## Art, Entertainment and Sports Law

### Entertainment Legislation

Nineteen entertainment-related bills were filed before or during the 2007 Regular Legislative Session. As of the date of this writing, three of these bills advanced substantially through the legislative process and could be presented to the Governor for signature:

- SB 70 extending the termination date for sound recording tax credits and other related matters;
- SB 218 granting tax credits for musical or theatrical productions and infrastructure projects (sometimes referred to as the Saenger Theater bill); and
- HB 936 amending current tax credit legislation for motion picture and television production as well as infrastructure.



This update focuses on the last bill, HB 936, which as of this date completed the legislative process of both House and Senate, as well as House Ways and Means and Appropriations Committees, Senate Revenue and Fiscal Affairs Committee, and the Joint Conference Committee. The bill now heads for signature by the Governor, which should occur as it is considered the administration's bill.

Some of the main provisions in HB 936, which primarily amends La R.S. 47:6007, are summarized below:

- An infrastructure tax credit limitation of $25 million (representing approximately a $61 million project) for infrastructure projects applying after a fixed date.
- Grandfathering of infrastructure projects submitting applications before Dec. 31, 2006, under current law, and allowing 24 months to earn the 40 percent infrastructure tax credits from the date of approval of further rules or Jan. 1, 2008, whichever is earlier.
- The extension of time after the anticipated effective date of July 1, 2007, for certain infrastructure projects to submit applications and be excluded from the tax credit cap referred to in item 1.
- The legislative protection honoring existing production certifications until the completion of the production.
- The creation of a special Entertainment Promotion and Marketing Fund allowing the Office of Entertainment Industry Development (the film commission) to utilize application fees to promote the state entertainment industry.
- The legislative entitlement and right to earn certain tax credits at the time qualifying expenditures are made, regardless of when the state issues the paperwork.

Nearly four dozen amendments were proposed to HB 936 and a large number of them passed. Despite these numerous changes, the bill creates possible issues of constitutionality and fails to address other issues that industry, the Arts, Entertainment and Sports Law Section and others raised during the session. These issues are:

- Retroactively voiding existing certification contracts unless certain additional substantive criteria are met, which were not required by law at the time the state contract was signed and issued.
- Failing to provide a legislative appeals process for denials and delays, but relegating the process to appeal a denial to the promulgation of rules, which have been mandated by law for several years but have not been issued.
- Failing to provide a fixed time limit for state issuance of state certifications, approvals and denials for greater investor comfort.
- Not incorporating investor assurances by guaranteeing fair and equal application and administration of the certification and tax credit process, instead allowing discretion in the process.

The legislation enacted will be reported in the next *Louisiana Bar Journal*.

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# Corporate and Business Law

## Personal Jurisdiction Over Corporate Director Upheld

***Southeast Wireless Network, Inc. v. U.S. Telementry Corp.***, 06-1736 (La. 4/11/07), 954 So.2d 120.

The Louisiana Supreme Court held that a non-resident director serving on the board of a foreign corporation with its principal place of business in Louisiana, acting in his capacity as a corporate director, engaged in sufficient activities within the forum to subject him to the jurisdiction of a Louisiana court. Additionally, the "fiduciary-shield doctrine" did not apply to defeat personal jurisdiction where the director allegedly committed a tort within the forum that subjected him to personal liability under Louisiana law.

The plaintiffs, investors in U.S. Telementry Corp. (USTC), brought suit against USTC and two of its directors for financial losses they sustained when they transferred licenses in low-frequency radio waves to USTC and invested cash in exchange for stock. The plaintiffs alleged that the directors materially misrepresented the state of the corporation's financial condition and its technology, and were personally liable under Louisiana's Blue Sky Law and theories of negligent or intentional misrepresentation, general tort liability and breach of fiduciary duty.

