



Disclosure of Labor Rates by Contractor Employees Does Not Necessarily Violate PIA

AlliantCorps, L.L.C., B-415744.2 (Apr. 4, 2018), 2018CPD ¶ 118. (Accessed at: <https://www.gao.gov/products/B-415744.2>.)

AlliantCorps, L.L.C. (Alliant) protested the corrective action taken by the Department of the Navy in response to Alliant's earlier protest of the award of a \$62.9 million task order, No. N61340-18-F-0018, to DKW Communications, Inc. under the General Services Administration Alliant Small Business Government-wide Acquisition Contract for software-maintenance services on naval-pilot-training simulation systems at the Government Accountability Office (GAO). In its protest, Alliant primarily alleged that DKW improperly received Alliant's bid and proposal information, which resulted in a violation of the Procurement Integrity Act (PIA), 41 U.S.C. §§ 2101–2107.

For a discussion on what is a bid protest and corrective action, see Bruce L. Mayeaux, "Corrective Action, Presumption of Good Faith, and Speculation at the GAO," Vol. 65, No. 6, La. B.J. 418.

The Competition and the Email

On June 22, 2017, the Navy issued the subject task-order solicitation. Both Alliant (incumbent) and DKW submitted offers by the proposal due date. On Nov. 14, 2017, the Navy made an initial award to DKW. Shortly thereafter, DKW informed Navy

personnel in an email that Alliant employees working under the incumbent contract could apply to work on the new contract using an emailed link.

After being informed it was not selected for the award, Alliant requested a debriefing, which was conducted on Nov. 28, 2017. After the debriefing, the Navy forwarded the DKW email to Alliant employees working on the incumbent contract. The email contained the following: "For immediate action!!!! Hopefully [another individual] already gave [the DKW employment application electronic link] to you or [the] company did." The next day, Alliant filed a post-award protest at the GAO challenging the Navy's past performance evaluation. In response, the agency requested the GAO dismiss this protest because of a proposed corrective action of amending the solicitation, re-evaluating proposals and making a new award decision; the GAO did so dismiss. *See, AlliantCorps, L.L.C.*, B415744, Dec. 7, 2017 (unpublished).

On Dec. 8, 2017, Alliant notified the Navy of an alleged violation of the PIA. In its notice, Alliant asserted that "direct labor rates and cost or pricing data that form the basis for Alliant's proposal (indeed they are included in the proposal) have improperly been furnished to DKW at the direction of the [Navy], and DKW has knowingly obtained bid and proposal information in violation of the [PIA]." *See, AlliantCorps, L.L.C.*, B-415744.2 (Apr. 4, 2018), 2018CPD ¶ 118 at 3. Essentially, Alliant's employees working on the current contract applied for new positions with DKW and in that process disclosed their labor rates.

On Jan. 23, 2018, the Navy finally amended the solicitation and set the new proposal due date for Feb. 2, 2018. On Feb. 1, 2018, Alliant filed its pre-award protest contesting the Navy's corrective action and asserting its PIA allegations. In reply, the Navy requested the GAO dismiss the protest as being legally and factually insuf-

ficient and untimely. While Alliant alleged multiple protest grounds, its PIA allegation stands out.

Procurement Integrity and Contractor Employees

The initial question before the GAO was whether the agency's emails encouraging Alliant employees to apply for positions with DKW — inevitably resulting in the discovery of Alliant's direct labor rates and cost and pricing data — violated the PIA. In rendering its decision, the GAO primarily relied on the procurement-integrity prohibitions within the PIA — specifically, that a federal government official "shall not knowingly disclose contractor bid or proposal information or source selection information before the award of a Federal agency procurement contract to which the information relates." 41 U.S.C. § 2102(a)(1).

In its protest, Alliant reasserted the allegation it proffered to the Navy on Dec. 8, 2017, and explained that "because the communication from the [Navy to incumbent contractor personnel] said that it was for immediate action and had four exclamation points, virtually all incumbent personnel immediately signed up and divulged their salary information to DKW;" thus, DKW had such data when it resubmitted its proposal during the corrective action, which violated the PIA. *See, AlliantCorps, L.L.C.*, B-415744.2 at 4.

In its decision, the GAO noted that generally the relevant PIA prohibition applies to anyone who is a current or former member of the federal government and is acting for or on behalf of a federal agency procurement. *See*, 41 U.S.C. § 2102(a)(3)(A). The GAO contrasted that with this protest in which the incumbent contractor employees — not government officials — provided their own salary information to DKW. *See, AlliantCorps, L.L.C.*, B-415744.2 at 4. The GAO found the prohibition did not ap-

ply to the incumbent contractors and, therefore, Alliant's allegations did not describe a violation of the PIA.

The GAO's bid-protest regulations require that a protest ground must (1) include a sufficiently detailed statement of the grounds supporting the protest allegations, and (2) establish a reasonable potential that the protester's allegations may have merit. See 4 C.F.R. §§ 21.1(c)(4), 21.1(f), 21.5(f); *Ahtna Facility Servs., Inc.*, B-404913, June 30, 2011, 2011 CPD ¶ 134 at 11. In dismissing the protest ground, the GAO reasoned that "because the incumbent contractor employees are not prohibited from disclosing their own salary information, the protest [ground] lack[ed] a sufficient factual basis to support a claim of a violation of the [PIA]."

Incumbent contractors should consider how the GAO applies the PIA in this situation when developing non-disclosure agreements (NDA) with their employees. Absent an NDA, or positive direction from an agency for an employee to "act on its behalf" in regard to a procurement, the common practice of post-award acceptance of job applications may disclose cost or pricing data to which the aggrieved contractor may have no recourse under the GAO's bid-protest regulations.

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

—**Bruce L. Mayeaux**
Major, Judge Advocate
U.S. Army
Member, LSBA Administrative
Law Section



Mobile Home Costs

21st Mortg. Corp. v. Glenn, 900 F.3d 187 (5 Cir. 2018).

Should the cost of delivery and set up of a mobile home be included in the home's value for purposes of confirming a Chapter 13 plan? 21st Mortgage financed Glenn's purchase of a used mobile home. The base price of the home included the cost of delivery and set up. When Glenn filed for Chapter 13 protection under the Bankruptcy Code, 21st Mortgage filed a claim secured by the value of the mobile home.

Under Glenn's proposed plan, she would retain the home and pay 21st Mortgage the secured value (*i.e.*, the value of the home) plus 5 percent interest. 21st Mortgage objected to the plan, claiming that the value Glenn provided for the home did not include the value of delivery and set up, which 21st Mortgage claimed must be included under 11 U.S.C. § 506(a)(2).

Section 506(a)(2) provides that the value of property in a Chapter 13 case means the replacement value of the property "without deduction for costs of sale or marketing." 11 U.S.C. § 506(a)(2). 21st Mortgage argued that because the cost of delivery and set up of the mo-

bile home in question was included in the base price when Glenn purchased the home, it fell under the category of costs of sale or marketing and could not be deducted from the home's value. Both the bankruptcy court and the district court disagreed. They considered the Supreme Court's decision in *Associates Commercial Corp. v. Rash*, 117 S.Ct. 1879 (1997), and the language in Section 506(a)(1), which states that the proposed disposition or use of the property should be taken into account when valuing property. Glenn was keeping the home and would not have to pay the delivery and set up fees again, and thus such costs should not be considered a cost of sale or marketing.

The Supreme Court in *Rash* held that creditors are not entitled to receive value for items that the debtor does not receive when he retains the property "such as warranties, inventory storage, and reconditioning." The 5th Circuit held that costs of sale or marketing means the repeat costs of doing business, such as storage and restocking fees, but does not include the cost of delivery and set up because those costs are completed service charges that will not be repeated, especially in a case where the debtor is retaining the property. The 5th Circuit, therefore, upheld the district court and ruled, as every other court who has faced this issue has, that the costs of delivery and set up of a mobile home are not included in the value of a mobile home for purposes of a Chapter 13 plan.

