Alternative Dispute Resolution

To Arbitrate or Not to Arbitrate? There is No Question

The Supreme Court recently held arbitration agreements to be valid in many consumer contracts. The court opined that the Federal Arbitration Act (FAA) establishes liberal federal policy favoring arbitration agreements, and such agreements may be overridden only when there is a contrary congressional command. *CompuCredit Corp. v. Greenwood,* 132 S.Ct. 665, 669 (2012). Whereas the *CompuCredit Corp.* decision involved a dispute over a mandatory arbitration clause in credit-card applications, the most recent high court decision evaluating the validity of arbitration agreements centers on tort claims. *Marmet Health Care Ctr., Inc. v. Brown*, 132 S.Ct. 1201, 1204 (2012).

In *Marmet*, Clayton Brown, Jeffrey Taylor and Sharon Marchio each brought negligence suits against nursing homes in West Virginia. Each party signed a contract with a nursing home on behalf of a family member who required extensive nursing care. Brown's and Taylor's agreements included a clause that required the parties to arbitrate all disputes except late-payment claims. Marchio's agreement also included an arbitration clause, but made no exceptions. Each claim was based on the negligence of the nursing homes for causing injuries or harm that resulted in the death of each party's respective family member. A West Virginia state court dismissed the lawsuits by Brown and Taylor based on the agreements to arbitrate contained in the contracts.

On appeal, the West Virginia Supreme Court of Appeals (hereinafter, the state supreme court) reversed the decision. The state supreme court ruled that the FAA did not apply to personal injury or wrongful death claims because those types of claims do not result from a written agreement evidencing a transaction affecting interstate commerce. The court believed that the FAA forces parties to arbitrate only those issues that were agreed upon via a "clear and unmistakable writing." This does not occur in tort claims, the court reasoned, as tort claims are not typically bargained for; no one expects to commit a tort or have a tort committed upon him. The state supreme court attempted to distinguish between a "conflicting" provision and an "exception," holding that personal injury and wrongful death claims were an exception to the FAA. By coming to this conclusion, the state supreme court did not believe there to be a conflict between state and federal law, so there should not be a federal preemption issue.

The U.S. Supreme Court disagreed. The high court concluded that the West Virginia court's interpretation was incorrect because (1) the text of the FAA statute does not provide for a personal injury or wrongful death exception, (2) it "reflects an emphatic federal policy in favor of arbitral dispute resolution," and (3) it "requires courts to enforce the bargain of the parties to arbitrate." Furthermore, it is well settled law, as the Supreme Court was quick to point out, that when state law prohibits arbitration in certain "classes" or "types" of disputes, here personal injury and wrongful death, the conflicting provision is displaced by the FAA. The court deemed West Virginia's categorical prohibition against enforcing pre-dispute arbitration agreements for personal injury or wrongful death claims against nursing homes to be in conflict with federal law, and the prohibition was, therefore, preempted by it.

In a proposed "alternate" holding, the state supreme court reasoned that nothing in the FAA overrides traditional rules of contract interpretation. *Brown ex rel. Brown v. Genesis Healthcare Corp.*, 724 S.E.2d 250, 281 (2011), *judgment vacated sub nom. Marmet Health Care Ctr., Inc. v. Brown*, 132 S.Ct. 1201 (2012). Therefore, contract defenses, such as laches, estoppel, waiver, fraud, duress or unconscionability, may be used to vitiate an arbitration agreement. The state supreme court opined that pre-dispute arbitration agreements regarding personal injury and wrongful death claims are unconscionable and, therefore, unenforceable. But in the state supreme court's advocacy of unconscionability, the court cited West Virginia's public policy rule of not enforcing pre-dispute arbitration agreements in personal injury or wrongful death cases — the same rule that the U.S. Supreme Court found earlier in the opinion to be in conflict with the FAA and, therefore, displaced by FAA provisions. The U.S. Supreme Court was uncertain of how much the invalid rule influenced the state supreme court's determination of unconscionability, and, therefore, the case was remanded for a determination of whether, absent the public policy argument, the arbitration clauses were invalid for reasons that are not preempted by the FAA.

This decision should be closely examined by businesses and consumers alike. The U.S. Supreme Court is applying a strict interpretation of the FAA provisions by enforcing arbitration agreements on all disputes that arise out of a contract that contains an arbitration provision. In consummating such a contract, the consumer is not only vacating his right to litigate in court for disputes that arise from the contract directly, but also derivative disputes arising from the nature of the relationship created by the contract. At present, it seems that the only way out of an arbitration agreement is invalidation on the face of the agreement itself. Therefore, it becomes the consumer's responsibility to note the existence of arbitration clauses and decide whether he/she is willing to give up the fundamental right to litigate in court.

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Bankruptcy Law

Supreme Court Requires Credit Bidding Opportunity in Sale of Assets Lien-Free

RadLAX Gateway Hotel, L.L.C. v. Amalgamated Bank, 132 S.Ct. 2065 (2012).

In 2007, RadLAX Gateway Hotel and RadLAX Gateway Deck, L.L.C. (the debtors) purchased the Radisson Hotel at Los Angeles International Airport and the adjoining lot on which the debtors intended to build a parking structure. To finance the purchase and construction, the debtors obtained a loan from Longview Ultra Construction Loan Investment Fund (the lenders), for which Amalgamated Bank (bank) serves as trustee. The lenders obtained a "blanket lien on all of the debtors' assets to secure the loan." The construction of the parking structure proved more expensive than anticipated, and the debtors filed for Chapter 11 bankruptcy in 2009.

Thereafter, the debtors submitted their Chapter 11 "plan" by which the creditors were divided into separate classes and the treatment of each class was specified. Under this plan, the debtors sought to auction their assets free and clear of all liens without allowing the bank to "credit bid" using the debt owed to offset the purchase price. It was then the debtors' intent to repay the bank with the sale proceeds.

