



### 2nd Circuit Holds Res Judicata not a Question of Procedural Arbitrability

*Wilson v. Allums*, 47,147 (La. App. 2 Cir. 6/8/12), 94 So.3d 908, writ denied, 12-1611 (La. 10/26/12), \_\_\_ So.3d \_\_\_.

In a case of first impression in Louisiana, the Louisiana 2nd Circuit Court of Appeal decided that the question of whether a demand for arbitration is barred by res judicata is a matter for courts, not arbitrators, to decide. The 2nd Circuit applied the teachings of the United States Supreme Court and decisions from around the nation to find that the res judicata question was one of substantive arbitrability.

*Wilson v. Allums* arose out of a construction contract between Wilson Construction, Inc. and Danny and Angie Allums that contained an arbitration clause. The case began when a lumber supplier sued both Wilson and the Allumses, alleging non-payment. The Allumses filed a cross claim against Wilson but did not reserve the right to arbitrate. The court granted summary judgment for the supplier, but the Allumses' cross claim remained pending.

After three years passed with no activity, the Allumses' attorney wrote to Wilson demanding reimbursement for amounts spent to complete the work and threatening to pursue arbitration if those amounts were not paid within 10 days. In response, Wilson moved to dismiss the still-pending

cross claim as abandoned. The trial court granted the motion and dismissed the cross claim with prejudice.

After the dismissal, the Allumses brought an arbitration demand against Wilson. Wilson responded by filing a petition for preliminary injunction that asserted waiver and res judicata based on the previously dismissed cross claim. In response to the petition, the Allumses sought a dismissal, claiming that arbitration was the proper forum in which to resolve the dispute. The trial court granted the preliminary injunction, based on the res judicata argument. The Allumses appealed.

The questions the court initially had to resolve were whether waiver and res


judicata were questions of "substantive arbitrability" or "procedural arbitrability." According to *Howsam v. Dean Witter Reynolds, Inc.*, 123 S.Ct. 588 (2002), questions of substantive arbitrability are for courts to decide, whereas questions of procedural arbitrability are for arbitrators to decide. Substantive arbitrability pertains only to a narrow class of disputes, including whether the parties are bound by an arbitration clause and whether an arbitration clause applies to the particular dispute. By contrast, procedural arbitrability applies to other "gateway" procedural matters that may impact the disposition of the case, such as waiver or estoppel. In the absence of an agreement to

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the contrary, those issues must be decided by arbitrators.

With those criteria in mind, the court turned first to the waiver issue. The court quickly disposed of that issue because the Louisiana Supreme Court held in *International River Center v. Johns-Manville Sales Corp.*, 02-3060 (La. 12/3/03), 861 So. 2d 139, that waiver is a question of procedural arbitrability. Accordingly, the court concluded it had no jurisdiction to decide the waiver issue.

With respect to the res judicata issue, however, no Louisiana court had addressed whether it was an issue of substantive or procedural arbitrability. Therefore, the court looked to other decisions from around the nation. According to the court, the authorities were split. After discussing the conflicting authorities, the court sided with the substantive arbitrability decisions and found that the question of res judicata must be decided by the courts. In support, the court reasoned that state court judges are in a better position to decide whether a prior state court judgment should be given res judicata effect.

Turning to the merits, the court affirmed the trial court's finding that the prior judgment was res judicata. The court also found that the trial court properly granted the preliminary injunction.

Although the question of whether res judicata is an issue of substantive arbitrability or procedural arbitrability was an issue of first impression, the 2nd Circuit offered little guidance on the issue, saying only that trial court judges are in a "better position" to decide the res judicata issue. The issue, however, presents a challenging dilemma. On the one hand, res judicata does not fit the criteria for substantive arbitrability because it does not pertain to the issues of whether a valid arbitration agreement exists or whether the particular case falls within the scope of the agreement. On the contrary, res judicata fits the definition of "procedural arbitrability" because, like waiver or estoppel, res judicata is a procedural question that bears on the final disposition of the case. This is precisely why the court in *Klay v. United Healthgroup, Inc.*, 376 F.3d 1092 (11 Cir. 2004), a case cited by the *Wilson* court,

decided that res judicata is a question of procedural arbitrability. However, courts that came down on the side of substantive arbitrability made a limited exception, on the ground that judges must protect the integrity of prior judgments. See, *John Hancock Mut. Life Ins. Co. v. Olick*, 151 F.3d 132 (3 Cir. 1998).

Had the *Wilson* court followed the lead of *John Hancock*, it could have made a limited exception to the standard of procedural arbitrability for the res judicata issue, based on the judiciary's interest in protecting the integrity of final judgments. Instead, the court potentially opened the door to further expansion of substantive arbitrability any time a court is in a "better position" to evaluate a particular defense, which is contrary to the policy of favoring arbitration.

—Scott H. Mason

Member, LSBA Alternative Dispute Resolution Section  
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## Attorney's Fees Paid Leaving Unsecured Creditors Unpaid is Not Per Se Bad Faith

*Sikes v. Crager*, 2012 WL 3518473 (5 Cir. Aug. 16, 2012).

Patricia Ann Crager filed for Chapter 13 bankruptcy and, upon the filing of the plan, the trustee objected to the confirmation of the plan. The trustee asserted that the plan was not filed in good faith pursuant to 11 U.S.C. § 1325(a)(3) and (7) and that the amount of attorney's fees sought by Crager's attorney was unreasonable. The bankruptcy court overruled the trustee's objection, approved Crager's Chapter 13 petition and plan, and requested legal fees and advanced

legal costs. On appeal, the district court reversed the confirmation of the plan and ordered the bankruptcy court to find on remand that the plan was filed in bad faith. Crager then appealed to the 5th Circuit.

On Aug. 16, 2012, the 5th Circuit reversed the ruling of the district court and affirmed the bankruptcy court's confirmation of the debtor's Chapter 13 plan. The court stated that there is no rule in the 5th Circuit that a Chapter 13 plan that "results in the debtor's counsel receiving almost the entire amount paid to the Trustee, leaving other unsecured creditors unpaid, is a per se violation of the 'good faith.'"

The trustee argued that the bankruptcy court abused its discretion by awarding attorney fees to Crager's counsel. The 5th Circuit looked to 11 U.S.C. § 330, under which the bankruptcy court can award "reasonable compensation" to attorneys for representing a debtor's "interests in connection with the bankruptcy case based on a consideration of the benefit and necessity" of the services provided, among other factors listed in the statute. Therefore, the 5th Circuit held the bankruptcy court was proper in its use of the Section 330 factors to determine that the attorney fees were reasonable under the circumstances.

## "Actual Fraud" Showing Not Required to Exempt Judgment Debts from Discharge

*Cardwell v. Gurley*, No. 12-40070 (Aug. 31, 2012).

