RECENT DEVELOPMENTS

CIVIL LAW & LITIGATION TO TRUSTS

Time’s a-Wastin’

Truitt v. Graco, Inc., 19-0121 (La. App. 5 Cir. 9/20/19), ___ So.3d ____, 2019 WL 6166266.

On Oct. 4, 1996, Arthur Truitt instituted an action against Graco, Inc. for personal injury allegedly caused by a paint sprayer manufactured by the defendant. In 2002, Truitt’s employer, Avondale, Inc., intervened with claims for reimbursement and indemnity. The case was set for trial several times over the years, each time being continued. During the pendency of proceedings, Northrop Grumman acquired Avondale, taking its place in the suit.

On Oct. 16, 2014, Northrop Grumman’s attorney sent Truitt’s attorney a letter and attached responses to requests for admissions that had been propounded on Avondale. Counsel for all parties received the responses. Less than a week later, on Oct. 22, counsel for Northrop Grumman sent a second letter to counsel for Truitt, apparently in response to a notice for records deposition that had been propounded in 2000, prior to the intervention, suggesting where plaintiff might locate the sprayer involved in the alleged incident. The record was devoid of any indication that Graco was copied on the letter of Oct. 22, 2014.

The case sat dormant thereafter, with no action taken by any party until Oct. 23, 2017, when Graco filed an ex parte motion to dismiss Truitt’s claim for abandonment under La. C.C.P. art. 561, based on the failure of the parties to take any steps in prosecution or defense of the case for three years. Graco asserted the last step taken by the parties in prosecution or defense of the case took place when the responses to requests for admissions were transmitted on Oct. 16, 2014, more than three years before. The trial court signed an order dismissing the suit the same date the ex parte motion was filed.

On Nov. 30, 2017, Truitt filed a motion to set aside the judgment of abandonment. Truitt relied on the letter of Oct. 22, 2014, asserting this informational letter constituted a response to an outstanding notice of records deposition and was therefore a step in defense of the case. If true, this would have restarted the three-year abandonment period and extended the end date to Oct. 22, 2017. Further, since Oct. 22, 2017, fell on a Sunday, Truitt argued that abandonment actually would have taken place after Oct. 23, 2017. Thus, Graco’s motion filed that same day was premature — and constituted a step in defense of the case, interrupting...
prescription altogether.

Graco opposed the motion on grounds that the Oct. 22, 2014, letter was neither formal discovery nor served on all parties and therefore did not constitute a step taken in defense of the case. The trial court denied Truitt’s motion to set aside the judgment on April 30, 2018, as well as a subsequent motion for new trial, giving rise to Truitt’s appeal. Judges Johnson, Windhorst and Molaison comprised the panel from the 5th Circuit Court of Appeal, which unanimously affirmed the trial court’s ruling.

The 5th Circuit began by addressing the procedural jumble of Truitt’s attempt to appeal the interlocutory judgment denying the motion for new trial, rather than properly appealing the initial judgment that led to the motion for new trial. But this technical misstep, so to speak, did not end the appellate court’s review, as the Louisiana Supreme Court has directed the lower courts to consider the merits of the appeal when it is clear from the brief a party is attempting to appeal the merits of the matter.

In addressing the merits, the court considered whether the Oct. 22, 2014, letter constituted a step in the prosecution or defense of the case sufficient to interrupt prescription of abandonment. The court noted that, while formal discovery served on all parties does qualify as a sufficient step, informal correspondence between the parties does not. The court found that, based on a plain reading of the letter, the fact that it was addressed solely to Truitt’s attorneys, and that there was no evidence it was served on the other parties, the letter was merely informal correspondence, not formal discovery. Thus, the last step taken in prosecution or defense of the case was the letter of Oct. 16, 2014, and abandonment became operative upon Graco’s filing of the motion to dismiss.

Because the Oct. 22, 2014, letter between counsel for plaintiff and Northrop Grumman did not constitute a step in the prosecution or defense of the case, the panel did not need to address Truitt’s second assignment of error, as the matter was resolved at the first crossroad. Truitt serves as a reminder to counsel of the importance of vigilance and calendaring deadlines on cases.

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Two New EPA Wastewater Rules Are Reversed


The 5th Circuit considered whether to apply the “well worn” *Chevron* deference to the EPA’s rule-making on two waste streams. *Id.* at 1004. It decided that in this instance, the agency decision was not entitled to traditional deference and instead the rule-making should be vacated and remanded to the agency.

This case arose out of the 2015 update to the Clean Water Act regulations, which the EPA promulgated after a detailed industry study and considering more than 200,000 comments. Six waste streams produced by power plants were affected by the 2015 Rule. Several lawsuits challenging the various waste-stream decisions arose following publication of the final rule, including the suits consolidated for this opinion, which included actions filed by power companies, water company associations and environmental groups. Eventually the challenges brought by the environmental groups survived for consideration by the 5th Circuit.

The environmental groups attacked the EPA’s rule-making that changed treatment standards for “legacy wastewater” and “leachate.” Legacy wastewater is not a specific type of waste stream from power plants, but is “wastewater from five of the streams . . . that is ‘generated prior to’ a future date.” *Id.* at 1010. The future date is not set but is referred to a future rulemaking. Essentially, legacy wastewater is the waste generated between the issuance of the Final Rule and the future date by which the stringent new standards in the 2015 Final Rule will be enforced. This is a time period built into the rule to give industry time to install improved control technologies or change its practices. In the “in between” period, wastewater generated by power plants can continue to conform to the pre-existing control standards, which were last updated in 1982.

