcy court's adjudication of the fraudulent conveyance claims was permissible. The U.S. Supreme Court granted certiorari.

The Supreme Court began its analysis by noting an unanswered question left in the wake of *Stern*. Specifically, while *Stern* held that "Article III prohibits Congress from vesting a bankruptcy court with the authority to finally adjudicate certain claims," *Stern* did not address how courts should proceed when faced with such "*Stern* claims," where a claim is designated for final adjudication in the bankruptcy court as a statutory matter, but the court is simultaneously prohibited from proceeding in that way as a constitutional matter. The Supreme Court reviewed the history of modern bankruptcy legislation, recognizing that federal district courts have original jurisdiction in bankruptcy cases and may refer to "core" and "non-core" proceedings to bankruptcy judges. In those core proceedings, the bankruptcy judges may hear and determine the claims and enter orders and judgments. As to those non-core proceedings which are "otherwise related to" the bankruptcy case, the bankruptcy judges may enter findings of fact and conclusions of law for the district court's *de novo* review, unless the parties consent to the bankruptcy judge's entry of a final judgment. However, in light of *Stern*, bankruptcy courts were prohibited from entering final judgments regarding certain "core" claims of tortious interference.

Addressing how bankruptcy courts are to proceed when faced with *Stern* claims, the Supreme Court reviewed the severability provision of 28 U.S.C. § 157 which allows those provisions deemed invalid under Article III to be severed without affecting the remainder of the statute. Therefore, where a claim otherwise satisfies section 157(c) governing non-core provisions, a bankruptcy court is to "treat the *Stern* claim as non-core."

Assuming that the fraudulent conveyance claims at issue are *Stern* claims, the Supreme Court determined them to be non-core, "related to" claims as they assert "that property that should have been a part of the bankruptcy estate and therefore available for distribution to creditors pursuant to Title 11 was improperly removed." Finding that the fraudulent conveyance *Stern* claims fit comfortably within those claims governed by section 157(c), the Supreme Court held that the same procedure should apply, *i.e.*, the bankruptcy court should enter findings of fact and conclusions of law to the district court for *de novo* review. As the district court in the present case had already conducted such *de novo* review, any procedural or consensual errors were cured as the parties were afforded to proper judicial review regardless of any improper final judgments entered by the bankruptcy court.

Importantly, the Supreme Court provided clarity as to this issue, but refused to decide "whether Article III permits a bankruptcy court, with the consent of the parties, to enter final judgment on a *Stern* claim." *Id*. at *4 n. 4. The Supreme Court expressly "reserve[d] that question for another day."

Inherited IRAs Not Exempt in Bankruptcy Proceedings

Clark v. Rameker, 13-299, 2014 WL 2608860 (U.S. June 12, 2014).

Heidi Heffron-Clark and her husband, Brandon C. Clark (collectively, the debtors), filed for Chapter 7 bankruptcy. Prior to the bankruptcy, Mrs. Heffron-Clark inherited her mother's individual retirement account (IRA) and the account transformed into an "inherited IRA account." Once the bankruptcy was filed, the debtors sought to have the inherited IRA excluded from their bankruptcy estate using the "retirement funds" exemption of 11 U.S.C. § 522(b)(3)(C). The trustee and the unsecured creditors of the estate challenged the exemption on the grounds that an inherited IRA is not "retirement funds" within the meaning of the Bankruptcy Code.

The Bankruptcy Court for the Western District of Wisconsin denied the exemption, reasoning that because an inherited IRA does not make distributions to a person's retirement, it is not a retirement fund within the meaning of section 522(b)(3)(C). The district court reversed, finding that the retirement funds exemption covers any account containing funds "originally accumulated for retirement purposes." The 7th Circuit reversed the judgment of the district court, finding that "inherited IRAs represent an opportunity for current consumption, not a fund of retirement savings."

The U.S. Supreme Court granted certiorari to resolve the 7th Circuit ruling with a conflicting case from the 5th Circuit, *In re Chilton*, 674 F.3d 486 (2012), 571 U.S. ____ (2013). The Supreme Court began its analysis by establishing that "retirement funds" are properly understood to mean "sums of money set aside for the day an individual stops working" and that any inquiry into whether funds are "retirement funds" must be an objective review of the legal characteristics of the account. The Supreme Court reviewed the three legal characteristics of an inherited IRA as compared to a traditional IRA. First, the holder of an inherited IRA is not permitted to make any contributions to the account, whereas the purpose of a traditional IRA is to create a tax incentive for regular contributions to a person's retirement account. Second, while a traditional IRA is designed for distribution upon retirement, an inherited IRA from a non-spouse is required to be distributed within five years of the original owner's death or through an annual distribution. This causes the inherited IRA to diminish over time regardless of proximity to the holder's retirement age. Lastly, the holder of an inherited IRA is permitted to withdraw the entire balance of the account for any purpose at any time. A traditional IRA prohibits such withdrawals without penalty, encouraging traditional IRA holders to leave the funds untouched until retirement.

The Supreme Court next reviewed the purpose of the Bankruptcy Code exemptions, namely to effectuate a balance between the interest of the creditors and the debtors. When debtors are permitted to exempt their traditional IRAs, it is to ensure the debtors' needs will be met during their retirement. On the other hand, an inherited IRA could be received as a windfall to the debtors, giving them the entire balance of the account for any frivolous use, to the detriment of the creditors.

Lastly, the Supreme Court reviewed the debtors' argument that because the funds were originally placed into an account bearing the legal characteristics of a retirement fund, the current status of the account is immaterial. The Supreme Court found that because section 522(b)(3)(C) imposes two conditions for exemption, namely that the funds must be "retirement funds" and they must be held in a covered account, the debtors' interpretation would render the first condition superfluous as the funds of an inherited IRA could be used for any purpose. Reasoning that the statute should not be construed so as to render any portion superfluous, the Supreme Court affirmed the decision of the 7th Circuit, finding that because inherited IRAs do not bear the defining legal characteristics of retirement funds, they are not entitled to exemption pursuant to section 522(b)(3)(C).

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Civil Law and Litigation

Supreme Court Holds Survival Actions Are Prescriptive Not Peremptive

Patricia Watkins v. Exxon Mobil Corp., 13-1545 (La. 5/7/14).

Plaintiff brought a survival action pursuant to La. Civ.C. art. 2315.1 as a result of the death of her father in 1986. In the petition, filed on June 17, 2011, plaintiff claimed that on June 22, 2010, she was first made aware of the defendants' use of "naturally occurring radioactive material" (NORM), which she believed led to her father's death.

Because the suit was filed 25 years after decedent's death, defendants asserted the claim should be perempted and, therefore, dismissed. La. Civ.C. art. 2315.1(A) sets out the action "shall survive for a period of one year from the death of the deceased . . . ." However, La. Civ.C. art. 2315.1(C) states, "[T]he right of action granted under this Article is heritable, but the inheritance of it neither interrupts nor prolongs the prescriptive period defined in this article."