Donald Lee Cardwell and Bill Gurley were business partners and co-owners of a real-estate development business. Cardwell was the managing member and was responsible for handling the business' day-to-day activities. Cardwell made misrepresentations to Gurley, inducing him to consent to a property development transaction that "ultimately injured Gurley to the benefit" of Cardwell. Gurley filed suit in state court and received a judgment against Cardwell. Thereafter, Cardwell filed for bankruptcy and Gurley filed this action seeking to exempt the judgment

from discharge. The bankruptcy court gave preclusive effect to the findings of fact and conclusions of law of the state court and concluded the debt was non-dischargeable; the district court affirmed.

On appeal, the 5th Circuit reviewed 11 U.S.C. § 523(a)(2)(A), which states that a debtor is not discharged from "any debt . . . for money, property, services . . . to the extent obtained by false-pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition."

The debtor argued that the five-element "actual fraud" test set out in *In re Acosta*, 406 F.3d 367 (5 Cir. 2005), must be applied to all actions brought under § 523(a)(2)(A). The 5th Circuit noted that "it has not determined whether the five-element test applies to all actions under § 523(a)(2)(A), and it need not do so [because] the debt at issue is not dischargeable even under the more stringent *Acosta* test."

The *Acosta* factors state that in order for a debt to be non-dischargeable, a creditor must show:

- (1) that the debtor made a representation;
- (2) that the debtor knew the representation was false;
- (3) that the representation was made with the intent to deceive the creditor;
- (4) that the creditor actually and justifiably relied on the representation; and
- (5) that the creditor sustained a loss as a proximate result of its reliance.

Asserting that the state court did not find "fraud" or an "intent to deceive" in so many words, Cardwell argued the *Acosta* standard was not met.

Finding that Cardwell persuaded Gurley to consent to business transactions that Cardwell had no intention of pursuing, the 5th Circuit ruled that primary *Acosta* elements, numbers 2 and 3, were met. As the result, the 5th Circuit ruled the debt was not dischargeable under § 523(a)(2)(A).

—**Tristan E. Manthey**  
Chair, LSBA Bankruptcy Law Section  
and  
**Alida C. Wientjes**  
Heller, Draper, Patrick & Horn, L.L.C.  
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## 6th Circuit Weighs in on Furnisher Duties Under the FCRA

In *Boggio v. USAA Federal Savings Bank*, 696 F.3d 611 (6 Cir. 2012), the court of appeals reversed and remanded the summary judgment dismissal of a Fair Credit Reporting Act (FCRA) claim under 15 U.S.C. § 1681s-2[b]. This is commonly referred to as the furnisher-reinvestigation action. Plaintiff alleged that USAA Federal Savings Bank violated the FCRA because it failed to investigate adequately and to respond accurately to notices sent to it by various consumer reporting agencies (CRA) about a disputed car loan. The court found that a jury could find both that USAA's

investigation was unreasonable and that Boggio was not responsible for the car loan or lien at issue in the credit reporting.

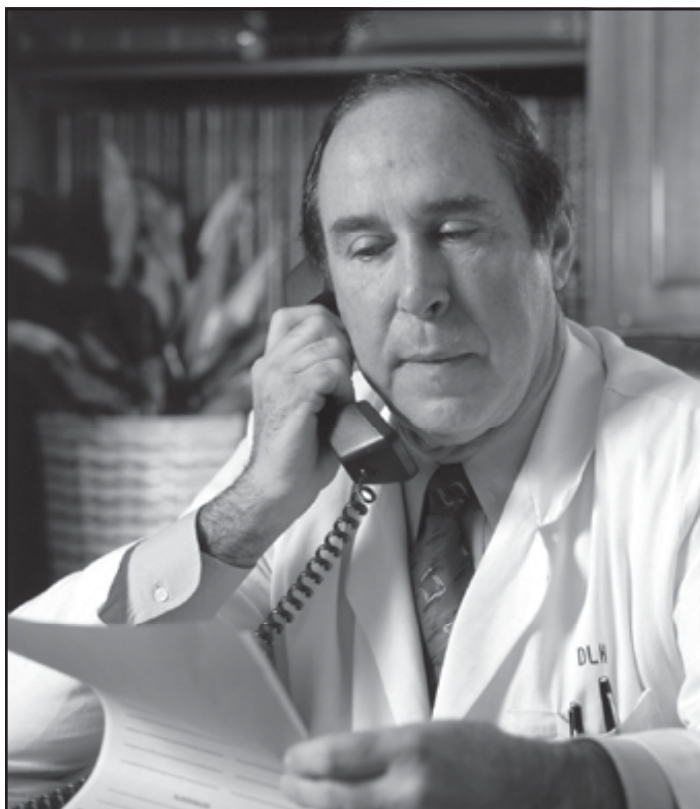
The unsigned security agreement listed plaintiff as a co-signer. Following other circuits and more than 100 district court decisions, the court found a private right of action for negligent or willful violations (equated to reckless disregard per *Safeco Insurance Co. v. Burr*, 127 S.Ct. 2201 (2007)). The furnisher-reinvestigation private right of action can be triggered only by a dispute to a reporting agency that, in turn, communicates the dispute to the furnisher. If the furnisher fails to properly reinvestigate and correct the reporting timely, the furnisher can be found to violate the FCRA.

A reinvestigation must be a real investigation and not some perfunctory recheck; "anything less than a reasonable inquiry would frustrate Congress's goal to create a system that permits consumers to dispute credit inaccuracies." *Boggio*, 696 F.3d at 616. The reinvestigation must be "reasonable," which, like willfulness and negligence, are fact questions reserved to the jury in almost all cases and not proper

for summary judgment. Suggesting that the reporting agencies must do more in the transmittal notice, the court noted that "how thorough an investigation must be to be 'reasonable' turns on what relevant information was provided to a furnisher by the CRA giving notice of a dispute." *Id.* at 617.

The court set forth the furnisher's duties, as follows: (1) review all relevant information provided to it by a CRA regarding a dispute in order to comply with § 1681s-2(b)(1)(B); (2) determine the scope of the investigation by considering the nature and specificity of the information provided by the agency to the furnisher; and (3) report the results of its investigation to the reporting agency under § 1681s-2(b)(1)(C).

After a reasonable investigation and review of all relevant information provided by a reporting agency, a furnisher must then report its findings about a customer's information to the agency that originally provided notice of the dispute. This reporting duty requires a furnisher to respond to an agency regarding the results of the furnisher's investigation, irrespective



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of the outcome of its investigation.

The FCRA further requires that if the investigation finds that the information is incomplete or inaccurate, the furnisher must “report those results to all other [CRAs] to which the person furnished the information and that compile and maintain files on consumers on a nationwide basis.” § 1681s-2(b)(1)(D). The furnisher also must either modify, delete or permanently block reporting of information that it finds upon investigation to be inaccurate, incomplete or unverifiable. § 1681s-2(b)(1)(E).

