Alternative Dispute Resolution

U.S. 7th Circuit Binds Party to Mediation Agreement Without Signature

In *Bauer v. Qwest Communications Co., L.L.C.*, 743 F.3d 221 (2014), the U.S. 7th Circuit Court of Appeals affirmed the U.S. district court decision that a party can be bound to a mediation agreement without signing the document. The court based its decision on the parties' lengthy litigation relationship, among other factors. Prior to the mediation, the lawyers were involved in a class action settlement involving multiple parties that resolved 10 years of litigation. The issue arose between the lawyers when the district court awarded attorneys' fees and expenses. The lawyers were unable to reach a division of attorneys' fees on their own. To resolve the dispute, they agreed to pursue mediation.

After years of attempts to resolve the division of fees (beginning in 2006), the lawyers reached an agreement in 2012 via a final "mediator's proposal" that was distributed to the parties and accepted by all. The agreement was later memorialized and put into a formal writing, with the addition of enforcement language meant to keep any further disputes out of litigation. The written agreement was circulated to all the parties; the parties made recommendations to change the document and were in agreement on the final language of the document. All parties quickly signed except for one, Arthur T. Susman. The lawyers and mediators tried to persuade Susman to sign, but to no avail. The other lawyers who did sign filed a motion asking the district court to hold that Susman be bound to the agreement. After reviewing the evidence, the court ruled that Susman should be bound to the agreement, despite the absence of his signature.

Courts of this country have ruled that alternative dispute resolution is a matter of contract. A contract is dependent on mutual agreement or consent and on the intention of the parties. For a contract to form, there must be a meeting of the minds. The court does not look to the subjective intent of the parties but to the objective manifestation of intent. The court must look to the evidence offered to determine whether a meeting of the minds occurred. In this case, the court of appeals felt that the district court was in the best position to determine whether a contract was formed.

One way a party shows consent to be bound to a contract is by his signature. Additionally, a party can be bound to a contract by his acts and conduct under a number of contract theories. The 7th Circuit analyzed the acceptance of a contract based on the silence of the party. Generally, the law does not treat silence as acceptance but rather as a rejection of an offer. This general rule has its own exception if the circumstances make it reasonable for a party to believe silence is acceptance. The court will look at previous dealings to determine whether it is reasonable; if the court finds it is reasonable, the offeree then has the duty to notify the offeror that he does not intend to accept. In the present case, the 7th Circuit found that silence was acceptance.

The appellate court found this determination reasonable due to a number of factors. The court first looked at the relationship of the parties during the course of the litigation. In this case, the parties worked together for more than a decade in a class action suit. Subsequent to the litigation, the parties mediated the fee arrangement for several years. The court believed that "[b]y this time, the lawyers were a sort of community of interest, working together toward a final resolution of the fee dispute and an end to the litigation."

The court also examined the actions of the parties. The court cites examples of Susman's behavior to show why silence should be seen as acceptance, including that Susman was known throughout the litigation to make an objection if he found something objectionable. During the mediation process, Susman raised two minor points to the initial draft after its circulation. The agreement was quickly amended to address those concerns and recirculated. The enforcement provision of which he complains in the present case was not a focus of these objections. Given Susman's reputation and previous actions, the court did not accept that his objections to the enforcement provisions were genuine. If so, he would have made an objection when they were introduced and not in court.

The court looked not only at the actions and relationships of one party, but took into account the position of all the parties. The "mediator's proposal" was a last-ditch effort for the mediators to end the fee dispute. The court looked to the mindset of the other parties, who knowingly took less of a fee distribution than they thought they deserved in order to put an end to future litigation and bring about the prompt distribution of the attorneys' fees in question. When it was time to sign the agreement, all of the parties, including Susman, were put on notice about the finality of the draft and were asked to make any objections; if there were no objections, the document was considered to be final. The lack of objections from anyone, including Susman, was seen as an acceptance by all the parties involved and led to all the other parties signing the document.

The court viewed Susman's belated objections as "buyer's remorse," and his refusal to sign the agreement as a tactic to reopen the process after a final agreement had been reached. The court was careful not to create a bright-line rule in which parties can be bound to a contract even if they do not sign the document. Instead, the court reached a decision that should be applied on a case-by-case basis after a thorough review of the evidence.

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Bankruptcy Law

Stay not Required to Preserve Right to Appeal as to Rights not Yet Fully Adjudicated

Newco Energy v. Energytec, Inc., et al. (In the Matter of Energytec, Inc.), No. 12-41162 (Dec. 31, 2013).

Energytec, Inc. (the debtor), the owner and operator of gas pipelines, filed for Chapter 11 bankruptcy in 2009. Newco Energy (Newco) claimed that it maintained a right to a "transportation fee" based on the amount of gas flowing through the pipeline. Newco's right to the transportation fee arose from an agreement with a previous owner of the pipeline, who granted Newco a security interest and lien on the entire pipeline to secure payment of the transportation fee. The agreement giving rise to Newco's interest specified that Newco's interest was to "run with the land."

In the course of the debtor's bankruptcy, the bankruptcy court authorized the sale of the pipeline system to Red Water, but reserved for later determination whether the sale was free and clear of Newco's right to fees and interests in the pipeline sold. One year after the sale, the bankruptcy court ruled that Newco's rights were not covenants running with the land and, therefore, the sale of the pipeline was free and clear of Newco's rights and interests. The district court affirmed, and Newco appealed to the 5th Circuit.

On appeal, the 5th Circuit reviewed the sale of the pipeline conducted by the bankruptcy court. While the debtor argued that jurisprudence requires a sale be stayed in order to preserve the right to set aside the sale on appeal, the 5th Circuit reasoned that Newco was not challenging the sale — it was challenging the bankruptcy court's declaration a year after the sale that the transportation fee was not a covenant running with the land. The 5th Circuit turned to 11 U.S.C. § 363(m) which states that the:

> reversal or modification on appeal of an authorization . . . of a sale or lease of property does not affect the validity of a sale or lease . . . to an entity that purchased or leased such property in good faith, whether or not such entity knew of the pendency of the appeal, unless the authorization and such sale or lease were stayed pending appeal.