In response to the plaintiffs' petition, James K. Gable, a non-resident defendant and a USTC director, filed an exception of lack of personal jurisdiction, which was sustained by the trial court. The 1st Circuit Court of Appeal reversed, and the Louisiana Supreme Court upheld the appellate decision, finding that Gable's actions evidenced sufficient minimum contacts with Louisiana to support the exercise of personal jurisdiction. The court noted that Gable accepted the directorship with knowledge of USTC's extensive activities in Louisiana. Gable was also present at a meeting at which he failed to correct false statements and misrepresentations made by fellow directors and failed to disclose the true state of the corporation's affairs, actions that could have given rise to plaintiffs' damages under the Blue Sky Law. Notably, the court agreed with the 1st Circuit's conclusion that:

> [a]ccepting such a corporate position is deemed to constitute a manifest decision to avail oneself of the protection of the laws of the forum, and therefore it is not unreasonable to subject such directors to personal jurisdiction in the forum notwithstanding that their actions may have been only in their official capacity.

Finally, the court refused to apply the fiduciary-shield doctrine, which provides that the acts of a corporate officer in his corporate capacity cannot form the basis for jurisdiction over him in an individual capacity. The court adopted the exception to the doctrine set forth in *Escoto v. U.S. Lending Corp.*, 95-2692 (La. App. 4 Cir. 5/22/96), 675 So.2d 741, *writ denied*, 96-1634 (La. 9/27/96), 679 So.2d 1343, namely, that the fiduciary-shield doctrine will not defeat personal jurisdiction where a non-resident corporate agent commits a tort within the forum which would subject him to personal liability under the laws of that state.

### Determination of Single-Business Enterprise Overturned

***Town of Haynesville, Inc. v. Entergy Corp.***, 42,019 (La. App. 2 Cir. 5/2/07), 956 So.2d 192.

The Louisiana 2nd Circuit Court of Appeal held that Entergy Louisiana, Inc. (ELI) and its affiliates were not a "single-business enterprise" in plaintiff's action against ELI under a "most favored nation" agreement.

The town of Haynesville sued Entergy Corp. and its subsidiary, ELI, under an agreement entered into in 1985 with ELI's predecessor, Louisiana Power & Light Co. (LP&L), that permitted Haynesville to increase its 2 percent franchise fee if the utility paid a higher fee rate to another town. Haynesville alleged that ELI breached this agreement by failing:

- ▶ to pay a franchise fee of 3 percent because ELI paid the City of West Monroe a 3 percent franchise fee; and
- ▶ to pay a 5 percent fee that had been traditionally paid by Gulf States Utilities, Inc., which was acquired by Entergy Corp. in 1992.

After finding that the agreement was ambiguous as to what it intended with respect to entities that may be affiliated with LP&L/ELI, the trial court held that ELI and its affiliates were a single-business enterprise and the corporate separateness of the entities could be disregarded to extend liabilities of ELI to affiliated corporations.

The trial court cited four reasons for its single-business enterprise determination:

- ▶ (1) Entergy Corp.'s ownership of sufficient stock to give it control over its subsidiaries;
- ▶ (2) common officers and directors;
- ▶ (3) an advertisement published in a Claiborne Parish newspaper asserting that Entergy and its subsidiaries were considered "one" company operating under "one name" and stating "we are unifying five separate power companies into one cohesive whole;" and
- ▶ (4) a check submitted to Haynesville in payment of the franchise fee by Entergy Services, Inc. "as agent for" Entergy Corp. and a number of its subsidiary power companies.

The 2nd Circuit overturned the trial court's decision, holding that LP&L/ELI's contract did not apply to fees paid by the former Gulf States Utilities, Inc. and ELI and its affiliates were not a single-business enterprise. The court stated that control of subsidiaries and common officers and directors were not by themselves sufficient for finding a single-business enterprise. The court also determined that the trial court erred in relying upon the advertisement and the check in its determination and declared that piercing the corporate veil is a "radical remedy only employed in exceptional circumstances."