The court further stated that:

as the scope of this duty is determined by reference to inaccurate or incomplete information, the duty equally extends to the discovery of both inaccurate or incomplete consumer information and to the discovery of consumer information that is materially misleading. In addition, a furnisher has a duty to modify, delete, or block its original reporting if it discovers, upon investigation, that it can no longer verify the consumer information it originally supplied to a CRA.

*Id.* at 618.

The court likewise rejected USAA’s company policy of demanding a sworn affidavit or police report from the contesting consumer before USAA did

anything. Further, USAA testified that its reinvestigation “reviewers were prohibited from consulting documents in his file — including the allegedly forged check in question—and instead would have verified only his identity before responding to a CRA notice,” which showed a genuine dispute as to whether USAA’s investigation was reasonable. *Id.* at 619. After reversing summary judgment, the court remanded for a jury trial.

The court also should have addressed the furnisher’s duties to review its own records in the process and not merely focused on the limited data furnished in the cursory automated consumer dispute verification email-style communication. The problem is that these emails do not incorporate the documents a consumer sends with his or her dispute to the reporting agency. This is a shortcoming of the agencies’ dispute verification process but not a loophole to escape liability on the part of a furnisher. The dispute verification email is never copied to the consumer, so the consumer is left to guess what the reporting agency said to the furnisher.

—David A. Szwak

Chair, LSBA Consumer Protection  
Law Section  
Bodenheimer, Jones & Szwak, L.L.C.  
Ste. 1404, 416 Travis St.  
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Shreveport, LA 71101



## EPA Wins New Source Review Case Determining Interpretation of “Routine” Work

In *United States v. Louisiana Generating, L.L.C.*, No. 09-100-JJB-CN, 2012 U.S. Dist. LEXIS 134195 (M.D. La. Sept. 19, 2012), the Louisiana Middle District Court granted summary judgment in favor of the U.S. Environmental Protection Agency (EPA), determining that replacements of two primary reheaters at the Big Cajun II coal-fired generating facility constituted a major modification, triggering the Prevention of Significant Deterioration Provisions (PSD) of the Clean Air Act (CAA). Louisiana Generating (LaGen) had argued that the replacements were “routine maintenance, repair or replacement” which would have exempted the work from the need to comply with the PSD provisions of the CAA.

LaGen purchased Big Cajun II from Cajun Electric in March 2000. Prior to the sale, Cajun Electric replaced the primary reheaters at two of its units because the reheaters were responsible for costly shutdowns. The cost of replacing each reheater was approximately \$4.5 million, which at the time was the most costly project ever undertaken at either unit.

The issue in this litigation was whether this replacement project constituted a major modification, defined in the CAA as a physical change in or change in the method of operation of a major stationary source that would result in a significant net emissions increase of a regulated pollutant. If so, the facility would be in violation of the PSD program and subject to New Source Review. However, under EPA’s regulations, a “physical change” does not include routine maintenance; thus, if the reheater replacement is routine maintenance, the action is not a modification. Whether work is considered “routine” is determined by the

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so-called “WEPCO” factors, which include the nature, extent, purpose, frequency and cost of the work, as well as any other relevant factors. The EPA has stated that these factors should be applied on a case-by-case basis to make a common-sense finding.

Most of the disagreement between LaGen and the EPA focused on the frequency factor. LaGen argued that the proper approach was to analyze the frequency of replacement on an industry-wide basis, while EPA argued that the analysis should be unit-specific. EPA proposed a heart transplant analogy — while LaGen would like to look at the total number of transplants performed across the medical field, EPA would like to look only at the number of transplants for each individual patient. In essence, LaGen argued for a “routine in the industry” analysis, and EPA argued for a “routine at the unit” analysis. The court found that both approaches are relevant to the analysis, but the unit-specific approach proposed by EPA is much more relevant to a determination of what is routine.

The court stated that whether similar units replace primary reheaters multiple times during a unit’s lifetime is relevant to the discussion. However, the fact that many similar units replace a primary reheater only once in the unit’s lifetime does not automatically make such a replacement routine. The court noted that LaGen could not identify any instances in which a facility had replaced a primary reheater more than once during a unit’s lifetime. The court did, however, agree with LaGen that the industry-wide analysis was relevant because otherwise the analysis would produce the absurd result whereby any work performed for the first time in the unit’s life would have to be considered non-routine. Ultimately, however, the court found in favor of EPA because it placed much greater weight on the frequency of the work performed at the unit in question.

—**Madeline Ahlgren** and  
**Stephen C. Thompson**  
Members, LSBA Environmental  
Law Section  
Harrison Law, L.L.C.  
Ste. 820, One American Place  
Baton Rouge, LA 70825

## Legislature Amends Act 312 and Changes Procedures for Legacy Lawsuits

On Aug. 1, 2012, several new sets of legislation amending the procedures for legacy lawsuits took effect. Legacy lawsuits — in which landowners file suit seeking compensation for remediation of their now-contaminated property against parties who have used their property to conduct oil-and-gas exploration and production activities — have been controlled by Act 312 since 2006. However, as lawsuits have progressed through the judicial system, all parties involved have criticized aspects of

the procedures established by the Act — criticisms that have resulted, for now, in the passage of several bills introducing new or changed procedures.

Senate Bill 555, now in effect, amended La. R.S. 30:29 by adding a new “pre-hearing” option. Now, per La. R.S. 30:29(B)(6), “[w]ithin sixty days of being served with a petition or amended petition asserting an action, a defendant may request that the court conduct a preliminary hearing to determine whether there is good cause for maintaining the defendant as a party in the litigation.” This (B)(6) pre-hearing responds to the complaint that often landowners name parties with little to no relationship to the property who are then unable to quickly and



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inexpensively escape the litigation. At the (B)(6) hearing, the plaintiff has the initial burden to introduce evidence to support the allegations of environmental damage. The burden then switches to the defendant to show an absence of a genuine issue of material fact that it is the party responsible for the alleged damage. Although the new rule does not mandate how soon this hearing must be scheduled, it does dictate that the court will issue its ruling within 15 days after the (B)(6) hearing.

Senate Bill 555 also suspends prescription for one year for landowner-plaintiffs who perform environmental testing after giving notice (*see* La. R.S. 30:29(B)(7)(a)), prohibits *ex parte* communications with LDNR personnel prior to the issuance of a remediation plan (*see* La. R.S. 30:29 (C)(2)(b)), and concludes with the following waiver of contractual indemnity from punitive damages upon an admission of liability in Subsection 29(L):

If pursuant to the terms of a contract the responsible party is entitled to indemnification against punitive damages arising out of the environmental damage that is subject to the provisions of this Section, the responsible party shall waive the right to enforce the contractual right to indemnification against such punitive damages caused by the responsible party's acts or omissions if the responsible party admits responsibility for the remediation of the environmental damage under applicable regulatory

standards pursuant to the provisions of the Code of Civil Procedure Article 1563. Such waiver of the right to indemnification against punitive damages shall not apply to any other claims or damages.

