Do Not Lose Your Eligibility! Be Cautious When Advising SBIR Holders

ASRC Federal Data Network Technologies, L.L.C., B-418028, Dec. 26, 2019, 2019 CPD ¶ 412 (*AFDNT*).

The federal government is routinely looking for efficient and innovative ways to procure supplies and services. While normally this deliberative process takes longer than desired because it follows the full and open competition requirements laid out in the Federal Acquisition Regulation (FAR) and the Competition in Contracting Act, 31 U.S.C. § 3551, *et seq*. (CICA), there are exceptions to this general rule. One is a Phase III award using the Small Business Innovation Research (SBIR) acquisition authority under the SBIR Program Act of 1982, 15 U.S.C. § 638. While a Phase III award can be made efficiently, this award authority has rigid statutory and regulatory eligibility considerations that must be continuously considered after a business obtains a Phase I/II award. The Government Accountability Office (GAO) addressed one such matter when it sustained a recent bid protest in *AFDNT*. For a discussion on what is a bid protest, *see* Bruce L. Mayeaux, "Recent Developments: Administrative Law," 65 La. B.J. 418 (2018).

To understand the issue in *AFDNT*, counsel must first understand what the SBIR program is and how a Phase III award differs from traditional procurement awards under the FAR and CICA. Essentially, "the SBIR program is designed to increase the participation of small business concerns in federal funded research or research and development." *See, AFDNT* at 2; SBIR Program Act of 1982, 15 U.S.C. § 638. The Small Business Administration (SBA) is tasked to administer the SBIR program and to issue policy directives for its operation; ostensibly, this includes the SBIR Program Policy Directive (PPD). *See, AFDNT* at n.4; 15 U.S.C. § 638(j). Generally, an SBIR has three phases: (1) Phase I, where potential SBIR holders compete to test scientific, technical and commercial-merit feasibility of a concept; (2) Phase II, if successful in Phase I, an SBIR holder may be invited to apply for further development of the concept; and (3) Phase III, non-SBIR government sources (other agencies/industry not involved directly in the SBIR program) may non-competitively award (sole-source) a contract to the SBIR holder for "work that derives from, extends, or completes efforts made un-

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der prior funding agreements under the SBIR program." *See, AFDNT* at 2; 15 U.S.C. § 638(e)(4)(A)-(C). Principally, this means that an agency can sole-source contract to an SBIR holder under Phase III authority for work that directly involved or is connected to a Phase I/II award, without the FAR and CICA's full and open competition requirements. While this process seems straightforward, it can become muddled, especially with novation and business acquisitions.

Theater Medical Information Program — Joint (TMIP-J)

In September 2019, the Defense Health Agency (DHA) issued a Phase III award to American Systems Corp. to "build on efforts that derive from, extend, or complete efforts that are generated under previous SBIR Phase I and II work." *AFDNT* at 3. Specifically, DHA wanted American to "transform and support [its] TMIP-J platform." *Id*. The TMIP-J platform "is a healthcare delivery system, which comprises multiple different systems and products that collect a variety of data related to the healthcare of service members." *AFDNT* at 2.

The instant award referenced work completed under a different Phase III award from another company called DDL Omni Engineering, L.L.C. *See, AFDNT* at 3-4. Earlier in 2018, American acquired Omni and subsequently executed an assignment-and-assumption agreement that identified Omni's contracts, including the aforementioned Phase III award. *See, AFDNT* at 4. Later, in 2019, the federal government executed a novation agreement with American recognizing American as Omni's successor-in-interest and explicitly listed various contracts in an exhibit to the agreement; the Phase III award was again referenced. *Id*. At no point was earlier SBIR work by American or any Phase I/II efforts of Omni referenced in any of the documents. *See, AFDNT* at 3-4.

The Protest

Later in September 2019, ASRC Federal Data Network Technologies, L.L.C. (protester), after filing an unsuccessful agency-level bid protest, filed a bid protest with GAO alleging, among other things, that American was ineligible for the Phase III award under the SBIR statute and the SBA's PPD. *See, AFDNT* at 4. The protester asserted that those authorities allowed for a Phase III award to only the company that originally developed the technology (Omni), or to a company that has properly novated a prior Phase I/II award, which American, it argued, had not. *Id*.

In retort, DHA asserted that, by virtue of its acquisition of Omni, American was Omni's successor-in-interest and was, therefore, eligible to receive the Phase III award. *See, AFDNT* at 7. Additionally, as this involved SBA regulations, GAO solicited the view of SBA, which ostensibly concurred with DHA's position. *See, AFDNT* at 7. Nonetheless, GAO found DHA's position unreasonable after a plain language reading of the statute and PPD and sustained the protest.

In accordance with its previous interpretation decisions, GAO focused primarily on the plain language of the PPD on this matter. *See, Curtin Mar. Corp*., B-417175.2, March 29, 2019, 2019 CPD ¶ 107. Specifically, GAO focused on section 6(a)(5) of the PPD, which states that, "in order to receive a Phase III award, the [a]wardee *must* have either received a prior Phase I or Phase II award or have been novated a Phase I or Phase II award." *See,* PPD § 6(a)(5) (emphasis added). GAO found that the use of the term "must" made clear that to receive or novate a Phase I/II award is a requirement to obtain Phase III eligibility. *See, AFDNT* at 8. Further, while GAO is required to give deference to an agency for the reasonable interpretation of its own regulation, it found the plain language of section 6(a)(5) in the PPD listed specific eligibility requirements to receive a Phase III award as it did not leave open any other scenarios — other than the one stated in the PPD — where a company could be eligible for a Phase III award. *See, AFDNT* at 9; *Edmond Scientific Co*., B-410179, Nov. 12, 2014, 2014 CPD ¶ 336 at 7, n.9. (stating where the language of a regulation is plain on its face, and meaning is clear, there is no reason to move beyond the plain meaning of the text).

