LASC Answers Certified Question: Louisiana Attachment Statute

Stemcor USA Inc. v. CIA Siderurgica Do Para Cosipar, 18-1728 (La. 5/8/19), ____ So.3d ____, 2019 WL 2041826.

In a world where arbitration clauses are becoming more and more commonplace, the Louisiana Supreme Court answered a Certified Question from the U.S. 5th Circuit Court of Appeals interpreting the term "action for a money judgment" as it related to a suit to compel arbitration.

The background of this case involves two companies who entered into unrelated contracts with America Metals Trading, L.L.P. (AMT). Daewoo International Corp. contracted with AMT to purchase pig iron; the contract between these two parties contained an arbitration clause. Daewoo alleged it paid more than $14 million to AMT for the pig iron, but AMT failed to deliver the goods. Thyssen Krupp Mannex GMBH (TKM) also entered into a contract with AMT to obtain pig iron, which it contends AMT never delivered.

Daewoo, having not received the pig iron contracted for, sued AMT in the U.S. District Court for the Eastern District of Louisiana. This suit was to compel arbitration, in accordance with the contract of the parties, *and* for a writ of attachment to obtain pig iron aboard the M/V Clipper Kasashio, pursuant to La. C.C.P. art. 3542. The writ of attachment was granted and served by the U.S. Marshals.

A few days after the U.S. Marshals served the writ of attachment on behalf of Daewoo, TKM filed suit in the 24th Judicial District Court (*Thyssen Krupp Mannex GMBH v. CIA Siderurgica Do Para Cosipar*, Docket 722-480). TKM alleged it paid more than $36 million to AMT for pig iron, AMT failed to deliver

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the pig iron, and the pig iron that was placed aboard the M/V Clipper Kasashio was already under attachment of TKM pursuant to a settlement agreement entered into in Brazil. TKM further sought a writ of attachment pursuant to La. C.C.P. art. 3542 for the pig iron aboard the M/V Clipper Kasahio — the same pig iron attached by Daewoo in the federal suit.

TKM, learning of Daewoo's attachment on the cargo, intervened in Daewoo's federal suit and obtained a federal writ of attachment on the cargo as well. TKM also moved to vacate Daewoo's attachment, alleging that by filing a suit to compel arbitration, pursuant to the contract between Daewoo and AMT, Daewoo had no right under art. 3542 as there was no "action for a money judgment" as required by the statute.

Initially, the federal court agreed with TKM and vacated Daewoo's writ of attachment, in essence, providing TKM the entirety of the claim to the attached goods. TKM appealed, and the U.S. 5th Circuit vacated the district court's ruling with a split decision. On rehearing, in yet another split opinion, the 5th Circuit withdrew the prior opinion and affirmed the district court's ruling. The parties filed separate rehearing petitions, and the 5th Circuit then certified the following question to the Louisiana Supreme Court: "Is a suit seeking to compel arbitration an 'action for money judgment' under Louisiana's nonresident attachment statute, La. Code Civ. Pro. art. 3542?"

The Louisiana Supreme Court accepted the certified question and ultimately answered in the affirmative, finding that the language "in any action for a money judgment" was not clear and unambiguous. Therefore, the majority examined the purpose of the statute, the context of the language and the law as a whole to determine the statute was broad enough to include a suit to compel arbitration when the ultimate goal of the arbitration was to obtain a money judgment.

Justice Guidry dissented, with Justice Genovese dissenting for the reasons assigned by Justice Guidry. Justice Guidry believed the language of the law was clear and unambiguous, and the application did not lead to absurd consequences, such that the secondary interpretation of the majority was improper. Accordingly, the dissenters would have answered the question in the negative and found that an action to compel arbitration was not an action for a money judgment and, therefore, art. 3542 would not apply.

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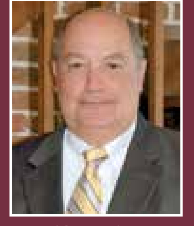
WOTUS on the Move: Southern District of Texas Remands Obama-Era Rule to EPA

Texas v. U.S. EPA, No. 3:15-CV-00162, ____ F.Supp.3d ____ (S.D. Tex. 2019), 2019 WL 2272464.

On May 28, 2019, Judge George C. Hanks, Jr. of the Southern District of Texas remanded to the Environmental Protection Agency (EPA) the 2015 Final Rule defining "Waters of the United States" (WOTUS) under the Federal Water Pollution Control Act, 33 U.S.C. §§ 1251 *et seq.* (Clean Water Act). Texas, Louisiana and Mississippi challenged the legality of the Final Rule. The states asserted that the Final Rule was an encroachment on the rights of the states to regulate lands within their borders and thereby in violation of the 10th Amendment. The states also asserted that the Final Rule was in excess of the EPA's and the U.S. Army Corps of Engineers' statutory authority un-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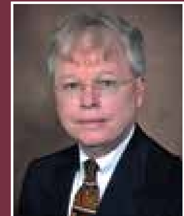
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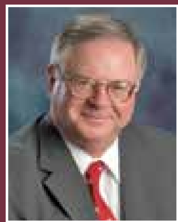
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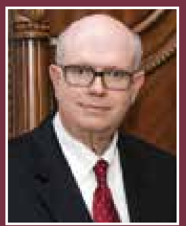
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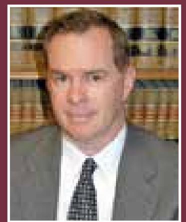
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der the Clean Water Act as interpreted by the U.S. Supreme Court. Lastly, the states asserted "that the Final Rule violates the notice-and-comment requirements of the [Administrative Procedure Act, APA] because (1) the Final Rule's definition of 'adjacent' was not a logical outgrowth of the Proposed Rule's definition, and (2) the Agencies denied interested parties an opportunity to comment on the Final Connectivity Report, which serves as the technical basis for the Final Rule." *Id.* at *3. Granting in part the states' motion for summary judgment, Judge Hanks found "that the Final Rule violated the APA's notice-and-comment requirements." *Id.* at *5.