Since Red Water proceeded with the sale with full knowledge that the pipeline could potentially be subject to Newco's rights and interests as those rights and interests had yet to be decided, the 5th Circuit determined that such rights and interests were not integral to the sale.

The 5th Circuit found that section 363(m) did not apply because "[r]equiring a stay before the court can review a decision entered a year after a sale that was not originally free and clear of a particular claim does not follow from the text of section 363(m) or satisfy its purpose." As the order declaring that Newco's rights and interests did not run with the land was entered over a year after the sale, Newco was unable to seek a stay at the time of sale. Therefore, section 363(m) did not moot Newco's appeal as to its rights and interests in the pipeline.

The 5th Circuit then determined, under Texas law, that Newco's rights and interests to the transportation fee were covenants which ran with the land. As a last resort, the debtor maintained that even if Newco's interest ran with the land, the pipeline could still be sold "free and clear of any interest . . . only if . . . such entity could be compelled, in a legal or equitable proceeding, to accept a money satisfaction" under section 363(f)(5). The 5th Circuit found that the determination of what is a qualifying legal or equitable proceeding for purposes of section 363(f)(5) was a question for the bankruptcy court to initially decide. Therefore, the 5th Circuit remanded to the district court to determine whether a qualifying proceeding would enable the debtor to sell the pipeline free and clear of Newco's interests under section 363(f)(5).

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Environmental Law

Are Claims of Contamination Heritable?

In *Pierce v. Atlantic Richfield Co.*, 13-1103 (La. App. 3 Cir. 3/19/14), ____ So.3d ____, the plaintiff-landowners brought claims against numerous insurance and industrial defendants for alleged contamination to their property from oil and gas operations and from the operation of a dump site. The landowners, during the pendency of the litigation, sold the dump site to the company that had operated the site in the 1970s. Despite this sale, the company was never dismissed from the suit and a post-sale amended petition also named the company's insurers, under the Louisiana Direct Action Statute, as additional defendants in the contamination claims. Exceptions of no right of action were granted in favor of the insurers by the trial court relying on the subsequent purchaser doctrine explained by the Louisiana Supreme Court in *Eagle Pipe & Supply, Inc. v. Amerada Hess Corp.*, 10-2267, 10-2272, 10-2275, 10-2279, 10-2289 (La. 10/25/11), 79 So.3d 246.

The 3rd Circuit upheld the trial court's action in dismissing the insurers. Basically, the 3rd Circuit found controlling *Eagle Pipe's* principle that the right to sue for alleged damage to immovable property is a personal right that can only be exercised as to damage caused to the property prior to a landowner's acquisition of the property if there is a specific assignment or subrogation of this right.

The 3rd Circuit went on to conclude that no such reserved right existed in the *Pierce* landowners' acquisition (a judgment of possession from their father's estate) and, thus, they had no claims against the insurers. This ruling is an extension of the *Eagle Pipe* decision inasmuch as it extends that decision to property acquired not just through sales or donations, but also through successions — an interesting conundrum in situations where parties may inherit by representation.

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Family Law

Sole Custody/Torts

Penton v. Castellano, 48,433 (La. App. 2 Cir. 10/23/13), 127 So.3d 944.

Ms. Penton, the assistant principal/disciplinarian at the second-grader's school, sued his divorced parents for injuries she suffered when the child tripped her while she was escorting him to the school office after he had pushed his teacher against a classroom locker. The trial court granted summary judgment in favor of both parents. The court of appeal affirmed as to the mother, but reversed as to the father. Because the father was the sole custodial parent, the mother had no liability for the child's actions. However, the father was subject to strict liability under La. Civ.C. art. 2318. The court of appeal rejected his arguments that, because the school was contractually obligated to care for the child, he owed no duty to Ms. Penton and she was not entitled to assert a claim under art. 2318. The court found that she was not responsible to take care of the child's health and was not his caretaker; moreover, his duty under art. 2318 did not shift to the school.

Community Property/ Creditor's Rights

Holland v. Holland, 13-636 (La. App. 3 Cir. 12/11/13), 129 So.3d 844.

Judgment creditors of Mr. Holland filed a petition to intervene in these divorce and community property partition proceedings to assert their claims against the community property. The trial court maintained the Hollands' exceptions of no cause and no right of action. The court of appeal reversed, finding that, even though no petition to partition was pending and their regime had been terminated, the property had not been partitioned, and the creditors had a valid revocatory action to attack transfers made by the Hollands in derogation of the creditors' rights.

Interdiction

In re Interdiction of Parnell, 13-1201 (La. App. 4 Cir. 11/13/13), 129 So.3d 690.

Although the appellants did not appear in the lower court, they had standing to appeal the judgment of interdiction of their mother because they could have intervened in the trial court under La. C.C.P. art. 2086. The trial court erred in ordering the intervention based on the pleadings and a court-appointed doctor's report without a contradictory hearing at which the person sought to be interdicted had a right to appear.

Community Property/ Donations

Schindler v. Schindler, 13-361 (La. App. 5 Cir. 12/19/13), 131 So.3d 439.

Donations by Mr. Schindler to Ms. Davis, who cared for him, were remunerative in nature and Ms. Davis properly met her burden by showing what services she rendered for him. Further, the donations were either made from his separate property, or he had Ms. Schindler's permission to spend the funds under his control, so he did not need her consent to make the donations. Finally, the donations, $111,000, were within the range of usual and customary amounts previously donated by the Schindlers to others.

Community Property/ Successions

LeGardeur v. Coleman, 13-435 (La. App. 5 Cir. 12/27/13), 131 So.3d 1035.

