Inadvertent Omission of Executory Contract

RPD Holdings, L.L.C. v. Tech Pharmacy Servs. (In re Provider Meds, L.L.C.), 907 F.3d 845 (5 Cir. 2018).

The 5th Circuit recently held that when an executory contract is inadvertently omitted from a Chapter 7 debtor's schedules and, neither assumed nor rejected, it is automatically rejected as a matter of law pursuant to Section 365(d)(1) of the Bankruptcy Code. Section 365(d)(1) provides that under Chapter 7: "[I]f the trustee does not assume or reject an executory contract . . . of the debtor within 60 days after the order for relief, or within such additional time as the court, for cause, within such 60-day period, fixes, then such contract . . . is deemed rejected."

RPD Holdings involved six debtors (OnSite debtors) who all operated as independent business entities, but all used the same pharmaceuticals dispensing software, OnSite. Prior to the bankruptcy filings, Tech Pharmacy Services sued several parties, including OnSite debtors, claiming the OnSite software infringed on the patent for its software. The dispute was resolved through a "Compromise, Settlement, Release and License Agreement" (license agreement). The license agreement released all claims that were or could have been brought, granted the OnSite debtors a "non-exclusive perpetual license" and required OnSite debtors to pay a one-time licensing fee of $4,000 for each new OnSite machine placed into use going forward and to provide quarterly reports to Tech Pharm.

Subsequent to resolution of the patent disputes, OnSite debtors filed for protection under Chapter 11 of the Bankruptcy Code, which cases were later converted

to Chapter 7. None of the schedules filed in the bankruptcy cases listed the license agreement as an executory contract, nor did the schedules mention Tech Pharm.

In three of the bankruptcy cases, RPD Holdings, which held secured claims in the bankruptcies, purchased its collateral pursuant to an asset purchase agreement (APA). Each of the APAs listed certain categories of property as sold and further provided that, to the extent any of the subject property was an executory contract, it was assumed and immediately assigned to RPD. The APAs did not explicitly reference the license agreement. Subsequent to the court approving the APAs, RPD became aware of the Tech Pharm licenses, and the remaining bankruptcy cases included in a settlement agreement a provision wherein RPD would be "entitled to all remaining available Tech Pharm Licenses (such as those otherwise acquired from" the other three bankruptcies).

The dispute before the 5th Circuit arose almost a year later when Tech Pharm filed suit in state court alleging that OnSite debtors were in breach of the license agreement by not providing the quarterly reports and not paying the $4,000 license fees. RPD intervened and removed the case to the bankruptcy court, claiming that it owned the licenses. The bankruptcy court held that the license agreement was an executory contract, and because it was neither assumed nor rejected by the trustee within 60 days of the previous bankruptcy cases being converted to Chapter 7 cases, the license agreement was rejected under 365(d)(1) as a matter of law. As such, the license agreement was not part of OnSite debtors' estates when the APAs were signed and, thus, could not have been assigned to RPD under the APAs. The district court agreed, and RPD appealed to the 5th Circuit.

After a lengthy discussion, the court determined that the license agreement qualified as an executory contract because both parties were still obligated to perform and failure to perform would relieve the other party from its obligation. Tech Pharm had an ongoing obligation to refrain from suing OnSite debtors, and OnSite debtors had the obligation to provide the $4,000 license fee for each new machine put into use and to provide the quarterly operating reports.

RPD argued for an "implicit exception" to Section 365 when a debtor fails to schedule the executory contract and the trustee is unaware of the contract within the 60-day period. Recognizing that this was a new issue in the 5th Circuit, the court drew on rulings from other circuits. Under one theory, a contract will not be deemed rejected when it was intentionally concealed from a trustee. However, the license agreement was a matter of public record and, as such, was not intentionally concealed. Where a contract was inadvertently omitted from a debtor's schedules, most courts ruled that it can still be deemed rejected, although the 5th Circuit noted at least one example where even an inadvertent omission would prevent the contract from automatic rejection.

The court ultimately relied on the trustee's affirmative duty under Section 704(a) to investigate the financial affairs of the debtor and the absence of an actual or constructive notice requirement in Section 365(d)(1). When an executory contract is inadvertently omitted from a Chapter 7 debtor's schedules and neither assumed nor rejected within 60 days of the order for relief, such a contract is deemed to be rejected by operation of law under Section 365(d)(1). Regardless of whether the settlement agreement in the later bankruptcies purported to sell those licenses, that they were rejected meant that they were no longer part of the estate and, thus, could not be sold to begin with. The court was careful to limit its holding to cases involving inadvertent omissions and did not comment on intentional concealment of contracts.

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Corporate and Business Law

Liability of Corporate Officer/Shareholder/ Nurse

Sam v. Genesis Behavioral Hosp., Inc., 18-0009 (La. App. 3 Cir. 8/29/18), 255 So.3d 42.

In 2011, according to the majority, plaintiff, a female patient of an outpatient day program run by Genesis Behavioral Hospital, Inc., was "lured off the facility grounds and into the nearby apartment" of a co-participant in the program, where she was raped and exposed to HIV. *Id.* at 43. The chief operations officer/nursing administrator of the corporation handled the clinical aspects of the facility, had some personal contact with the patients, and was familiar with plaintiff, who had received inpatient and outpatient treatment from Genesis facilities on and off for several years. She described plaintiff as a very mildly mentally handicapped young woman with schizophrenia and bipolar disorder. No security was provided at the facility.

The curatrix for plaintiff filed suit on her behalf against, among others, the chief operations officer/nursing administrator of the corporation, who also owned 49 percent of its stock but was not present at the facility at the time of the incident. Defendant moved for summary judgment on the grounds that she had no personal liability to third persons, such as plaintiff, for any negligence or fault of the corporation. The trial court granted the motion, and the 3rd Circuit Court of Appeal affirmed, with one judge dissenting.