Mineral Lease

Fallon Family, L.P. v. Goodrich Petroleum Corp., 894 F.3d 192 (5 Cir. 2018).

Fallon stems from a 1954 mineral lease between the Fallon Family's predecessor in interest, as lessor, and Goodrich, as lessee. In 2012, the Fallon Family sought to terminate the lease because Goodrich had ceased continuous operations. In October 2014, the Fallon Family recorded notices of lis pendens in both parishes encompassing the leased premises. Four days later, the parties agreed to settle the dispute and signed a



THE NATIONAL ACADEMY OF
DISTINGUISHED NEUTRALS

LOUISIANA CHAPTER

www.LouisianaMediators.org

Check your preferred available dates or schedule appointments online,
directly with top litigator-rated mediators and arbitrators.

To view our national roster of widely-respected neutrals, please visit www.NADN.org/directory

settlement agreement.

Under the agreement, Goodrich made a one-time payment of \$650,000 and gave the Fallon Family a \$1,000,000 promissory note to be paid in \$100,000 bi-annual installments. Having resolved the dispute over the lease, the parties filed a lease ratification that stated:

“NOW, THEREFORE, for the promises and covenants exchanged below, and other good and valuable consideration exchanged by the Parties on or near this date, *the receipt and sufficiency of which is hereby acknowledged*, the Parties agree to [the listed promises and covenants].” *Id.* at 196 (emphasis added).

The ratification went on to provide that the lease was affirmed, ratified and in full force and effect. Neither the settlement agreement nor the promissory note was mentioned.

Goodrich made one payment on the promissory note but failed to make the second payment and filed for protection under Chapter 11 of the Bankruptcy Code.

In bankruptcy, the Fallon Family sought to dissolve the settlement agreement because of Goodrich’s failure to make payments on the promissory note, which would allow the Fallon Family to terminate the lease and, presumably, lease it to another interested party. Goodrich took the position that Section 544 of the Bankruptcy Code, which provides a debtor-in-possession with the same powers as a hypothetical bona fide purchaser of real property as of the petition date, allowed Goodrich to avoid the settlement agreement as a bona fide purchaser of the lease, “strong-arming” the Fallon Family into continuing the lease despite the breach. The bankruptcy court and the district court allowed Goodrich to avoid the settlement agreement.

The 5th Circuit ruled that because the lease ratification stated that the lease

was in full force and effect and that consideration for the lease ratification had been fully paid, Goodrich, wearing the hat of a third party, could rely on the absence of any indication in the public record that the lease’s continuing viability was dependent on payment under the promissory note. Because the lease ratification showed consideration was paid, the Fallon Family could not dissolve the settlement agreement. Instead, it had a \$900,000 unsecured claim against Goodrich and could not terminate the lease.

—Cherie D. Nobles
and

Michael E. Landis
Members, LSBA Bankruptcy
Law Section
Heller, Draper, Patrick, Horn
& Manthey, L.L.C.
Ste. 2500, 650 Poydras St.
New Orleans, LA 70130

Bourgeois Bennett

CERTIFIED PUBLIC ACCOUNTANTS | CONSULTANTS
A LIMITED LIABILITY COMPANY

WHEN YOUR CASE
INVOLVES NUMBERS,

SEE HOW MUCH
WE CAN ADD.

While we are known as an accounting firm that is an important resource to many of the area’s top companies, we are also recognized as a valuable asset to some of the top law firms. We have done this by adding specialized litigation support including financial damage analysis, discovery assistance, business valuations and commercial litigation to the services we offer. To add even more value to our clients, we also offer expert testimony, class action administration and even forensic accounting. Call today and see first hand what we can offer to you and your clients.

bourgeoisbennett.com

New Orleans 504.831.4949 | North Shore 985.246.3022 | Houma 985.868.0139 | Thibodaux 985.447.5243



Wall v. Bryan: When Are Discounts Appropriate in Valuation?

In the 2nd Circuit's opinion in *Wall v. Bryan*, 52,165 (La. App. 2 Cir. 6/27/18), 251 So.3d 650, the court grappled with the collective interpretation of successive contracts and the propriety of discounting the value of a minority interest in a limited-liability company. On the latter issue, the 2nd Circuit was forced to confront and distinguish a recent holding by the Louisiana Supreme Court.

In *Wall*, a minority owner of a lim-

ited-liability company operating an ambulatory-surgery center (the LLC), a doctor, was forced to sell his interest in the LLC. Prior to the lawsuit, the doctor and the other members of the LLC entered into a series of agreements — the original operating agreement, the agreement in principle, and the settlement agreement. All three agreements dealt with the doctor's association with, and ultimate departure from, the LLC. While the first two agreements provided a method for valuing the departing member's interest, the third agreement lacked such an explicit valuation method.

When there is no agreement between the members of a limited-liability company on the valuation of a departing member's interest, La. R.S. 12:1325(C) requires that a member be paid the "fair market value" of his or her interest. The lower court and the 2nd Circuit were faced with determining whether a contractual-valuation method existed in the

series of agreements and, if not, what constituted the fair market value of the doctor's interest.

With regard to the first issue, the lower court and the 2nd Circuit agreed that the settlement agreement controlled. In reading the settlement agreement, the court found that the plain language of its merger-and-integration clause was persuasive. It read, in part: "This Agreement supersedes all prior understandings, negotiations, and agreements between and among the parties." The LLC attempted to overcome this reading by pointing out that the settlement agreement included a section regarding referral documents as well as a single reference to the agreement in principle.

However, the court did not find this argument persuasive, noting that no referral documents were attached to the settlement agreement and that the agreement in principle was merely an agreement to agree and did not bind the parties. In support of this finding, the court looked to the plain language of the agreement in principle, which stated that it was "subject to the reduction to writing of the final agreements." Accordingly, the settlement agreement superseded the two prior agreements between the parties and would serve as the controlling agreement for the remaining issues.

Because the settlement agreement lacked a specific contractual method for valuing the doctor's non-controlling interest, the court used La. R.S. 12:1325(C). Under the statute, if a method of valuation is not provided in a written operating agreement, a withdrawing member of a limited-liability company is entitled to receive "the fair market value of the member's interest as of the date of the member's withdrawal or resignation."

The valuation of the doctor's interest in the LLC hinged on the two parties' competing experts and the applicability of discounts on the value of the interest. The court took particular note of the definition of fair market value put forth by the LLC's expert and taken from the International Glossary of Business Valuation Terms. This definition of fair market value contemplates the cash

MEDIATION ARBITRATION

maps

PROFESSIONAL SYSTEMS, INC.

LEADER IN RESOLUTION



Roger Javier
Louisiana Mediator

Make The Most Of Your Time

LET *Roger* HELP YOU RESOLVE YOUR CASES

- Personal Injury
- Premises Liability
- Workers Comp.

Call mapsToday!

800.443.7351 • www.maps-adr.com • resolutions@maps-adr.com

price that would change hands between a hypothetical buyer and hypothetical seller who possess reasonable knowledge of the facts. Further, the court was persuaded that the fair market value of the non-controlling interest required the application of minority discounts and lack-of-marketability discounts.

The LLC's expert admitted, however, that because the interest was to be purchased by the existing members of the LLC, there would normally be a departure from the actual fair market value. As a practical matter, there was not a hypothetical buyer out in the market, but a specific buyer. Regardless, fair market value was the standard required by La. R.S. 12:1325(C), and the prevailing definition of fair market value required the application of discounts.

In order to affirm the lower court and apply the discounts, the 2nd Circuit had to confront *Cannon v. Bertrand*, 08-1073 (La. 1/21/09), 2 So.3d 393. *Cannon* is a Louisiana Supreme Court case involving similar facts (*i.e.*, the remain-

ing stakeholders buying shares from a withdrawing stakeholder). In *Cannon*, the Supreme Court found that "[m]inority discounts and other discounts, such as for lack of marketability, may have a place in our law; however, such discounts must be used sparingly and only when the facts support their use." *Id.* at 396. According to the 2nd Circuit, *Cannon* did not serve as a universal bar to the application of discounts, despite its broad language. In fact, *Cannon* did not serve as a bar against discounts in this facially similar case.