While an SBIR can be a great tool to procure supplies and services quickly, its requirements for Phase III eligibility must be considered throughout the life of an SBIR-holding going concern. Agency and industry counsel should consider how to handle "ownership" of Phase I/II awards during acquisition, mergers and novation to keep Phase III eligibility intact.

Disclaimer: The views presented are those of the writer and do not necessarily represent the views of DoD or its components.

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Win the Battle, Lose the War

Luv N' Care, Ltd. v. Jackel Int'l, Ltd., 19-0749 (La. 1/29/20), ____ So.3d ____, 2020 WL 499164.

Taking up a *res nova* issue, the Louisiana Supreme Court interpreted La. R.S. 13:4611(1)(g) to preclude an award of attorney fees for the prevailing party if that party is the defendant-in-rule. In the case at hand, a rule for contempt was brought by Luv N' Care against defendants Jackel and Mayborn over an alleged violation of a permanent injunction.

After hearing, the rule for contempt was dismissed, with costs, including reasonable expert fees, taxed to plaintiff/mover. After the parties could not agree on a reasonable attorney fee, defendants moved for attorney fees and expert fees.

The trial court awarded $172,621.10 in attorney fees to defendants, as well as $19,433.23 in expert witness fees. Plaintiff appealed, and the 2nd Circuit Court of Appeal affirmed the award and amount of the attorney fee, but reduced the award of expert witness fees. An appeal to the Louisiana Supreme Court ensued.

The case provided a back-to-basics statutory interpretation lesson. In reviewing La. R.S. 13:4611 as a whole, the Supreme Court reasoned it was clear that the penalty of an attorney fee can be imposed on a party only if the party is found guilty of contempt. The first place to look for the legislative intent is the language of the statute itself, and only then, if unclear, do we need to proceed any further into specific intent. Furthermore, the Court reminds us the law must be interpreted *in pari materia* to give a comprehensive harmony to the laws written on a specific subject.

This case focuses on the specific application of La. R.S. 13:4611(g), which provides, "The court may award attorney fees to the prevailing party in a contempt of court proceeding provided for in this Section." The trial court and 2nd Circuit in their rulings interpreted the statute to include an award of attorney fees to a prevailing defendant-in-rule. However, the Supreme Court, in reversing, held the entire statute, not just the singular sentence that provides "the court may award attorney fees to the prevailing party," must be considered. The notable precursor to the relevant sentence is the first paragraph of the statute, which provides that "courts may punish a person adjudged guilty of a contempt of court therein, as follows." The Court reasoned, when read as whole, the result is "courts may punish a person adjudged guilty of a contempt of court therein, as follows: . . . The court may award attorney fees to the prevailing party in a contempt of court

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proceeding provided for in this Section."

The award of an attorney fee in a contempt proceeding is a discretionary implementation of punishment, but such may be awarded only to the mover, if successful in prosecution of the rule. This ruling seems to be further aligned with the typical state system of each party paying its own attorney fees to prosecute or defend claims.

Ultimately, while successfully defeating the rule for contempt and obtaining a win for the defendants, the defendants in this case came out the losers, as they will be unable to recuperate their sizable legal fees incurred in defending the contempt issue. Those defending rules for contempt should consider this ruling and how that will impact the client who can successfully defeat the rule for contempt, but with consideration that the fees incurred in doing so cannot be awarded under this statute. Further, with the legislative session upon us, this is an opportunity to amend the statute if the Legislature actually meant the court could award an attorney fee to the prevailing party, including the party defending the rule.

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Personal Liability of LLC Members after Dissolution by Affidavit

Cambrie Celeste, L.L.C. v. Starboard Mgmt., L.L.C., 19-0737 (La. App. 4 Cir. 12/4/19), 2019 WL 6542792.

In 2012, Cambrie Celeste, landlord, filed suit against its tenant, Starboard Management, L.L.C., along with the members of Starboard — Robert Armbruster and Nicole Armbruster (collectively, the Members) — for breach of lease. While the lawsuit was pending, Mr. Armbruster filed an affidavit to dissolve Starboard in accordance with La. R.S. 12:1335.1, which outlines the requirements and consequences of a "dissolution by affidavit" of a limited liability company. In relevant part, La. R.S. 12:1335.1(A) provides that "if a limited liability company is no longer doing business, owes no debts, and owns no immovable property, it may be dissolved by filing an affidavit with the secretary of state executed by the members . . . attesting to such facts and requesting that the limited liability company be dissolved." Upon the filing of this affidavit, "the members . . . shall be personally liable for any debts or other claims against the limited liability company in proportion to their ownership interest in the company."