Prior to a court's confirmation of a plan, each class of creditors must consent, subject to certain exceptions, known as "cramdown" plans, established by 11 U.S.C. § 1129(b)(2)(A). In this section, under clause (i), the secured creditor retains its lien on the property and receives deferred cash payments. Clause (ii) allows the property to be sold free and clear of all liens, but the creditor is entitled to credit bid, and it receives a lien on the sale proceeds. Under clause (iii), the creditor is provided with the "indubitable equivalent" of its claim. As the debtors' plan did not permit credit bidding pursuant to clause (ii), the debtors argued that its plan provided the indubitable equivalent to the bank under clause (iii), and, thus, the bank's consent to the plan was not required. Unpersuaded, the bankruptcy court denied the debtors' sale and bid procedures motion, and the 7th Circuit affirmed.

The Supreme Court, applying the general, commonly applied statutory-interpretation rule that the "specific governs the general," found that clause (ii) offers detailed requirements for selling lien-free collateral, while clause (iii) is "broadly worded" and "says nothing about such a sale."

> The general/specific canon explains that the "general language" of clause (iii), "although broad enough to include it, will not be held to apply to a matter specifically dealt with" in clause (ii).

The court reasoned that, as clause (ii) covers the sale of assets free and clear of liens, while clause (iii) is a residual provisions "covering dispositions under all other plans," the debtors may not sell their property free of liens under section 1129(b)(2)(A) without permitting the bank to credit bid as required under clause (ii).

Forward Looking Contract Provides Defense to Avoidance Action

Lightfoot v. MXEnergy Elec., Inc. (In re MBS Mgmt. Servs., Inc.), ____ F.3d ____ (5 Cir. 2012).

MBS Management Services, Inc. managed apartment complexes in Texas and Louisiana. In 2005, MBS entered into a contract with Vantage Power Services, L.P., purchasing the "full elective requirements" for specified properties for 24 months, priced per kilowatt-hour, based on actual metered use. These agreements were later sold by Vantage to MXEnergy Electric, Inc. (MX). In August 2007, MBS paid $156,345.93 to MX to cover past-due amounts.

On Nov. 5, 2007, MBS filed for voluntary Chapter 11 bankruptcy, and the trustee initiated this adversary proceeding to recover the money paid to MX, arguing that it was an avoidable preferential transfer under 11 U.S.C. § 547(b) as the payments were made within the 90 days prior to the bankruptcy filing, while MBS was insolvent, and the payments remitted to MX were more than it would have received in a Chapter 7 liquidation. MX refuted this argument, alleging that the avoidance was impermissible under 11 U.S.C. § 546(e), which shields "a transfer that is a... settlement payment... made by or to [a]... forward contract merchant...." (*citing* 11 U.S.C. § 546(e)).

The bankruptcy court ruled, and the district court affirmed, that the agreement was, in fact, a forward contract and that the payments were not avoidable preferential transfers. On appeal, the 5th Circuit looked to the Bankruptcy Code's definition of a "forward contract" as "a contract (other than a commodity contract) for the purchase, sale, or transfer of a commodity... with a maturity date more than two days after the contract is entered into...." (*citing* 11 U.S.C. § 101(25)(A)).

The trustee argued that as the contract contained no specific delivery dates and no specific quantity of electricity to be purchased, it was not a forward contract. The 5th Circuit disagreed, stating that there are no such limitations under the statutory language of section 546(e), as the Bankruptcy Code reasonably forewent encumbering the definition of a forward contract with technical requirements. The court went on to conclude that simply because a contract does not include a specific maturity date, it does not mean that no maturity date exists, as argued by the trustee. Finding that the agreement was a forward contract within the meaning of 11 U.S.C. § 546(e), the 5h Circuit upheld the bankruptcy and district court decisions rejecting the trustee's avoidance actions.

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Family Law

Final Spousal Support

Ashworth v. Ashworth, 11-1270 (La. App. 3 Cir. 3/7/12), 86 So.3d 134.

The trial court found Ms. Ashworth free from fault and awarded her final spousal support. Mr. Ashworth appealed. The court of appeal found that the trial court did not abuse its discretion in finding that her leaving the matrimonial domicile was justified based on information she had regarding Mr. Ashworth's suspected adultery with two women. Moreover, he never asked her to return, and he was living with another woman within three months after she left. Further, her behavior was reasonably based and did not make their living together insupportable. Her testimony as to what her brother and niece told her about his actions was not hearsay because it was not offered for the truth, but for purposes of why she did what she did. Because her work as a sitter for the elderly was tenuous, extra income she picked up for extra days was uncertain and acted as a "buffer" for when she did not have steady work.

Child Support

Ficarra v. Ficarra, 11-0569 (La. App. 5 Cir. 2/14/12), 88 So.3d 548.

The trial court did not err in finding Mr. Ficarra's income to be $6,000 per month because his testimony was not credible, his tax returns did not accurately report his income, the ownership and books of the family company he worked for were unclear and untrustworthy, and the testimony of the special master and a CPA supported this higher income. Because of the parties' son's medical and learning issues, camp/child care and private school expenses were necessary. The trial court did not err in not considering her living with her parents as expense sharing benefits. Because the sum due between her demand and date of judgment was not a sum "in arrears," interest was due only from the date of the judgment, not on each payment as it became due.

Custody

Stewart v. Stewart, 11-1334 (La. App. 3 Cir. 3/7/12), 86 So.3d 148.