After briefly discussing duty-risk analysis and basic corporate law principles, the majority quoted at length from a 2010 2nd Circuit case that praised the benefits of the corporate shield and treated the principle that a corporate officer is liable for his own personal torts as an example of piercing the corporate veil. The majority also quoted at length *Canter v. Koehring*, 283 So.2d 716 (La. 1973), which held engineer employees personally liable for failure to relay correct information to their employer that resulted in the death of another employee. The majority summarized *Canter* as requiring plaintiff to prove, in order to pierce the corporate veil, that (1) the corporation owed a duty to plaintiff, (2) the corporation delegated that duty to defendant and (3) defendant breached the duty through personal fault.

Plaintiff argued (1) that the corporation, as a hospital, owed a duty to its patients to exercise the necessary care that their particular condition required, (2) that defendant, as chief operations officer/nursing administrator, was responsible for causing such care to be provided and (3) that she failed to implement or enforce any policy to protect plaintiff from the other patients at the hospital. The majority emphasized that "personal liability cannot be imposed upon the officer . . . simply because of [her] general

administrative responsibility for performance of some function of the employment" and that she "must have a personal duty towards the injured plaintiff, breach of which specifically has caused the plaintiff's damages." *Sam*, 255 So.3d at 47, quoting *Canter*, 203 So.2d at 721. The majority held that the hospital had no duty to protect plaintiff while she was not on its premises, much less against her being assaulted by a third party off premises, and that there was no evidence that any duty the corporation may have owed plaintiff had been "delegated" to defendant or that she had "assumed" such duty. As "no security was provided" at the facility, the majority reasoned, "[i]t would be nonsensical to find that a corporate officer such as [the COO/nursing administrator] assumed a personal duty to provide a service beyond that offered by the corporation." *Sam*, 255 So.3d at 50.

The dissent, after noting that plaintiff was a 42-year-old, mentally handicapped individual who functions with the understanding of a 4-to-9-year-old special-needs child, emphasized that the corporation was licensed as a hospital, that the outpatient program was at a psychiatric facility, that defendant was a registered nurse with a specialty in psychiatry and that no one was assigned to monitor the front door. The dissent opined that the majority, by focusing on piercing of the corporate veil, "misse[d] the point entirely," as under the majority's reasoning "every . . . licensed professional could avoid all personal exposure for their tortious conduct by simply incorporating and pointing every plaintiff to the corporate entity as their shield for their own tortious, negligent conduct." *Id.* at 53 (Cooks, J., dissenting). The dissent emphasized that "if an officer or agent of a corporation through his fault injures another to whom he owes a personal duty, whether or not the act culminating in the injury is committed by or for the corporation, the officer or agent is liable personally to the injured third person, and it does not matter that liability might also attach to the corporation." *Id.* at 54, quoting *H.B. Buster Hughes, Inc. v. Bernard*, 318 So.2d 9, 12 (La. 1975).

After reviewing supporting evidence, the dissent concluded that defendant, as the director of nursing in charge of the plaintiff's care, owed a personal duty to plaintiff to make sure the plaintiff was not left alone at the facility and allowed to be lured away by another patient, which duty defendant breached. In the dissent's view, "the law imposes a high level of responsibility on nurse [defendant] for [plaintiff's] safety and wellbeing while under her care." *Sam*, 255 So.3d at 55. The dissent also emphasized that if a shareholder "personally commits a tort . . ., he becomes personally liable without regard to whether some other person, either his corporation or his neighbor, happens to exist." *Id.* at 57.

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Environmental Law

La., U.S. Supreme Courts Weigh In By Not Weighing In on Highly Watched Cases

Bayou Canard, Inc., v. State, through Coastal Prot. & Restoration Auth., 18-0095 (La. 10/29/18), 254 So.3d 1209 (denying writ).

As discussed in the August/September 2018 *Louisiana Bar Journal*, the Louisiana 1st Circuit Court of Appeal overturned the 19th Judicial District Court and found that the indemnity language in all state-issued oyster leases barred leaseholders from bringing suits against the state even for challenges to the administrative process. *Bayou Canard, Inc. v. State*, 17-1067 (La. App. 1 Cir. 5/14/18), 250 So.3d 981. Previously, the indemnity clauses had been stretched to cover only physical losses rather than claims challenging a state agency's administrative procedure (the Coastal Protection and Restoration Authority's (CPRA) application of the Oyster Lease Acquisition and Compensation Program prior to conducting a restoration project in Bayou Canard). The 1st Circuit's decision was a resounding victory for the CPRA and solidified the state's indemnity for suits brought by oyster-lease holders, which have at times been at odds with coastal restoration efforts. *See, Avenal v. State*, 03-3521 (La. 10/19/04), 886 So.2d 1085.

Bayou Canard, Inc. applied for a writ to the Louisiana Supreme Court on June 13, 2018. On Oct. 29, 2018, the Louisiana Supreme Court denied the application, thereby leaving the 1st Circuit decision unchanged.

Weyerhaeuser Co. v. U.S. Fish & Wildlife Serv., 139 S.Ct. 361 (2018).

In this highly publicized case centered in St. Tammany Parish around the historic and potentially future home of the

dusky gopher frog (*Rana sevosa*), the U.S. Supreme Court waded yet again into the timeless environmental law tussle between private property rights and the federal government's authority over property. In particular, a group of landowners sued the U.S. Fish and Wildlife Service (FWS) who, acting under the color of the Endangered Species Act (ESA), designated a portion of private property slated for development as "critical habitat" for the rare amphibian. Although likely part of its historic range, FWS acknowledged that the 1,500 acres in Louisiana did not presently support a population of frogs. Rather, the agency posited that the land was prime for future expansion of the frog's habitat.

A group of landowners led by Weyerhaeuser Co. challenged the FWS decision at the U.S. 5th Circuit Court of Appeals in *Markle Interests, L.L.C. v. U.S. Fish & Wildlife Serv.*, 827 F.3d 452 (5 Cir. 2016) (the previous styling of the *Weyerhaeuser* case), which found that even though the amphibians did not currently live in Louisiana, the FWS designation was not arbitrary and capricious and was within the limits of its statutory authority. The Supreme Court granted certiorari in January 2018 to review the 5th Circuit's decision. Although covering many legal and factual issues, the arguments on appeal were focused on what became known as the "habitability requirement" or whether the ESA could be applied to property that was not currently habitat for a protected species.

