
## There Actually is (Still) a Limit to GAO Bid Protest Jurisdiction

***MD Helicopters, Inc.***, B-417379, Apr. 4, 2019, 2019 CPD ¶ 120.

In spring 2019, the U.S. Army issued an Other Transaction Agreement (OTA) for prototyping solicitation No. W911W6-19-R-0001 for the development of future attack reconnaissance aircraft prototypes under its prototype OTA authority contained within 10 U.S.C. § 2371b. In response to the solicitation, multiple interested vendors, including MD Helicopters, Inc., submitted "white papers" or offers. After a first round of evaluations, MD Helicopters was not selected by the Army to continue into phase one of the OTA competition. After receiving notice of its non-selection, MD Helicopters filed a pre-award bid protest with the Government Accountability Office (GAO) alleging that the Army: (1) unreasonably evaluated its offer, and (2) failed to promote small business participation pursuant to 10 U.S.C. § 2371b(d)(1). The Army requested the GAO dismiss the bid protest for lack of jurisdiction.

For a discussion on what is a bid protest, *see* Bruce L. Mayeaux, "Recent Developments: Corrective Action, Presumption of Good Faith and Speculation at the GAO," 65 La. B.J. 418 (2018).

### GAO Does Not Have Bid Protest Jurisdiction Over OTAs — Generally

In its request for dismissal, the Army argued that the GAO does not have jurisdiction to review bid protests of OTAs because such instruments are not considered "procurement contracts" under the Competition in Contract Act of 1984 (CICA). Generally, under CICA, procurement contracts are contracts entered into by the federal government for the procurement of goods and services. *See*, 31 U.S.C. §§ 3551(1), 3552. In the instant matter, while the Army may use

a prototype OTA to procure goods or services, an OTA does not fall under the auspices of CICA because OTAs draw authority from a separate statute, 10 U.S.C. § 2371b. *See,* 10 U.S.C § 2371b(d)(1). Contrary to its recent decisions in *ACI Techs., Inc.*, B-417011, Jan. 17, 2019, 2019 CPD ¶ 24, and *Oracle America, Inc.*, B-416061, May 31, 2018, 2018 CPD ¶ 180, where the GAO appeared to be taking a more expansive view of its jurisdictional grant under CICA, the GAO agreed with the Army and strictly interpreted its jurisdiction.

In its decision, the GAO referenced its basis for the dismissal as jurisdictional limitations provided by Congress in CICA and under its own Bid Protest Regulations; specifically, that it has jurisdiction to preside over bid protests concerning allegations of violations of procurement statutes or regulations by federal agencies in the award or proposed award of procurement contracts. *See,* 31 U.S.C. §§ 3551(1), 3552; 4 C.F.R. § 21.1(a). The GAO noted that under this general jurisdictional limitation, however, it would review a bid protest allegation that an agency is misusing its OTA authority merely to procure goods and services. *See,* 4 C.F.R. § 21.5(m); *Blade Strategies, L.L.C.*, B-416752, Sept. 24, 2018, 2018 CPD ¶ 327 at 2. In the instant bid protest, the GAO noted that MD Helicopters' allegations involved the Army's evaluation of offers and award decisions and not its use of its OTA authority under 10 U.S.C. § 2371b.

In its opposition to the dismissal, MD Helicopters argued that the GAO's Bid Protest Regulations actually allow an expansive jurisdictional grant in 4 C.F.R. § 21.5(m) when it provides that the "GAO *generally* does not review protests . . . of agreements other than procurement contracts" and that the GAO should use this "considerable discretion" to hear its protest. *See, MD Helicopters, Inc.*, B-417379, Apr. 4, 2019, 2019 CPD ¶ 120 at 3 (emphasis in original). However, the GAO did not find MD Helicopters' argument persuasive. Specifically, the GAO reiterated in its decision that the jurisdictional grant was from Congress by way of CICA and not its Bid Protest Regulations. Hence, because CICA limits the GAO's bid protest jurisdiction to procurement contracts and OTAs are not procurement contracts, the GAO could not hear the bid protest.