After his death, Mr. Coleman's children sued his second wife, claiming that immovable property he transferred to her was improperly transferred and that one-half remained owned by his first wife, their mother, and that an account was mistakenly distributed to her by his executor, as the account was his separate property. The court found that even though the act of sale purporting to transfer to her all of his rights to the immovable property was ineffective in and of itself to transfer the first Ms. Coleman's 50 percent interest, the second Ms. Coleman was in good faith, and the act sufficed to establish "just title" so that she acquired full ownership of the property by 10 years' acquisitive prescription. Thus, once she sold the property, the entire sales proceeds belonged to her. Further, the children failed to present sufficient evidence to show that the account existed prior to his marriage to the second wife. She was also entitled to the presumption of community. The children had failed to assert any ownership claim for 25 years, and the court believed her testimony over theirs. The testimony from the children's expert was also insufficient to establish that the account, or at least part of it, was Mr. Coleman's separate property. Insurance proceeds received after Hurricane Katrina, which were used to repair the immovable property, were treated as having been used to maintain the livability of the matrimonial home, and, thus, Mr. Coleman's estate was not entitled to reimbursement of those funds. Insufficient evidence was produced to show that the proceeds belonged to Mr. Coleman.

Custody/Surrogacy

Ramsey v. Morales, 48-765, 48-766, 48,767 (La. App. 2 Cir. 11/20/13), 131 So.3d 64.

After Mr. Morales and his wife arranged with Ms. Ramsey for her to bear a child for them, and they entered into a written agreement, twins were born. After 22 months, each party filed a petition for custody. The court of appeal found that the

Notice: Comment Period Set for U.S. Magistrate Judges

The current terms of office for United States Magistrate Judges Sally A. Shushan and Karen Wells Roby will expire on Jan. 31, 2015, and Feb. 21, 2015, respectively. The United States District Court is required by law to establish a panel of citizens to consider the reappointment of a magistrate judge to a new eight-year term.

The duties of a magistrate judge include: (1) conducting most preliminary proceedings in criminal cases; (2) trial and deposition of misdemeanor cases; (3) conducting various pretrial matters and evidentiary proceedings on delegation from the judges of the district court; and (4) trial and disposition of civil cases upon consent of the parties.

Comments are sought from members of the Bar and the public as to whether the incumbent magistrate judges should be recommended by the panel for reappointment by the court. Comments should be mailed to: William W. Blevins, Clerk, United States District Court, 500 Poydras St., Room C-151, New Orleans, LA 70130.

Comments must be received by Aug. 1, 2014.

trial court's decision granting Ms. Ramsey and Mr. Morales joint custody, with Ms. Ramsey being designated the domiciliary parent, was not manifestly erroneous or clearly wrong and was within the trial court's great discretion. Indeed, it found that had the trial court ruled in favor of Mr. Morales, it was probable that it would have affirmed that judgment.

Divorce/Extinguishment

Schiro v. Farrell, 13-635 (La. App. 5 Cir. 12/19/13), 131 So.3d 997.

After the parties' first divorce petition was extinguished by their pre-divorce reconciliation, a subsequent petition for divorce had to be filed as a new suit and could not be filed under the previous suit number because that matter had been extinguished by the reconciliation. He had accepted service of her second petition, and they had reached a consent judgment on custody, visitation, support, interim spousal support and use of the home and vehicles. After she filed a rule to set the 102 divorce, he filed a motion to dismiss her petition for divorce, and the trial court found that the first suit had been extinguished and suggested that the parties go to the clerk's office to see if the clerk would assign a different number to the second suit as a new suit. He then filed a petition for divorce, and she sought, on the clerk's advice, to have her suit transferred and consolidated with his. The trial court denied her request and dismissed her suit. The court of appeal found that because her first suit had been dismissed as a matter of law on the parties' reconciliation, her second suit should have been filed as a new suit under a new number, and filing the suit under the old number "could not revive the case." The court of appeal did not address the effect of this ruling on the consent judgment reached by the parties, despite her raising the question.

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Insurance, Tort, Workers' Compensation & Admiralty Law

Tort/Premises Liability

Finley v. RaceTrac Petroleum, Inc., et al., 48,923 (La. App. 2 Cir. 4/9/14), ____ So.3d ____.

During a refueling stop at a RaceTrac gas station and convenience store, Karen Finley entered the store to make purchases. Returning to her car, she slipped and fell on an oil slick in a handicapped parking space near the entrance and sustained injuries. She filed suit against RaceTrac pursuant to La. R.S. 9:2800.6, Louisiana's premises liability statute, alleging that the oil slick was in an area where RaceTrac knew, or should have known, of the dangerous condition and that its failure to take reasonable steps to clean up the slick resulted in her injuries. RaceTrac moved for summary judgment, arguing that Finley could not prove that RaceTrac had actual or constructive notice of the condition. Dena Davis and Ermond Ashley, the only two RaceTrac employees present at the time, did not witness the accident. Davis testified that she inspected the parking lot upon arrival at work and did not notice any spills or slippery substance. She could see the parking space from her vantage point at the cash register, but was unable to see whether oil was on the ground. She noted that a vehicle had been parked in the space prior to Finley's fall, which was corroborated by Finley's testimony. After Finley returned to the store to report her fall, cat litter was poured on the oil slick and promptly swept up, in accordance with store policy, and Davis informed her manager by telephone.

A merchant's tort liability for a patron's injury is governed by La. R.S. 9:2800.6, which provides, in pertinent part:

> A. A merchant owes a duty to persons who use his premises to exercise reasonable care to keep his aisles, passageways, and floors in a reasonably safe condition. This duty includes a reasonable effort to keep the premises free of any hazardous conditions which reasonably might give rise to damage.
>
> B. In a negligence claim brought against a merchant by a person lawfully on the merchant's premises for damages as a result of an injury, death, or loss sustained because of a fall due to a condition existing in or on a merchant's premises, the claimant shall have the burden of proving, in addition to all other elements of his cause of action, all of the following:
>
> (1) The condition presented an unreasonable risk of harm to the claimant and that the risk of harm was reasonably foreseeable.
>
> (2) The merchant either created or had actual or constructive notice of the condition which caused the damage, prior to the occurrence.

(3) The merchant failed to exercise reasonable care.

C. Definitions:

(1) "Constructive notice" means the claimant has proven that the condition existed for such a period of time that it would have been discovered if the merchant had exercised reasonable care[.]