The 2nd Circuit's logic can be summarized as follows: In *Cannon*, the entity involved was a limited-liability partnership. The value to be paid for a departing partner's interest is controlled, in part, by La. Civ.C. art. 2328. That specific article uses the term "value" but does not define the term any further. Because the term value is explicitly used but also undefined, the interpreting court can read value in that context to mean a host of different values, such as

book value or fair market value. *Wall*, on the other hand, involved a limited-liability company that was subject to La. R.S. 12:1325(C), which explicitly requires the payment of fair market value, and the 2nd Circuit determined that discounts were applicable to fair market value determinations.

In valuing the interest of a departing stakeholder, the courts will not apply a one-size-fits-all approach. The courts will look to the plain language of the agreements between the parties and the statutes or code articles that are applicable to the particular type of entity. A valuation of the interest by the courts will then proceed according to the language and requirement of these writings.

—**Luke D. Whetstone**

Member, LSBA Corporate
and Business Law Section
Cook, Yancey, King
& Galloway, A.P.L.C.
P.O. Box 22260
Shreveport, LA 71120



THESE EYES HAVE IT



PLASTIC SURGERY
ASSOCIATES

Both plaintiff and defense lawyers respect Dr. Darrell L. Henderson. With more than 45 years of reconstructive and plastic surgery. This surgeon has the skill and expertise to consistently deliver positive clinical and expert legal advice. All of this adds up to give your client the legal edge.

While legal expertise is important, patients can rest assured they are getting highly advanced medical expertise as well. Combining the knowledge to heal with the compassion to comfort, patients know their future is a genuine concern and always at the forefront.

1101 S. College Rd.
Suite 400
Lafayette, LA 70503
337.233.5025
www.psassoc.com
psalegal@hpyday.com



Remand to Begin Again

Vintage Assets, Inc. v. Tenn. Gas Pipeline Co., L.L.C., No. 18-30688, Doc. No. 00514665708 (5 Cir. 10/3/18).

The U.S. 5th Circuit Court of Appeals recently issued an order of note in the long-running litigation, *Vintage Assets, Inc. v. Tennessee Gas Pipeline Co., L.L.C.* This case, originally filed in state court in 2015, arises out of claims against various companies who have, at some time, been involved in certain pipeline construction activities in Plaquemines Parish. The Eastern District of Louisiana concisely summarized the nature of the action thusly:

Between 1953 and 1970, Defendants' predecessors received multiple right-of-way servitudes on Plaintiff's property, which authorized the construction and operation of pipelines and dredge canals. Defendants have dredged canals and laid pipelines pursuant to these agreements. Plaintiff al-

leges that its property has suffered damage because of Defendants' failure to maintain the pipeline canals and banks. Plaintiff alleges that this failure has caused ecological damages and loss of acreage due to erosion.

Vintage Assets, Inc., 2016 U.S. Dist. LEXIS 97467, *2.

In May 2018, Judge Milazzo in the Eastern District issued her findings of fact and conclusions of law that, while doing away with several of the plaintiffs' claims, found in their favor for some of the erosion damages caused by questionable maintenance of pipeline rights-of-way and dredged canals. *Vintage Assets, Inc.*, 2018 U.S. Dist. LEXIS 75736, *15-16.

On appeal, the 5th Circuit, in an order on July 30, 2018, directed the parties to brief the issue of whether the federal court system even had subject matter jurisdiction over the current suit. In the order handed down on Oct. 2, 2018, the 5th Circuit court upended the bench trial at the district court not on substantive grounds, but rather found that no subject matter jurisdiction existed in the federal system and that the case should be remanded to the 25th Judicial District Court for Plaquemines Parish.

The practical effect of such an outcome was the vacating of the federal

district court's merits decision. The basis for the lack of subject matter jurisdiction in this case related to the 5th Circuit's suspicion that there was a lack of diversity in a matter removed originally from the state court system solely on diversity grounds. The plaintiffs in this case were undisputedly Louisiana citizens. At first blush, it appeared that the defendants were all citizens of other states, thus meeting the diversity of citizenship requirement to invoke federal court jurisdiction. However, upon closer examination, it was determined, as the court suspected, that some of the defendants — namely, High Point Gas Transmission, L.L.C., and High Point Gas Gathering, L.L.C. — were entities held by a limited partnership, the latter of which was composed of at least one Louisiana partner.

Pursuant to federal jurisprudence, citizenship of partnerships depends on the citizenship of their individual partners. With a single partner of the parent entity to these two defendants being a citizen of Louisiana, complete diversity did not exist, and the federal court lacked subject matter jurisdiction. The practical result of this outcome is that, due to lack of jurisdiction, all of the subsequent proceedings, including the bench trial of this matter, were null *ab initio*. From a decision on the merits in this matter, the litigants must now reboot the entire case



Ronald E. Corkern, Jr.



Brian E. Crawford



Steven D. Crews



Herschel E. Richard



Joseph Payne Williams



J. Chris Guillet

UPSTATE MEDIATION GROUP

Resolving Disputes in Central and North Louisiana

NOW with reduced travel rates.

Panel experience in personal injury, insurance, medical malpractice, construction law, commercial litigation, real estate litigation and workers' compensation.

To schedule a mediation with Brian Crawford, please call Faye McMichael at 318-807-9018 or email Faye at Faye@bcrawfordlaw.com. For other panelists, please call Kathy Owsley at the Natchitoches location (318-352-2302 ext. 116) or email Kathy at knowsley@ccglawfirm.com.

in the state court system.

To the extent that there is a lesson to take from the *Vintage Assets* case, it is that initial discovery upon removal to federal court must include inquiries into the detailed corporate structure and history of each of the defendants. In the event that any non-diversity is identified through this discovery, the parties should immediately file a motion to dismiss for lack of subject matter jurisdiction. The risk of missing such details represents a significant drain on both litigants and the judicial system. For now, the determination of whether or how much liability exists for the erosion alleged to have been caused by pipeline construction and canal dredging under the laws of servitude will have to wait for the procedural do-over.

—**Ryan M. Seidemann**
Chair, LSBA Environmental
Law Section
Office of the Attorney General
1885 N. Third St.
Baton Rouge, LA 70802



Community Property

Knowles v. Knowles, 51,872 (La. App. 2 Cir. 2/28/18), 246 So.3d 758.

Although the trial court judge who heard this partition of community property was recused after he rendered judgment, since his former law firm represented Mr. Knowles, the judge to whom the matter was reallocated did not err in denying Mrs. Knowles' motion for new trial because the original trial judge was recused. The appellate court found that, even though the original trial judge was recused, there was no evidence that he was prejudiced or biased at the time he rendered the judgment. Moreover, most of the items addressed in the judgment were by consent of the parties. Moreover, the new judge "presided

over a form and content hearing," in which Mrs. Knowles' counsel acknowledged that the judgment accurately represented the judgment issued by the initial judge.

The motion for new trial was also properly denied because the judgment was in accordance with the parties' agreement. Further, claims for reimbursement had been heard by the court, and Mrs. Knowles had waived her complaints by not raising them at the "form and content" hearing. Regarding other errors she assigned, she also failed to raise those at the form and content hearing and thus could not do so for the first time on appeal. The appellate court also found that the trial court did not err in granting Mr. Knowles a reimbursement claim based on his testimony alone, with no supporting documentation, because the court had also awarded Mrs. Knowles a similar reimbursement claim for which the only proof was a credit card bill with no evidence of payment. The court found that the trial court could award the reimbursement claims based on the parties' testimony and its credibility determinations alone.

SMITH & FAWER LLC

A T T O R N E Y S A T L A W

Representing Landowners and Businesses for over
20 years in Expropriation, Appropriation and
Condemnation matters throughout Louisiana



201 St. Charles Ave. Suite 3702 New Orleans LA, 70170 • 504/525-2200 • smithfawer.com

Patterson v. Patterson, 51,929 (La. App. 2 Cir. 5/23/18), 247 So.3d 1148.