House Bill 618, now in effect, enacts two new articles of civil procedure: La. C.C.P. articles 1552 and 1563. Article 1552, entitled "Environmental Management Orders," allows any party or the DNR to request in a La. R.S. 30:29 suit that the court order the development of an environmental management order, which must "authorize all parties to access the property allegedly impacted to perform inspections and environmental testing" and requires sharing of all test results.

Article 1563 is entitled "Limited Admission of Liability in Environmental Damage Lawsuits; Effect." It permits La R.S. 30:29 defendants to make a limited admission of environmental liability to allow for the remediation of sites using the existing Act 312 procedure before trial on the merits. Although the limited admission of liability is admissible in court, it is not to be construed as an admission of liability for damages under La. R.S. 30:29(H).

—**Lauren E. Godshall**  
Member, LSBA Environmental  
Law Section  
Curry & Friend, P.L.C.  
Ste. 1200, Whitney Bank Building  
228 St. Charles Ave.  
New Orleans, LA 70130



## Final Spousal Support

**Rosenfeld v. Rosenfeld**, 11-0686 (La. App. 5 Cir. 3/13/12), 90 So.3d 1077.

Ms. Rosenfeld's appeal of this judgment terminating Mr. Rosenfeld's previously stipulated obligation to pay final spousal support to her did not have to be filed within 30 days because it was not a judgment "awarding" support under La. C.C.P. art. 3943. The parties' stipulation, made a consent judgment, provided that he was to pay her final spousal support of \$3,000 per month for two years, and then \$2,000 per month for four years. Upon her remarriage, he filed to terminate the obligation, which the trial court granted. The court of appeal affirmed, finding that as there was no non-modification clause in the agreement, it could be modified on a change of circumstances, and her remarriage terminated the support as a matter of law under La. Civ.C. art. 115.

**Faucheux v. Faucheux**, 11-0939 (La. App. 5 Cir. 3/27/12), 91 So.3d 1119.

The court of appeal stated that final spousal support is limited to an amount for maintenance (including food, shelter, clothing, transportation, medical and drug expenses, utilities, household necessities and the tax liability arising from the final spousal support) and not to continue the accustomed lifestyle. The trial court's reasons for judgment are not part of the judgment itself, and the trial court's "pre-supposition" that Mr. Faucheux would continue to pay the mortgage was not part of the final spousal support award of \$1,700 per month to Ms. Faucheux. The trial court did not err in not imputing income to her, who, during this 30-year marriage, worked outside of the home very little, was 50 years old and had a limited education and work experience. It was improper to impute the income she had as a real estate agent 12 years ago, and her license was lapsed. The trial court did not err in not limiting the final spousal support to a fixed period.

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*Delesdernier v. Delesdernier*, 12-0038 (La. App. 5 Cir. 5/31/12), 95 So.3d 588, writs denied, 12-1976, 12-1979 (La. 11/9/12), \_\_\_ So.3d \_\_\_.

The parties were divorced in 1986, and Mr. Delesdernier agreed to pay Ms. Delesdernier \$2,700 per month spousal support and supply her with a new vehicle every five years. He unilaterally reduced the support two years later and paid a reduced amount every month. In 2010, Ms. Delesdernier filed a rule for contempt and arrearages for the 22 years of unpaid spousal support. The trial court rendered judgment in her favor for \$596,168 in arrears. On appeal, the 5th Circuit reduced the arrears amount to \$518,738, with legal interest on each payment from the date due. The court of appeal also affirmed the trial court's finding that Ms. Delesdernier agreed to waive her interest in Mr. Delesdernier's pension for a life insurance policy to be provided by Mr. Delesdernier, and the pension was thus no longer community property subject to a petition for supplemental partition.

While general divestiture language does

not necessarily divest a spouse of her right to the employee spouse's pension if the community property settlement agreement as a whole does not expressly address the pension, whether the agreement divests the non-employee spouse of rights depends on the intent of the parties. Extrinsic (parole) evidence is admissible to determine the parties' intent when there is a dispute as to the scope of the compromise agreement. The court of appeal found that the trial court did not err in allowing parole evidence even though there was no mention of the pension in the settlement agreement.

## Child Support

*Kelly v. Kelly*, 11-1932 (La. App. 1 Cir. 6/13/12), 94 So.3d 179.

The trial court dismissed Ms. Kelly's rule for contempt and arrearages because she did not appear at trial, even though her attorney appeared. The attorney argued that Ms. Kelly had been "bumped" from a flight and could not appear. The trial court did not accept that reason then, or on her motion for new trial, and maintained its

dismissal of her action, with prejudice. The court of appeal reversed, finding that an appearance was made through the attorney; the court could have proceeded without Ms. Kelly; the court should have considered alternative remedies prior to dismissal with prejudice; and that such a dismissal would prejudice the children who may have been entitled to arrearages.

## Custody

*Lunney v. Lunney*, 11-1891 (La. App. 1 Cir. 2/10/12), 91 So.3d 350, writ denied, 12-0610 (La. 4/4/12), 85 So.3d 130.

Mr. Lunney's statement in his reconventional demand that an alternating weekly schedule would be more beneficial than the present 50-50 alternating days schedule was not a stipulation that a change of circumstances had occurred since the existing judgment. The trial court's allowing Mr. Lunney's psychologist to testify was harmless error because the trial court did not place much weight on it and it did not prejudice the former Ms. Lunney. The trial court did not err in not allowing

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From left to right, standing: Daniel Simpson, Jr., CPA; Jeanne Driscoll, CPA; Michele Avery, CPA/ABV, MBA, CVA, CFFA; Stephen Romig, CPA, CFP; Jennifer Bernard-Allen, CPA; Anna Breaux, CPA, JD, LLM; Ryan Retif, MS; seated: Irina Balashova, CPA, MBA, CIA; Chav Pierce, CPA/ABV, MS; Holly Sharp, CPA, MS, CFE, CFP

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the middle child to testify after counsel had stated that he would not, he was not on the witness list, and the trial court said she had heard enough from the other two children who testified in chambers. Even though the trial court found that she failed to show a change of circumstances to modify the custody arrangement and to name her as domiciliary parent, it nevertheless changed the physical custody schedule anyway. The court of appeal agreed that she failed to prove a change of circumstances, but affirmed the change in the physical custody schedule because, under *Bergeron*, there had to be a change of circumstances before the court could consider a “significant change” in the custody order. Because this change was not significant, it could be made on a best interest showing alone as they were continuing to have 50-50 time, just on a different schedule.

## Community Property

*Trahan v. Trahan*, 12-0173 (La. App. 3 Cir. 6/6/12), 91 So.3d 1291.

Mr. Trahan was unrepresented when he signed documents to terminate the community regime and partition the community property. Neither the documents nor the trial court’s judgment under La. Civ.C. art. 2329 stated that he understood the governing principles and rules of the regimes or that it was in his

best interest to establish a separate regime. Thus, the court of appeal found that the statutory requirements to terminate the regime had not been met.