The court discussed the established principles for legislative interpretation, ultimately holding the Legislature is well acquainted with the distinction between prescriptive and preemptive and, by choosing to define the time limitation as prescriptive, gave a clear and unambiguous intent for interpretation and application.

Legislative Changes

The 2014 regular legislative session concluded on June 2. During the session, more than two dozen bills were filed to address the way civil lawsuits are handled in Louisiana.

Jury Threshold

A hot topic this session was the reduction of the jury threshold. There were propositions to allow for a trial by jury in a tort case regardless of the amount of the claim, or, in the alternative, to allow for a reduction in the threshold for a jury trial. These bills failed early on in the session. The jury threshold for tort claims in Louisiana remains $50,000.

Summary Judgment

During the 2012 legislative session, La. C.C.P. art. 966 was amended, changing the procedure for summary judgments. This year, the Legislature once again tinkered with the procedure and further amended the article.

The newest amendments provide that the court *may* permit documentary evidence to be filed in the record. While the amendment continues to state this evidence can be in any electronically stored format, more importantly, it appears as though this provision would apply to evidence not cited in and attached to the original motion or opposition.

The second amendment to this article is specific to the objection of the submitted evidence. The article previously allowed for the opponent to object via a written motion to strike, wherein the reasons for objection were stated; the current amendment retains this procedure but clarifies the policy for service thereof. The article now provides that these objections must be served pursuant to La. C.C.P. art. 1313.

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Corporate and Business Law

Governor Signs New Corporation Law

On May 30, 2014, Gov. Jindal signed the Business Corporation Act (BCA) (Act No. 328), the first comprehensive revision of Louisiana's business corporation law since the current statute was originally adopted in 1968. Drafted by the reporter of the Louisiana State Law Institute's Corporations Committee, the BCA was submitted to the Legislature on the Law Institute's recommendation. The BCA will take effect on Jan. 1, 2015, and will be codified at La. R.S. 12:1-101 *et seq*.

The BCA is based on the Model Business Corporation Act, written and continuously revised by the Committee on Corporate Laws of the American Bar Association's Business Law Section. Approximately 30 states have adopted all or substantially all of the Model Act, and many other states have adopted selected provisions. The Model Act and the BCA are substantially longer than the current Louisiana Business Corporation Law, but it is hoped that the additional detail contained in the BCA will address questions that have arisen under current law. The law contains comments explaining the areas where it departs from the Model Act to preserve existing law or for other reasons.

A complete analysis of the new law is beyond the scope of this article, but some of the noteworthy changes in the BCA from existing law are highlighted.

► The BCA's default shareholder vote for the approval of extraordinary corporate transactions such as business combinations or amendments to the articles of incorporation is a majority of the corporation's outstanding voting power, unless the articles specify a greater vote. Current law requires a vote of two-thirds of the voting power present for most such events.

► The law will, by default, exculpate the corporation's directors and officers from liability to the corporation and its shareholders for money damages for any act or failure to act as a director or officer, except for breaches of the duty of loyalty, the intentional infliction of harm on the corporation or shareholders, the payment of unlawful dividends or an intentional violation of criminal law. A corporation wishing to reject this limitation of liability must affirmatively "opt out" through a statement in the articles of incorporation.

► The law eliminates the concept of legal capital, the requirement of stated capital and capital surplus, and the concept of treasury shares. However, the law retains a "dual insolvency" standard, now requiring that dividends cannot be paid if the corporation would not be able to pay its debts as they become due or if its total assets would be less than its total liabilities plus any amount needed to satisfy the liquidation preference of preferred stockholders.

► The BCA permits the issuance of shares in exchange for promissory consideration.

► The BCA generally makes it easier for shareholders to exercise dissenters' rights. Where dissenters' rights apply, the BCA entitles dissenters to the arms' length fair value of their shares, without discounts for minority status or lack of marketability. In limited circumstances, appraisal rights are a shareholder's exclusive remedy and foreclose the shareholder's ability to bring a fiduciary duty suit challenging a transaction.

► The BCA contains a withdrawal remedy not available under current law for an oppressed shareholder if the corporation's practices over a period of time are "plainly incompatible" with a genuine effort by the corporation to deal fairly and in good faith with the shareholder. If the remedy applies, the corporation must pay the shareholder fair value for his shares or may instead elect to seek a judicial dissolution of the corporation. The law provides that this is the exclusive remedy for a claim of oppression.

► Current Louisiana law provides a

mechanism for the approval of transactions between the corporation and its directors or officers, so-called "self-dealing" transactions. However, current law does not validate self-dealing transactions if the required approvals are obtained, but rather merely provides they are not automatically voidable. By contrast, the BCA affirmatively validates such transactions if the required procedures are followed.

► The BCA permits written unanimous governance agreements among shareholders, which can contain provisions that deviate from the governance provisions of the BCA, including the total elimination of the board of directors or the limitation of its powers.

► The BCA eliminates the limitation under current law on the term of a voting trust.

► The law rejects the demand futility doctrine for derivative suits under current law and implements the Model Act's universal demand rule. A board composed of a majority of disinterested directors (or a committee of such directors) can obtain a dismissal of the suit if the directors determine in good faith after reasonable inquiry that it is not in the best interests of the corporation.

► Section 1-120 of the BCA contains a set of unified filing rules specifying the signing, notarization and filing procedures to be followed for any document to be filed under the BCA with the Secretary of State. Documents filed electronically need not be notarized.

► The BCA reduces the "grace period" for failure to file an annual report from three years to 90 days. If the report is not filed timely after notice from the Secretary of State, the corporation's existence terminates, but the law permits the corporation's existence to be reinstated during a period of three years after the termination.

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Environmental Law

Circuit Strikes Down EPA's Attempt to Restrict Applicability of Judicial Decision

In *National Environmental Development Association's Clean Air Project v. EPA,* 13-1035, 2014 U.S. App. LEXIS 10047 (D.C. Cir. May 30, 2014) (*NEDACAP*), the U.S. Court of Appeals for the District of Columbia Circuit vacated an Environmental Protection Agency (EPA) directive instructing EPA regions to disregard the 6th Circuit's source aggregation decision outside the 6th Circuit. The court held that the directive violated EPA's regulations, which require EPA to maintain national uniformity when implementing the Clean Air Act.

EPA regulations provide that multiple pollutant-emitting activities may be aggregated and considered a single source under the Clean Air Act Title V and New Source Review permitting programs if the activities are, *inter alia,* "adjacent." While EPA's interpretation of "adjacent" has fluctuated over time, EPA has recently interpreted "adjacent" to include consideration of the functional interrelatedness of emission units, in addition to the physical distance between them. The 6th Circuit rejected this recent interpretation in *Summit Petroleum Corp. v. EPA*, 690 F.3d 733, 735 (6 Cir. 2012), holding that "EPA's determination that the physical requirement of adjacency can be established through mere functional relatedness is . . . contrary to the plain meaning of the term 'adjacent.'" The court vacated EPA's determination that a natural gas sweetening plant and sour gas production wells, which were dispersed over 43 square miles, constituted a single source. In response, EPA issued the *Summit* Directive stating that, although the agency may no longer consider interrelatedness in determining adjacency in the 6th Circuit, "[o]utside the 6th Circuit . . . EPA does not intend to change its . . . practice of considering interrelatedness."