The trial court's judgment awarding joint legal custody, shared 50/50 physical custody and co-domiciliary status, and providing that the child would remain in his current school and that the parties attend family counseling was sufficient to constitute a plan of implementation under La. R.S. 9:335. Decision-making authority not specifically provided for was shared equally. The trial court is not required to itemize in its reasons for judgment the factors under La. Civ.C. art. 134; a party can move for reasons for judgment. The 3rd Circuit found that a designation of "co-domiciliary parents" was within the trial court's authority, refusing to follow the 2nd and 4th Circuits, who have found that the law does not allow for such a term. The parents' inability to get along and their respective active participation in the child's life were reasons for such a designation. Although the court-appointed evaluator had never done a custody evaluation before and had not attended seminars to specifically train him to do custody evaluations, he was a licensed marriage and family therapist, had previously testified as an expert in marriage and family therapy, had a master's degree in counseling, and had training as a qualified divorce mediator, and was thus sufficiently qualified as an expert. The trial court did not err in not qualifying the mother's expert psychologist as an expert in developmental disabilities because his work over the past years had primarily been in administration, not firsthand patient contact.

Gallet v. Gallet, 11-1416 (La. App. 3 Cir. 3/7/12), 86 So.3d 179.

The trial court did not abuse its discretion in finding no change of circumstances under *Bergeron* to change joint custody to the father as sole custodian or name him domiciliary parent as he wanted. The court addressed the testimony of various mental health professionals and agreed with the trial court that the child's anxiety problems were due to the parents' constant tensions and the father's having her report to him events at the mother's home. His numerous complaints about her decision-making and actions were over "relatively minor" things and did not rise to require a change under *Bergeron*. The trial court did not err in maintaining her choice of a counselor for the child, which complied with the custody plan. There was no abuse of discretion in the trial court's denying his rule for contempt because the evidence was "ambiguous." The trial court's appointment of a parenting coordinator was affirmed to help the parties' communication and management of the child's activities.

Martin v. Martin, 11-1496 (La. App. 3 Cir. 5/16/12), 89 So.3d 526.

Although Ms. Woods violated the provisions of the relocation statute by moving without court authority or Mr. Martin's consent, the court of appeal reversed the trial court's change of domiciliary custody from her to him because of the child's young age and her better ability to provide a stable environment. Their disputes over travel arrangements for custodial periods were also insufficient to support a change of custody. Her cohabitation in violation of the court order prior to her marriage was also insufficient to support a change of domiciliary parent because he failed to show that it had a negative impact on the child. However, the court of appeal affirmed the trial court's order that she pay him court costs plus attorney's fees as a result of his objection to her relocation, and remanded for a new implementation order due to the relocation.

Community Property

Jenkins v. Leonard, 47,001 (La. App. 2 Cir. 2/29/12), 87 So.3d 230.

Where parties are separate in property under a valid marriage contract, "the mere inclusion of the name of a spouse and one's marital status in a deed does not, standing alone, constitute evidence of an intent to make an asset community rather than separate." Even though the parties had acquired some co-owned property during their marriage, where there was no documentary evidence to show an intent to make other properties co-owned, they had to be classified as separate. As stated: "The couple's purchase of several assets together did not manifest an intent to abolish the marital regime they established by contract nor did it somehow convert their marital regime from separate to one of acquets and gains."

Succession of Tabor, 11-1245 (La. App. 3 Cir. 4/4/12), 87 So.3d 982.

Because satisfaction of conditional requirements and the approval to pay a suspensive mineral lease bonus arising from Ms. Tabor's separate immovable property were completed prior to Mr. Tabor's death, the payment, even though made after his death, was community property. The court of appeal found that the payment was not a civil fruit under La. Civ.C. art. 551, but was to be treated as one for classification purposes under La. Civ.C. art. 2339. His succession was also due legal interest from the date of demand.

Raymond v. Fluellen, 11-1290 (La. App. 4 Cir. 3/7/12), 88 So.3d 652.

After Mr. Fluellen did not submit his inserts for the joint pre-trial descriptive list, Ms. Raymond moved to have her part of the list accepted as true, which the trial court granted, and then partitioned the property and awarded reimbursement claims based on her list. On Mr. Fluellen's appeal, the court of appeal reversed, finding that the trial court erroneously disregarded the list he had previously timely filed, and that there was no procedure that allowed a court to accept one party's list as a judicial determination of the assets and liabilities after both parties had filed lists. While the trial court could have sanctioned him for failing to comply with its pretrial order, Ms. Raymond still had to present evidence to support her list.

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Fidelity, Surety and Construction Law

Work of the 2012 Louisiana Legislature

In its 2012 Regular Session, the Louisiana Legislature passed several bills of interest to the construction industry in the state. A synopsis of some of the changes follows.

Senate Bill 258

La. R.S. 9:2772, governing peremptive periods for filing suit or initiating arbitration on private construction projects, was amended to address a hiccup of sorts in the law concerning claims for indemnification. In 2011, in the case of *Ebinger v. Venus Construction Co.*, 10-2516 (La. 2011), 65 So.3d 1279, the Louisiana Supreme Court declared that the five-year peremptive period for filing an action on a construction contract ran contemporaneously against all parties involved in a construction project. For example, in the event that an owner sued a general contractor at the end of the fifth year, it is distinctly likely that the general contractor might not have any ability to seek indemnity from a subcontractor or supplier that may have been responsible for the matters about which the owner complained. That unfortunate result would ensue despite the fact that the general contractor had no way to seek indemnity timely.

The change to the law now provides for the exact circumstance described above. The amendment states that if "within ninety days of" (presumably this means 90 days in advance of) the expiration of the five-year peremptive period a claim is brought against any person or entity contemplated by the statute, that person or entity will have 90 days from the date of "service of the main demand or, in the case of a third-party defendant, within ninety days from service of process of the third-party demand," to file its own claim for contribution, indemnity or a third-party claim against any other party.

This bill became effective Aug. 1, 2012.