*Delaney v. McCoy*, 47,240 (La. App. 2 Cir. 6/20/12), 93 So.3d 845.

Because Mr. Delaney’s pension had not been addressed in the parties’ prior community property judgment or in their extra-judicial partition, Ms. Delaney was entitled to petition for supplemental partition of this asset. Res judicata did not apply because the asset was not previously partitioned, and there was no evidence of an express waiver of her rights to the plan. General divestiture language in their previous agreement did not preclude the supplemental partition. There was no prior transaction and compromise because the asset was not explicitly addressed.

—David M. Prados

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



## Jones Act: Scope and Course of Employment

*Beech v. Hercules Drilling Co., L.L.C.*, 691 F.3d 566 (5 Cir. 2012).

Keith Beech was working aboard a jack-up rig owned by Hercules, his employer. Michael Cosenza was similarly employed on the vessel. Cosenza accidentally brought a firearm aboard, in violation of Hercules’ strict policy, and, after discovering his mistake, failed to report it, a further violation. On the fateful night, Cosenza, the only crewman on duty, was assigned to a night shift to monitor the rig’s generator, check certain equipment and report any suspicious activity or problems. Hercules encouraged such watchmen to spend their time between rounds in the break room, watching television and chatting with fellow crewmembers, on theory that the television’s shutdown would signal a generator failure. Thus, in the course of conversation with Beech, Cosenza retrieved the contraband weapon and showed it to Beech, who examined it without handling

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it. The weapon accidentally discharged, mortally wounding Beech, who was not on duty, but aboard the vessel and subject to the call of duty.

Mrs. Beech brought a wrongful death action against Hercules under the Jones Act. Following a bench trial, the district court granted judgment in favor of Mrs. Beech, individually, and as tutrix and guardian of their minor child, in the total amount of \$1,194,329. Hercules appealed, contending that Beech and Cosenza were not acting in the course of their employment at the time of the accident.

Prior to enactment of the Jones Act, 46 U.S.C. § 30104, in 1920, seamen could not recover against their employers for either the employer's own negligence or the negligence of a fellow crew member, but were limited to compensation under general maritime law, which included only unseaworthiness, and maintenance and cure. The Act provides:

A seaman injured in the course of employment or, if the seaman dies from the injury, the personal representative of the seaman may elect to bring a civil action at law, with the right of trial by jury, against the employer. Laws of the United States regulating recovery for personal injury to, or death of, a railway employee apply to an action under this section.

Thus, the Act extends the protections of the Federal Employer's Liability Act (FELA) to seamen, granting them the same rights enjoyed by railway employees. The Supreme Court has consistently held that because of the seaman's "broad and perilous job duties," the Jones Act should be interpreted liberally "to accomplish its beneficent purposes" to provide for "the welfare of seamen." In *Aguillar v. Standard Oil Co.*, 63 S.Ct. 930 (1943), the court explained:

Unlike men employed in service on land, the seaman, when he finishes his day's work, is neither relieved of obligations to his employer nor wholly free to dispose of his leisure as he sees fit. Of necessity, during the voyage he must eat, drink, lodge and

divert himself within the confines of the ship. In short, during the period of his tenure, the vessel is not merely his place of employment; it is the frame-work of his existence.

The Supreme Court has been adamant that liberal construction does not mean that the Jones Act is a workers' compensation statute because the employer is not the insurer of the safety of his employees while they are on duty. "The basis of his liability is his negligence, not the fact that injuries occur." Thus, common law limits on employer liability are subject to great weight in Jones Act cases. A common law principle that carries great weight is that an employer may be vicariously liable for its employee's negligence (or intentional tort) under the doctrine of *respondet superior* as long as the negligence occurred in the course or scope of employment, *i.e.*, while furthering the employer's (or the ship's) business.

Plaintiff contended, and the district court found, that because Hercules encouraged Cosenza to watch television and socialize with fellow crewmembers between rounds while on duty, his actions were well within the bounds of his job activity that night; thus, at the critical moment — when the gun discharged — Cosenza was acting in the course and scope of his employment. Hercules argued that because Cosenza's decision to show off his firearm did not further Hercules' business interests, and because it was in no way related to his job duties, he was not acting within the course and scope of his employment. Hercules further argued that if this factual scenario does not bring a seaman outside

the course and scope of his employment, no scenario could, meaning the Jones Act would effectively place employers under strict liability.

Noting conflicts in prior opinions of its own and those of the 7th Circuit, the 5th Circuit stated:

Today we make clear that we agree with the Seventh Circuit that regardless of whether the underlying injurious conduct was negligent or intentional, the test for whether a Jones Act employee was acting within the course and scope of his employment is whether his actions at the time of the injury were in furtherance of his employer's business interest.... [W]e conclude that Cosenza was not acting within the course and scope of his employment when he accidentally shot Beech.... Mrs. Beech [cannot] recover from Hercules under the Jones Act. (Footnote omitted.)

The judgment of the district court was reversed. Judge Elrod's compact (10-page) opinion is well written and interesting for its explication of what the Jones Act is and what it is not.

—**John Zachary Blanchard, Jr.**  
Past Chair, LSBA Insurance, Tort,  
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## United States Supreme Court

*Kiobel v. Royal Dutch Petroleum*, No. 10-1491.

The U.S. Supreme Court conducted oral argument on Oct. 1, 2012, in a unique case involving the territorial applicability of the U.S. Alien Tort Statute (ATS), 28 U.S.C. § 1350. Plaintiffs filed a class action lawsuit in the United States on behalf of individuals from the Ogonni region in Nigeria who allegedly suffered human rights violations while protesting oil exploration projects in their home region. Royal Dutch Shell and other defendants purportedly aided the Nigerian government in committing numerous acts of violence against the protestors. Plaintiffs were granted asylum in the United States and claim standing under the ATS, which they contend recognizes a cause of action for violations of international law outside the sovereign territory of the United States.

The question before the court is whether corporate civil liability under the ATS can

be adjudicated when the claim arises out of conduct in a foreign country. Opponents contend that the ATS is not an exception to the legal presumption that U.S. law does not apply extraterritorially. BP America and other businesses submitted *amicus curiae* briefs contending that any extension of the ATS to overseas conduct will discourage foreign investment and harm economic development in emerging markets that need foreign expertise. Proponents of the petitioners' position, including Ambassador David J. Scheffer (former Ambassador to the International Criminal Court) and the Parliament of the Federal Republic of Germany, argue that ATS extraterritoriality will enforce the global trend of imposing civil liability for corporate violations of international human rights.

## Supreme Court of Nevada

*Gutierrez v. Nevada*, 2012 WL 4355518 (53506)(Nev. Sept. 19, 2012)(unpublished).