On July 27, 2016, the trial court granted summary judgment against Starboard. Starboard then filed a suspensive appeal. While the case was on appeal, Starboard filed a petition for bankruptcy in the U.S. Bankruptcy Court for the Eastern District of Louisiana. Then, in December 2016, Starboard filed a motion with the bankruptcy court to reinstate Starboard as an LLC in order to continue with the bankruptcy proceedings. The bankruptcy court granted the motion to reinstate the LLC in January 2017. The court's order made clear that it was the responsibility of Starboard's counsel to serve the required parties who would not otherwise receive notice. Despite this, Starboard did not file the order with the Secretary of State.

In November 2017, the appellate court upheld the trial court's judgment against Starboard. In December 2018, the plaintiffs filed a motion to enforce the judgment against the Members personally pursuant to La. R.S. 12:1335.1(A). In response to this motion, on Jan. 17, 2019, Starboard filed the bankruptcy court's reinstatement order with the Secretary of State, and the Secretary of State reinstated Starboard on the same day. The next month, the trial court granted the plaintiff's motion to enforce personal liability against the Members. This appeal followed.

An LLC that is dissolved by affidavit may be reinstated as described in La. R.S. 12:1335.1(B), which provides that "[t]he Secretary of State shall reinstate a limited liability company that has been dissolved pursuant to this Section only upon receipt of an order issued by a court of competent jurisdiction directing him to do so." The appellate court interpreted this provision strictly and concluded that Starboard was not reinstated until Jan. 17, 2019, when the bankruptcy court's order was filed with the Secretary of State. Additionally, the appellate court held that the reinstatement was not retroactive to the date of dissolution. As such, it concluded that the trial court correctly granted the plaintiff's motion to hold the Members personally liable in proportion to their ownership for the judgment rendered against Starboard.

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5th Circuit Addresses Endangered Species Act Claims

The Golden-Cheeked Warbler, a yellow songbird found in Texas, was listed as an endangered species by the U.S. Fish and Wildlife Service (FWS) in 1990. Then in 2015, the Texas General Land Office (GLO) petitioned to delist the Warbler, claiming that the Warbler population and breeding habitat was actually larger than initially known. The FWS denied the petition, noting that it had just completed a five-year review of the species listing in 2014 and saw no new information in the 2015 petition that was not already addressed in its 2014 review.

GLO then sued the FWS, challenging the original listing and the continued listing of the Warbler under the Endangered Species Act (ESA) and the National Environmental Policy Act (NEPA), and claiming that the denial of the delisting petition was arbitrary and capricious. The district court dismissed the case on a motion for summary judgment; GLO appealed.

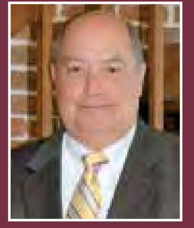
The 5th Circuit, in *General Land Office v. U.S. Dep't of the Interior*, 947 F.3d 309, 318 (5 Cir. 2020), found that GLO's claims under the ESA and NEPA were time-barred and should have been brought within six years of the original listing in 1990, or when the FWS failed to designate the Warbler's critical habitat in 1992 per 28 U.S.C. § 2401(a). GLO had characterized the listing as a "continuing violation," but the 5th Circuit disagreed, stating that once an agency acted or failed to act, that action (or lack thereof) was a single trigger that started the statute of limitations countdown. Thus the listing of the Warbler, or the ensuing failure to designate a critical habitat within the two years required by the ESA, was the start of the six-year statute of limitations, long since expired.

The 5th Circuit also found that the FWS's denial of the 2015 delisting petition was not a violation of NEPA, as the controlling law did not require the FWS to prepare either an environmental assessment or an environmental-impact statement.

However, this was not a complete win for the FWS. The 5th Circuit did find that the FWS's denial of the 2015 delisting petition was arbitrary and capricious. *Id.* at 320-21. The FWS was required to consider whether the petition contained "substantial scientific or commercial information indicating that the petitioned action may be warranted." 16 U.S.C. § 1533(b)(3)(a). Instead, the FWS looked to see if the petition contained any *new* information that it hadn't already seen and considered during its most recent five-year review. The 5th Circuit pointed out that there was no requirement that information in a petition be "new," just that it be "substantial." Thus, the 5th Circuit vacated the denial of the 2015 delisting petition and remanded the matter back to the FWS for further consideration under the proper legal standard.

Paid Protestors at Council Meeting: Open Meetings Law Violation But Outcome Not Void

The New Orleans City Council met to vote on a proposal from Entergy on whether to approve a permit for a proposed New Orleans Power Station. Several meetings to address the proposal were held, including a meeting before a City Council committee on Feb. 21, 2018, which later made headlines when it was discovered that the Entergy supporters present were "actors paid to attend the meeting and show support for Entergy." *Deep S. Ctr. for Envtl. Justice v. Council of City of New Orleans,* 19-0774 (La. App. 4 Cir. 2/12/20), ____ So.3d ____, 2020 WL 714492, at *1. The February 2018 meeting was packed with these paid supporters, and opponents were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unable to access the room or give comments, despite language on the agenda allowing comments. *Id.* The committee voted to send the matter to the full City Council.

The City Council met on March 8, 2018, and ultimately voted 6-1 to approve the construction of the New Orleans Power Station. At this March meeting, everyone interested was able to provide comments in favor or against the proposal.

Several individuals and groups then filed suit against the City, alleging that both the February and March meetings violated the Open Meetings Law, La. R.S. 42:11, *et seq.* The trial court found that the Open Meetings Law had been violated in the February meeting, which then necessarily led to the later Council vote, and thus the resolution approving the New Orleans Power Station was void. No violations independently occurred at the March Council meeting, however.