The 5th Circuit focused on the amount of legacy wastewater that would be generated during this period between the 2015 Final Rule and the date the Final Rule would actually be enforced, noting that the “‘legacy’ category will thus encompass a massive amount of wastewater from the five composite streams.” *Id.* at 1010-11. It also focused on the EPA’s inconsistency in allowing the old waste-treatment standards to stay in place while also declaring that the old waste-treatment standards were unacceptable and needed to be entirely revamped. The court concluded that this decision was arbitrary and capricious.

Next up was the regulation of “leachate,” liquid that has percolated through wastes or a landfill. The liquid picks up toxic constituents of the waste material it trickles through and is historically treated by surface impoundments. The court noted that “leachate thus accounts for more equivalent pollution than the entire coal mining industry” and can threaten drinking water supplies if not trapped and treated. *Id.* at 1012.

The court reviewed the EPA’s “new rule” for treating leachate, which was to use the same surface impoundments that had been required since 1982. *Id.* at 1023. The EPA argued that continued reliance of surface impoundments was reasonable because it lacked data about alternative treatments and, in any event, this was a minor waste stream. The court disagreed with both arguments, noting that data had been submitted to the agency during the lengthy rule-making process and that the size of the waste stream was not relevant — and also invalid, as leachate “constitutes a gargantuan source of water pollution on its own terms.” *Id.* at 1032. Therefore, again, the agency was not entitled to *Chevron* deference, and its rulemaking as to leachate treatment was vacated and remanded.

This decision reverses almost a decade of rule-making activity by the EPA. The EPA has not filed an appeal but has noted in the Federal Register, in the introduction of another proposed rule, that it “plans to address the Court’s remand in Southwestern Elec. Power Co. v. EPA with respect to the limitations for leachate and legacy wastewater in a subsequent action,” presumably a future rulemaking. 84 Fed. Reg. 64620 (Nov. 22, 2019) (“Effluent Limitations Guidelines and Standards for the Steam Electric Power Generating Point Source Category—Proposed Rule”).

Oil Pollution Clean Up Disputes Not Quite Entitled to a Jury Trial


In an ongoing dispute about a May 2015 oil spill on the Mississippi River, the U.S. filed suit seeking repayment from owners of a wastewater storage-and-treatment facility in Belle Chasse for the costs of cleaning up the spill under the Oil Pollution Act (OPA), 33 U.S.C. § 2701 et seq. The defendants denied they were the “responsible party” for the spill under the OPA and further requested trial by jury. The U.S. then moved to strike the defendants’ demand for a jury trial, which was the motion resolved by this order.

The U.S. raised two primary arguments in its motion:“(1) Congress did not provide a right to a jury trial in OPA cases, and (2) the Seventh Amendment does not provide a right to a jury trial here because an OPA cost recovery action seeks equitable, not legal, relief.” *Id.* at *2. Defendants, however, argue that the relief sought by the U.S. — monetary damages — is a classic example of a legal remedy, thus triggering their Seventh Amendment right to trial by jury.

The test for whether a defendant has a Seventh Amendment right to trial by jury was set forth in *Curtis v. Loether*, 415 U.S. 189, 194 (1974), which held that for new statutory causes of action, a
jury trial will be available “if the action involves rights and remedies of the sort typically enforced in an action at law.” Monetary damages are, arguably, “typical” remedies enforced in a lawsuit, although the OPA itself provides no right to a jury trial under a claim for environmental-cost recoveries.

Judge Fallon focused on the record of prior cases that directly considered whether a removal-cost recovery claim under the OPA gives rise to a constitutional right to a jury trial. One previous decision decided against jury trials, holding that the recovery of removal costs under the OPA constitutes an equitable remedy. Another local decision arising out of the Deepwater Horizon disaster was unclear. Subsequent decisions have acknowledged that this is still a “potential open question.” Id. at *4. Judge Fallon ultimately decided to rely on opinions derived from CERCLA clean up actions — another statute that provides for environmental clean-up actions and the recovery of costs related thereto — and determined that claims for removal-cost recovery under the OPA were also, like those in CERCLA, seeking equitable, not legal, relief. However, he pointed out that the 5th Circuit has yet to weigh in on this issue. Thus, Judge Fallon granted the U.S.’s motion to strike the defendants’ request for trial by jury, but also determined that an advisory jury should be used during this trial.

This is an interlocutory ruling by the judge and, thus, could be considered by the 5th Circuit on appeal of the underlying matter, should the matter proceed through trial.

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Custody


Although the court of appeal agreed that “courts may ‘tweak’ visitation schedules even when the evidence will not support modifying a prior considered decree,” and that “[v]isitation is always open to change when the conditions warrant it,” “courts are not permitted to apply the more flexible standard of visitation to circumvent principles and protections announced in Bergeron.” Id. at *11. Because Ms. Mars was seeking to change the physical custody schedule from an alternating weekend schedule to an alternating week schedule, the court found she was seeking to modify custody, not visitation, and, therefore, Bergeron had to be met. As she failed to show that a sufficient change had occurred, the trial court erred in modifying the schedule. The trial court, however, did not err in denying her request for a custody evaluation, particularly because “after several years of litigation, the family court was quite familiar with these parties.” Id. at *14.