Senate Bill 338

Taking away the latitude of public owners to delay the execution of awarded contracts for extended periods of time, the Legislature amended La. R.S. 38:2215 by adding language that now provides for a maximum period of time for the final execution of awarded public contracts. Under the added provision, if the contractor has provided all necessary documents to the public entity within 10 days of the opening of bids and no bid challenge has been submitted to the public entity, the contractor and public entity shall execute the contract not later than 45 days from the public entity's acceptance of the lowest responsible bid.

This bill became effective July 1, 2012.

House Bill 450

Often a change in the law merely adds to the confusion on the topic. The Louisiana lien laws (both Public and Private Works) have been the source of consternation for years based upon the myriad disparate, inconsistent regulations concerning timing and filing in each of the statutory schemes.

One of the principal sources of heartburn is the calculation of the time allowed for filing suit to enforce a claim following the filing of a statement of lien or privilege. On that topic, La. R.S. 9:4823 has now been amended to provide that — for Private Works Act liens only — beginning on the effective date of the Act, a claimant will have one year after the filing of the statement of claim of privilege to institute a suit to enforce. This changes the soon-to-be-former provision, which provided that the one-year period for filing suit began to run from the expiration of the deadline for filing the statement of claim or privilege. (Compare the Public Works Act, which provides that suit to enforce a claim under the Act must be filed within one year following the date upon which the certificate of substantial completion/termination is filed.)

This revision arguably benefits no particular group: while the change potentially shortens the period of time a Private Works Act claimant may have to file suit, it means for owners that certain claimants may find it necessary to file suit much earlier than previously required. This may entail that lien claims by trades that complete work early on a major project (for example, pile drivers) may choose to initiate suit during the course of the construction project as opposed to after the job is completed.

Note that the effective date of this portion of the bill is not until Aug. 1, 2013. Until then, the existing law remains in full force and effect.

House Bill 996

This bill, amending and reenacting Louisiana Public Bid Law provision La. R.S.38:2212.10(F) and enacting La. R.S. 38:2212.10(G) concerning E-Verify procedures, clarifies the existing, albeit relatively new, law by declaring that E-Verify provisions concerning eligibility to work in the United States do not apply to all "public contract work" but rather only to "contracts for public works." According to the terms of the revised law, "public works" has the traditional meaning of the term in the Public Bid Law, that is, it means "the erection, construction, alteration, improvement, or repair of any public facility or immovable property owned, used, or leased by a public entity."

This bill became effective Aug. 1, 2012.

House Bill 1129

The Legislature amended Public Bid Law provision La. R.S. 38:2212 on the topic of post-bid document submission. In order to clarify a matter that had become the source of litigation (*see, e.g., L.L. & G. Constr. v. Greater Lafourche Port Comm'n*, 11-1024 (La. App. 1 Cir. 5/3/12), 2012 WL 1564350 (unpublished)), the Legislature changed the law to more clearly state that the "other documentation and information" that can be required of bidders after the opening date specifically includes (but is not necessarily limited to) low bidder's attestations pursuant to R.S. 38:2212.10 and 2227. The attestations provided by the cited statutes are composed of certifications concerning prior criminal convictions (or lack of same) of the low bidder.

This bill became effective Aug. 1, 2012.

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Insurance, Tort, Workers' Compensation & Admiralty Law

Tort: Same-Sex Sexual Harassment

EEOC v. Boh Bros. Constr. Co., ____ F.3d ____ (5 Cir. 2012).

Suit was filed on behalf of Kerry Woods, a construction worker on an all-male Boh Bros. crew, claiming same-sex harassment by his crew superintendent, Chuck Wolfe, who referred to him in raw homophobic epithets and lewd gestures, calling him "faggot" and "princess," approaching him from behind to simulate sexual intercourse and exposing himself to Woods. After complaining of this behavior, Woods was transferred to another crew at a different work site. A year later, Woods was laid off for lack of work, whereupon he filed an EEOC charge of discrimination alleging, *inter alia*, sexual harassment.

The EEOC brought an enforcement action in district court on Woods's behalf under Title VII of the Civil Rights Act of 1964, which makes it "an unlawful employment practice for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1). The Supreme Court has recognized sexual harassment as a form of discriminatory treatment under Title VII. The jury, sympathetic to Woods, returned a substantial verdict for actual and punitive damages against Boh Bros., which filed this appeal.

The 5th Circuit prefaced its opinion by noting:

> There is no claim or evidence that either Woods or Wolfe is homosexual or effeminate. There is plenty of evidence that Wolfe is a world-class trash talker and master of vulgarity in an environment where these characteristics abound . . . [and] no question . . . that Woods was the primary and constant victim of Wolfe's offensive abuse and harassment, much of it in the nature of sexual vulgarity. . . . The EEOC's case depends on the proposition that sex stereotyping by a member of the same sex can constitute sexual harassment under Title VII . . . because Woods did not, in Wolfe's view, conform to the male stereotype.

In the seminal case of *Oncale v. Sundowner Offshore Services, Inc.*, 118 S.Ct. 998 (1998), the Supreme Court established three evidentiary paths to show same-sex harassment: (1) the same inference drawn in most male-female harassment situations, *i.e.*, explicit or implict proposals of sexual activity, "if there were credible evidence that the harasser was homosexual;" (2) harassing conduct not motivated by sexual desire, such as "if a female victim is harassed in such sex-specific and derogatory terms by another woman as to make it clear that the harasser is motivated by general hostility to the presence of women in the workplace;" or (3) direct comparative evidence of how the alleged harasser treated both sexes in a mixed-sex workplace.

The court found that it was not the federal court's business "to clean up the language and conduct of construction sites." Title VII is not "a general civility code for the American workplace," and it "protects employees against workplace discrimination, not against all forms of mistreatment."