On appeal, the City argued that any access violations in the February meeting were caused by Entergy, a private actor who could not violate an open meetings law. The appellate court disagreed, noting that regardless of who caused the public to be excluded from the meeting, the Council and the committee were charged by law to ensure that any meeting they conduct complies with the Open Meetings Law. Moreover, the barring of interested persons from the meeting and the decision mid-meeting to bar public comments constituted noncompliance with the law. "Not only was the agenda untimely changed in violation of the Open Meetings Law, but the record reflects that members of the public were deprived of the opportunity to observe the meeting and provide comments during the public comment period at the Committee meeting due to both the change in procedure and the barring of comments from members of the public who were made to wait in the hallway due to limited space." *Id.* at *6.

The next question was whether the Council vote at the March meeting cured that February meeting violation by "ratification" of the improper vote. A public body may correct an open meetings violation if a proper meeting is held that ratifies the earlier vote. *Id.* at *5. The appellate court found that ratification could not occur, despite a properly-held March Council meeting and vote, as the February committee meeting had a different and distinct purpose, was a different public body and the vote it held was not binding on the full Council. Thus, actions taken in the separate March meeting could not fix what happened in the February meeting.

However, precisely because the committee decision was not binding on the full Council, the appellate court determined that there was no necessary tie between the actions at the two meetings, and the trial court erred in determining that the violations that occurred at the February committee meeting rendered the separate March Council vote voidable. Thus, while the February committee meeting violated the Open Meetings Law, the vote by the full Council at the March meeting was not void.

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Child Support

Hensgens v. Hensgens, 19-0485 (La. App. 3 Cir. 12/18/19), ____ So.3d ____, 2019 WL 6886219.

In this child support and spousal support matter regarding crawfish and rice farming operations, Ms. Hensgens' expert calculated the parties' income on a cash basis, whereas Mr. Hensgens' expert calculated it on an accrual basis. The trial court found that the cash basis method was appropriate and required by La. R.S. 9:315, and the court of appeal agreed. The courts also rejected his arguments that, as the farming operation was a "community enterprise," she should have been assessed with one-half of the income and related aspects of the operation. The court found she was not employed, and the parties had stipulated that once the couple's young-

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est child reached age 5, minimum wage would be imputed to her. Thus, all of the farming operation's income was imputed to him.

Regarding income assessed to him for the sale of farming equipment, the court found that although Mr. Hensgens did not sell farm equipment as a business, it was "part of the cycle" of replacing older equipment with newer equipment; thus, the income from the sale of equipment was appropriately included. The court also found that Mr. Hensgens provided no proof to counteract Ms. Hensgens' and her expert's testimony that certain expenses charged to the business American Express card were actually personal expenses that should be added back to the business income. The trial court was correct in not deviating from the child support guidelines due to significant bank debt, as this debt had been due during the course of the parties' marriage, and there was no showing that their ongoing income was affected by it.

Custody

Guidry v. Guidry, 19-0534 (La. App. 1 Cir. 9/26/19), 2019 WL 7177093 (unpublished).

Due to continuing mental health issues with one of the parties' children, the trial court changed the domiciliary parent of that child from the mother to the father. Regarding another child, the court changed the custodial arrangement to designate Mr. Guidry as the domiciliary parent for educational, medical and mental health purposes. As a result of the change in the physical domiciliary custody of the one child, the court also modified the child support arrangement.

The parties had entered into a consent judgment providing for a series of child support payments with reductions when the first two of the three children completed high school and reached majority. The trial court found that that judgment was against public policy and could be modified. The court of appeal, on the other hand, found that the trial court did not need to find that the judgment was against public policy, as the judgment did not provide that a change in domiciliary custody would not be a change of circumstances to modify the support. The judgment addressed modifications only as each child aged out or if there were material increases or decreases in the parties' incomes. The trial court also did not err in granting Mr. Guidry an injunction prohibiting Ms. Guidry from making complaints against him that might potentially impugn his professional reputation, including to his employer and supervisory entities.

Paternity

Barras v. O'Rourke, 19-0412 (La. App. 3 Cir. 12/18/19), ____ So.3d ____, 2019 WL 6887850.

Mr. O'Rourke, who had an intimate relationship with Ms. Barras, believed that the child born in 2014 was his. Later, in 2017 when Ms. Barras filed a petition for child support and custody, she made statements that led Mr. O'Rourke to question his paternity and to obtain a home DNA test, which showed he was not the father.

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He then filed to annul the act of acknowledgment he had executed at the time of the child's birth (he had also signed the child's birth certificate). Ms. Barras filed an exception of prescription, arguing that under the version of La. R.S. 9:406 in effect at the time of the acknowledgment, Mr. O'Rourke had two years from the date of the execution of the act of acknowledgment to seek to annul it. He argued, however, that the current version of La. R.S. 9:406 in effect at the time of his petition applied.

The trial court granted her exception of prescription; however, the court of appeal reversed, finding that the legislative history showed that the amendment was retroactive and intended to revive claims that may have been prescribed under the prior version of the statute. The appellate court found that as there was no biological relationship to be acknowledged, it was "illogical" to find that one who was deceived into acknowledging a child that was not biologically his could be prevented from attacking an acknowledgment as absolute nullities are imprescriptible.