Joubert v. Joubert, 19-0349 (La. App. 3 Cir. 11/13/19), ____ So.3d ____, 2019 WL 5955998.

In the parties’ original stipulated judgment, they agreed to joint custody and to work out a reasonable physical custody schedule, including summer and holidays. On Ms. Joubert’s motion to modify the schedule, the trial court found that a material change of circumstances had occurred as the parties had not worked out an agreed-on schedule. The trial court issued a judgment fixing the time the parties had been sharing and providing Ms. Joubert an additional overnight. The

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court of appeal reversed, finding that she did not show a change of circumstances, as the children were doing well and no evidence was introduced showing that they were not. Nevertheless, the court of appeal found that even though there had been no material change of circumstances, it could alter “visitation” schedules when warranted to “tweak” the schedule to resolve certain issues. Thus, the court of appeal directed the trial court to strike that part of its judgment that added an additional overnight to the schedule. Joubert had been exercising, but kept in place that part of the trial court’s judgment that adopted the schedule that both parties testified that they had been following.

**Ferrand v. Ferrand**, 18-0618 (La. App. 5 Cir. 12/6/19), ____ So.3d ____, 2019 WL 6649379.

In this second appeal regarding custody issues between the biological mother, Ms. Ferrand, and the father, who was born female but identified as male, the court of appeal reversed the trial court’s granting sole custody to the mother and denying Mr. Ferrand any custody or visitation rights with the children. The court found that Ms. Ferrand had caused substantial harm to the children via a campaign to exclude Mr. Ferrand from their lives, although he had been the primary caretaker for the first six years of the children’s lives. The court stated: “Thus custody contests involving a parent and nonparent present the confluences of two powerful and basic principles: the child’s substantive right to live in a custodial arrangement which will serve his or her best interest and a parent’s constitutional right to parent his or her biological child.” *Id.* at *12. Given the “complicated history” of the case, the court of appeal not only reversed the trial court but rendered judgment ordering that the parties immediately begin reconciliation therapy between Mr. Ferrand and the children to establish, within three months, “joint shared custody” of the children consistent with custody plan set forth in the Domestic Commissioner’s order, which was rejected by the trial court on Ms. Ferrand’s objection to the Commissioner’s ruling. The appellate court also ordered the trial court to set a review hearing to have the reconciliation therapist provide a report on the parties’ progress and the establishment of a custody plan.

**Contempt**


Even though the trial court’s interlocutory order, made in open court in the presence of Ms. St. Germain was not signed until several months later, Ms. St. Germain had knowledge of the order and was in contempt for violating it. She had argued that she could not be held in contempt until after the order was signed. The court of appeal stated: “Pursuant to La. C.C.P. art. 1914, the rendition of an interlocutory judgment in open court constitutes notice to all the parties. Thus, notice of signing of the judgment is not required for the trial court’s order to be enforceable.” *Id.* at 286. She was also in contempt for violating other judgments requiring her to provide Mr. St. Germain with information regarding the child’s health, education and welfare. The court did not err in imposing a fine and sanctions on her, including more than $10,000 in attorney’s fees.

**Protective Orders**

**Craig v. Bishop**, 19-0166 (La. App. 3 Cir. 10/23/19), 283 So.3d 521; **Cummings v. Bishop**, 19-0168 (La. App. 3 Cir. 10/23/19), 283 So.3d 507.

The court of appeal affirmed the trial court’s granting of protective orders against Ms. Bishop in favor of two prior husbands on the grounds that she had threatened to have them murdered and may, indeed, have attempted to initiate a murder-for-hire arrangement. Regarding Mr. Craig, there was some evidence that she had attempted to poison him with arsenic. There was also some evidence that she attempted to poison one of the children with arsenic. The court of appeal found that the definition of domestic abuse was “broad enough to include the crime of solicitation of murder.” *Cummings*, 283 So.3d at 521. The court also found that both men were in immediate and present danger of abuse based on Ms. Bishop’s prior statements, actions and history of threats.

**Interim Support**

**Hanna v. Hanna**, 53,210 (La. App. 2 Cir. 11/20/19), ____ So.3d ____, 2019 WL 6139984.

Because Ms. Hanna did not have a claim for final spousal support pending at the time the divorce was rendered, her interim spousal support terminated on the date of the divorce. The amendment to La. Civ.C. art. 113 providing that interim support continues for 180 days after the divorce was not retroactive but only prospective, and was not in effect at the time of the judgment that awarded Ms. Hanna interim spousal support.

Although in her original petition for divorce she “reserved” the right to seek permanent spousal support, no specific claim was pending at the time of the divorce. The court of appeal reversed the trial court’s finding that Mr. Hanna was
in contempt for non-payment of support because no evidence was introduced whether he willfully disobeyed the order. Counsel for both parties simply made arguments and stipulations. No testimony was taken.