Industry challenged the *Summit* Directive, and the D.C. Circuit held that the directive violated EPA's "regional consistency" regulations in 40 C.F.R. Part 56, which "strongly articulate EPA's firm commitment to national uniformity in the application of its [air] permitting rules," with no exemption for variance created by a judicial decision. *NEDACAP*, 2014 U.S. App. LEXIS 10047 at *23-24. EPA argued that the Clean Air Act contemplates divergence between circuit courts and thus permits the agency to apply varied standards in different circuits. The court never reached this statutory issue because it concluded that EPA's regulations precluded the *Summit* Directive by requiring uniformity. Similarly, the court reasoned that the "intercircuit nonaquiescence" doctrine (providing that an agency may maintain its independent assessment of the statutes and regulations it administers after one circuit disagrees with the agency's position, in the hope that other circuits, the Supreme Court or Congress will later uphold the agency's position) does not allow EPA to ignore its own regulations.

In the wake of *NEDACAP*, EPA could amend its regional consistency regulations to account for regional variances created by a judicial decision or modify its source aggregation regulations to include consideration of functional interrelatedness. In the meantime, the decision will likely curtail EPA's use of the functional interrelatedness test to determine adjacency and its reliance on intercircuit nonaquiescence in the air permitting context.

Amendments from 2014 Regular Session of the Louisiana Legislature

Act 544

Act 544 provides that the sole cause of action that state and local governmental entities have related to certain coastal activities is under the Louisiana State and Local Coastal Resources Management Act (SLCRMA). Specifically, the act states that:

> [e]xcept as provided in [the SLCRMA], no state or local governmental entity shall have, nor may pursue, any right or cause of action arising from any activity subject to permitting under [the SLCRMA], 33 U.S.C. 1344 [Clean Water Act wetlands permitting] or 33 U.S.C. 408 [Rivers and Harbors Act permitting] in the coastal area as defined by [the SLCRMA], or arising from or related to any use as defined by [the SLCRMA], regardless of the date such use or activity occurred.

Act 544 sets forth certain limited exceptions to the prohibition on non-SLCRMA-based claims, including contractual claims and the pursuit of certain administrative remedies. Act 544 is a response to the 2013 lawsuit brought by the Southeast Louisiana Flood Protection Authority-East against numerous energy companies related to coastal oil and gas activities. The Act 544 amendments apply "to all claims existing or actions pending on the Act's effective date . . . ."

Act 400

Act 400 amends Louisiana's oilfield cleanup law, La. R.S. 30:29 (commonly known as "Act 312"). Under Act 312, a defendant may request a preliminary hearing to determine whether good cause exists for maintaining the defendant as a party. Act 400 provides that if a defendant is dismissed under this preliminary procedure, the defendant may recover reasonable attorneys' fees and costs from the party who asserted the claim. Act 400 reiterates that a defendant can make an admission of liability that is limited to responsibility for implementing the most feasible plan for remediation of the property but adds that, if a party makes such a limited admission, there shall be a rebuttable presumption that the plan ultimately approved by the Department of Natural Resources is the most feasible plan. Further, the court shall instruct the jury regarding this presumption if the party so requests. Act 400 also lists the specific types of damages that may be awarded in Act 312 cases. Finally, Act 400 provides that it "shall not apply to any case in which the court, on or before May 15, 2014, has issued or signed an order setting the case for trial, regardless of whether such trial setting is continued."

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Family Law

Custody

Bagwell v. Bagwell, 48,913 (La. App. 2 Cir. 1/15/14), 132 So.3d 426.

The parties' stipulation that *Bergeron* would not apply to a modification of custody was enforced as not being against public policy (although it appears that the previous judgment was by consent, so *Bergeron* would not have applied anyway, although some testimony seems to have been taken before the prior agreement was reached).

Barber v. Green, 49,049 (La. App. 2 Cir. 2/19/14), 134 So.3d 1223.

The trial court changed the parties' alternating weekly physical custody schedule to less time for the father because of his rotating work schedule as a fireman, which it found caused too much "shifting" in the schedule. The court of appeal reversed and restored the original schedule, finding that the father provided more continuity and stability and that the old schedule had less "shifting" than the one imposed by the trial court. The court of appeal also stated that his mother, who helped him with the children while he was working, was more than a mere "third party" and that there was value in the children having time with their grandmother.

Custody/Relocation

Randazzo v. Prosperie, 13-0704 (La. App. 1 Cir. 9/13/13), 135 So.3d 22.

In determining both custody and relocation as initial judgments, the court had to apply both the La. Civ.C. art. 134 and La. R.S. 9:355.14 factors. The trial court's award of alternating weeks between the father in Louisiana and the mother in Texas of this not-yet-school-aged child was not an abuse of discretion and fostered the relationship between the child and his extended families in both states. Because the trial court did not name a domiciliary parent, or explain why one was not needed, the court of appeal named the mother as domiciliary parent. It vacated the award of the child tax dependency deductions to the father as premature because no child support order had yet been entered. Although attorneys' fees were not recoverable under La. R.S. 9:355.6 for her relocation without providing notice, her failure to provide notice did increase the costs of the litigation, so the trial court's award of $500 attorneys' fees to him was affirmed under La. R.S. 9:355.19.

Procedure/Evidence

Parents of Minor Child v. Charlet, 13-0316 (La. App. 1 Cir. 10/12/13), 135 So.3d 724.

Because communication shared with a priest during confession is a confidential communication made to a clergyman, the priest is not a mandatory reporter even when the confession is by a minor regarding her being sexually abused by another member of the church. There is no private or civil cause of action against such a clergyman since there is no mandatory duty to report. There is no cause of action for negligent giving of advice given during the confession.

Parents of Minor Child v. Charlet, 13-2879 (La. 4/4/14), 135 So.3d 1177.

The Supreme Court granted writs, reversed the court of appeal and reinstated the trial court's judgment, holding that the child could waive the privilege regarding her confession to the priest, and that the priest had no independent right to claim a privilege because he could only raise the privilege "on behalf of the person" who made the confession. Further, whether the priest had a mandatory duty to report the child's claims of abuse was a question to be determined by the fact finder at trial, including whether the communications between the child and priest were actually confessions, and whether the priest had knowledge outside of the confessional that would lead to a duty to report the child's claims.

Adoption

In Re B.L.M., 13-0448 (La. App. 1 Cir. 11/1/13), 136 So.3d 5.