Community Property

Cola v. Cola, 19-0530 (La. App. 1 Cir. 12/27/19), 2019 WL 7207183.

During the parties' marriage, Mr. Cola acquired immovable property, in which act of acquisition Ms. Cola intervened, acknowledging that the property was his separate property. She also intervened in the mortgage, again acknowledging that the property was his separate property. During community-property-partition proceedings, she did not list the property as community on her sworn detailed descriptive list but sought a reimbursement for community funds used for the down payment and subsequent mortgage payments. He listed the property as his separate property on his sworn detailed descriptive list.

Although she claimed she was defrauded into signing the act of sale and mortgage, she filed no separate pleading alleging fraud with particularity. The court of appeal affirmed the trial court's finding that the property was Mr. Cola's separate property, finding that the declarations in her descriptive list were judicial confessions, and that she could not attack her interventions, as she did not separately plead fraud. Notably, the court of appeal stated that her claim in the joint detailed descriptive list that the property was community, contesting his claim that it was his separate property, was made after her sworn descriptive list "expressly acknowledging" that the property was his separate property. Furthermore, the joint list was not sworn to but was signed only by the attorneys, and "additionally the Joint DDL appears to be a tool for the trial court to use during the hearing, rather than a pleading required by La. R.S. 9:2801."

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Grass is Not Always Greener: Downside to Binding Arbitration

Many attorneys, guided by the benefits and strengths of arbitration, encourage their clients to include binding arbitration provisions in their contracts with employees, customers and others. There is little doubt that the streamlined and cost-effective arbitration process has many benefits and make it the best process for most situations. However, as can be seen in the case of *Abernathy v. DoorDash, Inc.*, recently issued by the U.S. District Court for the Northern District of California, the strengths of binding arbitration can come back to bite unsuspecting entities in the employment context. No. C 19-07545 WHA, 2020 WL 619785 (N.D. Cal. Feb. 10, 2020). The North District of California's decision presents a caveat to the overall beneficial procedure of arbitrations.

DoorDash, a food-delivery company, is one of the many transportation companies involved in the new wave of litigation involving the proper designation of workers as independent contractors or employees. This wave of litigation began with the surge of technology-based transportation companies like Uber and Lyft and has extended to food-delivery companies.

DoorDash, like many of its food-delivery counterparts, designated its couriers as independent contractors. Because of this designation, more than 6,000 DoorDash couriers filed demands for arbitration against DoorDash, arguing they were improperly categorized and should be employees. The American Arbitration Association (AAA), the arbitration organization listed in DoorDash's agreement, requires that the company pay a filing fee of $1,900 for each arbitration. Because of this, DoorDash owed just under $12 million for the couriers' arbitration claims. Unsurprisingly, DoorDash fought against paying these fees, arguing that it should not have to pay the fees because of "significant deficiencies" in the claimants' arbitration filings.

The claimants then filed a motion to compel arbitration in the Northern District of California, arguing that they signed a binding arbitration agreement, and so their arbitration demands were proper. For about 5,000 of these claimants, the court agreed and granted the motion to compel. For 869 of the claimants, the court held that they did not provide sufficient evidence to prove they signed the arbitration agreement and so denied the motion to compel as to them.

DoorDash also sought a stay of the proceedings until the final approval of a state court settlement that was pending at the time of the hearing and may have included some of the claimants who sought arbitration. Prior to the filing of these arbitration claims, couriers, allegedly including some of the claimants in the arbitration claims, filed a class-action lawsuit in state court. The court recognized that, ironically, DoorDash had previously attempted to dismiss the state court suit, alleging the claimants had a duty to arbitrate, and now was attempting to stay

the arbitration so that the class-action lawsuit could resolve some of the claims raised in the arbitration. The Northern District of California held that the claimants had the right to opt out of the class-action suit and to raise the arbitration claims, so the court denied the motion to stay. However, the court recommended that if any claimants attempt to "double dip" in the class-action and the arbitration, the arbitrator should place an order on claimants' counsel to fully reimburse DoorDash for all fees and costs incurred in defending the matter twice.

The court then concluded by reflecting on the overarching issues that it believed underlie the litigation before it. It noted that businesses have consistently promoted binding arbitration clauses for their employees, which normally include a waiver of their right to join class-action litigation, and the irony of the efforts of DoorDash in this case. The court observed that DoorDash sought the precise collective-litigation framework it encouraged its employees to waive through its binding arbitration agreements. Because of its efforts to contractually remove the possibility of class-action litigation and replace it with arbitration, the court showed little sympathy for DoorDash's obligation to pay the $12 million in filing fees for these arbitrations.

There is no doubt that arbitration is a streamlined, cost-effective method of getting just results for the vast majority of cases. Because of its truncated procedural structure, arbitration removes a number of expenses typically present in traditional litigation. Moreover, arbitration proceedings are usually better able to remove frivolous or unacceptable claims at the outset than traditional suits in court. Based on this, employers and their attorneys should still seriously consider binding arbitration agreements as part of their employment contracts. With that said, this case presents one of the financial pitfalls possible when large groups of arbitration claims arise all at once. Large employers with vast numbers of employees in a single category should follow this case and consider its outcome when determining whether binding arbitration agreements should be applied to its employees.

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Royalty Dispute; Motion to Dismiss for Lack of Personal Jurisdiction

Libersat v. Sundance Energy, Inc., ____ F. Supp. 3d ____, 2020 WL 548752 (W.D. La. Jan. 31, 2020).