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Bidding Documents Cannot Impose More Restrictive Requirements than Public Bid Law


The Office of Facility Planning and Control (FP&C) issued an advertisement for bids for a levee-repair project at Rockefeller Wildlife Refuge in Grand Chenier. The instructions to bidders provided that the authority of the signature of the person submitting the bid would be deemed sufficient and acceptable under only two conditions: (1) a corporate resolution or a copy of the detailed record from the Secretary of State’s business filing page submitted with the bid package; or (2) an affidavit, resolution or other acknowledged or authentic document indicating the names of all parties authorized to submit bids for public contracts.

Critically, while the two conditions set forth in the instructions to bidders are expressly accepted as sufficient evidence of authority in La. R.S. 38:2212(B)(5), the bidding documents failed to include the third type of evidence of authority set forth in La. R.S. 38:2212(B)(5) — namely, the signature on the bid is that of an authorized representative as documented by the legal entity certifying the authority of the person.

Leblanc Marine was the apparent low bidder, but (coincidentally) FP&C rejected Leblanc Marine’s bid for failure to submit any written evidence of the authority of the person signing the bid whatsoever. Thereafter, FP&C determined Southern Delta Construction, L.L.C., to be the lowest responsive bidder. LeBlanc Marine then filed a petition for injunctive and declaratory relief seeking to enjoin FP&C from awarding the contract for the project to Southern Delta on the ground that the “Certificate of Authority” submitted by Southern Delta failed to fulfill the requirements of written evidence of authority as set forth in the instructions to bidders. Southern Delta intervened into the action to protect its purported property right in the contract for the project.

After considering joint stipulations of fact with accompanying exhibits and argument of the parties, the trial court granted LeBlanc Marine’s request for declaratory relief, stating in its written reasons for judgment that FP&C was bound by the requirement as to written evidence of authority set forth in the bidding documents, albeit more restrictive than the requirements of the Public Bid Law, La. R.S. 38:2211, et seq. The 1st Circuit subsequently affirmed the decision of the trial court. 18-0434 (La. App. 1 Cir. 10/17/18), 264 So.3d 503.

The Louisiana Supreme Court, in a per curiam opinion, reversed the judgment of the 1st Circuit, holding that La. R.S. 38:2212(B)(5) clearly and unequivocally mandated that the authority of the person “shall” be deemed sufficient and acceptable “if any” of the three conditions of proving authority enumerated in the statute are satisfied. The Court further stated that bidding instructions that conflict with, rather than merely exceed, the statutory requirements and procedures set forth in the Public Bid Law are not valid. In prioritizing the conflict between the bidding instructions and the Public Bid Law, the Court attempted to distinguish this decision from prior case law that has recognized that a public entity may

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include requirements that may exceed what is required by the Public Bid Law, as long as the statutory requirements are also met.

**Market Value of Land Irrelevant Where Contractor Agreed to Restore Property**

*Fontenot v. Gilchrist Constr. Co.*, 19-0021 (La. App. 3 Cir. 10/9/19), 281 So.3d 761.

Gilchrist entered into three agreements with plaintiffs for the use of plaintiffs’ land in connection with Gilchrist’s contract with the state to expand U.S. Hwy. 165 in Allen Parish. The first agreement was a written “Right of Entry” whereby the property owner granted Gilchrist access to its property in exchange for Gilchrist agreeing to correct all damages arising out of Gilchrist’s construction. The parties subsequently entered into an “Agreement to Buy/Sell Dirt” that provided in pertinent part that Gilchrist would leave a “clean, nicely shaped dirt pit” to plaintiffs’ satisfaction. Shortly after entering into the agreement regarding the purchase and sale of dirt, the parties entered into an oral agreement whereby plaintiffs agreed to allow Gilchrist to temporarily place loads of dirt on their property.

During trial, plaintiffs’ representative testified that in making the oral contract, the representative of Gilchrist had agreed to restore the land to its original condition. Prior to trial, the court issued a motion for partial summary judgment holding that the purpose of plaintiffs’ property prior to the entry by Gilchrist was farmland and that Gilchrist had the obligation to restore the property to a condition suitable for farming.

At trial, witnesses for both plaintiffs and Gilchrist testified that Gilchrist had not removed all of the surface debris and that Gilchrist buried construction debris on plaintiffs’ property far below the surface, as was contemplated by plaintiffs when they agreed to allow Gilchrist to temporarily place loads of dirt on their property.

The jury rendered a verdict in favor of plaintiffs and awarded $5,559,000. On appeal, Gilchrist argued that the damages awarded were outrageously out of proportion with the value of the land (more than 70 times the value of the land, according to Gilchrist). However, the 3rd Circuit agreed with the trial court that the value of the land is irrelevant — relying on the Louisiana Supreme Court’s decision in *Corbello v. Iowa Production*, 02-0826 (La. 2/25/03), 850 So.2d 686, 695, which held that the standard for damages to immovable property in breach of contract cases is governed by the four corners of the contract.

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**U.S. 2nd Circuit Court of Appeals**

*In re Del Valle Ruiz*, 939 F.3d 520 (2 Cir. 2019).

The U.S. 2nd Circuit Court of Appeals recently resolved a split in the Southern District of New York regarding the extraterritorial application of 28 U.S.C. § 1782, known as the extraterritorial discovery statute. The statute enables litigants to obtain discovery in the United States for use in foreign legal proceedings. The Southern District of New York handles a large number of § 1782 applications because of the district’s large corporate presence. The 2nd Circuit resolved two important questions related to the statute — first, does the statute’s “extraterritorial” reach extend to documents located abroad; and second, what constitutes “residing or being found” in the United States for purposes of the statute.