The court stated that even if the EEOC has asserted a viable theory of Title VII discrimination in behalf of Woods, "it is a circular truth that a plaintiff may not recover based on nonconformance to gender stereotypes unless the plaintiff conforms to nonconformance gender stereotypes." Because the court found "insufficient evidence that Wolfe 'acted on the basis of gender' in his treatment of Woods," the judgment was vacated and the case remanded. Compare *Cherry v. Shaw Coastal, Inc.*, 668 F.3d 182 (5 Cir. 2012), for a somewhat similar factual situation yielding a somewhat different result, discussed in *Recent Developments: Insurance, Tort, Workers' Compensation & Admiralty Law*, 59 La. Bar J. 449, 450 (2012).

Admiralty: LHWCA Situs and Status

New Orleans Depot Servs., Inc. v. Dir., Off. of Workers' Comp. Programs, ____ F.3d ____ (5 Cir. 2012).

Juan Zepeda, most recently employed by petitioner NODSI as a container-repair mechanic, sought permanent-partial-disability benefits under the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. § 900, *et seq.* NODSI objected to the administrative law judge's factual findings that its container-repair yard is a maritime situs and that Zepeda is a maritime employee. The yard is 300 yards from the Industrial Canal and has no water frontage or docking facilities. Containers being repaired were variously used in rail or marine transport.

"For a claimant to be eligible for benefit under the LHWCA (1) his injury must occur on a maritime situs, and (2) his status must be that of a maritime employee. Both requirements must be met for the claimant to receive benefits under the Act." *Coastal Prod. Servs., Inc. v. Hudson,* 555 F.3d 426 (5 Cir. 2009).

In determining that NODSI's repair yard is a maritime situs, the ALJ considered its use in servicing containers used in maritime shipping and offloaded at the Port of New Orleans, and its proximity to marine facilities in the surrounding area.

As to Zepeda's status as a maritime employee, "the Supreme Court has instructed that occupations in addition to those enumerated in the statute will be covered as maritime employment if the occupation entails activities that are an integral or essential part of the loading, unloading, building or repairing of a vessel." The ALJ determined that Zepeda engaged in maritime employment because he repaired marine containers, "an essential function of the loading and unloading process."

The petition for review was denied. Judge Clement weighed in with a vigorous nine-page dissent.

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International Law

Revocation of Anti-Counterfeiting Trade Agreement

The European Parliament strongly defeated the Anti-Counterfeiting Trade Agreement (ACTA) on July 4, with 478 members voting against the treaty and only 39 in favor. The ACTA standardizes national laws protecting various intellectual property, including music, movies, pharmaceuticals, fashion goods and many other products that often fall prey to piracy. Opponents feared the treaty would limit Internet freedom and promote censorship and invasions of privacy by allowing private companies to spy on Internet activities in search of ACTA violations. The United States, Australia, Japan, Canada and several others have signed the treaty, but none of them have ratified it yet.

Interim Report on U.S.-E.U. Free-Trade Agreement

On June 19, trade officials from the European Union and United States submitted an interim feasibility report to their leaders on a potential U.S.-E.U. bilateral free-trade agreement. A transatlantic free-trade agreement would cover the largest amount of economic investment in the world. The report addresses various areas of mutual benefit where the two trading partners are likely to agree, such as reciprocal market access openings in services, goods, customs facilitation and investment. However, the report identifies numerous areas lacking convergence where additional work must be done in order to permit negotiations, including rules, agriculture and intellectual property.

MERCOSUR: Suspension of Paraguay, Admission of Venezuela

The presidents of three members of MERCOSUR, the Southern Cone trade bloc, voted to suspend Paraguay's membership because of the impeachment of Paraguay's President Fernando Lugo. President Lugo was removed over his role in the eviction of landless farmers that resulted in more than 15 deaths. The dismissal of the president was viewed as a parliamentary coup, with the president having fewer than 24 hours to prepare his defense. Paraguay's economy relies heavily on trade within the bloc, and MERCOSUR has issued no statement on when or if Paraguay's suspension will be lifted.

As soon as Paraguay's suspension was notified, Venezuela was admitted to MERCOSUR as a full member. Venezuela's application to join the bloc as a full member had been stalled by objection from Paraguay. Venezuela's energy production is important in the region, but Paraguay had objected to full membership primarily on human rights grounds.

China-MERCOSUR Free-Trade Agreement

Chinese Premier Wen Jiabao announced a proposed $10 billion credit line for Latin American countries to support infrastructure projects in the region. In connection with the credit line, China proposed a free-trade agreement with MERCOSUR in order to increase its trade in the southern cone. China has the world's largest foreign-exchange reserve, and Latin American countries are developing infrastructure projects to boost their economies. A free-trade agreement would increase bilateral trade by lowering tariff and non-tariff barriers and protect Chinese investments in the region. The current stand-off with Paraguay notwithstanding, MERCOSUR is an obvious free-trade partner for China because of its members' abundance of natural resources.

DR-CAFTA

In the Matter of the Arbitration between Railroad Development Corporation and Republic of Guatemala, International Center for Settlement of Investment Disputes, ICSID Case No. ARB/07/23 (June 29, 2012).

A decision on the first DR-CAFTA dispute-settlement claim to reach the merits stage was issued on June 29. The ICSID tribunal ordered the Republic of Guatemala to pay the investor approximately $12 million in damages regarding a dispute over the operation of Guatemala's railway system. The claimant, Railroad Development Corporation (RDC), secured a government bid in 1997 to operate Guatemala's railways for 50 years. Guatemala's executive branch subsequently declared the contract *lesivo* (harmful or damaging) because RDC purportedly failed to adequately rehabilitate the rail system.