Additionally, as a point of clarification, the GAO commented that the use of the term "generally" in its Bid Protest Regulations does not:

> connote some reserved discretion for [the] GAO to consider hearing cases involving the award or proposed award of an OTA, or other non-procurement agreement. Rather, it connotes that [the] GAO may, in limited circumstances, hear a protest that tangentially impacts an agency's award or proposed award of other than a procurement contract.

*MD Helicopters, Inc.*, B-417379, at 4. This statement harked back to the GAO's earlier position that it reviews OTAs only to see if an agency is properly using its statutory OTA authority because of a challenge to that effect. As MD Helicopters was not challenging the Army's decision to use an OTA and opposed only the outcome of the OTA competition, the GAO dismissed the bid protest for lack of jurisdiction.

This decision placed the GAO back in line with its earlier jurisdictional precedent regarding OTAs as contained within *MorphoTrust USA, L.L.C.*, B-412711, May 16, 2016, 2016 CPD ¶ 133, or at least attempts to clarify its jurisdictional limitations in light of *ACI Techs.* and *Oracle America*. Potential government contractors should be mindful of this restatement of GAO's bid-protest jurisdictional limitations and consider other fora, such as COFC or the federal district courts, for protests of OTAs as the GAO has now made clear that it will not entertain those protests.

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

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Bankruptcy Law

## 5th Circuit Allows Administrative Expense Claims for Costs "Induced" by a Debtor-in-Possession

***Nabors Offshore Corp. v. Whistler Energy II, L.L.C. (In re Whistler Energy II, L.L.C.)***, ____ F.3d ____ (2019), 2019 U.S. App. LEXIS 22337.

The U.S. 5th Circuit Court of Appeals recently clarified the scope and definition of "administrative expenses" under 11 U.S.C. § 503 of the Bankruptcy Code. For non-bankruptcy practitioners, an "administrative expense" is ordinarily a debt that arises post-bankruptcy that is related to, and usually beneficial to, the bankruptcy estate. For example, the debtor's bankruptcy counsel fees are typically considered administrative expenses. Classification as an administrative expense is important in bankruptcy because these expenses are given repayment priority ahead of most other creditors.

In *Whistler*, the 5th Circuit considered whether the bankruptcy court conducted the correct analysis when determining whether certain post-bankruptcy expenses were "administrative expenses." The facts of the case are this: prior to filing bankruptcy, Whistler Energy II, L.L.C., contracted with Nabors Offshore Corp. Nabors was to provide a drilling rig to Whistler, as well as related equipment and services. When Whistler entered bankruptcy, it rejected its contract with Nabors. Contract rejection is treated as a pre-bankruptcy breach of the agreement. 11 U.S.C. § 365(g)(1); *see also*, § 502(g).

The parties then entered a "pre-demobilization" period — the timeframe before equipment and infrastructure is removed from a drilling platform. During this time, Nabors' rig, equipment and some personnel remained on Whistler's platform. Approximately one month after rejecting its contract with Nabors, Whistler sent Nabors a letter requesting a "demobilization" plan. This plan was required by Whistler's federal regulator. Four months after Whistler rejected the Nabors contract, demobilization began.

Nabors then asked the bankruptcy court to classify its approximately $7 million in pre-demobilization and demobilization expenses as administrative expenses. However, the bankruptcy court found that many of Nabors' expenses during the pre-demobilization period were akin to Nabors merely being *available* to provide services, if needed, rather than *actually providing* those services. With the exception of services specifically requested by Whistler, the bankruptcy court found that a majority of Nabors' pre-demobilization expenses were not administrative expenses. Further, the bankruptcy court found that none of Nabors' demobilization expenses were administrative expenses because these costs did not benefit the bankruptcy estate. In total, the bankruptcy court awarded Nabors an administrative expense claim of only $897,024.

The district court affirmed the bankruptcy court's decision.

The 5th Circuit then reversed the lower courts' decision on pre-demobilization expenses. Regarding demobilization costs, the court agreed that these expenses were a consequence of Whistler's rejection of the Nabors' contract and did not benefit the estate. However, the court of appeals found that the bankruptcy court should have analyzed whether pre-demobilization expenses (1) benefitted the estate, and (2) whether Whistler induced the services giving rise to these expenses, regardless of whether Nabors actually provided any services.