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## Criminal Law

### Multiplicitous Convictions in Child Porn Downloading

***U.S. v. Buchanan,*** 485 F.3d 274 (5 Cir. 2007).

Joseph Michael Buchanan was a park ranger working for the United States Army Corps of Engineers. From 2001 through 2002, Buchanan used his work computer to download pornography, including child pornography and images of bestiality, and was ultimately caught by his employer and turned over to the FBI. He was charged with four counts of receiving child pornography transported in interstate commerce by computer and one count of possession of child pornography. The four counts of receiving child pornography were based on four large electronic (.jpg) files found among hundreds of thumbnail files in a memory cache. Buchanan was convicted of all five charges by a jury and appealed his convictions and sentence, claiming multiplicity of convictions as to the receiving child pornography charges and varied complaints regarding Guidelines enhancements.

The 5th Circuit agreed that the convictions were multiplicitous and vacated the convictions. The rule against multiplicity of convictions is grounded in double jeopardy, so as to prevent multiple punishments for the same act. The 5th Circuit explained that the test for determining whether the same act or transaction constitutes two offenses or only one is whether conviction under each statutory provision requires proof of an additional fact that the other does not:

> Where a multipart transaction raises the prospect of multiplicity under a single statute, the question becomes whether separate and distinct prohibited acts, made punishable by law, have been committed. When the jury is allowed to return convictions on multiplicious counts, the remedy is to remand for resentencing, with the government dismissing the count(s) that created the multiplicity because the chief danger raised by a multiplicious indictment is the possibility that the defendant will receive more than one sentence for a single offense [citations omitted].

In *Buchanan*, the four large files identified in the indictment showed date and time stamps over a 12-minute period on a single day. Although the date and time stamps were not necessarily the date and time on which the images were viewed or downloaded, the government did not prove that the four images were gathered separately or from different sites. As such, the government failed to prove that the images were acquired as part of anything but a single transaction, and so the convictions were vacated as multiplicitous.

## Impossibility Not a Bar to Federal Sentence Enhancement

***U.S. v. Rankin***, ____ F.3d ____, (5 Cir. 2007).

James Vaughn Rankin was approached by an undercover ATF agent who arranged to purchase a bomb built into a briefcase. After some preliminary visits and negotiation, the agent picked up the bomb, explaining to the defendant that she intended to use it to kill her (fictional) husband. Vaughn was convicted of the manufacture, possession and transport of explosive materials. At sentencing, Vaughn received 51 months of imprisonment for each of three counts, to run concurrently with each other. The district court used the basic Guidelines provisions, and the government objected, requesting a cross-reference to the Guidelines for attempted murder or solicitation of murder because the defendant knew that the bomb would be used to kill someone, albeit a fictional person. The district court declined to apply the cross-reference or to upwardly depart, and the government appealed.

The 5th Circuit found that the district court erred in determining that factual impossibility rendered the application of the cross-reference provision inappropriate. The court reasoned that factual impossibility is not a defense to a charge of attempt, and observed that attempt liability requires that the government prove two elements: (1) that the defendant acted with the kind of culpability otherwise required for the commission of the underlying substantive offense; and (2) that the defendant engaged in conduct that constitutes a substantial step toward the commission of the crime.

The court briefly discussed that the district court did not make factual findings outside of adopting the presentence report regarding Rankin's actual knowledge or intent, but did not reach the issue of actual intent, and instead remanded for resentencing. The court made no mention of the possibility of sentencing manipulation by government agents through the simple expedient of stating that a particular purchase was for a murderous intent, rather than remaining silent, though it may be difficult to envision a use for a briefcase bomb other than murder.

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## Family Law

### Custody

***C.L.S. v. G.J.S.***, 05-1419 (La. App. 4 Cir. 3/7/07), 953 So.2d 1025.

The court of appeal affirmed the trial court's finding that the daughter had been sexually abused by the father. It awarded sole custody to the mother and required the father to obtain treatment. The lack of physical evidence of abuse of a 4- to 5-year-old does not mean the abuse did not take place, especially given the other factors here. The trial court did not err in not appointing an independent child psychologist to examine the daughter because it was not shown that the three experts were not independent; only one of the four experts had been retained by the mother specifically for trial. Although it was error for the trial court not to appoint an attorney for the child once a *prima facie* case of abuse was made, the trial court's failure to do so was harmless error.