The pivotal issue is whether Finley proved that RaceTrac either created the condition or had actual or constructive notice of the condition which caused the damage, prior to the accident. The record being devoid of any evidence of actual notice, the burden is upon Finley, the non-moving party, to present factual evidence to establish that RaceTrac had constructive notice of the oil slick prior to her fall. A claimant relying upon constructive notice must present positive evidence that the damage-causing condition existed for some period of time sufficient to place the merchant on notice of its existence. This is not a certain number of minutes prior to the occurrence, but circumstantial evidence from which the factfinder can reasonably infer that it is more probable than not that the condition existed for such time prior to the accident that it should have been discovered and corrected. (Citations omitted.)

"The record amply supports the trial court's conclusion that Finley failed to prove the temporal element necessary to establish constructive notice, an essential element of Finley's claim under La. R.S. 9:2800.6. [W]e find no error in the trial court's conclusion that RaceTrac was entitled to summary judgment."

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International Law

U.S. Supreme Court

Daimler AG v. Bauman, 134 S.Ct. 746 (2014).

The U.S. Supreme Court addressed a unique jurisdictional claim in a case involving activities during the 1976-83 "Dirty War" in Argentina. Twenty-two Argentine residents filed suit in California federal court against Daimler AG, a German corporation with a parent company located in California, alleging that its Argentine subsidiary collaborated with Argentine state security forces to kidnap, detain, torture and murder employees of the Daimler AG Argentine subsidiary. The claims were primarily predicated on the Alien Tort Claims Act.

Daimler AG sought dismissal for lack of personal jurisdiction. The California

District Court granted the motion finding Daimler AG's affiliation with California insufficient to support general or specific jurisdiction. The 9th Circuit reversed relying upon jurisdictional agency principles, finding that the Argentine subsidiary's connection with its California parent was important and material enough to attribute the subsidiary's conduct to the parent. The U.S. Supreme Court granted certiorari to decide whether Daimler AG is amenable to suit in California within the confines of the Due Process Clause of the 14th Amendment.

Justice Ginsburg's opinion provides a succinct discussion of constitutional precepts of general and specific jurisdiction as applied to out-of-state defendants seeking to avail themselves of an in-state forum. Confirming the less dominant role of general jurisdiction in recent jurisprudence, the court noted that it "has not yet addressed whether a foreign corporation may be subjected to a court's general jurisdiction based on the contacts of its in-state subsidiary." *Daimler AG*, 134 S.Ct. 746, at 759. The court rejected the 9th Circuit's broad agency analysis, which primarily relied upon the "importance" of the services rendered by the subsidiary to the parent.

> Formulated this way, the inquiry into importance stacks the deck, for it will always yield a pro-jurisdiction answer. . . . The Ninth Circuit's agency theory thus appears to subject foreign corporations to general jurisdiction whenever they have an in-state subsidiary or affiliate, an outcome that would sweep beyond even the "sprawling view of general jurisdiction" the Court rejected in prior cases. *Id.* at 759-760.

Relying upon precepts set forth in the court's famous *International Shoe* decision, the court ruled that the proper test for jurisdiction is not solely whether the foreign company has substantial sales in a state, but rather whether a company's affiliations with the forum are "so continuous and systematic as to render it essentially at home in the forum State." *Id.* at 761. Daimler AG's connection to California does not satisfy this scrutiny and the court reversed the 9th Circuit.

U.S. Federal Circuit Court of Appeals

Guangdong Wireking Housewares & Hardware Co., Ltd. v. United States, 2014 U.S. App. LEXIS 5024 (Fed. Cir. March 18, 2014).

The U.S. Court of Appeals for the Federal Circuit (CAFC) upheld part of a federal law overturning a prior decision of the same court. As previously reported in this column, the CAFC ruled in *GPX Int'l Tire Corp. v. United States,* 666 F.3d 732 (Fed. Cir. 2011), *reh'g granted,* 678 F.3d 1308 (Fed. Cir. 2012), that U.S. international trade rules prohibit imposition of both antidumping and countervailing duties on goods from non-market economies. The U.S. Congress legislatively overruled the *GPX* decision through a 2012 amendment to the Tariff Act of 1930, which allows imposition of both trade remedies against non-market economies.

Guangdong brought suit against the United States alleging the 2012 amendment violates the Ex Post Facto Clause of the U.S. Constitution by retroactively imposing countervailing duties in existing cases. The 2012 amendment does not allow the Department of Commerce to retroactively adjust for any double counting that might occur on products already subject to an antidumping order.

A three-judge panel of the CAFC affirmed the U.S. Court of International Trade's prior decision upholding the law's constitutionality. The court agreed with appellant that the legislation had retroactive effect and was not merely a change in law. However, after finding that only in rare circumstances would a civil law violate the Ex Post Facto Clause, the court determined that the law is remedial and not punitive.

> The current amendment does not stray from the remedial nature of trade rules generally. The 2012 amendment enables Commerce to apply countervailing duties to NME imports. Thus, this law simply extends Commerce's ability to impose countervailing duties to a new group of importers. And like countervailing duty law generally, the specific purpose of the new law is to remedy the harm American manufacturers and their workers experience as a result of unfair foreign trade practices.
>
> Thus, like antidumping and countervailing duties generally, the specific purpose of the 2012 amendment is remedial, not punitive.
>
> *Guangdong Wireking Housewares & Hardware Co., Ltd. v. United States*, 2014 U.S. App. LEXIS 5024, *31-32.

World Trade Organization

United States-Countervailing and Anti-Dumping Measures on Certain Products from China (WT/DS449/R) (March 27, 2014).

Staying with the 2012 congressional amendment addressed in *Guangdong, supra*, a dispute settlement panel of the World Trade Organization (WTO) released its views on the law's conformity to the WTO Agreements. China challenged the U.S. countervailing duty law at the WTO and requested consultations with the United States on Sept. 17, 2012. China challenged the law as a violation of various Articles of the WTO Subsidies and Countervailing

Measures Agreement and Anti-Dumping Agreement. China specifically charged that the retroactive application of the law impermissibly results in double remedies on Chinese cases existing prior to the effective date of the new law. The United States maintained 27 orders on Chinese products between November 2006 and March 2012. Consultations failed and a panel was established to resolve the dispute on Dec. 17, 2012.