The second prong of this test, inducement, is key in the 5th Circuit's ruling. With this statement, the 5th Circuit clarified that a creditor may prove entitlement to administrative priority when its post-bankruptcy expenses are triggered by "inducement [from the debtor-in-possession] via the knowing and voluntary post-petition acceptance of desired goods or services." *Id.* at *13.

In *Whistler*, the court of appeals noted that Nabors' availability to provide services during the pre-demobilization period may have benefitted the bankruptcy estate, even if services were not actually provided. The court analogized this availability to that of an insurance policy, which benefits the debtor by minimizing risk even if the policy is not actually triggered. The 5th Circuit remanded the matter to the bankruptcy court for a factual determination of inducement on pre-demobilization expenses, applying the new inducement test.

Practitioners in the 5th Circuit should familiarize themselves with the *Whistler* inducement standard. This standard may allow for more administrative expense claims, and the court's analysis offers guidance on how to support such claims.

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## Shhhh . . . No Talking

***Gotch v. Scooby's ASAP Towing, L.L.C.***, 19-0030 (La. 6/26/19), 2019 La. LEXIS 1624.

This case arose from a jury trial relative to injuries sustained from an automobile accident, where the jury discussed the matter prior to deliberations. In a split decision, the Louisiana Supreme Court held that, even though the jury members discussed the matter before it was submitted to them, the trial court did not abuse its discretion in denying a mistrial for lack of prejudice, and the verdict should stand.

At the start of trial, the trial judge instructed the jury, "You may only discuss the case with the other members of the jury when you begin deliberations on your verdict and all other members of the jury are present."

After deliberations began, counsel for plaintiff asked the alternate juror, who had remained in the courtroom, about her impression of the case. Her answer suggested that the jurors had already discussed the case among themselves over the course of the trial. The alternate stated, "Pretty much from the opening statement, we had decided that the defendant wasn't at fault."

The jury deliberated for approximately 15 to 20 minutes before returning a unanimous verdict for the defendant, just as the alternate had said the jurors had previously decided. The court, with the parties' consent, and on the record, asked the jurors if they had discussed the case before deliberations. The procedure by which the court went about questioning the jurors is not evident from the opinion. The foreperson confirmed that the jurors did not know they were not allowed to discuss the case while in the jury room; on the contrary, they felt a "duty" to discuss the case over the course of the trial in order to reach a verdict.

Another juror explained that some jurors formed opinions from the beginning, but none of them had made their minds up "one hundred percent," evinced by the fact that they all took copious notes over the course of the trial. She assured the court that the jury "looked at all the information" before reaching its verdict.

Plaintiff filed a motion for mistrial, arguing that the jurors disregarded the instruction against making a determination before the conclusion of the trial. The district court found that there was no manifest error in allowing the verdict to stand and denied the motion for mistrial because the discussion did not affect the jury's verdict, and reasonable minds could have reached the same verdict. Plaintiff's appeal ensued.

The Louisiana 3rd Circuit Court of Appeal reversed the district court, and the Louisiana Supreme Court granted certiorari. The ultimate question was whether the district court had abused its discretion in denying a mistrial. In a 4-3 opinion, the court reversed the appellate court's decision and reinstated the district court's denial of mistrial.

The majority began by stating that a mistrial is a drastic remedy, not a matter of right, that a trial court has vast discretion to grant or deny, and which should be granted only when an error results in substantial prejudice sufficient to deprive a party of any reasonable expectation of a fair trial. To qualify for a mistrial, the court continued, juror misconduct must make it impos-

sible to proceed to a proper judgment.

Here, the majority found the district court did not abuse its discretion in finding that the jurors did not make a premature decision, and, therefore, the plaintiff was not prejudiced, because one juror's testimony refuted any suggestion of prejudgment or prejudice to plaintiff's case. Moreover, the majority believed any prejudice would have favored the plaintiff since his case was presented first.