RDC filed its arbitration request with ICSID in 2007 under the investment rules established in DR-CAFTA. RDC claimed that the *lesivo* declaration breached the minimum standard of treatment required under DR-CAFTA Article 10.5 by failing to provide fair and equitable treatment, and full protection and security, to its investment; the *lesivo* amounted to an indirect expropriation in violation of DR-CAFTA Article 10.7.1; and Guatemala violated the National Treatment requirement of DR-CAFTA Article 10.3. RDC sought approximately $64 million in damages, plus costs and attorney's fees.

The tribunal ruled that Guatemala breached the minimum standard of treatment required under DR-CAFTA Article 10.5 as its conduct was arbitrary and grossly unfair. Guatemala was ordered to pay nearly $12 million in damages, the exact amount to be determined based upon a valuation of shares in the venture. The tribunal used its discretion under the ICSID Arbitration Rules to refuse RDC's request for attorney's fees and costs under DR-CAFTA Article 10.26.1. The tribunal distinguished between the merits phase and jurisdictional phase when ordering payment of ICSID administrative expenses. Guatemala was ordered to pay 100 percent of ICSID's jurisdictional administrative expenses on the grounds that Guatemala's objections to jurisdiction were twice rejected "in an unusually protracted process." Each party was ordered to pay 50 percent of ICSID's merits expenses.

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Mineral Law

Legacy Litigation

During its 2012 Regular Session, the Louisiana Legislature adopted two bills relating to legacy litigation, and Governor Jindal signed each into law. The first bill became Act 754, described in a previous *Recent Developments/Mineral Law* article (Vol. 60, No. 2, August/September 2012, pages 162-63).

The second bill became Act 779. It enacts a new section of R.S. 30:29 that authorizes parties in legacy litigation to subpoena any Office of Conservation "employee, contractor, or representative" for testimony at a deposition or trial if that person was involved in formulating the "feasible plan" for remediation.

Act 779 also establishes a procedure whereby a defendant may request a hearing at which the plaintiff has the initial burden of introducing evidence of environmental damages. If the plaintiff introduces such evidence, the defendant has the burden of establishing the lack of a genuine issue of material fact regarding whether the defendant is legally responsible for the contamination. If a defendant demonstrates the absence of a genuine issue, the court must dismiss that defendant without prejudice. If another party later discovers evidence that the dismissed defendant may have liability, the party may cause the dismissed defendant to be rejoined to the litigation. If the dismissed defendant is never rejoined, the defendant is entitled to a dismissal with prejudice when the litigation ends in a final, non-appealable judgment.

Act 779 also:

► provides that liberative prescription is suspended for one year if a person submits to the Office of Conservation a "notice of intent to investigate" alleged contamination;

► restricts ex parte communications with the Office during the time that it is considering proposed plans; and

► authorizes the Office to issue compliance orders for remediation after a person admits liability or is found liable for contamination. Finally, if a party admits liability, Act 779 requires that party to waive any contractual indemnification rights it might have for any punitive damages claims that are based on the contamination.

Expropriation Prerequisites

Act 702 amends existing statutes to provide greater protection of property owners when a company seeks to expropriate property to construct a natural gas pipeline

Act 702 requires a company to make a "good faith" attempt to reach an agreement with a property owner regarding compensation prior to filing an expropriation action, and to offer compensation at least equal to the lowest appraised value of the property to be acquired. In addition, at least 30 days before filing an expropriation action, the company must send a letter to the property owner by certified mail, setting forth: (1) the legal basis by which the company could exercise expropriation authority; (2) the purpose and conditions of the proposed acquisition of property; (3) the compensation the company proposes to pay; (4) a copy of all appraisals that the company has obtained; (5) a plat showing the boundaries of the proposed acquisition; (6) a description and proposed location of any above-ground facilities the company proposes to place on the property; and (7) a statement of the "considerations for the proposed route or area to be acquired."

Pre-entry Notice to Surface Owner

Act 795 enacts La. R.S. 30:28(I), which requires operators to provide notice to landowners at least 30 days prior to entering their land to drill. The legislation does not require such notice if the operator has a contract with the landowner, the operator is entering the property only for pre-drilling activities or the operator is drilling an additional well from an existing well pad and the operator is not expanding the pad or the access road to the pad.

Units for Ultra Deep Formations

Act 743 amends La. R.S. 30:5.1 to authorize the Commissioner of Conservation to declare units up to 9,000 acres in size for subterranean "structures" located at a minimum depth of 22,000 feet. The Act anticipates such units could be served by one or more unit wells. The legislation defines "structure" as "a unique geologic feature that potentially traps hydrocarbons in one or more pools or zones."

Before entering such an order, however, the Commissioner must find, based on evidence presented at a properly noticed public hearing, that:

► the order is reasonably necessary to prevent waste and the drilling of unnecessary wells and to encourage the development of the ultra deep structure;

► the operations proposed by the party seeking unitization are economically feasible;

► the top of the structure is located at a minimum depth of 22,000 feet;

► sufficient evidence exists to establish the limits of the ultra deep structure; and

► the party seeking unitization has submitted a reasonable development plan.

The development plan must include the number of wells that the party intends to drill, an estimated schedule for drilling and the anticipated depth for each well. Each interested person is entitled to review all the information submitted, including any seismic data submitted to establish the limits of the ultra deep structure.

Act 743 also amends Louisiana's Risk Fee Statute (La. R.S. 30:10) to require the operator of a unit well to pay to a nonparticipating owner of mineral rights in the unit (even during recovery of the risk fee) a portion of the proceeds of production sufficient to cover any lease royalties or overriding royalties owed by the nonparticipating owner for that production.

NOTE: Copies of legislation are available at the Louisiana Legislature's website, *www.legis.state.la.us*.

CORRECTION: In discussing *Collins v. Godchaux*, 11-0996 (La. App. 3 Cir. 3/14/12), 86 So.3d 831, *writ denied*, 12-0835 (La. 7/2/12), 92 So.3d 344, the June/July 2012 *Recent Developments/Mineral Law* article referred to a landman involved in that dispute as "Godchaux." Actually, the landman's name was "Collins." We regret the error.