In 2014, the EPA and the U.S. Army Corps of Engineers jointly proposed a new definition of the phrase WOTUS (Proposed Rule). The technical basis for the Proposed Rule was a Preliminary Connectivity Report drafted by the EPA that reviewed "more than a thousand publications from peer-reviewed scientific literature and discussed the connected nature of the nation's waters." *Id.* at *2. After the notice-and-comment period for the Proposed Rule closed, the EPA issued a Final Connectivity Report. The Final Rule was issued nearly six months after the Final Connectivity Report. As the court recognized, "[t]his meant that the Proposed Rule was never open for public comment after the Final Connectivity Report was finalized." *Id.* at *2. In other words, the public never had an opportunity to comment on any changes in the Final Rule that were based on changes in the Final Connectivity Report.

The court found that "the Final Rule departed from the Proposed Rule in at least one key respect. Namely, the Final Rule defined 'adjacent waters' under the [Clean Water] Act using distance-based criteria, rather than the ecologic and hydrologic criteria used in the Proposed Rule." *Id.* at *3. Drawing on the Supreme Court's decision in *Long Island Care at Home, LTD. v. Coke*, 551 U.S. 158, 174 (2007), in addition to various appellate court decisions, the court concluded that the change to the definition of "adjacent waters" was so significant that it was not a "logical outgrowth of the Proposed Rule and that it was promulgated in violation of the APA." *Id.* at *4.

Moreover, because the public was not given the opportunity to comment on the Final Connectivity Report, the court found that "[t]he Final Rule also violated the APA by preventing interested parties from commenting on the studies that served as the technical basis for the rule." *Id.* at *5. While conceding that the public is not expected to have an opportunity to comment on all information influencing an agency's decisions, the court found that interested parties were prejudiced by not having the opportunity to "provide meaningful comments regarding the Final Rule's continuum-based approach to connectivity and . . . 'mount a credible challenge' to the Final Rule." *Id.* at *6 (*citing Am. Radio Relay League, Inc. v. FCC*, 524 F.3d 227, 237-38 (D.C. Cir. 2008).

Noting that "the Agencies have already begun reviewing whether changes should be made to the Final Rule," the court remanded the Final Rule to the EPA and the U.S. Army Corps of Engineers for proceedings consistent with its order. *Id.* at *6. Indeed, the agencies promulgated a draft revised definition of WOTUS and accepted comments thereon through April 15, 2019. The Southern District of Texas maintained the injunction it issued on Sept. 12, 2018, pending the proceedings on remand. The court denied all the remaining pending motions as moot. At the time of this writing, the delay for seeking reconsideration had not yet lapsed.

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Use and Occupancy/ Rent

Averill v. Averill, 18-0299 (La. App. 1 Cir. 9/21/18), ____ So.3d ____, 2018 WL 4520246.

After Ms. Averill found that Mr. Averill was having an affair, she moved out of the community home and later filed a petition for divorce, wherein she requested rent for his exclusive use of the home. He subsequently filed an answer and reconventional demand and sought use and occupancy of the home, or alternatively rent. The parties entered into a consent judgment granting Mr. Averill use and occupancy of the home and deferring Ms. Averill's reimbursement claim for rent until the partition. Following the partition and an award of rent to her, Mr. Averill appealed, arguing that the trial court erred in awarding her rent since she had not requested use of the home and been denied.

The appellate court held that La. R.S. 9:374(C) has been amended since *McCarroll v. McCarroll*, allowing retroactive awards of rent when that issue has been deferred to the partition trial. Further, the court found that the present version of La. R.S. 9:374(C) does not require that a party demand use and be denied in order to preserve a rental reimbursement claim. Further, Mr. Averill was aware of her claim and that it was deferred. Finally, he had changed the locks and moved his girlfriend into the home, and the court found that under such circumstances she did not need to request use and occupancy in order to preserve her rental claim, as he had denied her use of the home by such actions.

Premarital Contracts

Brady v. Pirner, 18-0556 (La. App. 4 Cir. 12/5/18), 261 So.3d 867.

Although the parties' premarital contract was invalid as a matrimonial agreement because it was in an improper form, it was nevertheless a valid and enforceable contract, in proper form for a contract, regarding certain matters contained within the agreement. Because there was a severability clause, the invalid provisions were ignored, and the remainder of the agreement remained enforceable as the agreement was not dependent on the invalid portion, which provided for a separate property regime. The court stated, "[T]he couple had distinct causes and multiple principal objects for consenting to the Agreement other than the establishment of a separate property regime."

Community Property

Villarrubia v. Villarrubia, 18-0430 (La. App. 5 Cir. 12/27/18), 263 So.3d 949.

This matter involved the classification of funds on BP files received after the termination of the community regime, on matters upon which Mr. Villarrubia, an attorney, had worked both before and after the termination. Ms. Villarrubia claimed that the funds were community property or, alternatively, that they represented uncompensated or undercompensated labor that increased the value of her husband's PLC, which was his separate property. Mr. Villarrubia argued that he had been fully compensated for his work during the regime, and that the funds belonged to his PLC until they were distributed to him. Further, he argued that if any of the funds were to be awarded to her, they must be reduced for income taxes and the overhead he paid to produce the fees.

The court of appeal affirmed the trial court's award of fees to her, based on a percentage of time he worked before and after the termination of the community to obtain the funds. The court found that as he was the sole member and owner of the PLC, only he would be entitled to a distribution of the fees from the entity. Thus, the fees partially represented compensation and were community property where attributable to work he performed before the termination of the community. Regarding his claims for overhead and taxes, the court found that he failed to present evidence at the trial except for his uncorroborated testimony.

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Custody

Melton v. Johnson, 18-0403 (La. App. 1 Cir. 12/12/18), 2018 WL 6571044 (unpublished).

The court of appeal stated: "The heightened standard stated in *Bergeron* is applicable to both changes in legal and physical custody." *Id.* at *5. Notably, the appellate court distinguished between "visitation" and "physical custody," stating that the proper term when parties have joint custody is "'physical custody,' not 'visitation.'" *Id.* at *6, note 14.

Bernard v. Bernard, 18-1149 (La. App. 1 Cir. 2/12/19), 2019 WL 546530.

The appellate court reversed the trial court and granted the father and grandmother joint custody, with the grandmother designated as the domiciliary parent. The court remanded to the trial court "to establish a joint custody visitation schedule." *Id.* at *1. (Note that the same appellate panel in *Melton* in an opinion written by Judge Whipple took careful time in footnote 14 to distinguish between "physical custody" and "visitation" when parties' shared joint custody.)

J.P. v. A.D., 18-0555 (La. App. 3 Cir. 2/20/19), 265 So.3d 860.