Ms. Patterson claimed that she did not see or read this pre-marital agreement, prepared by Mr. Patterson's attorney, until two days before their wedding, and that she did not intend to, nor could she because of shareholder-transfer restrictions, transfer her separate interest in a corporation to the community, so as to make it community property. The court found that the "conversion clause" was readily apparent, and that she should have been aware of it, and that the corporation was not listed on the attached schedule, which reserved certain items as separate property. Regarding the stock-transfer restriction, because she did not actually transfer ownership of the shares of stock itself to him, but, rather, only changed the classification, the agreement was sufficient to make the entity community property. Moreover, her signing the matrimonial agreement would have been a waiver of the stock-transfer restrictions. The court resolved the conflicts in testimony between her, Mr. Patterson, Mr. Patterson's attorney who prepared the document, and her former attorney, in favor of Mr. Patterson. Because the court found the agreement to be a contract, not a donation, it was not subject to revocation for ingratitude. The contract was not also voidable as being unconscionable on the basis of converting their separate property to community property but retaining their separate debts as separate.

Mendoza v. Mendoza, 17-0070 (La. App. 4 Cir. 6/6/18), 249 So.3d 67, writ denied, 18-1138 (La. 8/31/18), 251 So.3d 1083.

Although Ms. Mendoza filled out and applied for Road Home grant money on her own regarding the former community property home, which had not been partitioned, and of which she had an order of use and occupancy, the funds were, nevertheless, community funds, and she was not entitled to reimbursement for using those funds to repair the home after Hurricane Katrina. There were two dissents that would have found that the Road Home money was her separate property, as the community was terminated and the funds were obtained post-termination.

Interim Spousal Support

King v. King, 51,942 (La. App. 2 Cir. 4/11/18), 247 So.3d 973.

Although the evidence showed that Ms. King had begun cohabitating with another man prior to the parties' physical separation, she was, nevertheless, entitled to an award of interim spousal support from the date of demand through the date of judicial determination of cohabitation. Mr. King argued that she should be entitled to no interim spousal support as she was cohabitating prior to the filing of the petition for divorce. The trial court did not err in setting the amount of the award, as it was significantly less than the parties' lifestyle expenses. Moreover, he was entitled to certain offsets for direct payments he had made, which reduced the amount of support to be paid to her. She was not entitled to a cash allowance for fuel expenses and automobile insurance, as he had paid these. His claim that her award should be reduced for expense sharing

was rejected, as expense sharing is a child support, not a spousal support, concept. In any event, she would have had the same expenses, regardless of contributions from her cohabitor.

Custody

Mercer v. Mercer, 52,101 (La. App. 2 Cir. 4/11/18), 249 So.3d 924.

The court of appeal affirmed the trial court's judgment modifying a prior considered decree of custody to divide time equally between the parties on alternating two-week periods and changing the domiciliary-parent designation from the mother to the father. The child was 4 months old when the first judgment was rendered, and he was now 9 years old. Moreover, Mr. Mercer had remarried and had established a stable relationship, including the birth of another child with his second wife. The mother's living arrangements were not as stable. The parties' child would also be able to attend school with and spend more time with his half-brother. The dissent argued that the *Bergeron* standard had not been overcome.

—David M. Prados

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

Provosty, Sadler & deLaunay, APC

934 Third Street, Suite 800, Post Office Box 13530

Alexandria, Louisiana 71315

Direct Line: (318) 767-3197

jstandley@provosty.com

www.provosty.com

James W. "Jim" Standley, IV, former Disciplinary Counsel prosecutor (2009-2016), offers advice and counsel regarding legal ethics as well as defense of lawyers subject to disciplinary proceedings.

ANSWERS for puzzle on page 283.

1	I	L		B	L	A	C	K	B	A	Y	O	U
2	E	Y	E		E		A		L		A		N
3		E	C	L	A	I	R		A	C	N	E	D
4	B		R		D		F		C		K		E
5	L	S	U		B	L	A	C	K	B	E	A	R
6	A				Y		X		B		E		W
7	C	R	O	F	T	S			C	A	E	S	A
8	K		R		H		T		L				I
9	W	H	I	T	E	W	A	L	L			N	O
10	I		G		N		T		I		O		E
11	D	R	A	N	O			T	E	N	N	I	S
12	O		M		S		O		G		R		U
13	W	H	I	T	E	H	O	U	S	E		P	G



Materialman's Claim Against General Contractor and Surety on a Bond Under La. R.S. 38:2247

Amtek of La., Inc. v. Woodrow Wilson Constr., L.L.C., 17-1156 (La. App. 1 Cir. 8/6/18), ____ So.3d ____, 2018 WL 3719719.

A materialman to a site-work subcontractor, on a public project, alleged that it was not paid in full by the general contractor, pursuant to a joint-check agreement.

The materialman made 10 deliveries of materials to the subcontractor, from March 25, 2014, to June 11, 2014. It was undisputed that the materials were delivered, received in "good condition" and installed into the project. It was further undisputed that the materialman billed the general contractor for the materials, the general contractor billed the public owner for the materials, and the public owner fully paid the general contractor for the materials.

At some point during the project, a dispute arose between the general contractor and the subcontractor. It was undisputed that the general contractor, its surety and the subcontractor made no payments to the materialman for the materials provided. Accordingly, the materialman transmitted to the general contractor notice of nonpayment via certified mail on Oct. 29, 2014, which was 121 days from the last day of the month in which the materials were delivered.

A certificate of substantial completion for the project was recorded on Dec. 2, 2014. Thirty-three days thereafter, on Jan. 5, 2015, the materialman filed a statement of claim, alleging it was owed for the materials it supplied on the project. Also on Jan. 5, 2015, the materialman

transmitted, via certified mail, notices of filing its statement of claim as well as demand letters to the public owner, the general contractor and the surety.

Thereafter, the parties filed various petitions, reconventional demands and cross claims. Following a bench trial solely on the materialman's claims against the general contractor, the surety and the subcontractor, the trial court rendered judgment in favor of the general contractor and surety and against the materialman. The trial court found that no notice was given to the general contractor by the materialman that the subcontractor had defaulted on its payment obligations "until after a lapse of time for issuing a notice of nonpayment," and, therefore, the general contractor and the surety had no obligations to pay the subcontractor's debt to the materialman. Nevertheless, the trial court found that the materialman was entitled to recover from the subcontractor for the amount of the unpaid invoices. The materialman appealed the trial court's dis-

missal of its claims against the general contractor and the surety under La. R.S. 38:2242 (B) and La. R.S. 38:2247.

Public construction contracts are governed by the Louisiana Public Works Act (LPWA), La. R.S. 38:2241, *et seq.*, which provides the exclusive remedies arising out of a public work. The court of appeal noted the following notice requirements found in the LPWA:

► La. R.S. 38:2242(B) provides that a claimant may file a sworn statement of the amount due after the maturity of his claim and within 45 days after the recodation of acceptance of the work by the governing authority or of notice of default of the contractor or subcontractor.

► La. R.S. 38:2242(F) provides that prior to filing a lien or privilege, a materialman must give written notice of nonpayment via certified mail to the general contractor and owner within 75 days from the last day of the month in which the materials were delivered.

► La. R.S. 38:2247 provides that a claimant not in privity of contract with

ROY A. RASPANTI
Attorney and Counselor at Law

CIVIL MEDIATOR

\$275 Per Hour

NO ADMINISTRATIVE FEE

Member of the LSBA since 1975
Member of LSBA House of Delegates since 2000

110 Veterans Blvd. Suite 360 Metairie, LA 70005
(504) 835-5388

raz2050@aol.com

www.RoyRaspanti.com

the general contractor must, in addition to the notice and recordation requirements of La. R.S. 38:2242(B), give written notice via certified mail to the contractor within 45 days from the recordation of the notice of acceptance by the owner of the public work in order to bring an action on the bond.