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Recent Legislation

Jones v. Ruston Louisiana Hosp. Co., L.L.C., 46,356 (La. App. 2 Cir. 8/10/11), 71 So.3d 1154, *writ denied*, 11-1970 (La. 11/14/11), 75 So.3d 946, was reported in *Recent Developments/Professional Liability*, 59 La. B.J. 45 (2012).

Jones held that a hospital's failure to honor a do-not-resuscitate order was not covered by the Medical Malpractice Act (MMA), and thus a medical-review panel was not required.

Senate Bill 176, Act 538 (2012), legislatively overruled *Jones*. It amended La. R.S. 40:1299.41 by adding section "L":

> L. Any cause of action for the unintentional acts or omissions arising from resuscitating a patient who has a declaration concerning life-sustaining procedures executed pursuant to R.S. 40:1299.58.1 *et seq*., a Louisiana Physician Order for Scope Treatment executed pursuant to R.S. 40:1299.64.1 et seq., or a do not resuscitate order issued by a physician licensed in this state shall be governed by the provisions of this Part.

House Bill 766, Act 802 (2012), repealed La. R.S. 40:1299.44(A)(7)(e) and amended R.S. 40:1299.39.1, 1299.44 and 1299.47. Among the act's new provisions are: 1) the name of only one patient need be included in a request for review, and in the case "of a pregnant mother, and her unborn child," naming only the mother suffices; 2) filing fees paid for a panel request that is untimely filed are to be refunded; and 3) health-care providers may raise peremptory exceptions of no right of action, pursuant to La. C.C.P. art. 927(6), without first completing the panel process.

Vehicular Transportation of a Patient

Rivera v. Bolden's Transp. Serv., Inc., 11-1669 (La. App. 1 Cir. 6/28/12), ____ So.3d ____.

Rivera was being transported from Forest Manor Nursing Home to another medical facility. She was wheelchair-bound and was being transported in a vehicle owned by Bolden's Transportation Service. She was provided no seatbelt, nor was she strapped into her wheelchair, and the wheelchair was not fastened to the van. A sudden stop by the driver caused her to fall and to sustain injuries.

Rivera's allegation of negligence against Forest Manor was that its employees failed to provide a wheelchair that adequately secured her while she was being driven to receive medical care. In response to Rivera's lawsuit, which alleged ordinary negligence and not malpractice, Forest Manor raised an exception of prematurity, which the district court sustained, following which Rivera filed a supervisory writ.

The appellate court determined that the negligence claims were not treatment related, did not involve a patient's fall from a wheelchair while inside the nursing home or while Rivera was being pushed by a nursing home employee, did not require medical expertise to determine whether "the appropriate standard of care was breached" and did not directly involve "the handling of a patient, including loading and unloading."

The sole question was whether the equipment provided for Rivera's transportation was adequate for her safety. The court decided that the allegations of negligence did not fall under the penumbra of the MMA, and the trial court's granting of the exception of prematurity was reversed.

Negligent Supervision

Talbert v. Evans, 11-1096 (La. App. 4 Cir. 03/7/12), 88 So.3d 673, *writ denied*, 12-0774 (La. 5/18/12), 89 So.3d 1197.

A medical-review panel found that Dr. Evans breached standards of care by virtue of negligent care rendered by his physician assistant (PA). In the lawsuit that followed, the Patient Compensation Fund (PCF) intervened and filed a motion for summary judgment, contending that it did not cover the acts of the PA. The trial court concluded that the PA was not PCF-qualified and granted the motion for summary judgment.

The case proceeded to trial, following which the court found in favor of the plaintiffs, opining that Dr. Evans had breached the standard of care by failing properly to supervise his employee.

The total of the damages exceeded Dr. Evans' $100,000 statutory cap, and the court granted the physician's motion to have the judgment comply with the MMA's limitations. In its original judgment, the trial court found Evans 100 percent at fault, but the judgment was later amended to assign fault of 30 percent to Evans, 30 percent to the clinic and 40 percent to the PA, while continuing to refer to Evans's liability pursuant to the *respondeat superior* doctrine.

The PCF argued on appeal that it was not responsible for the physician's supervision of the PA because "negligent supervision" was not covered under the MMA at the time of the alleged malpractice; more specifically, the MMA's definition of malpractice did not include the word "supervision" at the time of the treatment or death. The appellate court disagreed, citing *Coleman v. Deno,* 01-1517 (La. 1/25/02), 813 So.2d 303, for the proposition that the MMA "could not possibly exhaust every potential scenario of malpractice as defined by the Act."

Although the trial court amended its original judgment in which it had declared Dr. Evans 100 percent liable, to reflect shared liability among Evans, his clinic and his PA, the appellate court decided that the trial judge intended for *respondeat superior* to apply, having referenced Dr. Evans's responsibility for the actions of the PA, thus making clear the trial court's intention to hold Evans 100 percent liable for the judgment. The appellate court affirmed the judgment of the trial court in all respects except to amend it to specify that Evans was 100 percent liable for the damages.

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IRS Announces "Fresh Start" Initiative

During the first half of 2012, and pursuant to the "Fresh Start" Initiative, the Internal Revenue Service (IRS) has announced significant changes to its collection procedures. These changes are detailed below.

Changes to Federal Offer in Compromise Program

On May 21, the IRS announced expansion of its Fresh Start Initiative by offering more flexible terms to the offer in compromise program. The goal is to enable financially distressed taxpayers to quickly clear up their tax problems.

In general, an offer in compromise is an agreement between a taxpayer and the IRS that settles a taxpayer's tax debt for less than the full amount owed. The IRS will not accept an offer in compromise if the IRS believes the tax debt can be paid in full as a lump sum or through an installment agreement. To make this determination, the IRS examines the taxpayer's future income and current assets to determine a taxpayer's reasonable collection potential.