The court of appeal reversed the trial court, which had named both parties as joint custodial domiciliary parents, citing the ruling in *Hodges v. Hodges*, 15-0585 (La. 11/23/15), 181 So.3d 700, that there can be only one domiciliary parent. The trial court also failed to adequately allocate the legal authority and responsibility between the parents in its joint custody implementation order, as also required by *Hodges*. The court determined that it had a sufficient record before it to render a de novo review and ruling and designated the mother as the domiciliary parent, with authority to make all major decisions stating in a footnote:

> Louisiana Revised Statutes 9:336 also provides that "[j]oint custody obligates the parents to exchange information concerning the health, education, and welfare of the child and to confer with one another in exercising decisionmaking authority." Major decisions "normally include decisions concerning major surgery or medical treatment, elective surgery, and schools attended, but not the daytoday decisions involved in rearing a child, *e.g.*, bedtimes, curfews, household chores, and the like." Nonmajor decisions are not subject to judicial review.

Id. at 865, note 6 (citations omitted).

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Evidence

State v. Ducote, 18-0060 (La. App. 3 Cir. 11/14/18), 260 So.3d 627, *writ denied*, 18-2026 (La. 4/22/19), 268 So.3d 298.

Mr. Ducote's jailhouse telephone calls to his wife were not protected by the spousal privilege of confidentiality under La. Code of Evidence art. 504(A). The court found that as inmates and their spouses are advised that phone calls may be recorded or monitored, they can have no expectation of privacy regarding such calls.

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Long-Term Disability

Foster v. Principal Life Ins. Co., ____ F.3d ____ (5 Cir. 2019), 2019 WL 1474315.

Amanda Foster was employed as a healthcare attorney at a New Orleans law firm in 2005. She described her duties as "review and draft leases and agreements; research and advise clients regarding government laws and regulations; represent clients in administrative appeals; [and] draft compliance plans." In March 2013, she reduced her work hours to part-time, allegedly due to intractable headaches, and took complete disability leave in July 2013.

Her law firm has a group benefits plan or policy, issued by Principal, providing employees with long-term disability (LTD) benefits. Plaintiff's claims under the policy are governed by the Employee Retirement Income Security Act of 1974 (ERISA). The policy confers on Principal the discretion to construe the policy provisions and determine eligibility, making Principal both the insurer and the plan administrator.

Regarding LTD, the policy states that a member is "disabled" if she "cannot perform one or more of the substantial and material duties of his or her Own Occupation." "Substantial and material duties" are "essential tasks generally required by employers from those engaged in a particular occupation that cannot be modified or omitted." The policy defines Own Occupation for attorneys as "[t]he specialty in the practice of law the Member is routinely performing for the Policyholder when his or her Disability begins." Her claim for LTD under the policy, supported by her neurologist's report, was provisionally approved, with the caveat that additional information would be required.

Principal requested surveillance on the plaintiff, which showed her performing routine tasks like shopping and picking up children. An updated review of the plaintiff's medical records by two of Principal's

physicians found that her "chronic headaches and intractable migraines" would not allow her "consistent full time employment for sedentary work" and that she was experiencing daily migraines that resulted in her "functional impairment," limiting her to part-time work.

Principal hired two additional physicians to review the plaintiff's file. The psychologist found "no indication of functionally impairing symptoms" and noted "generally mild psychological symptoms consistently across time." She concluded that "[n]o limitations are supported" that would result in the plaintiff's "total inability to perform any type of occupation."

The neurologist concluded that the plaintiff's "objective neurological exam is consistently normal," as well as her MRI and EEG, whereas her headaches were "subjectively affecting her functionality." Her records showed "no objective/clinical evidence which demonstrates that [plaintiff] is functionally impaired," further noting that "she is seen on video surveillance to be functional . . . . [plaintiff] has capabilities to perform work activities on a full-time basis, in a sedentary capacity."

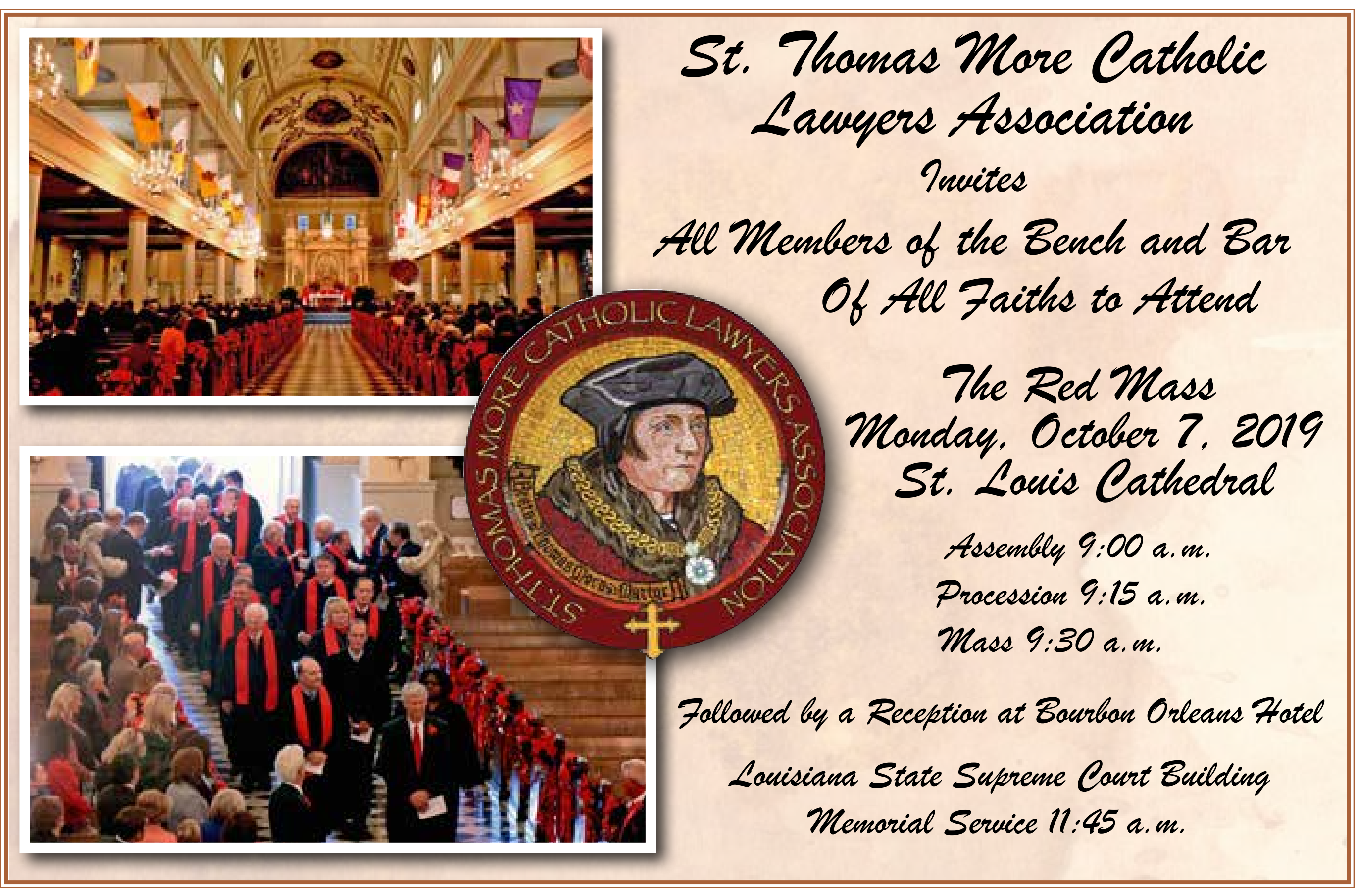
Principal terminated the plaintiff's LTD benefits, stating that her "subjective complaints did not correlate with objective findings" and concluding that "there is no objective medical or psychological evidence supporting an ongoing claim of Disability as it is defined in the policy." ERISA requires an employee aggrieved by her plan's decision to file "mandatory" and "voluntary" appeals with the plan's administrator before seeking review in federal district court.