This case involves a royalty dispute arising from a mineral lease located in McMullen County, Texas (Libersat lease). Plaintiffs are royalty owners living in Louisiana. Plaintiffs claim they were incorrectly paid royalties due to division orders based on a title opinion that did not accurately reflect record title.

The Libersat lease was originally assigned to Clayton Williams Energy, Inc. in 1984. Clayton Williams went to Louisiana to negotiate the lease with plaintiffs. Later, Clayton Williams assigned its interest to Eagle Ford Shale Exploration, L.L.C. Eagle Ford Shale then assigned the lease to SEA Eagle Ford, L.L.C. SEA Eagle Ford is a single-member Texas limited liability company. Its only member is Sundance Energy, Inc. Sundance is a Colorado corporation. Sundance did not have an interest in the lease but was responsible for coordinating royalty payments. Clayton Williams was eventually acquired by Noble Energy, Inc., a Delaware corporation with its principal

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After it acquired its interest in 2014, SEA Eagle commissioned a title opinion to determine the proper percentage of royalty payable to each royalty owner. Sundance issued division orders based on the title opinion. Some owners signed the division orders; others did not. Mark Libersat and Roxanne Gilton signed their division orders and were paid. But Gerald and Julie Libersat, who later became plaintiffs, refused to sign their division orders because they claimed the division orders showed the wrong percentage of interest.

Sundance and SEA Eagle conducted additional title research and discovered that the percentages were, in fact, wrong. Sundance and SEA Eagle then suspended royalty payments to all owners who inherited their interests from May Libersat. Sundance issued revised division orders. According to plaintiffs, SEA Eagle and Sundance required plaintiffs to indemnify them (defendants) for the prior erroneous royalty payments. If plaintiffs did not indemnify defendants, then plaintiffs would not be paid.

SEA Eagle filed a lawsuit in Texas state court against Mark Libersat and Roxanne Gilton, the two owners who were paid royalties pursuant to the incorrect division orders, claiming breach of contract and unjust enrichment. Separately, Gerald and Julie Libersat filed suit in Vermilion Parish, Louisiana, against SEA Eagle and the other mineral interest owners (including working-interest owners and ORRI owners), claiming breach of the lease and bad faith. Plaintiffs stated in their petition that they did not have any evidence of wrongdoing by Clayton Williams and/or Noble Energy at the time of filing their lawsuit but sued them as necessary parties. SEA Eagle and Sundance successfully removed the case to the Western District of Louisiana on the basis of diversity jurisdiction. Defendants moved to dismiss on the basis of lack of personal jurisdiction and claimed that the "Local Action Doctrine" prevented a federal court in Louisiana from hearing a case involving real property interests in Texas. Noble Energy also filed a motion to dismiss on the same grounds.

In considering defendants' motions, the district court analyzed whether it had general and specific jurisdiction over defendants and whether the Local Action Doctrine applied. On the issue of general jurisdiction, Sundance, SEA Eagle and Noble argued that there was no prima facie basis for the court to exercise general jurisdiction because none of the defendants are incorporated in Louisiana, nor are their principal places of business located in Louisiana. Moreover, they contended that they do not have "continuous and systematic" contacts with Louisiana. In response, plaintiffs argued that defendants did have sufficient contacts with Louisiana because (1) Clayton Williams came to Louisiana to negotiate the lease, and (2) Clayton Williams had long-standing business operations in Louisiana. Plaintiffs argued that Williams' contacts, by operation of law, should be imputed to defendants because defendants are assignees of Clayton Williams. The district court, however, held otherwise, finding that general jurisdiction did not exist. The court noted that none of the defendants were formed in Louisiana and none maintained their principal places of business there. Moreover, Sundance's mailing of the division orders did not create "systematic and continuous" contacts with Louisiana.

Regarding specific jurisdiction, there again, the district court found plaintiffs did not meet their burden of proof. Plaintiffs could not show that defendants had minimum contacts with Louisiana. To prevail, plaintiffs had to show that their claims arose out of defendants' jurisdictional contacts with the forum state. Plaintiffs (again) attempted to rely on the actions of Clayton Williams, but the court rejected this argument stating, "[h]ere, Plaintiffs' claims arise out of royalty payments and alleged errors in the division orders . . ., not Clayton Williams' or Clayton Williams Energy's actions in negotiating and executing the Libersat Lease [in Louisiana] thirty years earlier."

On the issue of "Local Action Doctrine," the court found that it did not have to determine whether Louisiana actually adopted the doctrine because the court's holding that it did not have personal jurisdiction over the defendants pretermitted the "Local Action Doctrine" claim. As a result of all of this, the court granted defendants' motions to dismiss and dismissed plaintiffs' claims without prejudice.

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Re-Credentialing

Thomas v. Reg'l Health Sys. of Acadiana, 19-00507 (La. 1/29/20), ____ So.3d ____, 2020 WL 500019.

A mother filed a request for panel review and also concurrently filed a lawsuit against two hospitals for negligently credentialing/re-credentialing and negligently providing privileges to a pediatric cardiologist. The defendants filed exceptions of prematurity, contending that the credentialing claim had to first be presented to a medical-review panel. The trial court noted that *Billeaudeau v. Opelousas General Hospital*, 16-0846 (La. 10/19/16), 218 So.3d 513, was a negligent credentialing case pending before the Louisiana Supreme Court at the time the exceptions of prematurity were filed and stayed the hearing on the exceptions until *Billeaudeau* was decided.