Arguments were held on Oct. 1, 2018, and on Nov. 27, 2018. The Court issued a unanimous 8-0 ruling (Justice Kavanaugh took no part) authored by Chief Justice Roberts vacating the 5th Circuit's decision and remanding the case for further proceedings. In its decision, the Court first addressed the habitability question and held that "[a]n area is eligible for designation as critical habitat under [the ESA] only if it is habitat for the species." *Weyerhaeuser*, 139 S.Ct. at 369 n.2. This finding seemingly mirrored the petitioners' argument that for a place to be *critical habitat*, it must first be *habitat*. At the argument, FWS did not dispute this grammatical truism; instead, the agency argued that the definition of *habitat* should include those areas imbued with special features requisite for a species' habitat that could support the species with "some degree of modification to support a sustainable population of a given species." *Id.* at 369. However, stopping shy of a clear win for the landowners, the Court noted that the 5th Circuit did not interpret the term *habitat* or review FWS' administrative findings to that point. Accordingly, the Court vacated the decision and remanded to the U.S. 5th Circuit to explicitly consider what constitutes *habitat* under the ESA and what FWS' findings are regarding the same.

In addition to the habitability question, the Court also addressed the petitioners' additional argument that FWS did not appropriately consider all relevant statutory factors when balancing the costs and benefits of the restrictions placed on the property by the critical habitat designation. The remand decision also contained instructions for the 5th Circuit to consider whether FWS' assessment of the costs and benefits was arbitrary and capricious, which was not done before.

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Community Property

Reagan v. Reagan, 52,080 (La. App. 2 Cir. 6/27/18), 250 So.3d 1122**.**

In this community property partition case, the Reagans were divorced in 2014 and Mr. Reagan died in 2015. Three months later, Ms. Reagan filed a petition to partition the community property. The executrix of Mr. Reagan's succession was substituted for Mr. Reagan,

and the succession and partition suits were consolidated.

A loan was taken during the community to assist the functioning of Mr. Reagan's separate property business, which generated most of the community funds on which the parties lived. It was secured by Mr. Reagan's separate property but was nevertheless a community obligation as it was incurred during the existence of the community and used for community benefit. The court specifically noted: "It is irrelevant what property secured the loan." *Id.* at 1129.

The trial court erred in awarding each party 50 percent of an LLC. It should have awarded the LLC to Mr. Reagan's succession and awarded Ms. Reagan an equalizing payment for one-half of the assets of the LLC, which were composed of the proceeds from the sale of the LLC's only asset, as well as funds in its bank account. Regarding a second LLC, the trial court erred in ordering the parties to receive 50 percent ownership each, instead of having the remaining funds in the LLC's bank account valued and Ms. Reagan receiving credit for one-half of the value of those funds at the termination of the regime. Although federal law may have required that funds in a Morgan Stanley retirement account be paid to a beneficiary, Ms. Reagan was entitled under La. R.S. 9:2801.1 to receive an offsetting value from the community property for 50 percent of the value of that account. A piece of property transferred to Mr. Reagan's separate property LLC in payment of a loan made by that LLC was property of the LLC, and, therefore, Mr. Reagan's separate property.

Mr. Reagan was not entitled to a reimbursement for Ms. Reagan's gambling debts, as he was aware of and condoned her gambling during the marriage. Approximately $800,000 in receivables earned by Mr. Reagan's separate property LLC prior to his death but not paid until after his death belonged to the entity, not the community, and Ms. Reagan was not entitled to half of those funds. The court found that Mr. Reagan had been compensated in the interim.

Berthelot v. Berthelot, 17-1055 (La. App. 1 Cir. 7/18/18), 254 So.3d 800.

Ms. Berthelot alleged only in her post-trial memorandum that her husband mismanaged a rental property by not evicting a tenant who was not paying rent. The appellate court found the trial court properly disregarded her claim because it was not properly raised in the trial court. Because both parties managed the rental property together, the trial court did not abuse its discretion when it awarded her the uncollected rent as an asset. The parties cohabitated for over two years after their divorce, and Ms. Berthelot was not entitled to reimbursement for the rent collected during the cohabitation as it was used for them both.

The trial court did nor err in finding Mr. Berthelot used his separate funds to purchase Ms. Berthelot's one-half undivided community interest in a home. He overcame the presumption of community with his own limited testimony, which was not considered inadmissible parol evidence because of the parties' conflicting testimony regarding the source of the funds.

The parties owned three tracts of land subject to a single mortgage. The trial court did not abuse its great discretion in dividing community property in awarding her two tracts and him one so that each received an equal net value. She argued she was unemployed and could not pay her portion of the mortgage, but the court noted the properties were income-producing.

Custody

S.L.B. v. C.E.B., 17-0978 (La. App. 4 Cir. 7/27/18), 252 So.3d 950.

The trial court granted an order to protect two children from their mother. The appellate court affirmed, finding that the mother hitting the child, taking him to the ground, sitting on top of him and continuing to hit him was physical abuse, not reasonable discipline. The mother failed to preserve her claims

that her due process rights were violated because the children did not testify; she failed to subpoena them or call them as witnesses and did not object that the father did not bring them to court.

The trial court did not err in allowing the testimony of the doctor who interviewed the child regarding the abuse or allowing into evidence the audiotape made at that time because they were relevant to the medical treatment and diagnosis of the child and the recording was properly authenticated. Interestingly, the court noted that the relaxed evidentiary standard for custody matters under La. Code of Evidence art. 1101 could be applied to this matter.

Laurent v. Prevost, 18-0126 (La. App. 4 Cir. 7/11/18), 251 So.3d 504.

As a form of discipline, Mr. Prevost had the children kneel on concrete for 20-30 minutes. The trial court found that this was abusive and changed the previous custody order to award Ms. Laurent sole custody. The 4th Circuit held the court did not abuse its discretion in modifying the custody award; it noted that the trial court "was presented with two permissible views concerning whether [his] use of kneeling as a form of discipline was abusive." Further, the court found that the trial court erred in requiring Mr. Prevost to pay for an outside supervisor for his visitation with the children and ordered, instead, that family members could supervise.

Miller v. Dicherry, 17-1656 (La. App. 1 Cir. 5/29/18), 251 So.3d 428.