The Supreme Court of Nevada recently remanded a conviction and death sentence for an evidentiary hearing to determine whether the appellant suffered actual prejudice due to the lack of consular assistance during sentencing. The issue stems from the 2004 *Avena* decision of the International Court of Justice, wherein

the ICJ determined that the United States violated the 1963 Vienna Convention on Consular Relations by failing to advise 51 Mexican nationals on death row of their consular notification and access rights. The U.S. Supreme Court ruled in *Medellin v. Texas* that the *Avena* decision does not constitute directly enforceable law in the United States and, therefore, did not provide reprieve for the petitioner, who was subsequently executed.

The Nevada Supreme Court ruled that to the extent a convicted individual could prove "actual prejudice" from the lack of consular notification, he or she may receive the benefit of the *Avena* decision under state procedural rules. Gutierrez arguably suffered actual prejudice insofar as he spoke virtually no English and had the equivalent of a sixth-grade education at the time of his arrest. The court concluded that "reasonable minds can differ" on whether he suffered actual prejudice and ordered an evidentiary hearing to make that determination.

## World Trade Organization

*China-Certain Measures Affecting Electronic Payment Services*, DS413 (July 16, 2012).

The United States requested consultations with China on Sept. 15, 2012,



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regarding electronic payment measures maintained by China that purportedly discriminate against U.S. electronic-payment-services providers. China processes more than \$1 trillion worth of electronic-payment-card transactions each year. The United States alleged violations of the WTO General Agreement on Trade in Services (GATS) insofar as China allowed only one entity, the state-owned China Union Pay, to supply electronic-payment services for payment-card transactions denominated and paid in Renminbi. U.S. and service suppliers from other WTO members are allowed entry only for transactions paid in foreign currency.

A WTO dispute settlement panel ruled in favor of the United States on July 16, 2012. The panel determined that China obligated itself to non-discriminatory treatment and market access in its GATS schedule for both cross-border (Mode 1) and commercial presence (Mode 3) electronic-payment-service providers. The panel found that China runs China Union Pay as a monopoly supplier for the clearing of certain electronic-payment services, in violation of China's GATS Article XVI:2(a) market-access commitment. The WTO Dispute Settlement Body adopted the panel's report on Aug. 31, 2012, and China is now on the clock to bring its non-conforming measures into compliance.

—**Edward T. Hayes**  
Member, LSBA International  
Law Section  
Leake & Andersson, L.L.P.  
Ste. 1700, 1100 Poydras St.  
New Orleans, LA 70163



## Royalty Dispute; Removal; Jurisdictional Amount

*Jefferson v. Beusa Energy, L.L.C.*, \_\_\_ F. Supp. 3d \_\_\_, 2012 WL 3598394 (W.D. La. 8/17/12).

Jefferson filed suit in state court, seeking a declaration that he owned 73.3 percent of an 80-acre tract in Webster Parish, from which Beusa produced natural gas under multiple leases. In contrast, Beusa asserted that Jefferson owned only a 63.3 percent interest. Although Jefferson did not bring a royalty claim, the primary motivation for his suit was his contention that Beusa was underpaying the royalties owed to Jefferson because the company did not recognize his correct ownership fraction. Beusa removed the case to federal court. Jefferson moved to remand, and the central issue became whether the \$75,000 amount in controversy threshold was satisfied.

Beusa argued that the amount in controversy was the value of a 73.3 percent ownership interest, and that this was \$123,385. But the court agreed with Jefferson's contention that the amount in controversy was the amount of the alleged underpayment of royalties. The court reasoned that because Jefferson had not brought a royalty claim, the double damages

sometimes allowed by the Mineral Code in royalty litigation were not in dispute.

Neither party had submitted evidence regarding the amount of the alleged underpayment in royalties, but based on evidence that was submitted, the court concluded that the alleged underpayment was less than \$20,000. Because Beusa had not carried its burden of showing that the amount in controversy exceeded \$75,000, remand was appropriate. Accordingly, the court granted the motion to remand.

Moreover, the court noted that if Jefferson prevailed, the difference between the 73.3 percent interest claimed by Jefferson and the 63.3 percent interest recognized by Beusa would come at the expense of Black Bull, L.L.C., another landowner. Thus, Black Bull was a necessary party, but the addition of Black Bull would destroy diversity.

## Borrowed Servants

*Fairfield Royalty Corp. v. Island Operating Co., Inc.*, \_\_\_ F. Supp. 3d \_\_\_, 2012 WL 3613102 (E.D. La. 8/20/12).

Fairfield Royalty co-owned a platform with Apache and Hilcorp. Apache was the designated operator. The platform caught on fire in January 2010. Fairfield claimed that Island Operating, which had entered into a Master Service Contract with Apache, was responsible for more than \$800,000 in damages, including property damages and loss of revenue. Island filed a motion for summary judgment on the basis that (1) the operators of the property were borrowed employees of Apache and (2) the operating agreement barred any claim by plaintiff against Apache and its employees (borrowed or otherwise).

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To determine whether an individual is a borrowed servant, nine factors are evaluated — (1) who has control over the individual and the work he is performing, (2) whose work is being performed, (3) whether an agreement, understanding or meeting of the minds exists between the original and borrowing employer, (4) whether the employee acquiesces a change in employer, (5) whether the original employer terminated his relationship with the employee, (6) who furnished tools and the place for performance, (7) whether the new employment lasted a considerable length of time, (8) who had the right to discharge the employee, and (9) who had the obligation to pay the employee. As to certain of these factors, no facts were disputed, but facts were disputed with respect to five of the factors. Accordingly, the court denied the motion for summary judgment.

## Sixteenth Section Lands; Oil & Gas Revenue Owed to School Board

*State of Louisiana ex rel. Plaquemines Parish Sch. Bd. v. La. Dep't of Nat. Res.*, \_\_\_ So.3d \_\_\_, 2012 WL 3854957 (La. App. 4 Cir. 9/5/12).

The Plaquemines Parish School Board claimed it was entitled to revenue for certain leases producing minerals from Sixteenth Section lands in Plaquemines Parish. Sixteenth Section lands are reserved for the benefit of public schools pursuant to federal law. The School Board filed a motion for summary judgment, seeking an accounting from the Louisiana Department of Natural Resources (LDNR) as to the amount of revenues owed it by the State. The trial

court granted the School Board's motion and ordered that LDNR to pay the School Board \$3,974,127.44 in royalties.

On appeal, the LDNR argued that (1) the trial court erred because prior rulings relating to the lands at issue barred the School Board's claim to the revenue, (2) the granting of the motion for summary judgment violated certain codal and jurisprudential principles, (3) the court erred in awarding a monetary sum because the School Board did not pray for one, and (4) the affidavits submitted in support of the motion for summary judgment were not based on personal knowledge. The appellate court rejected all of these arguments, finding that the School Board was entitled to the revenue it sought based on prior rulings, and affirmed the trial court's grant of summary judgment.