The panel rejected three Chinese complaints surrounding the United States' failure to promptly publish the new law, as required by Article X of the General Agreement on Tariffs and Trade (GATT). China prevailed in one important respect. The panel agreed that the United States failed to investigate whether "double remedies" arose in the orders at issue, in violation of Articles 19.3, 10 and 32.1 of the SCM Agreement. The United States previously lost a similar challenge in *United States-Definitive Anti-Dumping and Countervailing Duties on Certain Products from China* (WT/DS379/R) (Oct. 22, 2010).

This part of the panel decision sets up a potential conflict with U.S. law and the CAFC opinion. The U.S. 2012 amendment directs Commerce to adjust for "double counting" prospectively only. The CAFC in *Guangdong* ruled that the prospective-only application "does not undermine Congress's overarching remedial intent." "Congress enacted the prospective adjustment provision to ensure that the United States complied with its WTO obligations." *Guangdong*, *supra* at *24-25. Thus, there is the situation where the WTO panel believes the United States did not perform its WTO obligation in determining whether the law imposes double remedies on certain Chinese products; yet, the CAFC found that Congress specifically intended for the law to comply with WTO obligations and it is otherwise consistent with the U.S. Constitution. China appealed the panel decision on April 11, 2014, to the WTO Appellate Body.

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Labor and Employment Law

Private Employers Beware: Employee Confidentiality Policies May Violate NLRA

Regardless of whether its workplace is unionized, an employer must consider whether its policies and rules may be in violation of the National Labor Relations Act (the NLRA). The National Labor Relations Board (the NLRB) traditionally has been associated with enforcing the rights of unionized workers under the NLRA. Over the past year, however, the NLRB has undertaken a nationwide initiative aimed at the nonunion employment relationship—particularly targeting common provisions in employment agreements and policy manuals.

One of the most controversial areas of focus has been employee confidentiality rules and the NLRB's position that those rules unlawfully chill protected concerted activity under the NLRA. On March 24, 2014, the U.S. 5th Circuit Court of Appeals agreed with the NLRB that a broadly-written confidentiality provision had exactly that effect. In *Flex Frac Logistics, L.L.C. v. NLRB*, No. 12-60752, 2014 U.S. App. LEXIS 5429, at *1, 14 (5 Cir. March 24, 2014), the 5th Circuit enforced the NLRB's order "holding that Flex Frac's employee confidentiality policy is an unfair labor practice in violation of Section 8(a)(1)" of the NLRA.

The case involved a Fort Worth-based nonunion trucking company, Flex Frac Logistics, L.L.C., which delivered frac sand to oil and gas well sites through its employees and independent contractors. Because rates charged to customers were confidential, Flex Frac required each of its employees to sign a one-page, at-will employment agreement. That agreement contained a section entitled "Confidential Information," which provided the following:

> Employees deal with and have access to information that must stay within the Organization. Confidential Information includes, but is not limited to, information that is related to: our customers, suppliers, distributors; [our] organization management and marketing processes, plans and ideas, processes and plans; our financial information, including costs, prices; current and future business plans, our computer and software systems and processes; personnel information and documents, and our logos, and art work. No employee is permitted to share this Confidential Information outside the organization, or to remove or make copies of any [of our] records, reports or documents in any form, without prior management approval. Disclosure of Confidential Information could lead to termination, as well as other possible legal action.

See, Flex Frac Logistics, L.L.C. and Silver Eagle Logistics, L.L.C., Joint Employers and Kathy Lopez, 358 N.L.R.B. 127, at p. 1 (2012).

An employee in Flex Frac's accounting department discussed the rates that the company charged its clients to deliver loads of frac sand in relation to what the company paid its drivers, thus revealing the company's profit margin to its competitors. Flex Frac discharged the employee for violating the confidentiality rule, and she filed an unfair labor practice charge with the NLRB.

In proceedings before the administrative law judge, Flex Frac representatives testified that the intent behind the rule was to protect the company's competitive advantage in the marketplace by preventing disclosure of its contractual rates, and that it had no policy, written or unwritten, that prevented employees from discussing their wages. Indeed, the rule on its face contains no reference to wages, compensation or any other specific terms and conditions of employment, although it does prohibit disclosure of "personnel information and documents." The administrative law judge held, and the NLRB affirmed in a 2-1 split decision, that the confidentiality rule is "unlawfully overbroad" because employees could reasonably construe the prohibition against discussion of "personnel information" to preclude discussion of wages and other terms and conditions of employment. *Id*.

On Flex Frac's petition for review, the 5th Circuit agreed with the NLRB's holding that the confidentiality rule is unlawful. *Flex Frac*, 2014 U.S. App. LEXIS 5429, at *1. Flex Frac argued that there was no evidence that it had enforced the confidentiality rule in a way that prohibited employees from discussing wages with individuals outside of the company, or that its employees actually interpreted the rule as prohibiting disclosure of wage information. *Id*. at *9. Nonetheless, the court held that such evidence was unnecessary to uphold the NLRB's order. Instead, the court concluded that Flex Frac's confidentiality rule failed to adequately identify the categories of "personnel information" covered by the rule and, similarly, that the rule failed to include any limitation on the type of "personnel information" that was deemed confidential. *Id*. at *12. The court concluded that the confidentiality rule violated the NLRA because it implicitly prohibited employee discussion of wage information. *Id*. at *13.

The 5th Circuit's decision in *Flex Frac* is an important reminder that even nonunion employers are subject to certain provisions of the NLRA, and that employment policies should be reviewed periodically and revised if necessary to comport with the NLRA. In particular, confidentiality provisions should be narrowly tailored to the company's legitimate business needs and to prevent disclosure only of bona fide confidential or proprietary information. Employers should avoid broad, general prohibitions and undefined terms that could be read to prohibit employees from discussing wages, hours or other terms and conditions of employment with other employees or individuals outside of the company.