The court of appeal noted that in *Pierce Foundation, Inc. v. Jaroy Constr., Inc.*, 15-0785 (La. 5/3/16), 190 So.3d 298, 304, the Louisiana Supreme Court explained that the plain language of La. R.S. 38:2242(B) and La. R.S. 38:2247 conflict. The court in *Pierce Foundation* interpreted the statutes to provide that where a claimant fails to comply with the notice and recordation requirements of La. R.S. 38:2242(B), the claimant loses his privilege against the funds in the hands of the public authority; however, the failure to comply with La. R.S. 38:2242(B) does not affect the right of the claimant, *in contractual privity with the contractor*, to proceed directly against the contractor and its surety on the bond pursuant to La. R.S. 38:2247.

It was undisputed that the material-

man timely filed its statement of claim pursuant to La. R.S. 38:2242(B) but did not timely give written notice of non-payment within 75 days from the last month in which materials were delivered in accordance with La. R.S. 38:2242(F). The issue before the court of appeal, then, was whether the LPWA requires a materialman to comply with La. R.S. 38:2242(B) and La. R.S. 38:2242(F) in order to file an action against the general contractor and surety on the bond, as set forth in La. R.S. 38:2247.

The court of appeal concluded that “[b]ased upon a plain reading of La. R.S. 38:2242(B) and La. R.S. 38:2242(F), a materialman’s failure to provide the 75-day notice of nonpayment to the general contractor and owner results *only* in the materialman’s loss of the right to file a privilege against the unexpended funds in the hands of the public entity.” (Emphasis added.) The court noted, “Aside from the mention of La. R.S. 38:2242(B), La. R.S. 38:2247 contains *no mention* of La. R.S. 38:2242(F)’s materialman claimant 75-day notice of nonpayment requirement.” Extending the Supreme Court’s holding in *Pierce Foundation*, the court found that a materialman’s failure to comply with La. R.S. 38:2242(F) does not affect the right of the materialman to proceed directly against the contractor and the surety on the bond pursuant to La. R.S. 38:2247 provided that the materialman gave the 45-day notice set forth therein.

Accordingly, the court held that the materialman had preserved its right of action on the bond against the general contractor and the surety. The court reversed the trial court’s dismissal of those claims and remanded for further proceedings.

—**Benjamin R. Grau**

Member, LSBA Fidelity, Surety and Construction Law Section
Simon, Peragine, Smith & Redfearn, L.L.P.
1100 Poydras St., 30th Flr.
New Orleans, LA 70163



Insurance: Crown Zellerbach Clause

SCF Waxler Marine, L.L.C. v. Aris M/V, 902 F.3d 461 (5 Cir. 2018).

Two towing vessels, the *Loretta G. Cenac* and the *Elizabeth M Robinson*, were proceeding down the Mississippi River pushing large barge trains when a passing maneuver caused the *Aris T*, moving upriver, to collide with a tank barge in a chain reaction that damaged several vessels and riverside facilities, estimated to exceed \$60 million. Waxler, Valero, Shell and Motiva filed suit against the *Aris T*, who, seeking to limit its liability, filed a Verified Complaint in Limitation under the Limitation of Liability Act, 46 U.S.C. §§ 30501-12, arguing that it was not at fault in the accident.

The vessel most relevant to this appeal — the *Loretta G. Cenac* through its owner — similarly filed a Verified Complaint for Exoneration from or Limitation of Liability, seeking declaratory relief from the district court providing that Cenac was not liable or, if found liable, that its liability be limited to the value of Cenac’s interest in the vessels involved, \$14,602,365 (value of vessels plus freight). A quarrel ensued between the litigants and the excess insurers as to whether the primary P&I policy, issued by the primary insurers and followed by all excess insurers, had language indicating that the insurers could limit their liability to that of the *Loretta G. Cenac*, *i.e.*, whether the P&I policy contained a “Crown Zellerbach clause.” *See, Crown Zellerbach Corp. v. Ingram Indus., Inc.*, 783 F.2d 1296 (5 Cir. 1986).

Valero, Motiva and Shell filed a motion for partial summary judgment to settle the *Crown Zellerbach* issue. The district court denied the motion, concluding that the following provision satisfied *Crown Zellerbach*’s requirements for an

SCHAFER GROUP LTD
Certified Public Accountants

When you need a forensic accountant, call on a professional.

“Knowledge of business, finance and accounting may be needed at any stage of the litigation process. Therefore, we can be an important member of any successful litigation team. From contemplation of action to expert testimony, we can complement attorneys in ways that increase the likelihood of a desired outcome. We can support your litigation efforts to save you time and strengthen your case.”

—Kernion T. Schafer, CPA



SOUTH SHORE AND NORTH SHORE OFFICES

METairie
701 Aurora Avenue • Suite A
Metairie, Louisiana 70005
504.837.6573

MANDeVILLE
435 Girod Street • Suite B
Mandeville, LA 70448
985.626.4066

Forensic Accounting • Emerging Issues • Financial Services
Litigation Services • Legal Services • Emerging Business

insurer to limit its liability:

The Assurer hereby undertakes to make good to the Assured or the Assured's executors, administrators and/or successors, all such loss and/or expense *as the Assured shall as owners of the vessel named herein have become liable to pay and shall pay* on account of the liabilities, risks, events and/or happenings herein set forth . . .

Id. at 464.

Valero, Motiva and Shell timely appealed, asserting the court's jurisdiction to hear the appeal pursuant to 28 U.S.C. § 1292(a)(3), which provides that appellate courts may entertain appeals from a district court's "[i]nterlocutory decrees . . . determining the rights and liabilities of the parties to admiralty cases."

The 5th Circuit was not persuaded, adopting the holding of the 11th Circuit in *Wajnsat v. Oceania Cruises, Inc.*, 684 F.3d 1153, 1155 (11 Cir. 2012):

If, as [the Fifth Circuit in] *Ford Motor Co.* held, a district court does not determine the "rights and liabilities of the parties" when it decides the applicability of a statutory limitation of liability, it also does not determine the "rights and liabilities of the parties" when it determines the applicability of a contractual limitation of liability.

Id. at 467. The court found "no compelling reason to distinguish between a district court's determination of a contractual entitlement rather than statutory entitlement to limit liability" and noted that neither is reviewable on appeal under § 1292(a)(3). Thus, the appeal was dismissed for lack of jurisdiction.

—**John Zachary Blanchard, Jr.**
Past Chair, LSBA Insurance, Tort,
Workers' Compensation and
Admiralty Law Section
90 Westerfield St.
Bossier City, LA 71111



United States-Mexico-Canada Agreement

The U.S. Administration has formally submitted the United States-Mexico-Canada Agreement (USMCA) to Congress for review and vote under Trade Promotion Authority (TPA) legislation. The clock is now running for Congress to review the proposed agreement that replaces the North American Free Trade Agreement. Congress cannot amend the agreement and will hold an up-or-down vote after the statutorily mandated review period ends. The agreement will not likely see a lame duck vote, potentially leaving

it open for a new Congress that may see a different party in the majority.

The following is a brief outline of some of the important parts of the agreement.

► **Intellectual Property:** USMCA contains a 10-year protection period on biological-drug patents, which is an improvement over the Trans-Pacific Partnership Agreement time frame; copyright protection lasts for life plus 70 years; geographical indications receive new procedural safeguards.

► **Currency:** USMCA contains the first ever chapter covering macroeconomic and exchange rate matters, providing a mechanism to address unfair currency practices.

► **Automobile Rules of Origin & Labor-Value Content Rule:** New labor-value content rule requires 40 percent to 45 percent of auto content made by workers earning at least \$16 an hour; agreement also contains a 75 percent originating-value-content requirement for passenger vehicles, light trucks and parts, with 70

DRS

Dispute Resolution Services of LA., L.L.C.

Jim has over 44 years of experience litigating, negotiating and resolving disputes, judicial and non-judicial, including personal injury, commercial, business, medical malpractice, construction, insurance, oil and gas (including legacy litigation), property disputes (including damages), class actions, complex litigation, environmental litigation/claims and general civil litigation.



JAMES P. DORÉ, ESQ.