This intrafamily adoption was affirmed because, despite the existence of a consent judgment granting the mother sole custody, terminating the biological father's custodial rights, and enjoining him from contacting the mother and children, he failed to show "just cause" for not attempting to contact the children, and because the adoption was in their best interest.

M.P.W. v. L.P.W., 13-0366 (La. App. 1 Cir. 11/1/13), 136 So.3d 37.

M.P.W.'s petition to annul a stipulated judgment in which he agreed to terminate his custodial rights and awarded sole custody to the mother was appropriately dismissed on summary judgment because the stipulation was proper as to form, having been dictated into the record in open court, under oath. The mother's waiving of her rights to child support was not *contra bones mores*, nor was his agreeing to sign a voluntary act of surrender. Because the waiver of child support was tied to the act of surrender so as to allow the children to be adopted by the mother's new husband, the biological father's obligations of support and custody would have been terminated anyway and assumed by the adopting parent. The transcript of the stipulation showed no ill practices, duress or deprivation of legal rights. His change of heart or bad bargain made did not provide grounds for relief.

Final Spousal Support

Fontana v. Fontana, 13-0916 (La. App. 4 Cir. 2/12/14), 136 So.3d 173.

Although Ms. Fontana had some income and inherited assets, she was still entitled to final spousal support as a rehabilitative award for three years to obtain a degree. However, the court of appeal reduced the award by deleting support for entertaining, charities, salon, health club, pet, other and miscellaneous cash. Her attorneys' fees were allowed to remain as an expense category. Because the father's income was greater than the highest guideline amount, the court could use its discretion to set the child support award based on the expense sheet provided by Ms. Fontana's CPA expert. The court found it would be inconsistent to impute her income for child support purposes since it found that she was entitled to rehabilitative support. The trial court did not err in ordering Mr. Fontana to pay 100 percent of the children's tuition because he had been paying it under a temporary agreement and she had little income, especially compared to his. Mr. Fontana's contempt for late payment of child support was reversed because the parties had deviated by custom from the terms of the judgment, and his untimely payment was not in willful disobedience; further, amounts due for certain expenses were uncertain and were due on an uncertain date.

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Insurance, Tort, Workers' Compensation & Admiralty Law

Medical Expenses Incurred

Ashley Hoffman, *et al.* v. Travelers Indemnity Company of America, 13-1575 (La. 5/7/14), ____ So.3d ____.

Ms. Hoffman, injured in an auto accident, was treated at Baton Rouge General Medical Center (BRMC) under an agreement by which she assumed responsibility for payment of all charges. BRMC's charges totaled $713.67. Under terms of a contract with AETNA, her parents' insurer, the hospital billed her at a discounted rate of $485.29, which she paid. Travelers received an itemized bill from BRMC that did not reflect the discount and issued payment to Ms. Hoffman in the full amount. After learning of the contractual discount, Travelers sought reimbursement from Ms. Hoffman for the difference. Her suit alleged Travelers' non-compliance with its policy for failing to pay the full amount of the bill. Travelers moved for summary judgment, arguing it had complied with the policy because it paid Ms. Hoffman for "expenses incurred," *i.e.*, $485.29. The trial court denied the motion and the 1st Circuit Court of Appeal denied Travelers' writ for supervisory review. The Supreme Court granted Travelers' writ and remanded to the court of appeal for briefing, argument and full opinion.

On remand, the court of appeal considered the issue:

> [W]hether "expenses incurred," as stated in the medical payment provision of plaintiff's automobile liability policy, means the full amount of the medical expenses charged by a treating hospital in connection with plaintiff's automobile accident, or the reduced amount of medical expenses accepted by the hospital due to a contractual agreement with plaintiff's health insurer.

The court concluded that "'expenses incurred' constitutes the full amount of medical expenses charged by the treating hospital and that the trial court properly denied [Travelers'] motion for summary judgment." The opinion repeatedly referred to the discount as a "windfall" to which Travelers was not entitled. Judge Higginbotham, concurring, further stated, "[T]he meaning of the term ['expenses incurred'] is subject to interpretation of the parties' intent, and is, therefore, inappropriate for summary judgment." The court cited two 3rd Circuit cases, *Thomas v. Universal Life Ins. Co.*, 201 So.2d 529 (1967), and *Niles v. American Bankers Ins. Co.*, 229 So.2d 435 (1969).

The Supreme Court found these rulings inapposite to the case at bar, citing instead, with approval, *Drearr v, Connecticut General Life Ins. Co.,* 119 So.2d 149 (La. App. 4 Cir. 1960), and *Brackens v. Allstate Ins. Co.,* 339 So.2d 486 (La. App. 2 Cir. 1976). In both cases, plaintiffs received treatment without charge, to which they were entitled, at Veterans Administration hospitals. The appeals courts concluded that the plaintiffs "incurred" no expenses and, therefore, were not entitled to payments under their insurance contracts.

> Because we find Travelers paid the expenses incurred by Ms. Hoffman in accordance with the terms of its policy, we find that Travelers has fully performed under the insurance contract and is entitled to summary judgment.

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Survival Action Subject to Prescriptive Rather Than Peremptive Period

A decision by the Louisiana Supreme Court could have far-reaching repercussions in allowing individuals to bring claims for survival action when the victim died years earlier. In *Watkins v. Exxon Mobil Corp.*, 13-1545 (La. 5/7/14), ____ So.3d ____, the court clarified that survival actions under Louisiana law are subject to prescriptive rather than peremptive periods, opening the door for plaintiffs to file suit within one year of *knowing* of their cause of action, rather than one year from the date of death of the victim.

The plaintiff, Patricia Watkins, filed suit on June 17, 2011, setting forth claims under wrongful death and survival action relating to the death of her father, who had died on Dec. 27, 1986. The plaintiff alleged that her father had been exposed to naturally occurring radioactive material (NORM) by the defendants and claimed that, under the principle of *contra non valentem*, she did not have notice of her causes of action until June 22, 2010, making her filing of June 17, 2011, within one year of having knowledge of her claim.

The defendants filed exceptions of prescription, preemption and no cause of action, which were sustained by the district court, finding the one-year time period governing survival actions to be peremptive under La. Civ.C. art. 2315.1(A) and, therefore, not capable of renunciation, interruption or suspension, even under the doctrine of *contra non valentem*. Thus, the court dismissed the plaintiff's suit as untimely since it had been filed more than a year after the death of her father. On appeal, however, the 4th Circuit reversed the district court, finding that the 1986 amendment to article 2315.1 made the period prescriptive rather than peremptive, allowing for *contra non valentem* to suspend the running of the prescriptive period. *Watkins v. Exxon Mobil Corp.*, 12-0477 (La. App. 4 Cir. 5/29/13), 117 So.3d 548.