Billeaudeau involved only a negligent credentialing claim. The Supreme Court determined in *Billeaudeau* that the negligent credentialing claim sounded in general negligence rather than malpractice, while distinguishing the facts in *Billeaudeau* from cases involving "mixed allegations of negligent credentialing and supervision." This led the *Thomas* trial court to grant the exceptions of prematurity.

The appellate court opinion noted that the "narrow question" of *Thomas* was whether re-credentialing differed from "initial credentialing." *See, Thomas v. Reg'l Health Sys. of Acadiana,* 18-0215 (La. App. 3 Cir. 2/27/19), 266 So.3d 354, 358. The defendants argued that re-credentialing differed because it "implicates a peer review and supervision component such as to fall within the gambit of medical malpractice." The appellate court ruled that hiring and credentialing are identical to retention and re-credentialing, declared *Thomas* to be a case of ordinary negligence, and reversed the trial court's decision granting defendant's exception.

The Supreme Court then disagreed, finding that allegations of "negligent re-credentialing necessarily fall within the definition of 'malpractice' under the LMMA because they constitute an 'unintentional tort . . . in the training or supervision of health care providers.'" To reconcile this holding with the *Billeaudeau* court's statement that "the treatment-related medical decisions and dereliction of skill with which the LMMA is concerned . . . fall under the 'supervision and training of health care providers' once they enter the building and engage in the practice of medicine therein," the Court distinguished the *Thomas* case on its facts "[t]o the extent that [the] plaintiff's allegations against the hospital include the hospital's *initial* credentialing . . . ." The Court reasoned: "[A]sserting claims of 'credentialing' or 're-credentialing' against a healthcare provider cannot be a talismanic incantation that automatically excludes a plaintiff's claims from the strictures of the LMMA. If that were so, all medical malpractice plaintiffs could sidestep the statutory limitations of the LMMA."

The Court then clarified that future plaintiffs could continue to allege negligent credentialing or re-credentialing claims that fall outside the LMMA if they "are *not* so intertwined with malpractice claims." The Court theorized that a plaintiff could pursue a claim against a healthcare provider under the LMMA, while also alleging a negligent credentialing claim against the hospital that is totally unrelated to medical care, but instead involves the healthcare provider's negligent conduct as a hospital employee, concluding that no such claims were alleged in this case.

There were four additional opinions: two concurring and two dissenting.

Prescription

Brooks v. Meaux, 18-0980 (La. App. 3 Cir. 6/12/19), 275 So.3d 41, *writ denied,* 19-1135 (La. 10/8/19), 280 So.3d 590.

After his wife's death on Oct. 11, 2013, Mr. Brooks filed a panel request on Oct. 10, 2014, received the panel opinion on July 20, 2016, and thereafter filed a lawsuit on Oct, 5, 2016. The defendant filed an exception of prescription, claiming that Brooks, having requested a panel one day before prescription, had 91 days after receiving the opinion within which to file a claim, after which his case was prescribed. Brooks countered that he was unaware that malpractice was involved in the death until he received the autopsy report on Dec. 19, 2013. He claimed (as he had in his panel request) that after receiving the autopsy report, he researched the disease and its symptoms and realized that she was not correctly treated, which he could not have earlier known.

Dr. Meaux contended that prescription runs one year from the date of death, but even if it did not commence at the time of death, the death certificate, issued five days after death, showed the same cause of death as the autopsy report, and this was sufficient to incite Brooks' attention and for prescription to begin to run.

The trial court granted the exception of prescription. The appellate court reversed. It observed that the defendant's argument that Brooks was aware of the cause of death, per the death certificate that was in Brooks' possession five days after death, "conflate[d] knowledge of the cause of death with knowledge of alleged tortious conduct." Damage is always apparent from the moment of death, but an awareness of damages does not cause prescription to run unless it is reasonable to recognize that the death might be treatment-related. The court thus found that Mr. Brooks "was reasonable in not having recognized the alleged connection" between his wife's death and the defendant's treatment until he received the autopsy report and thereafter read a MedLine article that was attached to the autopsy report. The exception of prescription was denied.

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Taxpayer Must Pay Under Protest to Seek Declaratory Judgment

Bliss v. Lafayette Parish Sch. Bd. Sales Tax Div., 19-0186 (La. App. 3 Cir. 12/18/19), 284 So.3d 703.

Herbert Bliss operated as a sole proprietorship doing business under the trade name, "Cork's Automotive" (Taxpayer). Taxpayer makes repairs to automobiles for customers in Lafayette Parish. The Lafayette Parish School Board (Collector) conducted a sales-and-use-tax audit of Taxpayer, which revealed a tax deficiency. Collector, pursuant to La. R.S. 47:337.48(B), issued Taxpayer a 30-day Notice of Intent to Assess.

In response, Taxpayer requested a hearing pursuant to La. R.S. 47:337.49 and sought to protest the findings. A hearing took place at Taxpayer's counsel's office. Collector's auditor appeared on behalf of Collector. Taxpayer's counsel advised at the hearing that supplemental information would be provided in the next five business days. Thereafter, Collector twice extended Taxpayer's deadline to produce the supplemental information.