This announcement by the IRS revised financial analysis used to determine which taxpayers qualify for an offer in compromise. This announcement also enables some taxpayers to resolve their tax problems in as little as two years. The changes announced by the IRS include revising the calculation for a taxpayer's projected future income, expanding other living expense allowances and categories, and permitting taxpayers to repay their student loans, including state and local delinquent taxes, pay bank fees and charges, and make credit card payments

Under the Fresh Start Initiative, when the IRS calculates a taxpayer's reasonable collection potential, it will now look at only one year of future income for those offers paid in five or fewer months, down from four years; and two years of future income for offers paid between six to 24 months, down from five years. Now all offers must be fully paid within 24 months from the date the offer is accepted.

Changes to Federal Installment Agreements

The Fresh Start Initiative of the IRS also includes expansion of its installment program. The IRS has increased the threshold from $25,000 to $50,000 before a taxpayer needs to supply the IRS with a financial statement when establishing an installment agreement. In other words, those taxpayers who owe $50,000 or less in back taxes will now be able to enter into a streamlined agreement with the IRS that stretches the payments over a series of months or years. The maximum term for streamlined installment agreements has been raised to 72 months. Taxpayers also may pay down their balance due to $50,000 or less to take advantage of this payment option. Streamlined installment agreements may even be established by taxpayers online using the IRS website: *www.irs.gov*.

Changes to Federal Tax Lien Filings and Withdrawals

The Fresh Start Initiative changes also generally increase the filing threshold for a federal tax lien from $5,000 to $10,000. While the IRS will not retroactively apply the new filing threshold, it will withdraw a federal tax lien after certain qualifying taxpayers enter into a "direct debit" installment agreement. To qualify for this lien withdrawal, individual and business taxpayers must meet certain eligibility requirements, such as: (1) owe $25,000 or less; (2) the direct debit installment agreement must pay the amount owed in full within the shorter of 60 months or before the statute of limitations on collection expires; (3) must be in full compliance with other filing and payment requirements; (4) must have made three consecutive direct debit payments; (5) cannot have previously received a lien withdrawal for the same taxes unless the withdrawal was for an improper filing of the lien; and (6) cannot have defaulted on a current, or any previous, direct debit installment agreement.

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Trusts, Estate, Probate & Immovable Property Law

Writ of Mandamus Appropriate Only When Action Purely Ministerial

Aberta, Inc. v. Atkins, 12-0061 (La. 5/25/12), 89 So.3d 1161

In *Aberta*, the Louisiana Supreme Court held that a writ of mandamus ordering a clerk of court to remove from the public records mortgages placed on property was an inappropriate use of the remedy because the cancellation of the mortgages would involve more than a ministerial duty. As a writ of mandamus is appropriate only in directing a public officer to compel the performance of a ministerial duty required by law, the Louisiana Supreme Court reversed the lower courts' grant of mandamus.

The case involved a series of transactions regarding a single piece of property. On Aug. 26, 2003, the subject property was sold to Aberta, the first purchaser, who then turned around and sold the property that same day to Wagner World, the second purchaser. Again the same day, Wagner World granted mortgages on the property. While the first sale to Aberta and the mortgages placed on the property by the second purchaser were recorded the next day, the sale to the second purchaser was not recorded until after Aberta sold its shares to a third party.

Aberta subsequently filed a petition for writ of mandamus to cancel the mortgages placed on the property by the second purchaser, arguing that because the sale of property from it to Wagner World was not recorded, Aberta still owned the property, and thus the mortgages granted by the second purchaser were ineffective and should be cancelled. The trial court agreed, granting a writ of mandamus directing the clerk to cancel the mortgages, and the 4th Circuit affirmed.

In a per curiam opinion, the Louisiana Supreme Court reversed the lower courts, holding that mandamus was inappropriate. In reaching its decision, the court noted that while La. C.C.P. art. 3863 provides that "[a] writ of mandamus may be directed to a public officer to compel the performance of a ministerial duty required by law," mandamus will issue only where the action sought to be compelled is ministerial in nature, *i.e.*, where it contains no element of discretion.

Thus, the court reasoned that while certain statutes impose upon the recorder of mortgages the duty to cancel mortgages when the request meets specific requirements, here, in order to cancel the mortgages at issue, the recorder would have to determine whether the first purchaser was a third party protected by the public-records doctrine from the unrecorded sale to the second purchaser. Because such a determination was "not a condition admitted or proved to exist and imposed by law," the cancellation involved more than a ministerial duty and, therefore, mandamus was not appropriate.

Valuing an Estate at the Time of Decedent's Death: Fair But Not True

In re Succession of Linder, 11-0633 (La. App. 5 Cir. 5/22/12), 92 So.3d 1158.

The 5th Circuit Court of Appeal held that postmortem information, unknown to the parties and discovered after the testator's death, may not be used to re-value an estate.

The trial court used the fair-market value of the mineral and oil interests in calculating the value of the estate, noting that a fair-market valuation is restricted to the use of information that is available on a specified date, while true value works backward to determine an asset's worth on a previous date. The testator's forced heir, Mrs. Rosenthal, appealed, arguing that the trial court erred in its valuation of the estate and thus the valuation of her legitime. Mrs. Rosenthal argued that fair-market value and true value are synonyms, and even if the oil and gas's true value was based on information obtained after decedent's death, they were, in fact, present in the ground on the date of death. The 5th Circuit rejected these arguments and affirmed the trial court's calculation, reasoning that Mrs. Rosenthal produced no evidence that the information used to seek a postmortem increase in value was information that was available when Mrs. Linder died. As a result, the court held that the postmortem information could not be used to re-value the estate for it was not known by the parties at the date of death.

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