The Louisiana Supreme Court, per Justice Guidry, looked to the plain language of article 2315.1, legislative intent and policy considerations in affirming the 4th Circuit's ruling that the one-year time limitation is a period of prescription rather than peremption, and remanded the case to the district court for further proceedings. *Watkins v. Exxon Mobil Corp.*, 13-1545, p. 12 (La. 5/7/14), ____ So.3d ____. By allowing survival action claims to be brought more than a year after the death of the victim, the court expanded the rights of victims' families to file survival action claims if prescription has been interrupted or suspended. As the period is prescriptive rather than peremptive, survivors may bring their claims even years after the victim's death, which could lead to a flurry of survival actions from claimants who, for years, were unaware they could even bring such a claim.

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International Law

Ukraine and Russia

Political events in Ukraine beginning in November with pro-European protests in Kiev and culminating in March with the annexation of Crimea by Russia exposed a plethora of international legal issues, including some matters of first impression. The broader international legal issues include, *inter alia*:

► Whether the Russian minority in Crimea and Eastern Ukraine validly executed their *jus cogens* right of self-determination to become part of Russia or an autonomous region of Ukraine;

► Whether Russian interference and intervention in Crimea and Eastern Ukraine violates the Ukrainian right of territorial integrity codified in the 1975 Helsinki Final Act of the Conference on Security and Cooperation in Europe, which requires Russia to "refrain . . . from the threat or use of force" against Ukraine and requires that Russia "respect the territorial integrity of" Ukraine;

► Whether Russian interference and intervention in Crimea and Eastern Ukraine violates the 1994 Budapest Memorandum whereby Ukraine transferred its nuclear arsenal to Russia in exchange for Russia's reaffirmation of its "obligation to refrain from the threat or use of force against the territorial integrity or political independence of Ukraine;" and

► Whether Russian interference and intervention in Crimea violates three Black Sea Fleet agreements dividing up Soviet military warships stationed in Crimea and granting Russia leasehold interests in Crimean naval facilities through 2042. The Black Sea Fleet agreements require Russian military forces to "respect the sovereignty of Ukraine, honor its legislation and preclude interference in the internal affairs of Ukraine."

A full discussion of the broad legal questions is beyond the scope of this article. Ukraine lodged formal complaints at both the United Nations and the International Criminal Court, where most of the complex public and private international legal issues will be addressed. Russia launched a complaint at the World Trade Organization regarding the U.S. sanctions regime, discussed *infra*.

Economic Sanctions

In addition to major legal questions of public and private international law, the political events generated a myriad of economic sanctions that directly and immediately impact international business transactions and investments. U.S. law on sanctions, export controls and financial due diligence are difficult to comply with under ordinary circumstances. The broad sanctions issued by the United States, Canada, the European Union (EU) and Australia increase the pressure on counsel with client interests in the region.

The following is a brief overview and summary of major sanctions.

► On March 6, 2014, President Obama entered Executive Order No. 13660 (Blocking Property of Certain Persons Contributing to the Situation in Ukraine) authorizing the first set of economic sanctions against Russia under the International Emergency Economic Powers Act. The Executive Order did not name particular individuals or institutions, but set forth the general intention of the United States to target persons or individuals engaged in illicit financial activity or political activity destabilizing Ukraine.

► On March 6, 2014, the U.S. Department of the Treasury issued an advisory regarding financial institutions' ongoing obligations to monitor and report suspicious transactions relating to foreign senior political figures, including former Ukrainian President Victor Yanukovych (U.S. Department of the Treasury Financial Crimes Enforcement Network, Advisory, Updated Guidance to Financial Institutions on Recent Events Related to the Departure of Victor Yanukovych and Other Ukrainian Officials).

► The EU initiated sanctions against Russia at an extraordinary meeting of the European Commission on March 6, 2014. The EU suspended bilateral talks with Russia on visa and trade matters and preparations for the G8 Summit in Sochi, Russia. The G8 summit was held in Brussels on June 6, 2014, without Russian participation for the first time in 17 years.

► The United States and the EU acted again on May 17, 2014, following the annexation referendum in Crimea. The United States imposed sanctions blocking the assets and prohibiting transactions with four Ukrainian individuals and seven high-level Russian officials (Office of Foreign Assets Control, Changes to List of Specially Designated Nationals and Blocked Persons List since January 1, 2014 at 7-8). The EU imposed an asset freeze and travel ban on 21 persons (Council Regulation No. 269/2014, March 17, 2014). The EU list was expanded to add an additional 12 individuals on March 21, 2014 (Council Regulation No. 284/2014).

► The broadest sanction regime was imposed by the United States on March 20, 2014. The United States expanded the list of sanctioned individuals by 20 and also specifically targeted Russian financial institution Bank Rossiya. Nine sectors of the Russian economy also were targeted, including financial services, energy, metals and mining, engineering, and defense and related material (Office of Foreign Assets Control, Ukraine-Related Designations: Specially Designated Nationals List Update).

► Russia responded in March by issuing its own retaliatory sanctions banning travel and freezing the assets of, *inter alia*, Senators John McCain, Harry

Reid and Mary Landrieu.

► The United States, the EU, Canada and Australia have continued to add further designations to the sanction list since March. Currently 100 individuals and 21 entities are subject to sanction in one or more of the countries listed above.

Effect on International Business

What does the sanction regime mean for U.S. or other international business?

First, any designated individuals or entities are subject to a visa ban and asset freeze, including all assets located in the United States or in the possession of a U.S. citizen. Guidance provided by the Office of Foreign Asset Controls governs the scope of assets that may be blocked, which can include future contingent interests (Ukraine-Related Sanctions Regulations, 31 C.F.R. Part 589, May 8, 2014). U.S. individuals and entities are prohibited from engaging in transactions with designated individuals or entities, including any entities that are owned or controlled by the designated entities. This could include joint venture partners and others where the designated company or individual has a 50 percent or greater interest. Violations of these sanctions can result in civil penalties up to $250,000 or twice the value of the transaction, whichever is greater. Criminal penalties of 20 years' imprisonment are available for intentional or willful violations of the sanctions.

Every attorney representing companies doing business overseas must conduct significant due diligence to confirm they are not conducting business either with a specifically designated individual or entity, or an entity that is controlled by a designated individual or entity.

Second, the sanctions imposed an indefinite hold on export licenses for certain U.S. goods, services or technologies to Russia. The U.S. Department of Commerce's Bureau of Industry and Security (BIS) announced the suspension of export control licenses to Russia in its area of jurisdiction ("Commerce Department Announces Expansion of Export Restrictions on Russia," April 28, 2014, available at: *www.bis.doc.gov/index.php/about-bis/newsroom/press-releases/107-about-bis/newsroom/press-releases/press-release-2014/665-commerce-dept-announces-expansion-of-export-restrictions-on-russia*).

BIS primarily governs "dual use" items that have both a commercial and military application. For now, the BIS ban appears to apply prospectively only, with no impact on existing licenses. However, BIS always has the authority to modify or revoke prior licenses. Any business exporting goods to Russia or the region that are subject to export licenses should double check the license status and reconfirm with its consignees that goods sent to neighboring countries are not being re-exported to Russia.