Three justices dissented, including Chief Justice Johnson. The chief justice noted jury misconduct rises to the level of a mistrial when it causes prejudice that cannot be cured by admonition or further instruction. The chief justice stated unequivocally that, here, the jury had received instructions not to engage in premature deliberations and had violated them, causing prejudice that necessitated a mistrial. Further, the chief justice cited the alternate juror's comment as well as the court's comments on the record, stating that deliberations were barely long enough for the jurors to have a bathroom break, as evidence that the verdict was "predetermined."

Justice Hughes also dissented, chiding the courts for "cavalier treatment" of the Plain Civil Jury Instructions promulgated by the Louisiana Supreme Court. He, too, noted the apparent brevity of the jury's deliberations to suggest a predetermined verdict. Ultimately, he felt that the majority simply ignored the rules violations herein.

Justice Genovese dissented as well, stating outright that plaintiff was prejudiced by jury misconduct and that the only remedy available was a mistrial. Justice Genovese reasoned the alternate juror's statement that "[p]retty much from the opening statement, we had decided the defendant wasn't at fault" prohibited the plaintiff from a fair trial, as the jury had made a preliminary decision before any evidence could be presented.

This opinion begs the question of where the scale tips in establishing juror misconduct sufficient to necessitate a mistrial. At least for now, it is not where jurors openly disregard the court's instructions against discussing the case prior to submission, as happened here. Notably, this decision represents one of the last votes cast by former Louisiana Supreme Court Justice, now U.S. District Court Judge, Greg G. Guidry. His vacancy may raise the opportunity for a sudden reversal of this recent decision.

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## Community Property

***Volpe v. Volpe***, 18-0809 (La. App. 4 Cir. 2/20/19), 265 So.3d 871, *writ denied*, 19-0479 (La. 5/20/19), 271 So.3d 1269.

Ms. Volpe purchased a home prior to the parties' marriage and refinanced it shortly before the marriage. After their marriage, they lived in the home, and she later donated one-half of her interest in the property to Mr. Volpe. The preexisting mortgage remained in her name. Mr. Volpe was not entitled to reimbursement for community funds used prior to the donation to pay for flood insurance, homeowner's insurance and property taxes since such expenses are not reimbursable.

Further, the trial court's awards to Mr. Volpe of one-half of the community funds paid on the loan principal from the date of marriage to the termination of community, and for one-half of the community funds upon the sale of the property that were used to satisfy the existing mortgage, were reversed. Although the mortgage remained in her name, he was aware of the mortgage and acknowledged it in the Act

of Donation. His share of the equity in the property was calculated after payment of the mortgage due, not before.

The court found that "it is unjust, inequitable and improper for Mr. Volpe to also be reimbursed for half of the payments to the princip[al] on the mortgage during the marriage, and for one half of the funds used to settle the mortgage at the act of sale." Further, Ms. Volpe was not entitled to reimbursement for one-half of the mortgage payments she made post-termination because she had exclusive use and occupancy of the home and, under the co-ownership articles, La. Civ.C. art. 806, a mortgage expense is not a necessary expense or one for ordinary maintenance and repairs, or necessary management expenses paid to a third person.

***Sonnier v. Gordon***, 52,650 (La. App. 2 Cir. 5/22/19), 273 So.3d 629.

Because both Mr. and Ms. Gordon, during their marriage, signed a promissory note in favor of Mr. Sonnier, and funds from Mr. Sonnier were deposited into an account controlled by Mr. Gordon for a business venture between him and Mr. Sonnier, Ms. Gordon was liable on the note, even though she claimed that she did not receive any consideration for signing and had no control of the funds. The court found that she personally incurred the obligation by signing the note.

***Pembo v. Pembo***, 17-1153 (La. App. 1 Cir. 6/28/19), ____ So.3d ____, 2019 WL 2723554.

In this community property partition, Ms. Pembo was awarded a portion of Mr. Pembo's 401(k) plan as of Aug. 26, 2011, and all earnings or losses thereon until the date of segregation into her separate account. Almost a year later, Mr. Pembo filed a rule requesting that the court correct an error in calculation and calculate the amount as of Nov. 7, 2013, arguing that the sum awarded to Ms. Pembo was determined as of the date of settlement, and thus already included interest and earnings on her community portion since the date of termination, Aug. 26, 2011. Ms. Pembo filed an exception of res judicata, arguing that the court could not make a substantive amendment to the prior judgment, and that Mr. Pembo's request was for more than a mere correction of a calculation error.