The underlying case involved the Spanish government forcing a public sale of Banco Popular Español (BPE), Spain’s sixth-largest bank with approximately €147 billion in assets. *In re Del Valle Ruiz*, 939 F.3d 520, 523-24. After the 2008 financial crisis, BPE became...
aware it was saddled with toxic and non-performing debt. *Id.* at 524. Prior to the forced public sale, BPE engaged in negotiations with Banco Santander (Santander) to effectuate a private sale. Santander retained Citibank and UBS to provide valuation advice on a potential bid. News reports suggested that Santander was poised to offer €3 billion cash plus an additional €4 billion in capital for BPE. However, before a private sale could be effectuated, Spain’s national bank invited several banks, including Santander, to submit bids for a public sale. Santander’s bid for one Euro (€1) was accepted, and it became owner of the bank that it was previously willing to buy for €7 billion. *Id.*

As a result of the public sale, a group of 55 individual Mexican investors and two U.S.-based investment firms that held stakes in BPE suffered significant financial losses. *Id.* Both groups initiated legal proceedings at the European Court of Justice and in private arbitration. *Id.* at 525. These groups eventually filed a Petition for § 1782 extraterritorial discovery seeking financial information and documents from Santander and its New York-based affiliate. The district court denied the application against Santander on the grounds that it lacked personal jurisdiction but granted it against Santander’s New York affiliate. *Id.* at 523.

On appeal, the 2nd Circuit was first asked to delineate “the contours of §1782’s requirement that a person or entity ‘resides or is found’ within the district in which discovery is sought.” *Id.* The court of appeal concluded, based on prior cases and congressional intent, that the statute’s “resides or is found” language extends to the limits of personal jurisdiction consistent with U.S. norms of due process. *Id.* at 528.

In short, as long as the district court maintains personal jurisdiction over the resident, then that resident “resides or is found” within the district under the statute. On the facts, the court ruled that Santander’s forum contacts with New York were sufficiently limited in scope to preclude jurisdiction and the request for extraterritorial discovery. However, the court did find jurisdiction and allowed the application to proceed over Santander’s U.S. affiliate. *Id.* at 531.

The second question for the court was whether § 1782 allows discovery of documents not located in the United States from the U.S. affiliate. *Id.* Santander argued that the statute must contain a per se bar against discovery of evidence located abroad based on the principle of statutory construction known as the “presumption against extraterritoriality.” *Id.* at 532. Relying on the fact that the U.S. Supreme Court has never applied this presumption to a jurisdictional statute, the 2nd Circuit held that “a district court is not categorically barred from allowing discovery under § 1782 of evidence located abroad.” *Id.* at 533. On the facts, the court ruled that the district court was within its discretion to permit discovery of documents stored overseas from Santander’s U.S. affiliate. *Id.* at 533-34.

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The U.S. 5th Circuit Court of Appeals recently held that not only may an employee health plan prevent a healthcare provider from filing a direct claim against the health plan by including a valid and enforceable anti-assignment clause in the plan document, but also that any state statute that attempts to invalidate such anti-assignment clauses is preempted by ERISA. *See, Dialysis Newco, Inc. v. Cmty. Health Sys. Grp. Health Plan,* 938 F.3d 246, 260 (5 Cir. 2019).

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A participant in the Community Health Systems Group Health Plan was undergoing hemodialysis at Dialysis Newco, Inc. The plan paid the provider at 100% of its billed rate for the first three months of treatment; however, in December 2012, the plan drastically cut the amount paid to the provider for each treatment. *Id.* at 249. The plan’s third-party administrator determined that the plan would instead pay the provider at the “Usual and Customary” rate, which was capped at 200% of the amount Medicare would pay. *Id.* On balance, the provider was paid less then 8% on subsequent billings. *Id.*

Following unsuccessful internal appeals, the provider had the participant execute an “Assignment of Benefits,” which granted it the right to “pursue any legal claims arising out of the medical services it provided.” *Id.* Shortly thereafter, the provider filed a lawsuit against the plan and its administrator under ERISA, seeking payment of $776,193.54. The district court entered summary judgment in favor of the provider under ERISA, seeking payment of $776,193.54. The district court entered summary judgment in favor of the provider, finding that the plan’s anti-assignment provision was unenforceable because it was ambiguous, but that “even if the language of the anti-assignment provision was not ambiguous, the plan’s choice of law provision invoked the laws of Tennessee, and a Tennessee statute invalidated any language in the plan that would prohibit assignment to a healthcare provider.” *Id.*

The court next considered whether the anti-assignment clause was rendered unenforceable by Tenn. Code Ann. § 56-7-120(a) (2012), which expressly entitles an insured the right to assign benefits to the healthcare provider. The court noted that whether the Tennessee anti-assignment clause was preempted under ERISA was an issue of first impression. *Id.* ERISA preempts — subject to few exemptions — “any and all State laws insofar as they may now or hereafter relate to any employee benefit plan[.]” *Id.* at 256 (citing 29 U.S.C. § 1144(a)). The court found that “simply as a matter of plain and ordinary meaning . . . a state statute requiring plan administrators to honor assignments made to third-party healthcare providers would necessarily ‘relate to’ the administration of those plans.” *Id.* at 257. Specifically, the court concluded that the Tennessee law “ ‘relate[s]’ to ERISA plans because it impacts a ‘central matter of plan administration’ and ‘interferes with nationally uniform plan administration.’” *Id.* at 260 (citing 29 U.S.C. § 1144; *Gobeille v. Liberty Mut. Ins. Co.*, 136 S.Ct. 936, 943 (2016)). The court, in reversing the district court’s grant of summary judgment, went on to opine that:

Mandating that plan administrators must assume liability to be sued by third-party providers who are not in privity of contract with them impacts a central matter of plan administration. Furthermore, because states could — and seemingly already do — impose different requirements on when such assignments would have to be honored, permitting Tenn. Code Ann. § 56-7-120(a) to govern this plan would interfere with nationally uniform plan administration. To hold otherwise would prevent “ERISA’s express pre-emption clause...
Liens Invalid Under Louisiana Oil Well Lien Act


PADCO Energy Services, L.L.C., and PADCO Pressure Control, L.L.C. (collectively, PADCO) are companies that built “flowback units,” which are used at well sites during flowback, when hydraulic fracturing fluids are returning from the well bore. PADCO’s primary business was to rent these units to companies that were completing wells. Case Energy Services, L.L.C., sold piping and gauges to PADCO. Case would deliver these items to PADCO’s place of business, and PADCO incorporated these items into the flowback units.

A dispute arose between PADCO and Case. Case filed suit in state court, alleging that PADCO did not pay the full price for the use of certain flowback units. Case also filed 25 liens in Louisiana, pursuant to the Louisiana Oil Well Lien Act (LOWLA), La. R.S. 9:4861 et seq. In addition, Case filed 10 liens in Texas, based on a Texas statute. Each of the PADCO entities later entered bankruptcy, and Case’s state court action was stayed. PADCO filed adversary proceedings in the bankruptcies, seeking judgments that Case’s liens were invalid. PADCO sought summary judgment.

Under LOWLA, certain persons are entitled to liens. These include “contractors,” defined as persons who contract to perform “operations.” La. R.S. 9:4861; La. R.S. 9:4862. In turn, operations are defined to include various types of work performed “on a well site.” La. R.S. 9:4861. The court concluded that Case could not qualify as a contractor because it had not contracted to perform work at a well site.

Persons who deliver movables to a well site can be entitled to a lien, but Case had not delivered its equipment to a well site. Case had delivered the items to PADCO’s place of business.

In addition, under LOWLA, a person who sells movables to an operator or contractor is entitled to a lien to secure payment of the purchase price for the movables, provided the movables are incorporated into the well, incorporated into a facility located on the well site, consumed in operations or consumed by a person performing work at the well site. La. R.S. 9:4862(A). Here, it was not clear that Case had sold movables to an operator or contractor when it sold items to PADCO. PADCO was not an operator, which is defined to mean a lessee who contracts with the claimant. PADCO was not a lessee.

The court then considered whether PADCO was a contractor. Under LOWLA, to be a contractor, a company must enter a contract to perform work at a well site. PADCO’s main business was simply renting equipment for use at a well site, not performing work at well sites. If PADCO did not contract to perform work at the well site, it was not a contractor, and thus Case would not have a valid lien based on selling movables to a contractor. But Case managed to raise a genuine issue of material fact regarding whether PADCO had agreed to perform work at the well site, so the court could not grant summary judgment based on PADCO not qualifying as a contractor.

However, for Case’s liens to be valid under LOWLA based on a sale of movables to a contractor, it would be necessary that the movables be incorporated into the well, incorporated into a facility located on the well site, consumed in operations or consumed by a person performing work on the well site. The court concluded that this requirement was not satisfied. The piping and gauges sold by Case had not been consumed. Further, they were not incorporated into the well. The movables sold by Case were incorporated into the flowback units that were temporarily placed on the lease tract, but the court concluded that this is not what was meant by La. R.S. 9:4861’s reference to a “facility located on the well site.” Therefore, PADCO was entitled to summary judgment that the 25 liens that Case filed in Louisiana were invalid.

The court stated that there was an additional, independent basis for summary judgment in favor of PADCO regarding Case’s liens filed in Louisiana. In particular, the liens did not fairly apprise third persons of the nature of the
Professional Liability

liens because: (1) each lien each stated that PADCO owed Case more than $1.2 million, but that amount was actually the total amount allegedly owed to Case, while the individual liens each secured a much lower amount; and (2) the liens did not describe the work done by Case. The court stated that these deficiencies made these liens invalid.

In addition, the court held that the liens filed in Texas were invalid. These liens were governed by the Texas Property Code, § 56.001 et seq., which requires liens to include a description of the property to which they apply and an itemized list of the amounts claimed. Case’s liens failed to comply with either of these requirements.

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Follow-Up Appointments

The plaintiff filed a lawsuit that alleged the defendant “was negligent in failing to implement an administrative policy setting forth the procedure for ensuring that follow-up appointments are communicated to patients” and failed to properly train administrators who worked in the physical and computer mail departments. The defendant filed an exception of prematurity, contending that the claim sounded in medical malpractice, thus requiring a pre-suit panel. The trial court agreed.