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Labor and Employment Law

5th Circuit Limits Whistleblower Protections, But Leaves Open Extraterritorial Application

Villanueva v. U.S. Dep't of Labor, 743 F.3d 103 (5 Cir. 2014).

The U.S. 5th Circuit Court of Appeals held that the whistleblower protections of the Sarbanes-Oxley Act (SOX) do not apply to individuals who make complaints regarding violations of *foreign* law as opposed to *U.S.* law. Although the *Villanueva* decision narrowed the scope of SOX's whistleblower protections, the three-judge panel specifically declined to address the question of whether SOX has extraterritorial application. Thus, it remains an open question in the 5th Circuit as to whether SOX's whistleblower provision applies to complaints *originating* in foreign countries but involving alleged violations of U.S. law.

Given the procedural posture of the case, *Villanueva* also highlights the importance of the standard of review employed by a reviewing court. Because the *Villanueva* court was analyzing the order of an administrative court, it applied a deferential standard of review when conducting its examination. *Villanueva,* therefore, provides an excellent illustration of the difficulties associated with challenging an administrative decision at the appellate level.

Procedural History

The plaintiff, William Villanueva, was a Colombian national formerly employed with a Colombian subsidiary of Core Labs. (Core Labs is a Netherlands company whose stock is publicly traded in the United States and, therefore, is an entity covered by SOX's whistleblower provision.) According to Villanueva, he raised concerns that his employer, acting at the direction of Core Labs executives in Houston, engaged in improper transactions designed to underreport revenue for the purpose of reducing its tax burden in violation of Colombian law. After making these complaints, Villanueva was passed over for a pay raise and eventually terminated from his position.

Villanueva subsequently filed a charge with the Occupational Safety and Health Administration (OSHA), the agency charged with investigating alleged violations of SOX. Villanueva's administrative charge alleged that the withholding of his pay raise and the termination of his employment were in retaliation for his previous complaints and, therefore, violated SOX's whistleblower provision. However, OSHA found that it did not have jurisdiction over Villanueva's charge because the complained-of acts (*i.e.,* the denial of the pay raise and subsequent termination) took place outside of the United States in Colombia.

After receiving the adverse determination from OSHA, Villanueva sought further review of that decision before an administrative law judge (ALJ). The ALJ agreed with OSHA's determination to dismiss Villanueva's charge, reasoning that Villanueva's complaints would require extraterritorial application of SOX and that such application was impermissible because the statute does not apply extraterritorially. The ALJ likewise held that he lacked jurisdiction over Villanueva's whistleblower complaint.

Villanueva then appealed the ALJ's decision to the Department of Labor's (DOL) Administrative Review Board, which, in a 3-2 *en banc* decision, held that it had jurisdiction over the complaint but nonetheless affirmed the ALJ's dismissal of the case. In particular, the board held that SOX's whistleblower provision did not apply extraterritorially and the facts underlying Villanueva's complaint, *i.e.,* a non-U.S. citizen residing in Colombia alleging violations of foreign laws, would require extraterritorial application. For these reasons, the board concluded that Villanueva's complaints did not constitute protected activity under SOX.

5th Circuit's Decision

After having his SOX whistleblower complaint dismissed at three different administrative levels of review, Villanueva appealed his claim to the 5th Circuit. In a unanimous decision, the *Villanueva* court affirmed the decision to dismiss Villanueva's charge but on narrower grounds than the Administrative Review Board. While agreeing that Villanueva's claim failed because SOX's protections are limited to the reporting of violations of certain *United States* laws, the 5th Circuit explicitly declined to address the question of whether SOX applies extraterritorially, despite an amicus brief from the DOL urging the court to do so. Had the 5th Circuit accepted the government's invitation, it would have been the first federal appellate court to address whether SOX's whistleblower provisions apply to complaints made outside the United States.

Perhaps recognizing that the 5th Circuit would limit the application of SOX to complaints regarding U.S. laws, Villanueva argued in the alternative that his complaint implicated U.S. law because his charge included an allegation that tax fraud "was being perpetrated in Colombia at the express direction of Core Lab[s]'s executives in Houston *using mail, email and telephones to accomplish the fraud*." The 5th Circuit, however, found this single reference insufficient to demonstrate that Villanueva had a reasonable belief that U.S. mail and wire fraud statutes had been violated. Although the 5th Circuit agreed that an employee need not cite a specific code section to come within the scope of SOX's whistleblower protections, it held that the thrust of Villanueva's complaint was the alleged underreporting of taxes in violation of *Colombian* law rather than *U.S.* law and, therefore, was insufficient to constitute protected activity under the statute.

One notable, but perhaps overlooked, aspect of the 5th Circuit's decision is the impact of the standards of review it applied to the Administrative Review Board's determination that Villanueva's OSHA charge fails to raise violations of U.S. law. Because the board's order dismissing Villanueva's claim was governed by the Administrative Procedure Act, the 5th

Circuit reviewed that decision under abuse of discretion and substantial evidence standards. Given these deferential standards, the 5th Circuit affirmed the board's finding that Villanueva's charge did not allege violations of U.S. law "because a reasonable person could have reached the same conclusion as the [board]." Had the board reached a different conclusion regarding the scope of Villanueva's allegations and found them to implicate U.S. law, the 5th Circuit may well have reached the same determination given the limited scope of judicial review.

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Mineral Law

Mineral Code Article 149

Mineral Code Article 149 provides that, when land is acquired by certain types of "acquiring authorities" (primarily government agencies or other entities with expropriation authority, and nonprofit land conservancy groups), and the person from whom the land is acquired reserves a mineral right that is subject to prescription of nonuse, prescription will remain interrupted as long as the acquiring authority or any successor-in-interest that is an acquiring authority owns the land. Acts 2014, No. 473, adds a new provision to Mineral Code Article 149. It states that, if "an acquiring authority or other person" acquires land by contract, exchange or donation "as part of an economic development project pursuant to a cooperative endeavor agreement between the acquiring authority and the state through the Department of Economic Development . . ., the prescription of nonuse shall be for a period of twenty years from the date of acquisition whether the title to the land remains in the acquiring authority or is subsequently transferred."

Legacy Litigation

La. R.S. 30:29(B)(6) allows a defendant in a legacy litigation case to request a preliminary hearing early in the litigation to determine whether there is good cause for maintaining the defendant in the litigation. The provision provides for a dismissal without prejudice if no evidence is introduced at the hearing to show that the moving party caused or is otherwise legally responsible for the contamination alleged. If such a defendant is dismissed without prejudice, the defendant can be rejoined in the litigation later if new evidence is discovered. If the defendant is not rejoined prior to the end of the lawsuit, the defendant is entitled to a dismissal with prejudice. Acts 2014, No. 400, amends this provision to provide that, if such a defendant is never rejoined, the defendant is entitled to reasonable attorneys' fees and costs.