The plaintiff filed her mandatory appeal, attaching letters from her treating physician, an independent medical examination, an affidavit from her employer's founding partner attesting to her struggles with headaches and inability to work as an attorney, and additional medical records detailing her continued struggle with migraines.

Principal denied the plaintiff's appeal, relying on the opinions of two doctors. Dr. Harrop, a psychiatrist, concluded that the plaintiff was "not disabled for psychiatric reasons," that "the psychiatric restrictions suggested by the attending clinicians . . . are not supported by clinical findings or diagnostic evidence or the clinical records," that her"[m]emory, cognition, and concentration are not demonstrated by mental status examinations to be impaired . . . [and that] [t]he medical documentation does not support that there are restrictions and limitations which would render [plaintiff] unable to perform the occupation she regularly performs."

Dr. Miller, a psychiatrist/neurologist, diagnosed the plaintiff with "opioid dependence," "opioid induced mood disorder" and "opioid induced hypalgesia and somatoform disorder. Hydrocodone causes pain, particularly headache pain and her pain will be significantly reduced and the frequency . . . severity . . . [and] nature of her headaches all will improve once she no long [sic] is prescribed an uses hydrocodone." He concluded that "[plaintiff] is otherwise capable of full-time sedentary work" and "she should discontinue under medical supervision hydrocodone and Ativan [lorazepam] as these medications increase pain and anxiety and depression."

The plaintiff filed a second, voluntary



appeal, submitting additional reports. Principal scheduled an independent neuropsychological examination. The psychologist concluded that the plaintiff "would have no limitations on more complex legal tasks if these did not involve much oversight and responsibility." Principal upheld its previous determination that the plaintiff was not disabled within the meaning of the LTD provisions of the policy and denied the second appeal.

The plaintiff filed suit in federal district court, and the parties filed cross-motions for judgment on the administrative record. The court found that Principal did not abuse its discretion when denying the plaintiff's claim and denied a motion for reconsideration.

On appeal, the 5th Circuit noted its earlier stated standard of review:

> Where a benefits plan gives the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan, . . . the reviewing court applies an abuse of discretion standard to the plan administrator's decision to deny benefits.

Noting the light burden that Principal bears:

> Principal must support its decision only with "substantial evidence" and, if the decision "is not arbitrary and capricious, it must prevail."

Furthermore, although Principal has a "structural" conflict of interest in that it both evaluates and pays claims, . . . we accord this factor little weight in view of the extensive investigation Principal undertook. We therefore conclude that Principal's benefits denial was supported by substantial evidence.

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Court of International Trade

Am. Inst. for Int'l Steel, Inc. v. United States, 376 F.Supp.3d 1335 (Ct. Int'l Trade 2019).

A three-judge panel of the U.S. Court of International Trade ruled on a key constitutional challenge to Section 232 of the Trade Act of 1962. The case stems from President Trump's declaration that imported steel and aluminum threaten to impair U.S. national security and the subsequent imposition of 10% (aluminum) and 25% (steel) remedial tariffs. The American Institute for International Steel challenged Section 232 as an impermissible congressional delegation of economic authority to the President containing an "essentially unlimited definition of national security" and a "limitless grant of discretionary remedial powers." *Id.* at 1343.

Section 232 authorizes the Secretary of the Department of Commerce to initiate an investigation into whether certain imports are having or will have a detrimental impact on U.S. national security. The Secretary issues a written report to the President with a conclusion regarding any real or potential threat to national security and a recommended course of action, if any, to address the threat. Once the President receives the report, if he concurs with a finding that a national security threat exists, the President has discretion to adjust the imports to minimize or erase the national security risk. The President has unfettered discretion to either concur or not with the Secretary's findings and to impose remedial measures.

The opinion carefully reviews prior jurisprudence on legislative delegations, which are permissible if they satisfy the "intelligible principle" standard, where Congress "shall lay down by legislative act an intelligible principle to which the person or body authorized . . . is directed to conform . . . ." *Id.* at 1339, *quoting J.W. Hampton, Jr. & Co. v. United States*, 48 S.Ct. 348, 352 (1928). Despite acknowledging that Section 232 "bestow[s] flexibility on the President and seem[s] to invite the President to regulate commerce by way of means reserved for Congress," the panel dismissed the challenge because of prior Supreme Court precedent. *Id.* at 1344. The Supreme Court previously upheld Section 232 in 1976, finding that the law easily satisfied the intelligible principle standard. *Id.* at 1340, *citing Fed. Energy Admin. v. Algonquin SNG Inc.*, 96 S.Ct. 2295, 2302 (1976).