The Supreme Court granted the plaintiff’s writ, reversed the trial court, denied the exception of prematurity and remanded the case to the trial court, writing in a per curiam opinion that the plaintiff’s allegation that the defendant “fail[ed] to properly train administrators working in the mail department, and fail[ed] to ensure that administrators properly used the mailing computer programs and/or other comparable methods” raised issues of administrative negligence rather than medical malpractice.

HIPAA/Invasion of Privacy

Lewis ex rel. Lewis v. Cornerstone Hosp. of Bossier City, L.L.C., 53,056 (La. App. 2 Cir. 9/25/19), 280 So.3d 1262.
The decedent’s son filed a medical malpractice and invasion of privacy lawsuit against Cornerstone Hospital. While the jury found no medical malpractice, it did find that the hospital made “an unauthorized disclosure of Mr. Lewis’s medical information, in violation of HIPAA, and resulting in an invasion of privacy,” but no damages occurred as a result. Id. at 1267.

The invasion of privacy action involved two Cornerstone employees who visited the VA Hospital to which the decedent had been transferred and exchanged information about the decedent. Cornerstone’s representatives admitted that they took this action, not knowing that the patient died the day before the visit, because they “wanted to repair their damaged business relationship with the

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nullity because his status as a state employee made LSU an indispensable party that had not been joined in the litigation, that the procedures used to obtain the default judgment were fatally flawed and that the Evenses failed to serve Dr. Miller. LSU and Dr. Miller also moved for summary judgment. The trial court granted the motion for summary judgment and ruled that the default judgment was an absolute nullity.

Of the plaintiffs’ seven assignments of error, the appellate court found that the failure to include LSU in the lawsuit, alone, was dispositive of the appeal.

The controlling statute (now re-designated as La. R.S. 40:1237.1(G)) is part of the “state/public” act and provides that damages “in connection with any claim lodged against any state healthcare provider . . . for an alleged act of malpractice” can be collected only if judgment is entered “against the state alone.” State-employed healthcare providers are insulated from judgment for medical malpractice. Adjudication against state-employed healthcare providers alone, without the employer named as “a party to the litigation, is an absolute nullity.” The court concluded that LSU was an indispensable party and the “failure to join LSU as a defendant [was] a fatal defect that render[ed] the resulting default judgment an absolute nullity.”

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Purchases of Mobile Homes


Blakewood, L.L.C., purchases residential mobile homes and leases them at its Old Hammond Highway site in Baton Rouge. Blakewood purchased 41 mobile homes and intended to acquire a total of 77 for its leasing inventory. Blakewood submitted an exemption certificate with an application to register the title to each home. The Louisiana Department of Public Safety and Corrections, Office of Motor Vehicles, would not accept the exemption certificate and charged Blakewood state and local sales taxes, penalties, interest and fees. Blakewood paid the taxes under protest and filed petitions for recovery against the City of Baton Rouge and East Baton Rouge Parish through its director of finance, Marsha Hanlon (City/Parish), as well as Kimberly Robinson, secretary of the Louisiana Department of Revenue (Department).

The parties filed cross motions for

Indispensable Parties

Miller v. Larre, 19-0208 (La. App. 5 Cir. 12/11/19), __ So.3d ___.

The plaintiffs alleged that Dr. Miller committed malpractice when he recommended that Mrs. Evans terminate her pregnancy. The plaintiffs’ petition showed that it was filed pursuant to La. R.S. 40:1299.41, which was then the statute pertaining to “private physicians,” e.g., non-state-employed physicians.

The sheriff’s office was unable to serve the defendant, whereupon a special process server effected “Drop Service.” The suit was not answered. The plaintiffs obtained a default judgment.

The plaintiffs attempted to collect the judgment by garnishment of Dr. Miller’s wages. Dr. Miller, who was employed by LSU at all pertinent times, filed suit against the plaintiffs and their lawyer to have the default judgment annulled, contending that the claim was an absolute and/or relative
summary judgment. The Louisiana Board of Tax Appeals (BTA) granted the City/Parish’s and Department’s motions for summary judgment and dismissed Blakewood’s claim for refund of taxes paid under protest. On appeal, Blakewood claimed that the BTA erred in concluding it was a consumer for its purchases of the mobile homes it placed on its Old Hammond Highway site for lease. The City/Parish and the Department maintained that the BTA correctly determined Blakewood was the consumer of the mobile homes.

Pursuant to La. R.S. 47:302(A), sales taxes are imposed on the sale, use, consumption, distribution and storage for use or consumption in Louisiana of tangible personal property. Factory-built homes are not included in the definition of tangible personal property except as provided in La. R.S. 47:301(16)(g). That subparagraph provides that factory-built homes are considered tangible personal property for purposes of sales-and-use taxes for the initial sale of a new factory-built home from dealer to consumer, but only to the extent of 46% of the retail sales price. The issue was whether Blakewood was the “consumer” of the mobile homes.

Blakewood used the homes as rental properties. Blakewood was responsible for maintenance with respect to repairs of $100 or more. In addition, Blakewood retained the right to sell the mobile homes during the term of the lease and thus could dispose of the property. Based on these facts, the BTA concluded Blakewood used, maintained and could dispose of the mobile homes. The 1st Circuit found no error in the BTA’s interpretation of La. R.S. 47:301(16)(g) and upheld the BTA’s finding that Blakewood was the consumer given its use of the mobile homes. The 1st Circuit held the BTA correctly granted summary judgment in favor of the City/Parish and the Department.