Act 400 also adds a new section which states that, if a defendant makes a limited admission of liability as allowed by R.S. 30:29, there will be a rebuttable presumption that the plan approved by the Department of Natural Resources, after consultation with the Department of Environmental Quality, is the most feasible plan for remediation.

In addition, Act 400 amends R.S. 30:29 to state that money damages "may be awarded only" for: (1) the costs of funding the feasible plan; (2) the cost of additional remediation *only* if required by an express contractual provision providing for remediation to original condition or to some other specific remediation standard;" (3) costs of evaluating or correcting damages "caused by unreasonable or excessive operations;" and (4) "nonremediation" damages.

Cooperative Endeavor Agreements for Purchase of Surface Water

La. R.S. 30:961 authorizes the Department of Natural Resources to enter cooperative endeavor agreements that grant persons the right to withdraw running surface waters in the state of Louisiana in return for payment of fair market value. The statute previously prohibited the Department from entering any new cooperative endeavor agreements after Dec. 31, 2014, though existing agreements could be extended to a date no later than Dec. 31, 2020. Acts 2014, No. 285, changes the deadline for the Department to enter new cooperative endeavor agreements to Dec. 31, 2016.

Coastal Erosion Litigation

Acts 2014, No. 544, amends La. R.S. 49:214.36 to add a section stating that "no state or local governmental entity shall have, nor may pursue, any right or cause of action arising from any activity" in the coastal area that is "subject to permitting under" one of three statutes — La. R.S. 49:214.21 (part of the State and Local Coastal Resources Management Act of 1978); 33 U.S.C. 1344 (part of the Clean Water Act); or 33 U.S.C. 408 (part of the Rivers and Harbors Appropriation Act of 1899) — or that arises from "use" or activity in the coastal zone, "regardless of the date such use or activity occurred." The legislation states that nothing in the new section precludes any government entity from enforcing contract claims or from pursuing any administrative remedies. Act 544 states that it applies to pending actions, as well as claims asserted after the effective date of the legislation. An objective of the supporters of Act 544 is to stop litigation in which the Southeast Louisiana Flood Protection Authority-East has sued nearly 100 oil and gas companies, blaming the companies for coastal erosion and seeking billions of dollars in compensation.

City's Annexation of Parish Road

Chesapeake Operating, Inc. v. City of Shreveport, 48,608 (La. App. 2 Cir. 2014), 132 So.3d 537.

The City of Shreveport and Caddo Parish disputed which of them was entitled to the royalties attributable to the area occupied by certain roads located within units where Chesapeake operated productive wells. The beds of the roads had been owned by Caddo Parish, but the City of Shreveport had annexed an area that included the roads. The City asserted that the annexation had the effect of transferring ownership of the roads to the City and that the City, therefore, had the right to the royalties attributable to the roadbeds. The Louisiana 2nd Circuit agreed, holding that the annexation had the effect of transferring ownership of the roads to the City. Therefore, the City was entitled to the disputed royalties.

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Professional Liability

Panel Composition

In Re Vankregten, 48,622 (La. App. 2 Cir. 2/5/14), 134 So.3d 641.

Mr. Vankregten's survivors filed a request for a medical review panel, naming as respondents a hospital and two of its nurse-employees. They then nominated a nurse as a panelist. The hospital objected because the nominee was not a physician. The petitioners refused to nominate a physician, contending that the claimed negligence was by two nurses and that the Louisiana Medical Malpractice Act (LMMA) allows healthcare providers of the same class and specialty to serve on panels.

The attorney chair notified the parties he did not have authority to decide the question, following which the hospital moved to compel petitioners to withdraw the nomination of the nurse and to substitute a physician in her place.

Does La. R.S. 40:1299.47 allow a registered nurse to serve on a panel involving only a hospital and two of its nurse-employees? All parties stipulated, and the court accepted, that there were no reported Louisiana cases addressing this issue.

Eligibility for medical review panel service is set forth in La. R.S. 40:1299.47(C)(3)(j). The controlling sentence reads: "If there is only one party defendant which is a hospital, community blood center, tissue bank, or ambulance service, all panelists except the attorney shall be physicians."

Schumpert (the hospital) argued there is only one party defendant, despite the nurses also having been named as parties, because those nurses were the hospital's employees, and they would not be separately liable for any acts of negligence; only Schumpert would be.

All negligence allegations in the panel request were against the nursing staff, with no allegation of independent negligence by the hospital. The appellate court concluded, in affirming the trial court's decision, that absent a claim against Schumpert for its individual negligence, there is "effectively only one defendant in this case," and, thus, all panelists must be physicians, under the clear and unambiguous language of Section 1299.47(C)(3)(j).

Physician's Liability After Settlement with PCF

Fruge v. Foret, 13-1071 (La. App. 3 Cir. 3/5/14), 134 So.3d 152.

Following a split panel decision, and prior to trial, the plaintiff accepted $600,000 from the PCF in full settlement of all claims against it, while reserving rights against Dr. Foret. Following Mr. Fruge's trial against Dr. Foret, the court found Dr. Foret negligent and awarded Fruge $700,000 in general damages and approximately $66,000 in future medical expenses. The trial court reduced the award to $500,000, under La. R.S. 40:1299.42(B)(1), and found Dr. Foret's liability was limited to $100,000 plus interest. The judgment said nothing about the settlement with the PCF and gave Dr. Foret no offsetting credit for the settlement.

Dr. Foret contended on appeal that the trial court should first have reduced the award to the statutory cap of $500,000 and then again reduced that amount by the $600,000 paid by the PCF, which would mean he owed nothing. He asserted that the PCF settlement was "an advanced payment" under the LMMA, and, therefore, a payment for which he must be given credit because:

> A plaintiff is not entitled to recover damages from the [fund] before an admission of liability has been made by the defendant [healthcare] provider, then recover again after a judgment has been rendered against the defendant [healthcare]provider.

Fruge countered that his settlement with the PCF had no legal effect on Foret's liability for his $100,000 (plus interest) exposure.

In its reasons for judgment, the trial court relied on two provisions of the LMMA. La. R.S. 40:1299.42(C) provides that an advanced payment by a healthcare provider to anyone for injuries or damages suffered by the plaintiff may not be construed as admission of liability. Section 1299.42(D)(2) provides that advanced payments inure to the exclusive benefit of the defendant or his insurer who makes the payments. The PCF is neither a defendant healthcare provider nor an insurer. The court reasoned that the PCF settled prior to trial to "protect its own interests." Section 42(D)(2) is unambiguous: Advanced payments inure to the exclusive benefit of the defendant or his insurer. Dr. Foret paid nothing; therefore, he can receive no credit to apply to the judgment against him.

In affirming the trial court's ruling, the appellate court found "clear" the LMMA's language that advanced payments inure only to the "defendant or insurer making the payment."

Failure to Pass Board Certification Exams

Sanders v. Ballard, 48,714 (La. App. 2 Cir. 2/14/14), 134 So.3d 1205, *writ denied,* 14-0565 (La. 4/25/14).