Although Dicharry, the mother, was the domiciliary parent, the court did not err in granting Miller, the father, the right to make medical decisions as Dicharry failed to comply with recommended medical practices, failed to notify Miller of doctors' appointments and refused to vaccinate the children. Her reasoning for refusing vaccinations was, "It's just my belief." The court noted: "The mere assertion of a religious belief, however, does not automatically trigger First Amendment protections . . . . 'Philosophical and personal' belief systems are not religion, in spite of the fact that these belief systems may be held with 'strong conviction' and inform critical life choices." The court found no error in the trial court's conclusion, after considering Dicharry's testimony that her beliefs against vaccinations were not "sincerely and genuinely held 'religious' beliefs," but instead arose "from a personal, moral, or cultural feeling against vaccination for her minor child." *Id.* at 435.

Torts

Hoddinott v. Hoddinott, 17-0841 (La. App. 4 Cir. 8/1/18), 253 So.3d 233; *reversed*, 18-1474 (La. 12/17/18), 2018 WL 6649593, ____ So.3d ____.

On the same day the parties obtained their judgment of divorce, they also entered into a consent judgment providing that any claims Ms. Hoddinott made under La. Civ.C. art. 103(4) and any claims for interim or final support under that article and under La. R.S. 9:327 were dismissed with prejudice. Subsequently, she filed a tort action against him to recover damages for domestic abuse she alleged occurred during the marriage, including, but not limited to, those acts alleged in the divorce proceedings. The trial court granted Mr. Hoddinott's exception of *res judicata*, but the court of appeal reversed, three judges to two, finding that exceptional circumstances existed under the *res judicata* statute since La. R.S. 9:291 prevented Ms. Hoddinott from bringing her tort claim until the parties' divorce was final. The Supreme Court reversed, finding that Ms. Hoddinott had dismissed her claims of abuse with prejudice.

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Insurance, Tort, Workers' Compensation & Admiralty Law

Louisiana Uniform Trade Secrets Act Preemption

Brand Servs., L.L.C. v. Irex Corp., 909 F.3d 151 (5 Cir. 2018).

Brand Services, an industrial scaffolding company, claims that its former employee stole trade secrets and confidential and proprietary information — software that Brand Services uses to invoice customers and track productivity — and gave them to his new employer, Irex, a competitor. Brand Services' suit alleges misappropriation, asserting claims under the Louisiana Uniform Trade Secrets Act (LUTSA), La. R.S. 51:1431, *et seq.*, and for conversion under Louisiana civil law. The district court granted summary judgment for Irex on the LUTSA claim, concluding that Brand Services failed to proffer evidence sufficient to create a fact issue on the amount of unjust enrichment damages Irex obtained from use of the trade secrets. It also granted summary judgment on Brand Services' conversion claim, holding LUTSA preempted that claim.

To recover damages under LUTSA, a complainant must prove (a) the existence of a trade secret, (b) a misappropriation of the trade secret, and (c) actual loss caused by the misappropriation. He also may recover for the unjust enrichment caused by the misappropriation that is not taken into account in computing damages for actual loss. A plaintiff fulfills its burden for proving trade secret damages by identifying evidence a factfinder could use to reasonably estimate damages in its favor. "[U]ncertainty in damages should not preclude recovery . . . . But a plaintiff must be able to show 'the extent of the damages as a matter of just and reasonable inference, although the result be only approximate.'" *Id.* at 157, quoting *Wellogix, Inc. v. Accenture, L.L.P.*, 716 F.3d 867, 879 (5 Cir. 2013).

Brand Services provided some evidence from which a factfinder could reasonably estimate unjust enrichment damages: it demonstrated that Irex's use of the information saved it at least two to three days a month in time spent invoicing. The 5th Circuit concluded that Brand Services met its summary-judgment burden of proof regarding the amount of its damages and reversed the district court's judgment on the LUTSA claim.

LUTSA's preemption provision states:

A. This Chapter displaces conflicting tort, restitutionary, and other laws of this state pertaining to civil liability for misappropriation of a trade secret.

B. This Chapter does not affect:

(1) contractual or other civil liability or relief that is not based upon misappropriation of a trade secret, or

(2) criminal liability for misappropriation of a trade secret.

The court concluded that "the plain text of LUTSA would preclude a civilian law conversion claim involving confidential information that qualifies as a trade secret under LUTSA." *Id.* at 158. The court further concluded that "if confidential information that is not a trade secret is nonetheless stolen and used to the unjust benefit of the thief or detriment of the victim, then a cause of action remains under Louisiana law." *Id.* The court thus reversed the grant of summary judgment regarding the LUTSA claim and the civilian law claim for conversion of allegedly non-trade secret information but affirmed the summary judgment dismissing the civilian law claim for conversion of trade secret information.

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International Law

U.S. Supreme Court

Jam v. Int'l Fin. Co., 138 S.Ct. 2026 (2018) (granting writ).

The U.S. Supreme Court held arguments on Oct. 31, 2018, in a case determining whether the International Organizations Immunities Act (IOIA) confers the same immunity to international organizations as that provided to foreign governments. The case involves a lawsuit filed by a group of fishermen and farmers from India who were allegedly harmed by a coal-fired power plant funded by the International Finance Corp. (IFC), the private sector financial arm of the World Bank. The IFC contends that it has absolutely immunity under IOIA, which grants international organizations "the same immunity from suit and every form of judicial process enjoyed by foreign governments." Plaintiffs contend that IOIA immunity runs parallel to the 1976 Foreign Sovereign Immunities Act, which carves out an immunity exception for the foreign

government's commercial activities. If the Court finds an immunity exception, it will pave the way for many new cases involving alleged harm by the commercial actions of international organizations.

European Court of Justice

Wightman v. Sec'y of State for Exiting the European Union, C-621/18 (Dec. 10, 2018).