As the 5th Circuit's decision confirms, an overly broad confidentiality policy violates the NLRA if it can be *construed* as preventing employees from engaging in protected activities such as discussing wages and terms and conditions of employment outside the company — even if there is no evidence that employees actually *interpret* the policy as restricting those rights.

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Mineral Law

3rd Circuit Issues Opinion in *Savoie*

Savoie v. Alice T. Richard, et al., 2014 WL 1306264 (La. App. 3 Cir. 4/2/14), ____ So.3d ____.

The Louisiana 3rd Circuit Court of Appeal issued an interesting opinion in the continuing saga of the *Savoie* case. This case began as a legacy lawsuit in Cameron Parish before Judge Penelope Quinn Richard. In late 2011, following a month-long trial between the Savoies (plaintiffs) and Shell Oil Co. and its affiliate, SWEPI LP (collectively, Shell), the jury awarded plaintiffs $34 million to restore their property to state regulatory standards (Statewide Order No. 29-B) and an additional $18 million to remediate their property to the standards set forth in the mineral leases at issue. After trial, pursuant to Act 312 (La. R.S. 30:29), Shell submitted its remediation plan to the Louisiana Department of Natural Resources (LDNR) for approval. The plan required Shell to pay $3,963,003 to remediate the Savoies' property. The LDNR approved Shell's plan.

The plan was then submitted, without contest by the Savoies, to the trial court for approval. The trial court entered a judgment in favor of plaintiffs — $34 million to remediate the property to state standards, with Shell paying $3,963,003 into the registry of the court, as required by Act 312. The remaining $30 million was converted into a personal judgment in favor of the Savoies, plus the $18 million awarded by the jury to remediate their property to the standards set forth in the mineral leases.

Shell appealed, asserting four assignments of error: (1) the trial court erred because it did not advise the jury as to Act 312 in its jury charges; (2) the trial court erred in awarding $30 million as a cash payment for regulatory clean-up; (3) the $30 million judgment in addition to the performance of the clean-up amounted to a double recovery, which is illegal pursuant to Louisiana law; and (4) the trial court erred in denying Shell's request for directed verdict.

As to jury instructions, the 3rd Circuit found that the trial court did not violate the law. In fact, the court concluded that the trial court carefully crafted its jury verdict form and instructions (essentially accomplishing the purposes of Act 312), even though the jury did not receive any specific instructions about Act 312. Further, because the verdict form differentiated between regulatory clean-up damages and private damages, the 3rd Circuit believed this was key in overcoming the absence of any instruction regarding Act 312.

As to the amount of damages awarded to plaintiffs for remediation (the $34 million), the 3rd Circuit held that the Savoies were not entitled to a private judgment in the amount of $30 million because clearly the $34 million in remediation damages was meant as just that — to clean up the property, not as private damages. The court found that both the jury verdict form and the trial court's judgment indicated that the *$34 million* was meant to *remediate* the property to state standards. Moreover, requiring that the $34 million be deposited into the registry of the court comported with the 3rd Circuit's reading of Act 312. Thus, the court ruled that the entire $34 million must be placed into the registry of the court, with any unused portion to be returned to Shell.

As to the directed verdict issue, the 3rd Circuit found that the jury, after listening to four weeks of testimony at trial, carefully heard and weighed the evidence when it arrived at the $18 million award for remediation beyond state standards. The court did not find Shell's argument — that the remediation requirements of the mineral leases and the state's standards are the same — to be persuasive, mainly because Shell's argument hinged on just two sentences from plaintiffs' expert witness testimony in a trial record that was more than 17,000 pages long.

The Savoies, in answering the appeal, argued that the trial court should have calculated judicial interest from the date of the breach, not the date of judicial demand. There is case law that suggests in "highly complicated" breach-of-contract cases it is appropriate to award interest from the date of judicial demand. To avoid this rule, the Savoies argued that the instant case was not complicated. The 3rd Circuit, however, disagreed and found that the appropriate measure of interest was from the date of judicial demand.

Based upon these rulings, the 3rd Circuit amended the trial court's judgment and ordered that the entire $34 million for remediation damages be placed into the registry of the court. The 3rd Circuit affirmed the remainder of the trial court's judgment.

Update: New Regulations Relating to Salt Caverns

On Feb. 20, 2014, the Louisiana Department of Natural Resources promulgated new rules relating to salt caverns.

The new rules for Class III solution-mining injection wells (Statewide Order No. 29-M-3) can be found at Louisiana Administrative Code Title 43, Part XVII, Subpart 5, Chapter 33, Section 3301, *et seq.*

The new rules relating to hydrocarbon storage wells in salt dome cavities (Statewide Order No. 29-M (Rev. 3)) can be found at Louisiana Administrative Code, Title 43, Part XVII, Subpart 3, Chapter 3, Section 301, *et seq.*

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Professional Liability

PCF Unilaterally Stops Custodial Care Payments

Watkins, et al. v. Lake Charles Memorial Hospital, et al., 13-1137 (La. 3/25/14), ____ So.3d ____.

Dustin Watkins suffered a stroke *in utero* two days before his birth in 1990. A jury trial in 2003 resulted in damages awarded to Dustin that included future medical care, including custodial care.

The PCF in 2006 disputed the payment of certain custodial care expenses. Watkins obtained a judgment awarding these expenses. The judgment also ordered the PCF to make quarterly payments as specified in the original judgment, provided the plaintiff certify, 30 days prior to any quarterly payment, no change in the patient's condition. The PCF appealed, arguing that it should not have to pay future medical expenses prior to the incurrence of the expenses, or the services being performed, or allowing the submission of a claim for reimbursement of future medical expenses without proving the services were actually performed. The appellate court affirmed the district court's judgment.

In 2011, Ms. Watkins certified "no change" in her son's condition and asked for the advance quarterly payment. The PCF had learned from Facebook postings that Dustin was married, living with his wife, and no longer residing with his mother, facts allegedly verified, and the PCF required Dustin to undergo an independent neurological evaluation.