***LeBlanc v. LeBlanc***, 06-1052 (La. App. 3 Cir. 2/14/07), 951 So.2d 500.

The court of appeal reversed the trial court's change of domiciliary parent to the father, finding that there was no material change of circumstances. A relocation is not alone a change of circumstances. The mother's move from Lake Charles to Pollock was not sufficient to establish a change of circumstances. Other factors that did not suffice as a change of circumstances included the child's reaching school age, behavior problems unrelated to the proposed move, and difficulties in the physical custody arrangement.

## Child Support

***Flickinger v. Flickinger***, 05-2228 (La. App. 1 Cir. 12/28/06), 952 So.2d 70.

Amended La. R.S. 9:315.7 retroactively applied, even though the law was different at the time the trial court ruled, because the amendment clarified that Social Security benefits received by a child due to the earnings of a parent shall be credited as child support to that parent. The trial court did not abuse its discretion in ordering Mr. Flickinger to pay his share of the child's private school tuition where he did not respond to Ms. Flickinger's attempt (she was the domiciliary parent) to consult with him regarding school placement and did not contest her placing the child in private school. However, he could only be ordered to pay his share of the tuition costs accruing after the date her rule was filed.

***Sampognaro v. Sampognaro***, 41,664 (La. App. 2 Cir. 2/14/07), 952 So.2d 775.

The trial court did not abuse its discretion in ordering child support of $5,500 per month where the parties' income exceeded the guidelines, even though there was shared custody, considering the children's standard of living during the marriage and the father's income and mother's expenses. This sum included such expenses as child care, tuition, uniforms, tutoring and summer camps, which he could pay directly and deduct from the $5,500, but he was required to give her a monthly accounting of such third-party payments. Mr. Sampognaro was entitled to reimbursement for mortgage payments on a co-owned property, costs of construction improvements to that property, and for taxes, insurance and maintenance expenses he paid, subject to an offset for his exclusive use of the property.

## Final Spousal Support

***Ackel v. Ackel***, 06-0646 (La. App. 5 Cir. 1/16/07), 951 So.2d 403.

Because the hearing officer's recommendation was signed by the domestic commissioner, and an order was entered by the district court judge, requiring him to pay final spousal support until a hearing could be held before the judge on his objection to the hearing officer's recommendation, Mr. Ackel could be found in contempt for not paying the support.

## Adoption

***Doe v. A.B.***, 06-1226 (La. App. 3 Cir. 1/31/07), 949 So.2d 602.

The court of appeal reversed the trial court's upholding of A.B.'s objection to the adoption of the child, finding that A.B. failed to show a substantial commitment to the child, and failed to show he was fit to care for the child. The court of appeal found that it was not in the child's best interest for A.B. to assume care of the child. The court of appeal thus terminated his parental rights and held that the adoption could go forward without his consent.

*In re: T.M.L.*, 06-1442 (La. App. 1 Cir. 12/28/06), 951 So.2d 364.

The trial court erred in approving this intra-family adoption without appointing an attorney for the child, which is mandatory; nor were there allegations in the petition that the father's parental rights had been terminated or proof in the record that they had been.

### Property

***Corkern v. Corkern***, 05-2297 (La. App. 1 Cir. 11/3/06), 950 So.2d 780.

The purported donation of a crew boat to Mr. Corkern by his father was an onerous donation, not a gratuitous donation, because it was burdened with charges to pay the existing mortgage, and the value of the boat did not exceed the charge by one-half; thus, the boat was community, not separate property. Registration in his name alone was insufficient to make it his separate property. Certain of Mr. Corkern's reimbursement claims were reduced for lack of proof of payment or lack of proof that payment was made with his separate property.