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Medical Equipment Found to Be Immovable Property Under Art. 466

West Jefferson MRI, L.L.C. v. Lopinto
19-0082 (La. App. 5 Cir. 11/27/19), ___ So.3d ___, 2019 WL 6337477.

West Jefferson MRI, L.L.C. (Taxpayer) operated MRI and CT scan machines in Jefferson Parish. After audit, Jefferson Parish (the Collector) determined Taxpayer owed use taxes on repairs to the machines, reasoning that repairs to tangible personal property (i.e., movable property) are taxable in Louisiana. Taxpayer argued that, under La. Civ.C. art. 466, the repairs were to immovable property as the machines were component parts of the buildings into which they were incorporated because their removal would cause “substantial damage” to themselves and the buildings.

The trial court ruled in Taxpayer’s favor, finding that the machines were component parts. Though a full discussion of the trial court’s findings was not included, the opinion noted the Collector assigned as legal error the trial court’s finding that “substantial damage” contemplated “devaluation of the [machines] following removal.” Id. at *4. At trial, Taxpayer’s witness testified that the machines must be viewed as integral parts of a series of interconnected systems, all of which are constructed into the buildings before the machines are installed. He explained that removing the MRI included disconnecting the systems; tearing down the inside walls and an outside wall; then removing the machine by crane or forklift. Removing the CT machine required dismantling the room to its metal studs, as well as the doors and frames, and breaking down the drywall to remove the lead wall — which could not be reused. Finally, the witness testified that, once removed, the machines become nothing more than a stack of parts with no value until proper reinstallation. A second witness testified that removing a machine is a substantial construction project and the damage to the building is significant.

The appellate court reviewed the matter de novo to apply the correct version of art. 466, though still on the trial record. The court affirmed the trial court’s decision. The court noted that the Collector failed to rebut Taxpayer’s witnesses’ testimony, but acknowledged a recent decision in Hitachi Medical Systems America, Inc. v. Bridges, 15-0658 (La. App. 1 Cir. 12/9/15), writ denied, 16-0042 (La. 2/26/16), 187 So.3d 1004, wherein the court affirmed a Louisiana Board of Tax Appeals ruling that the MRIs at issue were not component parts of the buildings. The West Jefferson MRI court found the cases distinguishable, however, because of their underlying factual findings, and noted that “the evidence in this matter is substantially different from the evidence presented in Hitachi, thus leading us to a different conclusion.” West Jefferson MRI, 2019 WL 6337477 at *7 n.1. The competing decisions set up a potential split in the circuits that may lead to Louisiana Supreme Court review.

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Is Extrinsic Evidence Admissible to Prove the Execution Date of an Act of Revocation?

In Succession of Robin, 19-0405 (La. 10/22/19), ____, So.3d ____, 2019 WL 5432123, the Louisiana Supreme Court reversed the trial court’s judgment and held an undated act of revocation of all prior testaments was a valid authentic act. Extrinsic evidence was used to prove the date of execution and establish it was executed after the testament.

In 2004, Edward Robin (Testator) properly executed a testament bequeathing personal items and his estate to three sons (Legatees), excluding Testator’s seven other children. Testator executed a Revocation of Any and All Prior Wills and Codicils, but the Revocation was undated until the proper date was affixed to it the day after execution. Testator died on Aug. 22, 2017. Testator’s daughter, Chantel Viada (Heir), was appointed administratrix on the premise that Testator died intestate. Legatee filed a petition for injunction and removal of the administratrix and argued that, because the Revocation had not been dated by a notary, it did not satisfy the authentic act requirement of La. Civ.C. art. 1607, it was ineffective, and Testator did not die intestate. Legatee further argued the undated Revocation was not authentic because it was not self-proving as to what testament was being revoked. Heir argued that La. Civ.C. art. 1833 does not require that the authentic act be dated to be valid.

The trial court found “clear identification of the testament to be revoked” was required, but clear identification was lacking in this case because the Revocation did not indicate by date the testament being revoked. The appellate court majority acknowledged the execution date was not required for a valid authentic act but also found the undated Revocation was not self-proving. The court held in favor of Legatee because they were unable to determine the Revocation’s execution date. However, the dissenting appellate judge found the Revocation valid because parol evidence was admissible to prove when it was executed.

La. Civ.C. art. 1607 allows a testator to revoke an entire testament if the testator declares it is revoked in a form prescribed for testaments or in an authentic act. The law on revocation of an entire testament by authentic act does not require an execution date. Extrinsic evidence may be admitted to prove a fact, as long as it does not negate or vary the contents of an authentic act. Because Heir did not attempt to admit extrinsic evidence to negate or vary the contents of the Revocation, and provided evidence that was supplemental information to allow the court to determine if Testator intended to revoke the 2004 Testament, the Supreme Court found the extrinsic evidence was admissible to prove the date the Revocation was executed and Testator had intent to revoke the 2004 testament. Evidence proved the Revocation was executed in 2016, which was after execution of the will in 2004. Thus, the Revocation was effective, which meant Testator died intestate.

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