The European Court of Justice (ECJ) issued a decision on a preliminary ruling reference from a petition for judicial review in the Court of Session, Inner House, First Division (Scotland, United Kingdom) by members of the UK parliament related to Brexit. The petition in the lower court sought clarification on whether the UK could unilaterally reverse its decision to withdraw from the European Union. The ECJ agreed to hear the case under its expedited procedural rules because of the impending UK exit deadline. The ECJ full court ruled that, under Article 50 of the Treaty on European Union (TEU), a Member State is free to revoke a previously lodged withdrawal request. Any revocation must be lodged with the European Council before any withdrawal agreement between the Member State and the EU comes into force, or if no withdrawal agreement is in place, before the expiration of the two-year period from the date of notification of the intention to withdraw from the EU. The revocation must be conducted following a democratic process in accordance with the Member State's national constitutional requirements.

The UK notified the European Council of its intention to withdraw from the EU on March 29, 2017. Under TEU Article 50, the withdrawal becomes effective either upon the execution of a withdrawal agreement between the UK and EU, or two years from the March 29, 2017, notification of withdrawal. The UK Parliament is currently deadlocked regarding the withdrawal agreement negotiated by Prime Minister Theresa May. If no agreement is reached by March 29, 2019, the withdrawal takes place by operation of EU law absent an extension. The ECJ's decision raises the specter of a potential second referendum to reverse Brexit. However, given the TEU timeline, it is unlikely that a referendum could be conducted without an extension of the two-year period.

World Trade Organization

Korea-Measures Affecting Trade in Commercial Vessels (Japan), WT/DS571/1G/L/1279G/SCMD121/1 (Nov. 13, 2018).

Japan submitted a request for dispute settlement consultations at the World Trade Organization (WTO) regarding illegal financial subsidies provided by the Republic of Korea to its domestic shipbuilding industry. Japan alleges numerous violations of the WTO Subsidies and Countervailing Measures Agreement, including the following financial support measures provided in connection with purchases of Korean-built vessels: (1) illegal corporate export subsidies by the Korea Development Bank, Export-Import Bank of Korea, Korea Trade Insurance Corp., Marine Finance Center and the Korea Ocean Business Corp.; (2) refund guarantees and other insurance financing on non-commercial terms by various state-run enterprises; (3) pre-shipment loans to finance customer purchases, purchase of bonds to fund customer purchases and capital injections to finance purchases; (4) non-commercial financial assistance to purchasers for replacement vessels that comply with certain environmental standards from Korean shipbuilders; and (5) broad-based non-commercial support provided under the Development Strategy for the Shipbuilding Industry and the Five-Year Marine Transportation Industry Rebuilding Plan.

This consultation request is the first step in the dispute-settlement process. A panel will be established to adjudicate the dispute after 60 days.

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Male Applications of #MeToo Movement in Employment

The #MeToo movement has pervaded the conversation about sexual harassment, especially in the workplace. The Equal Employment Opportunity Commission (EEOC) filed 41 sexual harassment lawsuits as of October 2018, more than 50 percent more than sexual harassment suits filed in 2017.

Although #MeToo originated to protect women, some men have not hesitated to apply it to their situations. Travis Hardwick referenced the movement in his Title VII sexual harassment case in the Southern District of Indiana, but the court rejected his argument. *Hardwick v. Ind. Bell Tel. Co.*, No. 1:15-01161 (S.D. Ind. Sept. 26, 2018), 2018 WL 4620252. Recently, Paul Engelien filed a complaint blaming #MeToo and the media for his wrongful termination by influencing his employer to conduct a pretextual sexual harassment investigation against him. *Engelien v. Alaska Airlines, Inc.*, No. 18-2-27481-8 (Wash. Super. Ct., King Cty. Nov. 1, 2018), 2018 WL 5729877.

Hardwick was a technician for Indiana Bell Telephone Co. in 2008. In mid-2013, Brantley, Hardwick's supervisor, a female, went to Hardwick's job site. While there, Brantley questioned why Hardwick was not wearing his company-issued pants. Hardwick claimed Brantley then commented, "Nice ass." Hardwick did not file any charges or report Brantley to any supervisors.

In December 2013, Brantley audited Hardwick's garage and found Hardwick violated company guidelines, including falsifying timesheets. Brantley suggested that Hardwick be terminated. Hardwick presented evidence to rebut Brantley's findings at his pre-term hearing, to no avail. The company disagreed with Hardwick and terminated him.

Hardwick sued Indiana Bell for sexual harassment, hostile work environment and retaliation based on Brantley's comment. Indiana Bell responded that Hardwick failed to prove the comment was severe or pervasive. In response, Hardwick said that, because of the #MeToo movement, "what should be tolerated and what creates a hostile work environment for any and all employees is changing for the better and Title VII is providing more protection than ever before. Isn't one degrading and humiliating act of any supervisor abusing their power enough in this day and age[?]"

The court held that Title VII remains unchanged and this one comment was not enough. The court further stated that Hardwick's comparison of himself to the women who brought the #MeToo movement to national attention was "insulting to the movement and women involved. . . . Sexual assault, sexual violence, and sexual abuse are a far cry from the isolated comment that Mr. Hardwick describes." The court granted Indiana Bell's motion.

In an arguably more compelling application of the #MeToo movement, Paul Engelien, a male Alaska Airlines pilot, filed a complaint against Alaska, co-pilot Betty Pina and Alaska's workplace-investigation agency. His claims include wrongful termination, negligence, tortious interference, defamation and invasion of privacy. Note that this matter is at the complaint stage, so the below statements are only allegations.

Engelien and Pina were selected to fly together, with a return trip scheduled for the next morning. The night between flights, Engelien and Pina went to the hotel bar for drinks. Alaska prohibits pilots from consuming alcohol within 10 hours of reporting for duty. Engelien alleged that they stopped drinking at 8 p.m., more than 10 hours before report time, and headed back to their adjacent rooms.

Engelien allegedly did not remember entering his hotel room or anything else until his cell phone rang at 10:47 p.m. When he woke up, he saw Pina asleep in the other bed. On the call, the duty officer said a flight attendant saw Engelien with wine and felt uncomfortable with him flying. Engelien mistakenly told the officer he had alcohol during the 10-hour window because of alleged phone-clock issues, and so the officer pulled Engelien from the morning flight. Pina requested to be pulled from duty as well because she was distraught about potentially losing her job as a probationary pilot.