Despite the binding precedent of *Algonquin*, the panel's decision was split 2-1. Judge Katzmann issued a separate *dubitante* opinion. An opinion entered *dubitante* expresses doubt or unhappiness with some aspect of the decision without lodging a formal dissent. *Dubitante* opinions are also issued where a judge is constrained by precedent but suggests an alternative view of the matter. *Id.* at 1345 n.1. Judge Katzmann addressed *Algonquin* at the outset, stating, "While acknowledging the binding force of that decision, with the benefit of the fullness of time and the clarifying understanding borne of recent actions, I have grave doubts." *Id.* at 1346-47. Considering the broad delegation contained in Section 232 and the potentially limitless scope of national security, Judge Katzmann concluded that the statute almost certainly violates the U.S. Constitution's separation of powers:

> What we have come to learn is that section 232, however, provides virtually unbridled discretion to the President with respect to the power over trade that is reserved by the Constitution to Congress. Nor does the statute require congressional approval of any presidential actions that fall within its scope. In short, it is difficult to escape the conclusion that the statute has permitted the transfer of power to the President in violation of the separation of powers.
>
> . . .
>
> In the end, I conclude that, as my colleagues hold, we are bound by *Algonquin*, and thus I am constrained to join the judgment entered today . . . . I respectfully suggest, however, that the fullness of time

can inform understanding that may not have been available more than forty years ago. We deal now with real recent actions, not hypothetical ones. Certainly, those actions might provide an empirical basis to revisit assumptions. If the delegation permitted by section 232, as now revealed, does not constitute excessive delegation in violation of the Constitution, what would?

Id. at 1352 (footnote omitted).

The American Institute of International Steel has appealed this matter directly to the Supreme Court, bypassing the Court of Appeals for the Federal Circuit. The Supreme Court has yet to consider the request for a *writ of certiorari*. *See* Docket No. 18-1317. The matter was distributed for conference on June 20, 2019.

World Trade Organization

China-Domestic Support for Agricultural Producers, WT/DS511/R (Feb. 28, 2019).

The United States secured an important victory against China at the WTO when a dispute-settlement panel ruled that China was illegally subsidizing its farmers in excess of its WTO commitments. At issue was a Chinese farm-subsidy program ensuring an "applied administered price" for farm products. The United States contended that the program violates Chinese Aggregated Measure of Support commitments and provides an unfair advantage to Chinese domestic producers over foreign competitors. The panel ruled that the "applied administered price" contained in China's 2012, 2013, 2014 and 2015 farm-subsidy program violated China's trade commitments and is inconsistent with Articles 3.2 and 6.3 of the Agreement on Agriculture.

The United States has launched similar challenges to additional Chinese agriculture programs, including import quotas on rice, corn and wheat. Those disputes remain pending.

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Charge-Filing Requirement Not Jurisdictional: Much Ado About Nothing?

You have probably seen myriad articles addressing the Supreme Court's recent unanimous ruling in *Fort Bend County, Texas, v. Davis*, 139 S.Ct. 1843 (2019), a Title VII case. Many of their eye-catching titles imply this ruling is a bigger deal than it should be. The holding is simple: Title VII's charge-filing requirement is not jurisdictional. While the ruling implicitly creates currently unanswered questions, this ruling should not significantly change the way Title VII cases are handled and serves as a good reminder for defense counsel to assess and assert available defenses early, or risk waiving them.

Title VII prohibits employment discrimination on the basis of race, color, religion, sex or national origin, and retaliation against persons who assert rights under Title VII. The statute directs workers to file charges of discrimination describing their legal claims with the Equal Employment Opportunity Commission (EEOC) or state equivalent, which notifies the employer and investigates, as a precondition to filing suit. If the EEOC chooses not to sue the employer, the complainant receives a "right-to-sue" notice, giving permission to bring a civil action.

Here, the plaintiff filed a charge against her employer alleging sexual harassment and retaliation for reporting harassment. While the charge was pending, the employer fired her when she failed to show up for work on a Sunday and went to a church event instead. She attempted to supplement her charge by handwriting "religion" in the margin of an intake questionnaire but did not amend her formal charge. After receiving her right-to-sue letter, she sued, alleging religious discrimination and retaliation.

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After years of litigation, only the religious discrimination claim remained, and the employer argued the district court lacked jurisdiction because the charge did not state a religious discrimination claim and the intake questionnaire was not a valid charge. The district court granted the motion to dismiss; the 5th Circuit reversed, holding the charge-filing requirement is not jurisdictional, but instead a prerequisite to suit, which the employer here forfeited by waiting too long to raise the failure-to-exhaust objection.

The Supreme Court affirmed. The basis for this ruling is simple: Federal courts exercise jurisdiction over Title VII actions pursuant to the grant of general federal question jurisdiction and Title VII's own jurisdictional provision, and separate provisions of Title VII contain the charge-filing requirement. The word "jurisdictional" is generally reserved to describe the types of cases a court may hear (subject matter jurisdiction) and the persons over whom the court may exercise adjudicatory authority (personal jurisdiction). On the other hand, the charge-filing requirement is a claim-processing rule, albeit a mandatory one, that requires parties to take certain procedural steps prior to litigation. While this type of rule may be mandatory in that a court must enforce it if timely raised, it is ordinarily forfeited if not timely asserted.

Of course, employers have good reason to raise objections promptly that may eliminate the headache of litigation. And, as the Supreme Court points out, "[a] Title VII complainant would be foolhardy consciously to take the risk that the employer would forgo a potentially dispositive defense." *Id.* at 1851-52. However, this ruling does create a potential loophole where a plaintiff does not file a charge of discrimination before filing suit, and the employer fails to timely assert the failure-to-exhaust defense.

This ruling also generates some unanswered questions. A charge has to be filed within 180 days (or 300 days if the state has a fair employment agency of its own) of the alleged unlawful employment practice to be timely. If no charge is filed, how far back can the alleged wrongdoing have occurred to be actionable in a lawsuit? Does the same temporal restriction (180 or 300 days) apply from the date of suit? Similarly, if the EEOC determines there is no reasonable cause to believe the charge is true, the EEOC will dismiss the complaint and notify the complainant of his or her right to sue in court. The complainant may then commence a lawsuit against the employer within 90 days following such notice. If no charge is filed, and thus no notice right-to-sue letter is issued, what is the statute of limitations for a claim under Title VII? As long as charges continue to be filed and failure-to-exhaust defenses are timely raised, these questions are moot, but, in the rare case where this defense is forfeited, these may be additional issues to be litigated.