After receipt and review of the supplemental records provided by Taxpayer, Collector made its final determination and issued a "Notice of Assessment and Right to Appeal" to Taxpayer notifying Taxpayer that "he has thirty calendar days from the date of the notice to do any of the following: (a) Pay the amount of the assessment; (b) Appeal to the Board of Tax Appeals for redetermination of the assessment; or (c) Pay under protest . . . and then either file suit or file a petition with the Board of Tax Appeals . . . ." Taxpayer received the assessment.

In response, Taxpayer filed suit in the district court, seeking a judgment declaring the assessment null and void, and/or inaccurate and improperly calculated. Collector filed peremptory exceptions of peremption, no cause of action and no right of action, and a declinatory exception of lack of subject matter jurisdiction. The trial court sustained Collector's exceptions and dismissed the petition with prejudice. The trial court found there was no possible way for Taxpayer to cure any pleading defects given Taxpayer did not respond to the assessment within 30 calendar days to protest or appeal the assessment in any of the manners specifically enumerated by law.

On appeal, Taxpayer asserted the hearing was not fair because no examination was made, no testimony was offered and no record was created. Taxpayer asserted, because such did not take place before the issuance of the assessment, Taxpayer was not required to pay under protest before seeking a declaratory judgment. The 3rd Circuit held the pre-assessment procedure was proper and noted hearings are not defined by statute and no specific format is provided. The 3rd Circuit found the hearing was fair as: (1) it took place in person at Taxpayer's counsel's office; (2) Taxpayer's counsel made arguments on behalf of Taxpayer; (3) Taxpayer admitted there was a discussion between the Collector's auditor and Taxpayer's counsel; and (4) the hearing was with the Collector's auditor who was in charge of holding the hearing, reviewing supplemental documentation and rendering a final determination. Further, Collector twice extended the deadline to produce supplemental records. The 3rd Circuit held Taxpayer failed to properly protest or appeal the assessment in any of the manners specifically enumerated by law. The 3rd Circuit found no error in the trial court's ruling that Taxpayer was first required to pay the amounts assessed under protest, which Taxpayer failed to do.

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Collector's Summary Proceedings Deemed Abandoned; Marketplace Facilitators Not "Dealers"

Normand v. Wal-Mart.com USA, L.L.C., 19-0263 (La. 1/29/20), ____ So.3d ____, 2020 WL 499760.

The sales tax collector for Jefferson Parish (Collector) filed a tax rule on Feb. 16, 2017, against Wal-Mart.com USA, L.L.C., for taxes estimated and assessed in the amount of $1,896,882.15. It contended Wal-Mart should have collected the taxes on sales made by third-party sellers on its marketplace website. The trial court held that Wal-Mart was contractually required to "collect all proceeds from such transactions" for third-party sellers, which included sales tax, and it ordered Wal-Mart to pay $137,944.25 in tax with penalties, interest and attorney fees. (Evidence produced at trial showed the actual value of the marketplace third-party sales, which was a great deal less than estimated.)

The appeal court affirmed the trial court's decision and noticed the judgment on Dec. 27, 2018. When Wal-Mart applied for writs on Feb. 14, 2019, the Collector contended the writ application was too late because Wal-Mart had only 30 days from notice of judgment under the summary procedure at La. R.S. 47:337.61(3). In denying the Collector's motion to dismiss, the Supreme Court held that the Collector waived its right to require the strict adherence to the summary proceedings deadlines. In so holding, the Court noted several departures from the summary procedure — the initial trial court hearing was not held within 10 days of notice; the actual trial did not commence until five months later and took three months to conclude; the trial court decision was rendered four months after the trial concluded instead of 48 hours; the appeal record was prepared in 49 days instead of 15 days; and the appellate decision was rendered 77 days after oral argument and 297 days after the motion for appeal instead of the 48 hours from submission.

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issue before the Court, it held that Wal-Mart was not a "dealer" under La. R.S. 47: 301(4)(l) and, therefore, not required to collect the sales tax on its marketplace website by third-party sellers under La. R.S. 47:337.17. The Court acknowledged the broad definition of "dealer," but stated:

> [I]it is the seller of merchandise, the performer of taxable services, and the rentor or lessor of property as parties to the underlying transactions that are liable for collection of the tax. The statutory and regulatory scheme does not contemplate the existence of more than one dealer that would be obligated to collect sales tax from a purchaser. An online marketplace in its role as a facilitator for sales of third party retailers does not fall in these groups.

Id. at *11. The Court found additional support for its conclusion that Wal-Mart was not "the" dealer in tax regulations that contemplate the existence of a lone dealer in a retail sale transaction. L.A.C. 61:I.4303, 61:I.4307(A)(1), and 61:I.4311. Lastly, the Court observed that special legislation existed to require tax collection by auctioneers who conduct and consummate a sale for a third party under La. R.S. 47:303(C) and 337.15(C) and L.A.C. 61:I.4307(C). The Court stated that, if marketplace facilitators and auctioneers were already included in the definition of "dealer," there would be no need for the auctioneer law. Stated another way, tax collectors could not require marketplace facilitators to collect sales tax so long as no law mandated their duty to do so like that for auctioneers.

Justice Johnson dissented on the ground that she would hold Wal-Mart to be a dealer responsible for collecting the sales taxes. Justice Hughes dissented and would have dismissed the appeal for the untimeliness of the writ application.

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