Alaska then began an investigation into the potential 10-hour violations. After Pina began to question her memory, Engelien alleged that "Alaska's investigation shifted from both pilots' alcohol use to solely a #MeToo investigation" against Engelien. Pina then filed a "#MeToo lawsuit" against Alaska, alleging it failed to protect her against Engelien's sexual assault. The lawsuit gained national attention because of Pina and her attorney's media campaign. Engelien then claimed that shortly after Pina filed her lawsuit the investigation ended, concluding that Engelien had violated the 10-hour rule, but Pina did not. Alaska subsequently terminated Engelien.

Engelien alleges that he provided evidence of the inconsistencies of the investigation and that Pina had a second alcohol incident where she was not able to fly. In spite of this, Alaska refused to reopen his case.

These cases reflect how male employees can implement the #MeToo movement to their claims and the challenges it raises for employers. Men who are victims of harassment are likely more willing to bring sexual harassment claims in this more accepting environment, so employers must take all complaints seriously. Conversely, Engelien's complaint exemplifies the tightrope that employers walk when the male employee is the accused. The employer must be cautious not to ignore an employee's allegations of sexual harassment, but also must be cognizant of how it handles the investigation because lawsuits wait on both sides of this difficult position. The best practice is to treat all complaints as legitimate and perform thorough investigations.

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1st Circuit Allows Legacy Suit to Proceed as Citizen Suit

Global Marketing Solutions acquired land by cash sale in 2005. *Global Marketing Sols. v. Blue Mill Farms*, 18-0093 (La. App. 1 Cir. 11/6/18), ____ So.3d ____, 2018 WL 5816971. Later, Global sued several oil and gas companies, alleging that their pre-sale operations had contaminated the land. The district court granted an exception of no right of action based on the subsequent-purchaser doctrine.

Global amended its petition, seeking to assert a claim based on La. R.S. 30:14 and 30:16. R.S. 30:14 states in part:

> Whenever it appears that a person is violating or is threatening to violate a law of this state with respect to the conservation of oil or gas, or both, or a provision of this Chapter, or a rule, regulation, or order made thereunder, the commissioner shall bring suit to restrain that person from continuing the violation or from carrying out the threat.

R.S. 30:16 states in part:

> If the commissioner fails to bring suit within ten days to restrain a violation as provided in La. R.S. 30:14, any person in interest adversely affected by the violation who has notified the commissioner in writing of the violation or threat thereof and has requested the commissioner to sue, may bring suit to prevent any or further violations, in the district court of any parish in which the commissioner could have brought suit.

Global alleged that it had notified the Commissioner of Conservation of oilfield contamination and asked that the Commissioner file suit against the defendants, but the Commissioner failed to do so. Instead, the Commissioner ordered the defendants to submit a work plan for evaluating contamination at the site. The defendants apparently submitted such a plan, but Global filed suit, seeking a judicial remedy.

The defendants filed an exception of no cause of action, arguing that La. R.S. 30:16 authorizes citizens only to bring suit to stop an ongoing violation of the conservation laws or to prevent a threatened violation, not to remedy a past violation. Because Global alleged its land had been contaminated by past operations, the defendants asserted that Global could not bring suit under R.S. 30:16. The district court agreed and dismissed Global's suit. Global appealed.

A five-judge panel of the Louisiana 1st Circuit reversed and remanded the case to the district court to allow the litigation

to proceed. The majority noted that the plaintiffs stated the violations of conservation rules "are ongoing." Judge Guidry dissented, stating that R.S. 30:16 cannot be used to remedy past violations and that the plaintiffs were complaining about past conduct. Judge Holdridge issued a concurring opinion. He agreed with the defendants that some of the language of R.S. 30:16 seems to authorize citizen suits only for ongoing or threatened violations. He stated, however, that he thought some of the language in R.S. 30:14 and R.S. 30:16 was ambiguous and could be read as authorizing a broader range of citizen suits. For that reason, he concurred with the judgment.

Western District Allows Legacy Suit to Proceed with Citizen Suit Theory

In *Watson v. Arkoma Dev., L.L.C.*, No. 17-1331 (W.D. La. Nov. 15, 2018), 2018 WL 6274070, the plaintiffs asserted that the defendants were liable for oilfield contamination that resulted from past operations. The plaintiffs asserted several legal theories, including a citizen suit pursuant to La. R.S. 30:16.

The defendants moved to dismiss several of the claims, including the citizen suit. They argued that R.S. 30:16 citizen suits can be used only to prevent ongoing or threatened future violation of the conservation statutes and regulations, not to remedy past violations. Because the conduct that allegedly caused contamination was past conduct, the defendants argued that the plaintiffs could not rely on R.S. 30:16. In response, the plaintiffs contended that the defendants' failure to remediate the property was an ongoing violation. Magistrate Judge Karen L. Hayes recommended denying the motion to dismiss with respect to the citizen suit, concluding that the plaintiffs were alleging an ongoing violation. Thus, she reasoned, she did not need to decide whether R.S. 30:16 can be used to remedy past violations.

Judge Hayes recommended granting the motion to dismiss with respect to the following claims — a "Good Samaritan Doctrine" claim based on Restatement (Second) of Torts § 324A; continuing tort; a Civil Code art. 2688 obligation to notify plaintiffs that the leased property needed repairs; unjust enrichment; Act 312 (because it is procedural only, not an additional source of liability); land loss and subsidence; and fraud. She recommended denying the motion to dismiss with respect to an ultrahazardous activities doctrine claim under a prior version of Civil Code art. 667; *garde* liability under Civil Code art. 2317 and 2322; unauthorized disposal of salt water; and breach of express lease terms. She also recommended that the plaintiffs' claims for breach of "Lease #3" be dismissed because the plaintiffs had not given the defendants notice of the alleged breach and an opportunity to cure, which are prerequisites to filing suit under the terms of that lease. The district court entered a judgment consistent with the recommendation of Judge Hayes. *Watson v. Arkoma Dev., L.L.C.,* No. 17-1331 (W.D. La. Nov. 30, 2018), 2018 WL 6274008.

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Service of Process on State Employee

Wright v. State, 18-0825 (La. App. 4 Cir. 10/31/18), ____ So.3d ____ (2018 WL 5660127.)