Mediation, Arbitration
& Special Master

DRSLOUISIANA.COM

CONTACT JIM DORÉ AT 225.937.4825
OR JIM.DORE@DRSLOUISIANA.COM

percent content for steel and aluminum.

► **Digital Trade:** Non-discrimination principles apply to trade in digital products; agreement ensures cross-border data transfer with limits to restrictions on storage and processing of data; limits government's ability to require disclosure of proprietary computer-source codes.

► **Sunset Clause:** The agreement contains a 16-year sunset clause, with mandatory review every six years, after which the parties can decide to extend the agreement.

► **Agriculture:** United States obtains additional market access for dairy, poultry and eggs, along with Canada agreement to eliminate certain programs on milk inputs; Canada obtains greater market access in United States for sugar and sugar-containing products.

► **Investor-State Dispute Settlement:** The controversial investor-state dispute mechanism from NAFTA is phased out between the United States and Canada over three years for existing investments and eliminated for new investments after USMCA enters into force; scope of allowable claims between the United States and Mexico is limited and includes a 30-month local-remedy exhaustion clause.

► **Chapter 19 Dispute Settlement:** USMCA eliminates bi-national panel review for Antidumping and Countervailing duty matters between the United States and Mexico; review remains available between the United States and Canada.

—**Edward T. Hayes**

Chair, LSBA International Law Section
Leake & Andersson, L.L.P.
Ste. 1700, 1100 Poydras St.
New Orleans, LA 70163

How do you address your stress? Don't go it alone.
*Call JLAP,
we'll show you the way.*

**Judges and Lawyers Assistance
Program, Inc. (JLAP)**

Your call is absolutely confidential
as a matter of law.

Toll-free (866)354-9334
Email: jlapp@louisianajlap.com



Employment Arbitration Update: 6th Circuit Upholds Collective Action Waiver Under FLSA

Gaffers v. Kelly Servs., Inc., 900 F.3d 293 (6 Cir. 2018).

The U.S. 6th Circuit Court of Appeals recently ruled that a class- or collective-action waiver in an arbitration agreement does not violate the Fair Labor Standards Act (FLSA) — an unsurprising result in light of the U.S. Supreme Court's decision in *Epic Systems Corp. v. Lewis*, 138 S.Ct. 1612 (2018), upholding such waivers under the National Labor Relations Act (NLRA). The 6th Circuit joins a number of other federal appeals courts that have upheld arbitration agreements containing FLSA class- or collective-action waivers, including the 2nd, 4th, 5th, 8th and 11th Circuits.

In *Gaffers*, the plaintiff had worked from home as an employee of Kelly Services' virtual call center. He (and about 1,600 opt-in plaintiffs) sued the company for back pay and liquidated damages, alleging that the company failed to pay them for time spent logging in and out of the network and fixing technical problems. Although Gaffers himself had not signed an arbitration agreement with the company, about half of the opt-in plaintiffs had, and those agreements included class- or collective-action waivers that stated that "individual arbitration is the 'only forum' for employment claims, including unpaid-wage claims." *Gaffers*, 900 F.3d at 295. After the company moved to compel individual arbitration under the Federal Arbitration Act (FAA), Gaffers argued that the employees' arbitration agreements were unenforceable under the NLRA and the FLSA.

While the appeal in *Gaffers* was pend-

ing, the U.S. Supreme Court issued its decision in *Epic*, which disposed of Gaffers' argument under the NLRA. Similarly, the 6th Circuit relied on *Epic* to reject the plaintiff's argument that the FLSA's collective-action provision is irreconcilable with the FAA and that the FLSA, therefore, displaces the FAA. Citing *Epic*, the court noted that to displace the FAA, a federal statute must do more than simply provide the right to engage in a collective action; rather, a statute can displace the FAA only if it contains a "clear and manifest" congressional intent to bar individual arbitration agreements by explicitly stating that "an arbitration agreement poses no obstacle to pursuing a collective action." *Id.* at 295-96. However, like the NLRA and other federal statutes considered by the Supreme Court, such as the Age Discrimination in Employment Act, the Sherman Act, the Clayton Act, the Credit Repair Organizations Act, the Securities Act of 1933, the Securities Exchange Act of 1934 and the Racketeer Influenced and Corrupt Organizations Act, the FLSA has no such provision. Instead, the FLSA simply gives an employee the *option* to sue on behalf of himself and others. The court emphasized that the FLSA does not *require* employees to sue in a collective action; further, the FLSA does not state that an agreement requiring individual arbitration becomes null if an employee who signs such an agreement later decides to pursue a collective action. As such, the court reasoned that it "can give effect to both statutes: employees who do not sign individual arbitration agreements are free to sue collectively, and those who do sign individual arbitration agreements are not." *Id.* at 296.

The plaintiff further argued that the agreement was illegal under the FAA's savings clause because the FLSA gives employees the right to sue collectively, whereas the agreement required individual arbitration. Again citing *Epic*, the court explained that the FAA's savings clause does not permit contract defenses that apply only to arbitration agreements or that interfere with the fundamental aspects of arbitration. Because plaintiff's illegality argument attacked the "historically individualized nature" of arbitration, that defense failed.

This case is a good reminder for em-

players operating in multiple jurisdictions to continue to monitor developments in the area of mandatory individual-arbitration agreements. This is particularly so given the sharp increase in the use of arbitration agreements.

—**Rachael A. Jeanfreau**

Secretary-Treasurer, LSBA Labor and Employment Law Section
Breazeale, Sachse & Wilson, L.L.P.
Ste. 1500, 909 Poydras St.
New Orleans, LA 70112-4004



Offshore Platforms; Decommissioning; Maritime Contract

In re Crescent Energy Servs., L.L.C., 896 F.3d 350 (5 Cir. 2018).

Recently, the U.S. 5th Circuit Court of Appeals answered a question of law that has gone unanswered for many years. Is a contract to decommission an offshore platform a maritime contract or a contract governed by state law? The answer is: a maritime contract.

This case involved the decommissioning of three wells located in coastal waters of Lafourche Parish, Louisiana. Carizzo, the owner of the wells, hired Crescent Energy pursuant to a Turnkey Bid to perform the decommissioning work. The equipment to be used for the job included: (1) a quarters barge with a 30-foot crane, (2) a tug boat and (3) a cargo barge. The crane was an essential piece of equipment for the decommissioning operation. Carizzo and Crescent Energy also had a preexisting master-service agreement (MSA) that included provisions requiring knock-for-knock indemnity/additional insurance between Carizzo and Crescent Energy.

While performing the decommissioning work, a Crescent Energy crewmember was severely injured when a pressurized pipe and flange separated. Carizzo

sought indemnity and insurance from Crescent and its insurers, pursuant to the MSA. Crescent Energy and its insurers rejected Carizzo's indemnity and insurance claims pursuant to the Louisiana Oilfield Anti-Indemnity Act (LOAIA) (La. R.S. 9:2780), arguing that because the incident occurred on a fixed platform and involved the decommissioning of a fixed platform (not a vessel), the LOAIA should apply.

On cross-motions for summary judgment, the federal district court ruled in favor of Carizzo and found that maritime law applied to the MSA/Turnkey Bid contract. Thus, Crescent Energy and its insurers were contractually bound to defend and indemnify Carizzo for the incident. Crescent Energy appealed to the 5th Circuit, which affirmed the district court's ruling, with an explanation of the application of the recently decided *Doiron* case in the context of decommissioning.

The first issue the 5th Circuit dealt with was whether the maritime-but-local doctrine should apply. It found it did not apply:

[T]he fact that [MSA/Turnkey Bid] was to be performed in the territorial waters of Louisiana does not justify causing the outcome of this lawsuit to be different than if the contract was for work on the high seas. Consistency and predictability are hard enough to come by in maritime jurisprudence, but we at least should not intentionally create distortions.

Id. at 355.