In August 2011, Watkins again submitted a "no change" affidavit and requested an advance quarterly payment for custodial care. The PCF refused, based on the neurological evaluation by its physician. Thereafter, Watkins submitted no requests for payment and instead sought relief from the district court. In its March 26, 2012, ruling, the district court awarded Dustin 24-hour custodial care expenses to March 26, 2012, and the PCF was ordered to pay the $5,000 expense incurred by Ms. Watkins to obtain a neurological evaluation that contradicted the PCF's evaluation. The court also ruled Dustin would thereafter be entitled to only six hours per day of custodial care and that the PCF was liable for Watkins' attorney fees and costs. The appellate court affirmed that judgment, following which the Supreme Court granted certiorari.

The PCF argued that no statute required that it obtain court approval to modify a judgment for future care if the claimant submitted falsified affidavits. It also argued that it was only required to pay expenses "actually incurred," had "good reason" to deny the claims, that attorneys' fees and costs were improperly awarded, and that the plaintiff had not submitted any affidavits about Dustin's conditions since August 2011; thus, it was not responsible for any payments after that date.

Watkins countered that the PCF was arbitrary in terminating the custodial care payments without medical justification, as this decision was based solely on Facebook posts (never introduced into evidence), and Dustin continued to suffer cognitive and emotional problems that required ongoing custodial care.

The Supreme Court traced the genesis of the MMA and commented that it was amended in 1984 to provide for severely injured victims disadvantaged by the liability cap by sanctioning:

> . . . a speedy, convenient and inexpensive administrative remedy for the payment of actually incurred medical expenses, without limit, except as tailored to the patient's needs. . . LSA-R.S. 40:1299.43 aims to remedy to an extent the damage cap's harsh tendency to prune recovery inversely to the injury, and to provide cost-effective actuarially-sound methods for financing and delivering compensation for medical services necessitated by medical malpractice.

In *Watkins*, all Section 1299.43 procedures were followed by the lower courts, and the court determined the medical expenses "are not made executory until review and approval by the [PCF] or, if denied, upon subsequent order of the court under its continuing jurisdiction." When Watkins sought payment of the expenses denied by the PCF, the district court found it acted unreasonably. In oral reasons for the judgment, the district judge said it had already determined custodial care was necessary, and there was nothing left for the PCF to do other than make the payments. If the PCF felt there was some abuse, however, there were mechanisms in place to request change. Despite the PCF's discovery that Dustin no longer lived with Ms. Watkins, it failed to initiate any proceeding for relief in the district court. In its last appearance before the district court — that led to this review by the Supreme Court — the district judge noted:

> The PCF willfully violated the mandate of the 2006 judgment by making the unilateral determination to cease the custodial care payments, despite receiving certification from [the plaintiff] that there had been no change in Dustin's condition.

> . . . [T]he fact that a misrepresentation or change in condition has occurred or is suspected does not allow the PCF to make the unilateral determination to cease payment.
>
> . . . [P]rior to discontinuing payments for future medical care related benefits, *i.e.,* custodial care, [the PCF] must first obtain a judicial ruling modifying the prior judgment.
>
> The PCF has no legal right to substitute its own opinion for the ruling of the court.

The court said the PCF had ignored the significance of the district court's 2006 judgment ordering the payments, and court orders must be obeyed until set aside. Failure to comply with the court order is a constructive contempt of court. Irrespective of what evidence the PCF may have for the lack of need for continuing care, the requirement that it comply with a court's judgment until it is modified does not conflict with Section 40:1299.43(C) of the MMA. The district court maintains continuing jurisdiction in future medical care cases and provides for attorneys' fees and costs to be paid by the PCF if it unreasonably fails to pay medical costs within 30 days after submission of a claim. There are no restrictions on a district court's power to "fashion" any remedy to ensure these expenses are timely paid.

The court affirmed the district court's ruling that all expenses claimed prior to amending the judgment were to be paid, including those contested by the PCF by reason of the plaintiff's failure to continue submitting affidavits, because the "no change" affidavit requirement was put in place by the district court to procure *advance payment of expenses,* which had no effect on the power of the court's ruling to adjudicate whether payment was owed for prior or subsequent expenses. The PCF had also stipulated during the March 2012 hearing it was not reserving any rights to contest the validity of the custodial care cost that had accrued prior to the date of the hearing.

The PCF also contended that it should not be required to pay attorneys' fees and costs because it had "good cause" to deny the payments. But, Section 40:1299.43 (E)(2) requires the award of reasonable attorneys' fees if the PCF unreasonably fails to pay for medical care within 30 days after a claim is submitted. The Supreme Court found the PCF was unreasonable in discontinuing the advance payments.

Finally, the PCF argued the "law of the case doctrine" in support of its claim that the court should examine the correctness of the 2006 lower court decisions. The Supreme Court explained the PCF was trying to merge two separate provisions of the MMA (Sections 1299.43(C) and 1299.43(E)) which would eliminate the district court's continuing jurisdiction, an argument the court rejected.

In a 4-3 opinion, the court concluded, in affirming the lower courts' holdings:

> We hold herein that when the PCF denies a claim for payment of a future medical or related expense and the district court thereafter exercises its continuing jurisdiction and issues a ruling as to that matter, the PCF is obligated to comply with the district court's ruling, order, or judgment unless it is modified or set aside by the court.

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Taxation

Sales Tax Exemption for Purchases for the Government Not Proven

Bridges v. Cepolk Corp., 13-1051 (La. App. 3 Cir. 2/12/14), ____ So.3d ____, 2014 WL 551587.

The 3rd Circuit Court of Appeal reversed a trial court's decision denying the Louisiana Department of Revenue's (Department) motion for summary judgment and granting Cepolk Corp.'s (Cepolk) cross motion for summary judgment. The 3rd Circuit held that the movable items purchased by Cepolk were subject to sales and use tax, after finding that Cepolk failed to prove it acted as the United States Government's (Government) agent in purchasing the items at issue and that the items were purchased prior to their incorporation into the final product.