Following the issuance of a medical-review-panel opinion, Wright filed a lawsuit against five individual healthcare providers (HCPs) and effected service against each them at their various addresses. The HCPs filed declinatory exceptions of insufficiency of citation and service of process, complaining that only individual state employees, and no state institutions or agencies, were named or served. The trial court denied the exceptions.

The HCPs successfully obtained a supervisory writ. The appellate court began its analysis by referencing La. R.S. 13:5107 and its subparts, which together require that service of suits against the state, state agencies, political subdivisions or any state officer or employee be requested within 90 days of the filing of the action. Failure to name and file suit against the proper state entity and to request service within that 90-day period results in the action being dismissed without prejudice. The HCPs argued that the plaintiff's failure to sue the correct state agencies called for the dismissal of the case.

The plaintiff admitted that all of the

HCPs were state employees, but he argued that, pursuant to La. R.S. 13:5107(D), his service was timely because he requested service, albeit improperly, within the 90 days, a position for which he cited no case law. The court found the plaintiff's reliance on 13:5107(D) was misplaced. It noted the timeliness of the request for service of process was not the deciding issue; rather, the issue was "the failure to *request* service on the proper party or parties." The court explained in a footnote:

> Necessarily, timeliness is *an* issue. Clearly, service of process in this matter was not requested on the proper party/parties. Thus, service was not requested "on all named defendants within ninety days of commencement of the action." La. C.C.P. art. 1201(C). To hold otherwise would be to allow a plaintiff to request service *on anyone* within 90 days of filing an action and technically comply with the requirement of the article.

Likewise, that the state employees had actual knowledge of the suit was irrelevant because "[k]nowledge of the existence of an action on the part of the defendant, no matter how clearly brought home to him, cannot supply the want of a citation," quoting *Guaranty Energy Corp. v. Carr*, 490 So.2d 1117, 1120 (La. App. 5 Cir. 1986). The healthcare providers' exceptions were granted and the case was dismissed without prejudice.

Mailbox Rule

In re Anderson, 17-1576 (La. App. 1 Cir. 11/14/18), ____ So.3d ____ (2018), 2018 WL 6579553.

After receiving Ms. Anderson's request for a medical-review panel, the PCF advised her by letter that it must receive a filing fee "within forty-five days of the postmark of the notice" and that failure to strictly comply with this requirement would invalidate the request and would "not suspend the time within which suit must be instituted."

Three days prior to the expiration of the PCF's deadline for payment, the filing fee was mailed to the PCF via certified mail. The payment was not received by the PCF until seven days after the 45-day deadline. The PCF then notified Anderson and all of the respondents that it considered her claim "invalid and without effect."

Anderson filed a petition asking the district court to reverse the PCF's decision. The court affirmed the PCF's determination and denied all relief, from which Anderson appealed.

Anderson's position on appeal was that the "mailbox rule" as explained in La. R.S. 1:60(A)(2) should apply to the mailing of the filing fee. Under the mailbox rule, the date of mailing, not the date of actual receipt, would determine the date payment was "received." Noting that La. R.S. 40:1231.8(A)(2)(b) already applied the mailbox rule to the mailing of complaints, Anderson argued that, because the filing of a complaint and the payment of the filing fee are inexorably joined under the Medical Malpractice Act, the mailbox rule should likewise apply to the payment of filing fees.

The PCF argued that the deadline for payment of the filing fee is distinct from that of filing a complaint, citing *In re Benjamin*, 14-0192 (La. App. 5 Cir. 11/25/14), 165 So.3d 161, 162, *writ denied,* 15-0142 (La. 4/10/15), 163 So.3d 814, wherein the 5th Circuit determined the filing fee must be actually received by the Board within the 45-day period

The *Anderson* court noted, however, that the 5th Circuit had recently clarified its position in *Benjamin* with its later opinion in *Glover* where it declared its statement in *Benjamin* that "payment occurs when the filing fees are received by the PCF Board" was dicta. *In re Glover*, 17-0201 (La. App. 5 Cir. 10/25/17), 229 So.3d 655, 662; *see also, Glover* discussion, 65 La. B.J. 429-30 (2018). The *Anderson* court found the facts and arguments before it to be similar to those in *Glover* and concluded that the 5th Circuit's reasoning in *Glover* was more persuasive than in *Benjamin*. Consequently, the *Anderson* court held "that the mailbox rule should apply when determining the timeliness of filing fees paid to the PCF Board, pursuant to LSA-R.S. 40:1231.8(A)(1)(c)."

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No Refund Allowed Based on a Misinterpretation of Law by the Department

Bannister Props., Inc. v. State, 18-0030 (La. App. 1 Cir. 11/2/18), ____ So.3d ____, 2018 WL 5732839.

Bannister Properties, Inc. and Southold Properties, Inc. (Taxpayers) filed amended Louisiana corporation income and corporation franchise tax (CFT) returns claiming they were not subject to CFT for the years beginning Jan. 1, 2008, Jan. 1, 2009, Jan. 1, 2010, and Jan. 1, 2011. Taxpayers claimed they were not subject to CFT based on the decision *UTELCOM, Inc. v. Bridges*, 10-0654 (La. App. 1 Cir. 9/12/11), 77 So.3d 39, *writ denied*, 11-2632 (La. 3/2/12), 83 So.3d 1046. *Utelcom* declared the regulation invalid, finding that the CFT regulation Louisiana Administrative Code 61:I.301(D) was promulgated on was based on a mistake of law due to the Department's misinterpretation of La. R.S. 47:601.

The Department denied the Taxpayers' overpayment refund claims filed pursuant to the overpayment refund procedure, La. R.S. 47:1621, asserting they were not refundable under any provision of law. In response to the Department's denials, the Taxpayers filed petitions at the Louisiana Board of Tax Appeals (BTA) pursuant to the overpayment refund procedure and/or in the alternative a claim against the state under La. R.S. 47:1481. While the BTA matters were pending, the Taxpayers and the Department entered into a settlement to resolve the claim against the state whereby the parties stipulated an overpayment had been made and the amount thereof. The BTA issued recommendations to the Legislature that funds be appropriated to pay such claims. An appropriation has not yet been made,

and Taxpayers sought to avail themselves of the overpayment refund procedure.