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Mutual Interest Provision

Glassell Non-Operated Interests, Ltd. v. EnerQuest Oil & Gas, L.L.C., No. 18-20125 (5 Cir. June 12, 2019), ____ F.3d ____, 2019 WL 2442745.

This case involves the interpretation of an area-of-mutual-interest (AMI) provision in a development agreement in which a group of oil companies agreed to cooperatively develop oil prospects in the Dubose Field in Texas. The AMI was defined in Section 2.1 of the development agreement. EnerQuest acquired an interest in the specified area (the DKE/Pati-Dubose interest) after the agreement took effect, but refused to offer a *pro rata* share to the other parties.

The development agreement, however, did not require that a party share with another party any interest *already owned prior to the effective date of the development agreement*. The AMI provision stated that the AMI shall cover all lands within the DuBose Field that are *acquired after Aug. 1, 2010* (the effective date). The AMI provision defined any interests acquired after Aug. 1, 2010, as "Acquired Interests." All "Acquired Interests" were subject to the sharing obligation; any interests acquired prior to Aug. 1, 2010, were not. Section 2.3 of the Development Agreement further stated that "[a]ll interests, leases or agreements owned by a Party prior to the Effective Date . . . shall not be considered part of or subject to the AMI." Id. at *3.

EnerQuest interpreted its DKE/Pati-Dubose interest as an interest that was acquired *prior to Aug. 1, 2010*, and, thus, not subject to the sharing obligation of the AMI. Because DKE and Pati-Dubose were both parties to the development agreement, they owned interests in the Dubose Field prior to *Aug. 1, 2010*. Therefore, the DKE/Pati-Dubose interest was not subject to the AMI. The U.S. 5th Circuit Court of Appeals agreed with EnerQuest's interpretation and found that

it was bound by the plain text of the AMI in the development agreement. The court stated, "If Appellees sought to prohibit the type of activity in which EnerQuest engaged, they could have easily done so through the contract." Id. at *3.

Louisiana Mineral Code

AWT Be Good, L.L.C. v. Chesapeake Louisiana, L.P., No. 16-1412 (W.D. La. June 4, 2019), ____ F.Supp.3d ____, 2019 WL 2385199.

In deciding a motion for reconsideration of a summary judgment ruling filed by PXP Louisiana, the U.S. District Court for the Western District of Louisiana (C.J. Hicks) confirmed its prior decision regarding the liability of an assignee/sublessee to a mineral lessor under the Louisiana Mineral Code. The court found that given the general rule under the Mineral Code that an assignee/sublessee is directly liable to a mineral lessor for the lessee's obligations, and because PXP did not meet its burden of proof on summary judgment in showing that it did not consent to the lease amendment, the mineral lessor in this case (AWT) can seek to hold PXP liable for the same claims it brings against Chesapeake (original lessee). Thus, the court found that (1) AWT can proceed with discovery on its claims, and (2) PXP and/or Chesapeake's liability to AWT would be determined at trial.

New Well Control Rule

On May 2, the Bureau of Safety and Environmental Enforcement (BSEE) issued the 2019 Well Control Rule, a long-awaited, revised (and final) well-control and blowout-preventer rule governing Outer Continental Shelf (OCS) activities. This rule represents a groundbreaking development for the offshore industry in the aftermath of the Deepwater Horizon incident in 2010. It is the first time that BSEE has provided more learned guidance for oil and gas companies regarding well-control and blowout-preventer systems since the well-control rules issued in April 2016 (2016 WCR).

The new rule revises current regulations impacting offshore oil and gas drilling, completions, workovers and decommissioning activities. Specifically, the new final rule addresses six areas of offshore operations: (1) well design, (2) well control, (3) casing, (4) cementing, (5) real-time monitoring (RTM), and (6) subsea containment. Recognizing that blowout-preventer technology and well-control systems continue to evolve and improve, BSEE decided that it was time to review and revamp its well-control rules so that they not only incorporate the lessons learned from Deepwater Horizon, but also take into account OCS stakeholders' concerns about the implementation and application of the 2016 WCR.

The 2019 Well Control Rule affects Part 250, Subparts A, B, D, E, F, G and Q of Title 30, Code of Federal Regulations. In creating the new rule, BSEE received and reviewed more than 265 sets of comments from individual companies, industry organizations and others, totaling 118,000 submissions. The new rule revises/adds to 71 provisions of the 2016 WCR. The new rule also embraces the recommendations set forth in a number of investigative reports following Deepwater Horizon and maintains the core safety and environmental protective provisions of the 2016 WCR, with a more tailored approach focused on reducing regulatory burdens on the industry. The new rule does not alter the following: (i) the Drilling Safety Rule of 2010, (ii) SEMS I (2010) or (iii) SEMS II (2013). The 2019 Well Control Rule will go into effect 60 days after publication in the Federal Register on May 15, 2019 (84 Fed. Reg. 21,908).

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Prescription

Guffey v. Lexington House, L.L.C., 18-1568 (La. 5/8/19), ____ So.3d ____, 2019 WL 2041788, *reh'g denied*, 2019 WL 2750928 (La. 6/26/19), ____ So.3d ____.

Frederick, Mrs. Guffey's granddaughter, timely filed a medical-review panel request. More than a year after Mrs. Guffey's death, Frederick supplemented the request to add decedent's children as claimants. Lexington filed an exception of no right of action, asserting that the granddaughter was not a proper claimant to request a medical-review panel because she had no right to file a survival or wrongful death

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action. The trial court, referencing *Truxillo v. Thomas*, 16-0168 (La. App. 4 Cir. 8/31/16), 200 So.3d 972, denied the exception based on the definition of "claimant" in La. R.S. 40:1231.1(A)(4) of the MMA which, it reasoned, did not limit claimants to only those who ultimately would be allowed to assert a claim when panel proceedings are concluded. Lexington's writ application was denied.