Next, the court addressed whether the MSA/Turnkey Bid was a maritime contract under *Doiron v. Specialty Rental Tools & Supply*, 879 F.3d 568 (5 Cir. 2018). As to the first prong of *Doiron*, the court held that decommissioning is a necessary and inescapable activity in the "life-cycle" of a well and thus satisfies the "facilitates the drilling or production" and/or "concerns the drilling and production" prong of *Doiron*. The court also held that *even though* the MSA/Turnkey Bid involved otherwise non-maritime fixed-platform structures, it is not the location of the incident that determines the maritime-contract inquiry, but the *nature of the operations* called for by the contract. "We are no longer concerned about whether the worker



A CPA Firm Specializing in Forensic Accounting

- Business Interruption Calculations
- Business Valuation Services
- Buy/Sell Agreement Consulting
- Commercial Litigation/Contract Disputes
- Discovery Assistance
- Economic Damage Quantification
- Expert Witness Testimony
- Fraud/Embezzlement Investigations
- Marital Disputes/Property Partitions
- Personal Injury & Wrongful Death
- Transaction Advisory Services (M&A)
- Turnarounds/Corporate Renewal



Ralph A. Litloff, Jr.
CPA/CFF/ABV, CVA, MBA
2637 Edenborn Ave., Ste. 305
Metairie, LA 70002
504.587.1670
RalphL@ralforensics.com
ralforensics.com

was on a platform or vessel. The question is whether this contract concerned the drilling and production of oil and gas on navigable waters from a vessel.” *Crescent*, 896 F.3d at 356-57. Because the MSA/Turnkey Bid involved and required the use of vessels on navigable waters, this aspect of the *Doiron* was also satisfied.

The court also found that, under the second prong of *Doiron*, vessels “played a substantial role in the completion of the” decommissioning work. The court’s focus for the second *Doiron* prong was on the use of the crane and barge for P&A/decommissioning work. The court noted that essentially 50 percent of the work for the job involved use of wireline equipment, and that the wireline equipment was housed on the crane barge. It found:

[S]o long as the vessel is being used for more than transporting between land and the well site . . . its necessity as a work platform is particularly relevant. To the extent there was not enough space on the fixed

platform for the equipment, such as for the wireline unit, the role of the vessel becomes more significant. Its utility as a work platform comes from its being a vessel, as it could be positioned as needed at the well site, then proceed to the other wells to perform similar functions. . . .

In conclusion, this contract anticipated the constant and substantial use of multiple vessels. It was known that the [crane barge] would be necessary as a work platform; that essential equipment would need to remain on that vessel, including a crane; that the most important component of the work, the wireline operation, would be substantially controlled from the barge; and that other incidental uses of the vessel would exist such as for crew quarters.

Id. at 361.

In affirming the district court’s decision, the 5th Circuit also found that the

holding (although dealing with decommissioning in state waters) was equally applicable to decommissioning fixed platforms in the Outer-Continental Shelf (OCS). The court’s reliance on the “life cycle” argument, and its conclusion that the state law requirement for removal of platforms in state waters renders such operations “facilitative of oil and gas drilling/production” under the first *Doiron* prong, applies equally to the OCS.

—Keith B. Hall

Member, LSBA Mineral Law Section
Director, Mineral Law Institute
Campanile Charities Professor
of Energy Law
LSU Law Center, 1 E. Campus Dr.
Baton Rouge, LA 70803-1000
and

Colleen C. Jarrott

Member, LSBA Mineral Law Section
Baker, Donelson, Bearman,
Caldwell & Berkowitz, P.C.
Ste. 3600, 201 St. Charles Ave.
New Orleans, LA 70170-3600

the MEDIATION INSTITUTE



Call or Register Online Today!

www.mediationinstitute.net
(888) 607-8914 (toll free)

Tuition: \$1075.00

(Early Registration, Group & Multiple Course
Discounts Available)

Mediation is Growing! Sign Up Today!

40 Hour Family & Divorce Mediation Training

New Orleans - Dec. 12, 2018
Baton Rouge - March 13-16, 2019
New Orleans - April 3-6, 2019
Baton Rouge - June 12-15, 2019

40 Hour Civil, Commercial & Employment Mediation Training

New Orleans - Jan. 16-19, 2019
Baton Rouge - Feb. 13-16, 2019
New Orleans - April 24-27, 2019
Baton Rouge - May 15-18, 2019

Our Courses:

- ✓ Are led by James Stovall, an experienced professional mediator who has conducted training for thousands of individuals, including judges, attorneys, executives and mental health professionals.
- ✓ Meet **ALL** training requirements for licensed professionals to be placed on the approved registry of mediators.
- ✓ Are **approved by the LSBA MCLE Department for 40 MCLE hours** (including 1.5 hours of Ethics and 1.0 hour of Professionalism).
- ✓ Combine lecture, discussion groups, case studies, role-play, demonstrations, and provide marketing strategies for launching a successful mediation practice.



The Bullying Panelist

Bergeron v. Richardson, 18-0415 (La. 5 Cir. 8/8/18).

Three physicians serving on a medical-review panel agreed that two respondents met the applicable standard of care and that two respondents failed to meet the applicable standard, with an additional finding that this breach was not a factor in the patient's death. The panel chair circulated a written opinion to the panelists for their signatures. The chair, having received no response, contacted the physicians' offices and learned that panelists A and B did not agree with the panel opinion, as drafted, and they refused to sign it because they had been "bullied" by panelist X. A and B then submitted their own opinion in which they explained that, during the medical-review panel meeting, they were harassed and bullied by X, and "[a]fter an hour and a half of being berated [they] acquiesced, simply to end the panel."

A and B then wrote that the breach of the standard of care discovered by all three panelists "was a factor in the patient's death." Dr. X signed the original opinion, which recited that the breach was not a factor in the patient's death.

After suit was instituted, the physicians filed a motion in limine to strike and exclude the supplemental panel opinions of A and B on the basis that their opinions "were not medically-based, but were based on feelings of harassment and bullying by" Dr. X. The trial court denied the motion and the defendants' application for a supervisory writ. Noted the court: "We do not find this argument persuasive. In fact, it seems just as likely that [A and B's] verbal agreement with the initial opinion was the result of harassment and bullying by Dr. [X] and that their supplemental opinions were based on their medical assessments."

Thus, finding no abuse of discretion by the district court that had denied the motion in limine, the 5th Circuit denied the defendants' writ application.

Prescription

Guffey v. Lexington House, L.L.C., 18-0475 (La. App. 3 Cir. 8/22/18), ____ So.3d ____, 2018 WL 4000953.

Following the death of a Lexington House resident, her granddaughter timely filed a request for the formation of a medical-review panel. More than a year after the death, the granddaughter supplemented her panel request to include the decedent's children as claimants.

Lexington filed an exception of no right to action, asserting that the granddaughter was not a proper party claimant who has a right to file a survival or wrongful death 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), which "is not limited to those who will ultimately be allowed to assert a survival or wrongful death claim when the panel proceedings are concluded." Lexington's writ application was denied, and the panel process proceeded.

The panel found that Lexington breached the standard of care. Two of the decedent's children filed a lawsuit within 90 days of the panel opinion. Lexington filed an exception of prescription. The trial court denied the exception, again relying on *Truxillo*.

In its application for a supervisory writ, Lexington argued that the children's petition was prescribed on its face because it was filed more than one year from the date of the incident and from the date of the patient's death. This meant the plaintiffs had relied solely on the claim filed by the granddaughter to suspend prescription during panel proceedings, even though the granddaughter had no right to bring a claim that would interrupt prescription. Plaintiffs noted that she was never a beneficiary entitled to file a survival or wrongful death action under La. Civ.C. art. 2315.1 or 2315.2, all as was further proven by her absence as a party plaintiff in the pending suit.

The opinion of the 3rd Circuit contains an extensive discussion on this issue, including references to holdings in the other jurisdictions. Noting that prescription is suspended in all malpractice claims until at least 90 days following notification of the

panel opinion, and that the MMA suspends prescription against all joint and solidary obligors, as well as "against all other unnamed, potentially liable defendants," the court reasoned that the last sentence of La. R.S. 40:1231.1(1)(4) evidenced the Legislature's "intent 'for a similar application of the statute to benefit all other unnamed potential *plaintiffs* and claimants.'" La. R.S. 40:1231.1(1)(4) explicitly states that "[a]ll persons claiming to have sustained damages as a result of injuries to or death of any one patient are considered a single claimant." Relying on the language of the statute and the reasoning of *Truxillo*, the court found that the filing of a single request for a medical-review panel protected the rights of all potential plaintiffs. The granddaughter was a claimant under the MMA, and thus her filing of a medical-review-panel request suspended prescription as to all potential claimants.