The LDNR also filed exceptions of no cause of action and prescription. As to no cause of action, the appellate court found that, based on the language of La. R.S. 41:640, the School Board clearly had a cause of action against LDNR. As to prescription, the court held that the claims were being asserted by the State through the School Board. Because liberative prescription does not run against the State, the exception was denied.

—**Keith B. Hall**

Member, LSBA Mineral Law Section  
Louisiana State University Paul M.  
Hebert Law Center  
1 E. Campus Dr.  
Baton Rouge, LA 70803  
and

**Colleen C. Jarrott**

Member, LSBA Mineral Law Section  
Slattery, Marino & Roberts, A.P.L.C.  
Ste. 1800, 1100 Poydras St.  
New Orleans, LA 70163



## Expert Witness Qualification

*Benjamin v. Zeichner*, 11-1524 (La. App. 3 Cir. 6/27/12), 94 So.3d 1005.

Benjamin sued Dr. Zeichner for alleged medical malpractice occurring in 2000. In 2004, Zeichner filed a motion for summary judgment. Benjamin countered with an expert affidavit from Dr. James Shamblin, which presumably caused the defendant not to set the motion for hearing. The plaintiffs then proffered Dr. Shamblin as an expert witness at trial in 2011. Zeichner objected, contending that Shamblin did not meet Louisiana's statutory requirements for an expert medical witness. Shamblin had surrendered his license to practice in Louisiana in 2007 and did not renew his license to practice in Alabama at the end of 2010.

La. R.S. 9:2794(D)(1) supplements La. C.E. art. 202 and requires that a physician not licensed to practice in any jurisdiction in the United States at the time of trial be a graduate of "a medical school accredited by the American Medical Association's Liaison Committee on Medical Education or the American Osteopathic Association." Shamblin was a 1958 graduate of Tulane Medical School. But there was no "competent evidence" concerning the 1958 accreditation status of that school. The plaintiffs attempted to introduce a faxed letter from Tulane as to its 1958 status, but the court ruled that the letter and attachment to it were inadmissible hearsay, causing the trial judge to refuse to qualify Shamblin.

In evaluating the plaintiffs' appeal of the disqualification, the court noted the district court's broad discretion in determining the admissibility of expert testimony. It acknowledged that subsection (D)(1)(a) allows a physician to testify as an expert, irrespective of whether he is licensed at the time of trial, if he was practicing medicine at the time the claim arose. The defendant



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conceded that Shamblin was practicing at the time the claim arose but objected to his qualifications because of his failure to meet the requirements of subsections (b) (c) and (d). The court of appeal noted, however, that the trial court had not disqualified Shamblin because he failed to meet the requirements of subsections (b) or (c), but because he did not qualify under (d), as the plaintiffs could not prove that Tulane Medical School was accredited at the time of Shamblin's graduation.

The appellate court agreed that Tulane's accreditation had not been proven but noted that this factor alone did not preclude Shamblin from testifying as an expert. Shamblin had been reviewing the evidence in the case and had formed his conclusions before he voluntarily relinquished his medical licenses. He provided an affidavit concerning negligence and causation relating to the death of Mrs. Benjamin while he was licensed in both Alabama and Louisiana and, therefore, he was "clearly qualified" under Louisiana law to provide such testimony. The court held:

We find, therefore, that to require Dr. Shamblin to maintain his licenses simply to testify in this case or to require Plaintiffs at this late date to retain another expert who would be unfamiliar with the case creates an unduly onerous burden, considering there was no question as to Dr. Shamblin's expert qualifications under La.R.S. 9:2794(D)(1)(d) when he rendered his previous affidavit.

The court concluded that to disqualify him retroactively under subsection (d) simply because he voluntarily relinquished his licenses "is a hyper-technical reading of the statute which in no way furthers its intended purpose to provide competent expert witness testimony."

The court of appeal also pointed out that subsection (d) does not "specifically" require that a medical expert be licensed at time of testimony, whereas subsection (a) specifically states that the expert must be practicing at the time the testimony is given or at the time the claim arose. The court stated that "the failure of subsection (d) to contain


a specific time period in its wording creates ambiguity. . . . It is reasonable to assume, considering the lack of a specific time period referenced in subsection (d), that a physician is qualified to testify as an expert if he was licensed at the time the claim arose."

The court concluded that the intent of the statute was to require that expert testimony come from qualified physicians, which Shamblin was found to be. Thus, the appellate court ruled that the trial court erred in disqualifying Shamblin from testifying, a ruling that also required it to reverse the trial court's grant of a directed verdict, as it was premised on the absence of expert testimony.

## Waiver of Panel

*Alexander v. Shaw-Halder*, 11-1136 (La. App. 5 Cir. 5/8/12), 95 So.3d 1100.

Alexander filed a request for a panel alleging negligence by Dr. Shaw-Halder and Halder Creative Smiles Dental, Inc. (Creative). The Patient Compensation Fund (PCF) responded to Alexander's Oct. 24, 2009, request by letter, notifying him that he had failed to provide the dates of the alleged



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malpractice and a brief description of the injuries, while also advising that failure to submit a "corrected request" within 30 days of this notice would mean, for prescriptive purposes, that the original filing date would be invalid. Alexander was also "warned" that the notice did not suspend the one-year time frame to appoint a panel chair, which the PCF said began to run from the date the initial request was filed.

Alexander's response on May 22, 2010, gave additional information about his injuries and stated that he had consulted with the defendant in 2007.

The PCF sent Alexander's counsel a second letter, advising that he had failed to provide the date of the alleged malpractice and that he was required, at least, to provide the month and year so it could determine whether the defendant was PCF-qualified. Again, Alexander was advised that the failure to provide a corrected request within 30 days of its (second) letter would result in his original filing date being of no legal consequence.

On July 29, the PCF again wrote Alexander and advised that his panel request would be dismissed unless he appointed an attorney chair within one year from the filing date. Hearing nothing from Alexander, the PCF notified him on Oct. 25, 2010, that the request for review had been "closed" because of the failure to timely appoint a panel chair, that the panel was deemed to have been waived, and that the filing of a panel request suspended the time in which

suit must be filed until 90 days after it had been dismissed.

Alexander filed a lawsuit on April 7, 2011, claiming that the request had been dismissed without a panel's having rendered an opinion because the defendants "failed to cooperate or participate in the medical review panel process."

The defendants filed exceptions of prescription, and in the alternative, of prematurity. They contended that the panel process never began because Alexander's complaint failed to provide the minimum information despite the PCF's pleas. The defendants also contended that the PCF's dismissal of the panel complaint was improper because it denied them their due process rights, and it was never determined whether Shaw-Halder was entitled to a panel.

The trial court overruled the exception of prescription but sustained the exception of prematurity and dismissed the lawsuit without prejudice.

Alexander contended on appeal that Creative was not a qualified provider and thus not entitled to a panel. The appellate court agreed and reversed the granting of the prematurity exception in Creative's favor.