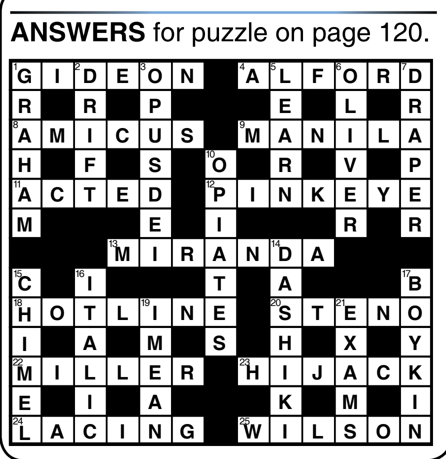
Decedent's children filed a lawsuit within 90 days of the panel opinion that found Lexington had breached the standard of care. The trial court denied Lexington's second exception of prescription.

Lexington argued on appeal that the children's lawsuit was filed more than one year from the date of the incident and from the date of the death and that their reliance solely on a claim filed by the granddaughter could not suspend or interrupt prescription. The 3rd Circuit relied on the reasoning in *Truxillo* and the MMA and ruled that the granddaughter was a "claimant," although she would not be eligible as a plaintiff in subsequent legal proceedings.

The Supreme Court acknowledged that the lower courts had ruled that the granddaughter was decedent's representative filing on decedent's behalf, from whom she held power of attorney; the granddaughter was named as executrix in decedent's will; and she had amended her panel complaint to reflect her representative capacity. The Court agreed the MMA does define "claimant" as a patient or "representative," a seemingly broader definition than that which appears in the Civil Code, but the Court ultimately found that the lower courts "ignored the full wording of La. R.S. 40:12311.1(A)(4)," which defined a claimant as "a patient or representative or any person, including decedent's estate, *seeking or who has sought recovery of damages or future medical care and related benefits under this Part."* The Court emphasized this language to "make it clear that the 'claimant' requesting the medical review panel must be seeking damages sustained as a result of injuries to or the death of the patient," in order to make a panel request valid.

The Court wrote that allowing a claimant to proceed through panel and into a lawsuit before a defendant could challenge the right of action "would virtually read out of the Act the provision providing for the defendant health care provider to end the medical review panel proceedings before they have been completed by peremptorily excepting to the claimant's right of action to seek such damages."

Lexington's exception of prescription was granted, and the case dismissed.



Two Caps

Smith v. Touro Infirmary, 18-1028 (La. App. 4 Cir. 5/8/19), ____ So.3d ____, 2019 WL 2030983.

The plaintiff sued private health-care providers under the MMA and state health-care providers under the MLSSA. The PCF and private health-care defendants settled all claims prior to trial. The State defendants filed a motion for summary judgment, contending that the plaintiff had already received the $500,000 maximum damage recovery. The trial court agreed and dismissed all the State defendants.

The plaintiff urged on appeal that the cap on recovery against various co-defendants was not intended to divest non-settling defendants of liability or plaintiffs of the right to a trial.

The appellate court did a comprehensive analysis of prior jurisprudence, advising that it had previously examined the then *res nova* issue of whether malpractice plaintiffs could recover two caps when their damages were caused both by the negligence of MMA-qualified health-care providers and MLSSA-qualified health-care providers, ultimately deciding that a plaintiff could not, but noting that the Supreme Court has recognized that multiple caps can exist in certain situations, *e.g.*, two negligent acts causing "separate and independent damages." But in *Smith*, the most important issue was whether a malpractice plaintiff is precluded from proceeding to trial "against remaining MLSSA defendants when the LMMA defendants settled in excess of the cap" before trial.

While finding no jurisprudence on this "specific procedural posture," the court noted that the Supreme Court had stressed in earlier cases the importance of the term "amount recoverable" in the MMA as opposed to "damage sustained." Recognizing the similarity in language used in both the MMA and MLSSA, the appellate court interpreted the Supreme Court's distinction to reason that "the MLSSA does not provide that no fault shall be allocated or verdict reached in excess of" $500,000.

This historical review led the *Smith* court to determine that the plaintiff was entitled to proceed with a trial against the non-settling defendants because to find otherwise "would further amplify the reductions placed on the plaintiff by the cap. Moreover, permitting defendants to evade trial via summary judgment in this instance would also circumvent the entire comparative fault scheme."

The appellate court reversed the trial court's dismissal of the State defendants and remanded the cases for trial, declining to discuss whether the State defendants would receive a credit after trial because it was "prohibited from issuing advisory opinions 'from which no practical results can follow.'"

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Lack of Jurisdiction to Review Enterprise Zone Contract

Zelia, L.L.C. v. Robinson, BTA Docket No. 10430D (4/10/19).

Zelia, L.L.C. appealed a notice of assessment issued by Louisiana Department of Revenue Secretary Kimberly Lewis Robinson to recoup a refundable Investment Tax Credit (ITC) that the taxpayer, Zelia, received in connection with Louisiana Economic Development Enterprise Zone Contract No. 20111066-EZ (EZ contract). Robinson issued the assessment after receiving a copy of a letter from the Louisiana Department of Economic Development (LED), notifying Zelia of the EZ contract's cancellation. The cancellation was based on LED's determination that Zelia was in violation of its new-job-creation obligations under the EZ contract. Zelia appealed the assessment by filing a petition for redetermination of assessment with the Louisiana Board of Tax Appeals.

In its petition, as originally filed, Zelia named the following defendants: Robinson, the LED and the Louisiana Board of Commerce and Industry (LBCI) (collectively respondents). The petition also contained a prayer for relief asking the board to order the LED and LBCI to reinstate the EZ contract. Respondents filed exceptions of no right of action, no cause of action and lack of subject matter jurisdiction. Respondents essentially argued that the board lacked jurisdiction over the contractual dispute between Zelia and the LED and LBCI. The board denied the exception of lack of subject matter jurisdiction.

Respondents sought supervisory writs to the 1st Circuit Court of Appeal. The 1st Circuit granted LED and LBCI's writ application and reversed the judgment of the board. The 1st Circuit held that the board lacked the subject matter jurisdiction to determine the merits of the underlying contract dispute, "particularly considering the tax assessment issued by the Louisiana Department of Revenue is a secondary issue contingent upon resolution of the contract dispute." *Zelia, L.L.C. v. Robinson*, 18-0011 (La. App. 1 Cir. 5/14/18), 2018 WL 2202314. The 1st Circuit denied Robinson's writ application. As a result, Robinson was the only remaining defendant in the action.