—Robert J. David

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



We wish to thank
our inaugural members
for their commitment
to fairness and equity
for all children
in the justice system:

CHRISTINE M. CALOGERO
BONITA DAY
GEORGE C. FREEMAN, III
VICTOR M. JONES
ANDREW R. LEE
ANNA C. MATEJCEK
LAWRENCE G. PUGH, III
WENDY HICKOK ROBINSON
PAUL M. STERBCOW
QUENTIN F. URQUHART, JR.
THE HONORABLE MIRIAM WALTZER (RET.)

WWW.LACCR.ORG/CALOGERO



Louisiana Center
for Children's Rights



Guidelines for What is a “False” Tax Return

Succession of Ciervo v. Robinson, BTA Docket No. 10832D (9/11/18).

The Succession of Anthony Ciervo, Jr. (taxpayer) appealed the Department’s assessments for individual income tax for the years 2006 through 2011 (tax period). The taxpayer’s defense to the assessments was that they were prescribed. Pursuant to Louisiana Constitution article 7, § 16, income taxes prescribe three years after the 31st day of December in the year in which they are due except when prescription is interrupted or suspended as provided by law.

At issue was whether prescription was

interrupted or suspended such that the Department’s assessments were timely. Specifically, at issue was whether prescription was suspended by the filing of a false return with intent to evade taxes.

For the tax period, the taxpayer’s original reported tax liability was \$7,963, \$10,184, \$4,155, \$2,747, \$2,698 and \$3,464. The taxable income per IRS account transcripts was \$3,029,568, \$3,526,104, \$3,104,861, \$1,229,816, \$740,411 and \$79,388. The account transcripts further indicated additional taxes were added after examination in the respective amounts of \$1,032,815, \$1,211,075, \$1,065,867, \$408,040, \$235,315 and \$17,724. Because of the large discrepancy in reported and actual income, the Board of Tax Appeals found it necessary to determine if taxpayer filed false returns with the intent to evade taxes.

La. R.S. 47:1580(A)(4) states that prescription against Louisiana tax is suspended by the “filing of a false or fraudulent return, as defined in La. R.S. 47:1605(2).” La. R.S. 47:1605(B)(2)

defines a false or fraudulent “report” as “any report filed with the intent to evade taxes, or a willful attempt to defraud or evade taxes that are due.”

Relying on federal jurisprudence, the Board noted the courts have equated the word “false” with “incorrect,” “untrue” or “an underpayment.” Based on the severe discrepancy between reported and actual income noted above, the Board held taxpayer’s returns would be considered “false” within R.S. 47:1580(A)(4) and R.S.1605(B)(2). The Board also reasoned that based on federal jurisprudence, intent to evade taxes or fraudulent intent may be proven by circumstantial evidence and reasonable inferences from the facts. The Board noted three specific factors supported such a finding. First, taxpayer consistently and substantially understated his income by millions of dollars over a six-year period and could not explain his conduct. This weighed in favor of finding an intent to evade tax. Second, taxpayer concealed assets overseas in foreign financial institutions, which showed taxpayer was sophisticated and knew how to hide his assets from state and federal authorities. The Board adopted the holdings of other courts that such conduct is indicative of an intent to evade taxes. Third, taxpayer filed false documents, which the Board held was an indicium of fraud. Based on the above reasoning, the Board held the Department’s assessments for the tax period were not prescribed and dismissed taxpayer’s petition with prejudice.

—**Antonio Charles Ferachi**

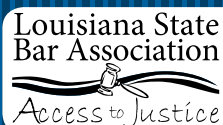
Member, LSBA Taxation Section
Director, Litigation Division
Louisiana Department of Revenue
617 North Third St.
Baton Rouge, LA 70821

Opportunity Zones Guidance Now Available

Opportunity Zones (OZs) were added to the U.S. Tax Code by the 2017 Tax Cuts and Jobs Act (TCJA). OZs are economically distressed communities where new investments, under certain conditions, may be eligible for preferential tax treat-



A FREE ONLINE FORUM FOR CIVIL LEGAL QUESTIONS



ment. Communities are nominated by the states and approved by the Treasury Department as designated OZs.

OZs are designed to spur economic development by providing tax benefits to investors. First, investors can defer tax on any prior gains invested in a Qualified Opportunity Fund (QOF) until the earlier of the date on which the investment in a QOF is sold or exchanged, or Dec. 31, 2026. If the QOF investment is held for longer than five years, 10 percent of the deferred gain is excluded. If held for more than seven years, 15 percent of the deferred gain is excluded. Second, if investments in the QOF are held for at least 10 years, investors are eligible for an increase in basis of the QOF investment equal to its fair-market value on the date the QOF investment is sold or exchanged. Importantly, investors do not have to live in the OZs to take advantage of the benefits; they need only invest a recognized gain in a QOF and elect to defer the tax on that gain.

Recently, the Treasury Department released the first set of proposed regu-

lations and a related revenue ruling for OZs. The proposed regulations provide for the types of gains that may be deferred, the timing to invest such gains in QOFs, and the mechanism for selecting deferral of such gains. The proposed regulations also address self-certification of the QOF, valuation of QOF's assets and identification of OZ businesses.

Revenue Ruling 2018-29 addresses issues related to the qualification of an existing building and land in an OZ as OZ Business Property (OZBP). OZBP is tangible property used in a trade or business of the QOF: (1) that is purchased by the QOF after Dec. 31, 2017; (2) the original use of which commences with the QOF *or* the QOF substantially improves the property; and (3) during the QOF's holding period, substantially all of the use of such property is in the OZ. OZBP is treated as substantially improved by the QOF if, during any 30-month period beginning after the date of acquisition, additions to basis exceed the adjusted basis of such property at the beginning of such 30-month

period.

The Revenue Ruling notes that, given the permanence of land, land can never have its original use in an OZ commencing with a QOF. The Ruling holds that, regarding an existing building located on land that is wholly within an OZ, the original use of the building in the OZ is not considered to have commenced with the QOF, and the original-use requirement is not applicable to the land on which the building is located. Second, substantial improvement to the building is measured by the QOF's additions to the adjusted basis of the building. Finally, measuring substantial improvement to the building does not require the QOF to separately substantially improve the land on which the building is located.

—Angela W. Adolph

Member, LSBA Taxation Section
Partner, Kean Miller LLP
Ste. 700, 400 Convention St.
Baton Rouge, LA 70802



STRIDES IN DIVERSITY

SAVE THE DATE! MARCH 8, 2019

12TH ANNUAL CONCLAVE ON DIVERSITY
IN THE LEGAL PROFESSION

Opening Doors for the NEXT GENERATION

Join the LSBA in cooperation with the Louisiana Supreme Court for the 12th annual Conclave on Diversity in the Legal Profession on March 8, 2019 at the Sheraton New Orleans Hotel, 500 Canal Street.

CONCLAVE HIGHLIGHTS

<p>Luncheon Keynote Speaker:</p> <p>Dima Ghawi Dima Ghawi LLC, Baton Rouge, LA</p>	<p>Excellence in Diversity Reception</p> <p>Breakout Session One – Immigration Breakout Session Two – Best Practices</p>
<p>Diversity and Inclusion Workshop Presenter:</p> <p>Dr. Katrice Albert Executive VP of Inclusion and Human Resources, NCAA, Indianapolis, IN</p>	<p>Plenary Session One – Labor and Employment Plenary Session Two – Trending Legal Issues</p>

Reserve your spot and register before February 8, 2019 for a discounted rate, visit
WWW.LSBA.ORG/GOTO/CONCLAVE