A jury found that Dr. Ballard breached the standard of care owed to Mr. Sanders but that the breach caused no injury to Sanders that would not have otherwise occurred.

Sanders posed several arguments on appeal, one of which involved the denial of his motion in limine to prevent the defendant from cross-examining Sander's expert about his failing his board certification exams on his first attempt.

Sanders presented evidence that his orthopedic expert (Dr. Leitman) passed the exams on his second attempt, possessed many impressive qualifications and skills, had outstanding academic training, with military service after medical school, had performed several hundred surgeries of the kind Sanders underwent, and had worked under the head team physician for the Philadelphia Eagles and Philadelphia Flyers, as well as for several high school and minor league baseball teams.

Dr. Ballard countered that the failure of Dr. Leitman's certification exam was relevant and highly probative of his qualifications and knowledge. Dr. Ballard also argued that Sanders' attorney raised board certification in tendering Dr. Leitman as an expert witness and that "board certification was relevant to an expert's knowledge of accepted standards of practice and the expert's training and experience."

The appellate court noted that while Dr. Leitman was accepted as an expert, the jury weighed the testimony of all of the experts and decided the case based on the weight of the evidence. Given the "great discretion" of trial judges in determining relevancy and admissibility, the court's determination concerning "relevancy and admissibility should not be overturned absent a clear abuse of discretion."

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Taxation

Taxpayer Refund Requests Do Not Interrupt Prescription in Favor of Collector

Cajun Industries, L.L.C. v. Vermilion Parish School Board, 14-22 (La. App. 3 Cir. 5/14/14), ____ So.3d ____, 2014 WL 2107047.

The 3rd Circuit Court of Appeal reversed in part a trial court's decision to grant a motion to strike and an exception of prescription filed by Cajun Industries, L.L.C. (Cajun). The motion and exception were in response to the Vermilion Parish School Board's (the collector) reconventional demand for offset of additional taxes due against Cajun's suit for refund of sales and use taxes. The 3rd Circuit held that the collector had the right to offset tax liabilities against any refund found to be due to Cajun, but held that Cajun's filing of a refund request did not interrupt prescription for taxes that were not assessed by the collector within the constitutionally prescribed period.

Cajun paid sales and use taxes on certain purchases it made from 2007-10. Cajun later asserted that the purchases were exempt from tax. In December 2010, Cajun filed a claim for refund of the taxes. In May 2011, Cajun filed a claim for an additional refund for sales and use taxes paid in 2010-11. The collector granted a partial refund and formally denied the remainder. Cajun filed a petition for refund in the 15th Judicial District Court in May 2013. The collector filed an answer and reconventional demand against Cajun for statutory offset, stating that it expected to find delinquent taxes, interest and penalties owed by Cajun for the disputed periods, 2007-11. Cajun filed a motion to strike and an exception of prescription, which the trial court granted. The collector appealed.

In reversing the matter, the 3rd Circuit addressed two questions: (1) whether the collector has the right to offset taxes against any tax refund amount found due to a taxpayer; and (2) whether the filing of a refund request by a taxpayer interrupts prescription in favor of taxes that have not been assessed within the constitutionally prescribed period set forth by La. Const. art. 7, § 16?

In rejecting Cajun's reliance on the Louisiana Civil Code concept of compensation, the 3rd Circuit relied on La. R.S. 47:337.78 and La. R.S. 47:337.81(C). Relying on the aforesaid statutory provisions, the 3rd Circuit found that the collector had the right to credit any overpayment against liability owed by a taxpayer and assert any demand for tax due for the period involved in the claim for refund.

In addition, the 3rd Circuit found that none of the instances in which prescription can be interrupted and suspended under La. R.S. 47:337.67 were applicable. The collector asserted that Cajun's first claim for refund filed on Dec. 10, 2010, prevented the running of prescription and opened up the entire disputed period for the collector's claims for taxes. The 3rd Circuit held that there was no statute or jurisprudence stating that a refund request by the taxpayer interrupts prescription in favor of the collector. Considering the foregoing, the 3rd Circuit ultimately held that the collector's reconventional demand to assess additional taxes for the 2007, 2008 and 2009 years were facially prescribed but such demand for the 2010 and 2011 years were not.

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Department Erred in Issuing Assessment to Member of Out-of-State LLC

In *Thomas v. Bridges*, 13-1855 (La. 5/7/14), ____ So. 3d ____, the Louisiana Supreme Court held that the Department of Revenue erred in assessing a member of an out-of-state limited liability company for sales tax on the company's purchase of a recreational vehicle. The individual was a Louisiana resident who formed a Montana LLC admittedly to avoid Louisiana sales tax on the purchase of a recreational vehicle since Montana does not impose sales tax on the purchase of vehicles by its residents, including resident LLCs. After the LLC purchased the RV and did not pay sales tax to Louisiana, the Department of Revenue pursued the individual rather than the LLC and issued an assessment to the individual for taxes owed on the vehicle.

The court found that the Department clearly erred in assessing the individual rather than the LLC, essentially ignoring the separate existence of the LLC before establishing any valid basis for doing so. After assessment and over the course of the proceedings, the Department's attorneys offered various theories for why the assessment against the individual was appropriate, but the court was dismissive of these undeveloped theories in support of the assessment and stated that the record did not contain any factual or legal basis for assessing the individual directly. With respect to one such theory, the court held that the Department's "after-the-fact appraisal the veil should be pierced" did not overcome the problems created by the Department's approach of simply ignoring the existence of the validly formed Montana LLC, which acquired and held title to the property. The Department's approach was in derogation of Louisiana's statutory protection for LLCs, Louisiana's obligation under the U.S. Constitution to provide full faith and credit to the laws of Montana, and the assessed individual's constitutional right to due process. The court suggested that pursuing an assessment against the LLC first and then looking to Montana law in order to find personal liability on the part of the individual member of the LLC should have been the Department's approach.

Further, although personal liability could have been imposed under Louisiana law if the individual member of the LLC had committed fraud, there was no evidence offered that he had committed fraud. Regarding the situation at hand, the court stated "taking actions to avoid sales tax does not constitute fraud" and "[a] finding that the formation of an LLC solely for tax avoidance and not for any 'legitimate' purpose constitutes fraud would have destabilizing implications for Louisiana law." Additionally, the court declined to examine the Department's arguments regarding the doctrines of substance over form and economic substance since the Department raised those issues for the first time in its appeal. Although the court was sympathetic to the Department's policy arguments, it found that the issues in this case involved policy considerations that should be addressed by the Louisiana Legislature rather than the court system. Finally, the court rejected the Department's assertion that the lower courts failed to dismiss the suit on account of the plaintiff neglecting to follow the procedure for posting bond and determined that the statements made by the Board of Tax Appeals to the plaintiff effectively waived strict adherence to the bond provision in La. R.S. § 47:1434.

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