Robinson and Zelia then filed cross motions for summary judgment. Robinson's motion argued that, absent jurisdiction over the underlying contractual dispute, the sole remaining issue as to the correctness of the assessment was whether Robinson received notice from the LED that the EZ contract had been cancelled. Robinson asserted that, upon receipt of such notice, the Department of Revenue was statutorily required to recoup the ITC under La. R.S. 51:1787(1). If that argument was accepted, the only matter left for review would be the correctness of the computation of the liability on the assessment. If no error was found, Robinson argued the board must render summary judgment in her favor. Zelia disagreed and argued that the board still had jurisdiction over the contract dispute as it relates to Robinson.

In reliance on the 1st Circuit's ruling, the board held its jurisdiction extended only to reviewing the propriety of Robinson's actions in issuing the assessment. The board rejected Zelia's argument that Robinson had to make her own determination as to whether the LED properly cancelled the EZ contract. The board held Robinson had a mandatory duty to issue the assessment pursuant to La. R.S. 51:1787(I).

The board found the assessment was proper under the law and factually correct with respect to the computation of liability. The board granted Robinson's motion for summary judgment and denied Zelia's cross motion for summary judgment.

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3rd Circuit Affirms BTA Ruling

Avanti Exploration, L.L.C. v. Robinson, 18-0750 (La. App. 3 Cir. 4/17/19), 268 So.3d 1093.

In this case, Louisiana's 3rd Circuit Court of Appeal affirmed the Louisiana Board of Tax Appeals' ruling that Avanti, the taxpayer, did not owe additional severance taxes for prior periods and vacating the Louisiana Department of Revenue's challenged assessment.

Avanti produced crude oil from mineral leases and was subject to the severance tax levied under La. R.S. 47:633(7), which bases the tax on the value of the oil at the time and place of severance. The tax is calculated on the producer's gross receipts from sales in an arm's length contract, or by the posted field price, whichever is higher; but if a producer incurs transportation costs in getting its product to market,

it can subtract certain costs and calculate tax on the reduced amount. The court found that there was an arm's length contract, but that no posted field price existed; thus, the case turned on whether taxes were paid on the proper amount of gross receipts.

The pricing formula used in the taxpayer's purchase contracts began with published market-center prices and made adjustments to determine a sales price, including for amounts the purchaser incurred to transport oil derived from the lease. The Department argued that the receipts were improperly reduced by the transportation deduction in La. R.S. 47:633(7)(a), as the producer had borne no transportation costs. The court found, however, that the price adjustment did not relate to the *producer's* transportation costs, but the *purchaser's*, which, as "an element of the negotiated price of the oil in an arm's length transaction . . . appears as just another fluctuating overhead expense in the cost of doing business." *Id.* at 1098. The court described the Department's argument, that it could properly add back the costs for transportation, as "attenuated" before ultimately ruling that taxes were paid on the appropriate amount of gross receipts. *Id.* at 1100.

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Is Canal Servitude Abandoned When Replaced with Underground Pipeline?

In *Clement v. Menard*, 18-0497 (La. App. 3 Cir. 5/1/19), ____ So.3d ____, 2019 WL 1930115, the 3rd Circuit addressed whether a canal servitude was abandoned when it was filled and replaced with an underground pipeline.

The Menards' ancestor in title, Marcel Guidry, in an agreement in 1952, "granted to Willie Clement, his heirs, and his assigns, a twenty-four-foot predial servitude/right-of-way for an irrigation canal across his property." The agreement was properly recorded. In 1997, the Clements installed an irrigation pipeline in the same location as the open irrigation canal and filled the canal. The Menards purchased the property in 1998. The sale transferred all rights, subject to any easements or rights-of-way, but did not specifically disclose the underground pipeline. When the irrigation pipeline needed repairs, the Menards prevented those repairs, resulting in the Clements' lawsuit. The trial court granted the Clements' temporary restraining order for 10 days on June 22, 2017. The Menards opposed the injunction, alleging that the irrigation canal was abandoned in 1997 when it was replaced with an underground irrigation system. The Menards also asserted there was no mention of the pipeline in the act of sale, and a 1997 survey attached to the cash sale did not indicate the presence of the pipeline on the Menard property. The trial court ruled in favor of the Clements.

When a servitude is established by title, the use and extent of the servitude is regulated by the title that created it. Since the 1952 agreement provided for an "irrigation canal," the issue on appeal was whether that included an underground irrigation pipeline. The Menards argued the 1952 agreement established a right-of-way for an apparent servitude only and that the nature of the servitude had been changed to a non-apparent servitude. The Clements argued that the underground pipeline was permissible because it served the same purpose, irrigation. The Louisiana Civil Law Treatise states the "owner of the dominant estate may not unilaterally change the nature of a servitude, its location, or its purpose."

The trial court concluded that the term "irrigation canal" encompassed a subsurface pipe for agricultural irrigation. Although the underground pipeline changed from an open canal to a subsurface pipe, the irrigation canal was consistently used for irrigation for many years. However, the appellate court reversed the trial court's ruling, finding in favor of the Menards, holding (1) the 1952 agreement described only an apparent servitude because the agreement required that Willie Clement maintain the canal levees; (2) the Clements unilaterally changed the nature of the servitude; and (3) when the Clements filled in the canal, they ceased using the apparent servitude.

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INDEX TO ADVERTISERS

Admiralty Symposium 85
Joseph G. Albe, Jr. 158
D. Wesley Attaway 159
Bourgeois Bennett 130
Broussard & David .... OBC
Christovich & Kearney, L.L.P. 125
Complex Litigation Symposium 121
Expert Communications 159
Robert G. Foley 158
Chad M. Garland, CPA, LLC 81
Gilsbar, Inc. .... 99, IBC
J. Chris Guillet 137
International Maritime Consultancy 139
LaPorte, CPAs and Business Advisors 115
LawPay 82
Legier & Company, apac .... IFC
Louisiana Association for Justice 119
Louisiana National Guard Foundation 128
MAPS, Inc. 143
J. Price McNamara Law Offices 133
National Academy of Distinguished Neutrals 141
The Patterson Resolution Group 129
Schiff, Scheckman & White, L.L.P. 126
Stanley, Reuter, Ross, Thornton & Alford, L.L.C. 127
St. Thomas More Catholic Lawyers Association 135
Taggart Morton, L.L.P. 159
Upstate Mediation Group 131
The Write Consultants 159