Alexander's other assignments of error were that the trial court did not require the PCF to form a panel and that it did not address which panel request (October or May) was the operative request that triggered the prescriptive period. He contended that his Oct. 24 request was a "relative nullity" that should not have triggered any provision of

the MMA or interrupted prescription because it did not comply with the requirements of the MMA, yet he also contended that his subsequent May panel request was timely filed, valid, and interrupted prescription; thus, the trial court was incorrect in not ordering the PCF to convene a panel when it sustained the exception of prematurity. It left him, he contended, "in a curious state of procedural limbo," in which he could proceed with neither the panel, which had been dismissed, nor his lawsuit.

The defendants countered that Alexander never filed a valid/sufficient panel request. They argued that the statute not only requires the filing of panel request but also that the claim be presented for panel review before filing suit.

The trial court had not specified which panel request it used in determining the commencement of prescription. The court of appeal deduced that the PCF considered the Oct. 24, 2009, request to be that date and that the trial court had simply affirmed that PCF determination. The appellate court cited La. R.S. 40:1299.47(A)(2)(b), which states that a panel request is "filed" on the date it is received or on the date it is mailed, if mailed by certified or registered mail. The first panel request was sent by certified mail on Oct. 24, 2009. The appeals court ruled that Alexander's other letters were amendments to the October request, not new requests. This was proven, at least in part, because the PCF never dismissed the October request, thus establishing Oct. 24



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as the date that triggered the one-year period to appoint a chair.

As no chair had been appointed within a year from Oct. 24, the court cited La. R.S. 40:1299.47(A)(2)(c), which states that failure to timely appoint is deemed a waiver of the panel process. The PCF notified the parties on July 29, 2010, that the panel request would be dismissed unless a chair was appointed by Oct. 24 and then notified the parties on Oct. 25, 2010, that it had been dismissed. The court ruled that because neither party took the appropriate steps to appoint a chair, the panel had been waived and there was no need to remand the matter to the PCF because "the case is ripe to proceed to the trial court without rendering of an opinion from the medical review panel," thus reversing the trial court's sustaining of the exception of prematurity by Shaw-Halder.

—**Robert J. David**

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



## Louisiana Supreme Court Grants Writ

*Chase Bank USA, N.A. v. Webeland, Inc.*, 12-0240 (La. 9/28/12), 98 So.3d 823.

On Sept. 28, 2012, the Louisiana Supreme Court reversed the 1st Circuit Court of Appeal's holding that a default judgment based on an absolute nullity can act as res judicata to a subsequent action seeking to assert the nullity. The case arose in 2003 when Clifford Lane Keen, Jr. and his wife, Vickie Sue Keen, purchased a lot on Shubert Lane in Covington, La. Thereafter, on Dec. 21, 2006, the Keens executed a promissory note in the amount of \$183,700, payable to Chase Bank. To secure repayment of the note, on that same day, the Keens granted Chase Bank a mortgage over the

Shubert Lane property.

When the Keens failed to pay their property taxes in 2004, the St. Tammany Parish sheriff/tax collector sent a tax notice and, subsequently, a delinquency notice to the Keens at the address listed in the act of sale. However, both notices were returned to the sheriff undelivered and stamped "NO SUCH NUMBER." Although the act of sale listed both parties individually as co-owners and the Latin abbreviation "et-ux." was not used in the act of sale to identify Mrs. Keen, the notices were simply addressed to "KEEN, CLIFFORD L JR ET UX."

On June 8, 2005, the sheriff sold the property to Jackson Title Corp. for \$529 in past due taxes, who subsequently sold its interest in the property to Webeland, Inc. through a quitclaim deed. On April 23, 2009, a default judgment was entered in favor of Webeland and against the Keens and Chase Bank, confirming and quieting Webeland's title to the Shubert Lane property, and ordering the erasure of the Shubert Lane mortgage from the mortgage records.

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On April 23, 2010, Deutsche Bank, as assignee of the Chase Bank note and the Shubert Lane mortgage, filed an action to have the 2005 tax sale declared null, Webeland's confirmation judgment declared null, and the Shubert Lane mortgage reinstated. Webeland responded with exceptions of no cause of action, no right of action, prescription and res judicata, and a motion for summary judgment. The district court overruled Webeland's exceptions and denied its motion for summary judgment, holding that the 2005 tax sale was null due to insufficient notice based on the mailing and publication to Mrs. Keen by addressing her simply as "et ux."

Consequently, the confirmation judgment was also absolutely null because it was based on a null act, and thus could not support the exceptions of res judicata, prescription and no cause of action. The 1st Circuit left that ruling in place with regard to Webeland's exception of no cause of action and its motion for summary judgment. But the 1st Circuit's majority ruling found that despite this nullity, Webeland's exception of res judicata should have been sustained because Webeland previously had obtained a default judgment against the

Keens and Chase Bank in a previous tax-title-confirmation action. The 1st Circuit's concurring opinion also found in Webeland's favor, but instead found that Webeland's exception of prescription should have been sustained because an attack on a tax sale for any reason, including for an absolute nullity, must be brought within six months pursuant to Louisiana Constitution article 7, § 25, and Deutsche Bank's subsequent nullity suit was brought too late.

In a summary opinion, the Louisiana Supreme Court found that both these decisions were incorrect. First, the Supreme Court cited *Smitko v. Gulf South Shrimp, Inc.*, 11-2566 (La. 7/2/12), 94 So.3d 750, a recent Louisiana Supreme court decision that overruled the 1st Circuit's finding that a tax debtor's nullity actions were past six months and thus were untimely. In *Smitko*, the court held that lack of constitutional notice as required by *Mennonite Board of Missions v. Adams* and other federal and Louisiana Supreme Court jurisprudence is fatal to a tax sale and results in an absolute nullity. Further, the court found that the six-month time limitation under Louisiana law did not prevent the tax debtor and the mortgagor from raising the absolute nul-

lity. Therefore, the nullity actions in that case were considered to be timely.

As for the exception of res judicata, the Louisiana Supreme Court cited the Louisiana 4th Circuit Court of Appeal decision of *Sutter v. Dane Investments, Inc.*, 07-1268 (La. App. 4 Cir. 6/4/08), 985 So.2d 1263, writ denied, 08-2154 (La. 11/14/08), 996 So.2d 1091. In that case, a tax-sale purchaser brought a tax-sale-confirmation action and obtained a default judgment against the tax debtor. The tax debtor later attacked the tax sale through a separate nullity action. The 4th Circuit stated that the lack of pre-sale notice resulted in an absolute nullity, which could be asserted even after a default judgment.

The Louisiana Supreme Court reversed the appellate court and reinstated the district court's judgment.

—Christina Peck Samuels

Member, LSBA Trusts, Estate, Probate and Immovable Property Law Section  
 Sher Garner Cahill Richter Klein  
 & Hilbert, L.L.C.  
 Ste. 2800, 909 Poydras St.  
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