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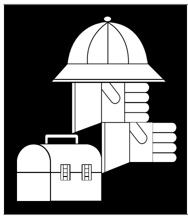

## Labor and Employment Law

### Alito Speaks for the Court: Timeliness Under Title VII

On May 29, 2007, the United States Supreme Court, in a 5-4 decision authored by Justice Alito, determined that a plaintiff challenging a pay discrepancy under Title VII must file a timely charge with the EEOC as to each discrete act of discrimination — within 180 days (or 300 days, depending on the state) from each alleged discriminatory act leading to the pay discrepancy — not the date of the effect of the decision. Rejecting the plaintiff's "paycheck accrual rule," the court held that Ledbetter's claim was untimely because each new paycheck did not constitute a new violation that restarts the clock for filing an EEOC charge. *Ledbetter v. Goodyear Tire & Rubber Co., Inc.*, 127 S.Ct. 2162 (2007).

Ledbetter worked at a Goodyear plant as a salaried employee from 1979 until 1998. During most of that time, salaried employees at the plant were granted or denied raises based on their performance evaluations. In March 1998, Ledbetter submitted a questionnaire to the EEOC claiming sex discrimination. In July 1998, she filed a formal EEOC charge. After taking early retirement in November 1998, Ledbetter filed suit under Title VII and the Equal Pay Act asserting a pay discrimination claim, along with other claims. The district court granted summary judgment on certain claims, including her EPA claim, but allowed other claims, including her Title VII pay discrimination claim, to proceed to trial.

At trial, she introduced evidence that during the course of her employment she had received poor evaluations because of her sex, resulting in her pay not increasing as much as it would have had she not been a victim of sex discrimination. These past pay decisions, she alleged, continued to affect the amount of her pay through the last pay decision in 1998. The evidence demonstrated that she was being paid significantly less than any of her male counterparts. A jury awarded back pay and damages.

On appeal, Goodyear had argued that her pay discrimination claim was time barred as to all pay decisions prior to Sept. 26, 1997 — 180 days before the filing of her charge questionnaire. The 11th Circuit agreed and reversed, holding that a Title VII pay discrimination claim cannot be based on any pay decision that occurred before the last pay decision that affected the employee's pay during the EEOC charging period. 421 F. 3d 1169, 1182-83 (11 Cir. 2005).

The petition sought review of the following:

> Whether and under what circumstances a plaintiff may bring an action under Title VII of the Civil Rights Act of 1964 alleging illegal pay discrimination when the disparate pay is received during the statutory limitations period, but is the result of intentionally discriminatory pay decisions that occurred outside the limitations period.

Based on a circuit split as to the proper application of the limitations period in Title VII disparate-treatment pay cases, the court granted certiorari.

Relying on precedent, the court held that the EEOC charging period is triggered when a discrete unlawful practice takes place. A new violation does not occur, and a new charging period does not commence, upon the occurrence of subsequent nondiscriminatory acts that entail adverse effects resulting from the past discrimination. The court found that Ledbetter should have filed an EEOC charge within 180 days after each allegedly discriminatory pay decision was made and communicated to her.

> She did not do so, and the paychecks that were issued to her during the 180 days prior to the filing of her EEOC charge do not provide a basis for overcoming that prior failure.

127 S.Ct. at 2169. The court noted that, not only would Ledbetter's position eliminate the element of intent, but it would also distort Title VII's multistep enforcement procedures and Congress' intent to encourage early resolution. Rejecting the argument that an employment practice committed with no improper purpose and no discriminatory intent is rendered unlawful because it gives some effect to an intentional discriminatory act that occurred outside the charging period, the court held Ledbetter's claim untimely. 127 S.Ct. at 2170-71. The court determined that her claim was fully formed and present when each discriminatory employment action was taken against her, which is the point when she could have and should have filed her claim and then sued.