The Department filed a motion for summary judgment asserting that Louisiana law prohibited the issuance of a refund. La. R.S. 47:1621(F) states: "This Section shall not be construed to authorize any refund of tax overpaid through a mistake of law arising from the misinterpretation by the secretary of the provisions of any law or of the rules and regulations promulgated thereunder." The Department argued that since the Taxpayers' claims were based on the *Utelcom* decision, La. R.S. 47:1621(F) applied. The Taxpayers filed a cross motion for summary judgment.

The 1st Circuit reversed the BTA's decision that granted the Taxpayers' motion for summary judgment and ordered the Department to repay the taxes. The 1st Circuit in turn granted the Department's motion for summary judgment and held the Taxpayers were not entitled to a refund pursuant to the Overpayment Refund Procedure.

In a unanimous decision granting the Department's motion for summary judgment, the 1st Circuit held that statutes providing for tax refunds must be strictly construed against the taxpayer. The court found Section 1621(F), which prohibits the authorization of any refund of overpayment based on the Department's misinterpretation of tax law, is clear and unambiguous and must be applied as written. In holding the Taxpayers' claims do not qualify as refund claims under the overpayment refund procedure, the court found the Taxpayers voluntarily paid the taxes and are not entitled to a refund of taxes overpaid based on the Department's misinterpretation of tax law as recognized in the *Utelcom* decision. The court held the Taxpayer's only available remedies were to have paid the taxes under protest and filed suit for recovery under La. R.S. 47:1576, which the Taxpayers did not do, or through the claim against the state, which the Taxpayers already received.

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Limitations on Tax Credit for Income Taxes Paid to Other Jurisdictions Ruled Unconstitutional

Smith v. Robinson, 18-0728 (La. 12/5/18), ____ So.3d ____, 2018 WL 6382118.

The Smiths are Louisiana resident shareholders of S corporations that operated in both Louisiana and Texas. La. R.S. 47:33 offers a Louisiana resident individual-income-tax credit for "net income taxes imposed by and paid to another state on income taxable" in Louisiana. Act 109 of the 2015

Louisiana Regular Legislative Session restricted the availability of the credit to net income taxes paid to another state that offered a reciprocating credit like La. R.S. 47:33.

The Texas Franchise Tax (TFT) does not offer a reciprocating credit, so the Smiths paid the portion of their 2015 Louisiana individual-income -tax liability attributable to Act 109 under protest and filed a refund petition. The 19th Judicial District Court agreed with the Smiths that Act 109 was unconstitutional, triggering an automatic appeal to the Louisiana Supreme Court.

There the Smiths argued that Act 109 violated the Dormant Commerce Clause of the U.S. Constitution. The Supreme Court agreed, relying on *Comptroller of Treas. of Md. v. Wynne*, 136 S.Ct. 1787 (2015), to determine that the effect of Act 109 violated two parts of the four-part test for the constitutionality of state taxes established in *Complete Auto Transit, Inc. v. Brady*, 97 S.Ct. 1076, 1079 (1977).

The Department argued that the Smiths were ineligible for the credit because (1) the TFT was not a net-income tax, and (2) the TFT was imposed on the businesses, not the Smiths. The Louisiana Supreme Court rejected the first argument because, under Louisiana jurisprudence, the type of a tax is determined by its operational effect, and the TFT's operational effect was to tax net income. The Supreme Court also rejected the second argument, deciding to follow the Louisiana 1st Circuit's opinion in *Perez v. Sec'y of La. Dep't of Rev. & Taxation,* 98-0330 (La. App. 1 Cir. 3/8/99), 731 So.2d 406, which held that S corporation shareholders qualify for the La. R.S. 47:33 credit for taxes paid to another state by their S corporation. An application for rehearing has been filed in this matter.

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Effects of a Will if Notary Only Attests to Authenticity of Signatures

On appeal of *In re Succession of Dale*, 18-0405 (La. App. 1 Cir. 9/24/18), ____ So.3d ____, 2018 WL 4562153, the court analyzed whether a 2016 will was valid as to form and, if invalid, whether it was a valid authentic act that revoked a 2014 will. The attestation clause in the 2016 will contained all language and signatures required by law, but next to the notary's signature was a disclaimer stating: "The notary has neither prepared nor read this document and is solely attesting to the authenticity of the signatures affixed hereto."

The court found two issues with the disclaimer: (1) if the notary attested only to the authenticity of the signatures, it is unclear whether the testator declared in the presence of the notary and two witnesses that the instrument was her last will and testament; and (2) it nullified the declaration that the document was signed in the presence of the testator and each other. Thus, the court held: (1) the will was absolutely null; (2) an absolutely null will cannot constitute a valid and effective revocation of prior wills because it is "void ab initio, and can have no effect of any sort;" and (3) the null will did not provide a basis to reopen the succession.

When is a Servitude by Implication Created?

In the 1st Circuit's opinion in *Templeton v. Jarreau*, 18-0240 (La. App. 1 Cir. 9/24/18), ____ So.3d ____, 2018 WL 4561669, the court analyzed whether implied dedication created a predial servitude over the defendant's property. The plaintiff owned Lots 6A, 6C and 6D, and the defendant owned Lot 6B. The plaintiff argued a servitude existed over Lot 6B for the benefit of Lots 6C and 6D, but the defendant argued a predial servitude never existed.

Two surveys are central to this case — the Pringle map, prepared before the resubdivision of Lot 6; and the Mistric map, prepared after the resubdivision of Lot 6 and provides for a servitude of passage along the southern boundary of Lots 6C and 6B. A servitude by implication is created only if "the servitude is shown on a recorded survey map pursuant to which the property is sold and described" and the deed or survey "clearly expresses" intent to create a "servitude for the benefit of owners of neighboring property."

The court found in favor of the defendant and held no servitude existed because: (1) the act of sale to the defendant was silent as to the servitude claimed by the plaintiff (the only plat referenced therein was the Pringle map); and (2) the subdivision plat at issue was not recorded in the conveyance records.

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