Cepolk entered into contracts to modify and replace heating, ventilation and air conditioning (HVAC) systems at the Fort Polk housing complex in Louisiana. The Department conducted a sales and use tax audit of Cepolk, which found Cepolk failed to pay sales tax on approximately $4 million in purchases of electrical, plumbing, and heating and air conditioning materials and supplies. The Department filed suit to collect. Cepolk asserted that its purchases were made as an agent for the Government and were exempt from sales tax under La. R.S. 47:301(10)(g). The Department filed a motion for summary judgment asserting Cepolk was not a purchasing agent for the Government and its purchases were not exempt from tax. Cepolk filed a cross motion for summary judgment asserting the opposite, which was granted by the district court. Thereafter, the Department appealed.

The 3rd Circuit addressed two questions: (1) whether Cepolk was a purchasing agent for the Government; and (2) whether the purchases were made for future sale to the Government before they were incorporated into the final product?

Relying on *F. Miller & Sons, Inc.*, 02-1680 (La. 2/25/03), 838 So.2d 1269, and La. Admin. Code 61:I.4301, the 3rd Circuit found that, in order for Cepolk to be a valid purchasing agent for the Government, a signed agreement of agency and evidence demonstrating transfer of title to the materials which passed to the governmental agency at the time of purchase were required.

In reviewing the contracts at issue, the 3rd Circuit found that there was no provision proving an agency or mandatory relationship between Cepolk and the Government, nor any signed contract which met the requirements of La. Admin. Code 61:I.4301. Further, the 3rd Circuit found that the contracts showed that

Cepolk was a contractor and title to the materials did not pass to the Government at the time of purchase as required by *F. Miller & Sons, Inc*. and La. Admin. Code 61:I.4301, or at any time prior to their incorporation into the finished product. Considering the foregoing, the 3rd Circuit held that Cepolk owed the tax and that Cepolk had not met its burden of proving that it was entitled to any of the exemptions asserted.

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Computation of Time to Appeal Denial of Claim for Refund

In *Dillard University v. Barfield*, 2013-CA-1336 (La. App. 4 Cir. 4/2/14), Louisiana's 4th Circuit ruled on a controversy involving computation of delays with respect to tax notices. At issue was the date on which the 60-day period for appealing the Department's denial of a claim for refund under La. R.S. 47:1625 begins. La. R.S. 47:1625 provides that an appeal may not be filed "after the expiration of sixty days from the date of mailing by registered mail by the collector to the taxpayer of a notice of the disallowance of the part of the claim to which such appeal relates." Although the date of the event triggering the delay period under this statute is the mailing by registered mail, the court stated that the Department had a practice of issuing post-dated denial letters informing taxpayers that they had 60 days from the date of the letter to file an appeal, which resulted in the date of mailing occurring before the date of the letter. The court affirmed the holdings of the district court and the Board of Tax Appeals which both found that this practice precluded the Department from asserting the statutory language of "sixty days from the date of mailing" to determine the prescriptive period. Consequently, the event triggering the 60-day period was the date of the notice. Additionally, the court upheld the Board's rule that adopted La. C.C.P. art. 5059 by reference (providing that the date of the event is not to be included in computing a period of time) and upheld its determination that this principle governs the calculation of time delays for La. R.S. 47:1625, and therefore the computation of the 60 days began the day after the date of the notice.

District Court's Subject Matter Jurisdiction over Pending BTA Matters

In *Department of Revenue v. KCS Holdings I, Inc.*, 2013-CA-1479 (La. App. 1. Cir. 3/31/14) (not designated for publication), Louisiana's 1st Circuit ruled on the district court's jurisdiction over matters that were not yet final at the Board of Tax Appeals (BTA) level. After the decision in *UTELCOM, Inc. v. Bridges*, 10-0654 (La. App. 1 Cir. 9/12/11), KCS sought a refund of franchise taxes paid pursuant to La. R.S. 47:1621 and filed a petition with the BTA as a claim against the state. Relying on 47:1621(F) (which provides that Section 1621 shall not be construed to authorize any refund of a tax overpaid through a mistake of law arising from the secretary's misinterpretation of the law), the Department denied the request for refund. After KCS appealed the denial of the refund to the BTA, the Department filed exceptions alleging that KCS had no cause of action and no right of action to pursue its claim under 47:1621 and argued that KCS's sole remedy to recover the taxes it had voluntarily paid was a claim against the state since La. R.S. 47:1621(F) precluded the issuance of a refund. The BTA denied the Department's exceptions and found that, while Section 1621(F) may prohibit the Department from making a refund where the secretary misinterpreted the law, it does not prohibit the BTA from making a refund.

Following the BTA's decision, the Department filed a petition for judicial review, an application for supervisory writs and a petition for declaratory judgment in district court based upon its position that the BTA erred in determining that 47:1621(F) does not prohibit the taxpayer from obtaining a refund from the Department. Thereafter, the district court consolidated the actions and granted KCS's exception of lack of subject matter jurisdiction over the consolidated actions, and the Department appealed to the 1st Circuit. The court of appeal affirmed the district court's decision that it lacked appellate, supervisory and declaratory judgment jurisdiction, finding as follows: (1) because a district court's appellate jurisdiction under La. R.S. 47:1434 over a "decision or order" of the BTA extends only to "final" decisions or orders by the BTA and the BTA's judgment denying the Department's exception is interlocutory in nature, the district court correctly dismissed the Department's petition for judicial review for lack of subject matter jurisdiction; (2) because the Department's application for supervisory writs neither asserted a claim of deprivation of a constitutionally protected right, nor contended that an agency exceeded its constitutional or statutory authority, the district court correctly dismissed it based upon a lack of subject matter jurisdiction; and (3) since the trial court lacks original jurisdiction to consider the merits of plaintiffs' claims, as distinguished from the legality or constitutionality of the procedural mechanisms for assertion of those claims, the district court correctly sustained the exception of lack of subject matter jurisdiction and dismissed the petition for declaratory judgment, which concerned the merits of the Department's defense to the refund claim rather than a challenge to the statute's legality or constitutionality.

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