The court also rejected Ledbetter's argument that *Bazemore v. Friday*, 106 S.Ct. 3000 (1986), mandated a different result. Distinguishing that decision, the court stated:

> *Bazemore* stands for the proposition that an employer violates Title VII and triggers a new EEOC charging period whenever the employer issues paychecks using a discriminatory pay structure. But a new Title VII violation does not occur and a new charging period is not triggered when an employer issues paychecks pursuant to a system that is "facially nondiscriminatory and neutrally applied." . . . The fact that precharging period discrimination adversely affects the calculation of a neutral factor (like seniority) that is used in determining future pay does not mean that each new paycheck constitutes a new violation and restarts the EEOC charging period.

127 S.Ct. at 2174. The court also rejected the dissent's position that a Title VII discrimination pay claim is more like a hostile environment claim. 127 S.Ct.at 2175.

The court reinforced its prior holdings that when an employee alleges "serial violations," *i.e.*, a series of actionable wrongs, a timely EEOC charge must be filed as to each discrete alleged violation.

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## Professional Liability

### Claim of Panel Bias

***Cascio v. Downing***, 06-0570 (La. App. 4 Cir. 4/4/07), ____ So.2d ____.

Two of three medical-review panelists opined that the evidence supported the conclusion that Dr. Downing failed to meet the appropriate standard of care. A lawsuit ensued, and the trial court rendered judgment in favor of the plaintiff.

On appeal, Dr. Downing alleged that the medical-review panel was "tainted" and the opinion prejudiced by the failure of one of the panel members to recuse himself. Dr. Downing contended that because of his testimony in a separate matter, one of the panelists (whose opinion was that Dr. Downing breached the standard of care) faced disciplinary action. He said that the trial testimony showed that this panelist "had an axe to grind." Dr. Downing further contended that this physician and the other panelist who found a breach worked in the same office and that this was additional evidence that the panel was biased.

Dr. Downing raised an objection to the trial court about the composition of the panel after it rendered its opinion, but at trial he offered no evidence to prove that he was prevented, prior to the rendition of the panel's opinion, from learning of the alleged bias. The trial court's finding that the challenge to the panel's opinion was untimely was upheld by the appellate court, as were the trial court's other findings.

### Summary Judgment

***Samaha v. Rau***, 06-1561 (La. App. 1 Cir. 5/4/07), ____ So.2d ____.

The plaintiffs filed a medical-malpractice lawsuit against a physician. A medical-review panel had ruled in favor of the physician. The physician moved for summary judgment supported only by a "certified true copy" of the medical-review-panel opinion and a correcting affidavit of the attorney chair. He asserted summary judgment should be granted because the plaintiffs had no expert witness to support their claim. The trial court granted summary judgment.

The plaintiffs appealed, asserting as the sole assignment of error that the panel opinion, unsupported by testimony or affidavits from one or more panel members, is insufficient evidence to carry the movant's burden of proof. The appellate court agreed, finding that the burden of proof never shifted to the plaintiffs to require them to show any support for their claims. The grant of summary judgment was reversed.

### Standard of Proof

***Lanningham v. Walton***, 06-1103 (La. App. 3 Cir. 2/7/07), 950 So.2d 922.

In his oral reasons for judgment, the trial judge said that the plaintiffs failed to prove:

> either through clear and convincing evidence, or beyond a reasonable doubt, that Dr. Walton fell below the reasonable standard of care as required by physicians who practice similar medicine.

The court of appeal agreed with the plaintiff's assertion that the burden of proof in a medical-malpractice case is by a preponderance of the evidence, not by clear and convincing evidence or evidence beyond a reasonable doubt, and that the trial judge had committed legal error by applying the wrong standard, thereby requiring the court of appeal to review the matter *de novo*. However, after a *de novo* review, the court affirmed the judgment in favor of the defendant because it found the record "devoid of any sufficient and tangible evidence which supports the assertions of [plaintiff's expert] and Plaintiffs," stating also that the plaintiff's theory was more "speculative than definitive."

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