The trial court ordered that the QDRO be amended to reflect that her share was calculated as of Nov. 7, 2013, and that she was entitled to interest and earnings only since that date, not since the community termination date, Aug. 26, 2011. The court of appeal reversed, finding that the exception of res judicata was not the proper procedural mechanism to challenge an attempt to amend a judgment, but instead considered her arguments under La. C.C.P. art. 1951 that Mr. Pembo sought a substantive amendment to the judgment, not a mere correction of an error in calculation.

The court also found that the QDRO, which had already been accepted by the plan administrator, was not interlocutory under La. R.S. 9:2801 (B) but was a final judgment. Further, although La. C.C.P. art. 1951 allows final judgments to be amended, because the amendment he sought would change the substance of the agreement, it could have been changed only by consent of the parties, an application for a

new trial, an action for nullity or a timely appeal. The court of appeal thus reversed the trial court, finding that the change was not an error in calculation, but was substantive.

***Succession of Schelfhaudt***, 19-0129 (La. App. 4 Cir. 5/8/19), 271 So.3d 304.

During their long-term relationship, Ms. Schelfhaudt donated a one-half interest in her home to Mr. Stephens, subject to a mortgage. Subsequently, she refinanced the home and executed a promissory note in favor of the bank. Mr. Stephens did not sign the note, but he did sign the mortgage, allowing the home to secure the debt represented by the note. After her death, her heirs argued that Mr. Stephens was responsible for the note. The court found that his signing the mortgage only allowed the home to be used as security, and since he did not sign the note itself, he was not obligated on it.

## Appeals

***Meadows v. Adams***, 18-1544 (La. App. 1 Cir. 8/7/19), ____ So.3d ____, 2019 WL 3717547**.**

Mr. Meadows filed a motion for new trial and then a motion for devolutive appeal by facsimile filing with an electronic signature; he then submitted the same pleadings but with a handwritten signature. The appellate court dismissed his appeal as untimely, as the second filed pleadings were not exactly the same as the facsimile-filed pleadings because of the different signatures. Consequently, the facsimile-filed pleadings were ineffective, leading to the second filings each being untimely. The dissent argued that appeals are favored and should not be dismissed on "hypertechnical" interpretations of statutes, including here, where the only difference in the pleadings filed was the electronic and handwritten signatures.

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## Insurance, Tort, Workers' Compensation & Admiralty Law

### Tort: Liability for Damages in Civil Protests

***Doe v. Mckesson***, ____ F.3d ____ (5 Cir. 2019), 2019 WL 3729587.

In July 2016, during the summer of our national discontent, a protest associated with Black Lives Matter took place by blocking a highway in front of the Baton Rouge Police Department headquarters. The Baton Rouge Police Department prepared by organizing a front line of officers in riot gear, standing in front of other officers, including Officer Doe, prepared to make arrests. DeRay Mckesson, associated with Black Lives Matter, was "the prime leader and an organizer of the protest."

Some protestors began throwing full water bottles, stolen from a nearby convenience store. The complaint alleges that Mckesson did nothing to prevent the escalating violence but rather incited it. The police began making arrests when an unidentified person picked up a rock or piece of concrete and hurled it at the officers, striking Doe in the face. His injuries included loss of teeth, injuries to his jaw, head and brain, lost wages "and other compensable losses." Doe filed suit in district court, naming Mckesson and Black Lives Matter as defendants, on theories of negligence, respondeat superior and civil conspiracy. Mckesson filed two motions: (1) a Rule 12(b)(6) motion asserting failure to state a plausible claim for relief against Mckesson, and (2) a Rule 9(a)(2) motion asserting that Black Lives Matter is not an entity with capacity to be sued. Officer Doe moved to amend his complaint to add factual allegations as to Black Lives Matter Network, Inc., and #Black Lives Matter as defendants. The district court granted both of Mckesson's motions and denied Doe's motion for leave to amend, taking judicial notice that #Black Lives Matter is a "hashtag" and, therefore, an "expression," lacking capacity to be sued, and dismissed

his case with prejudice. The court did not reach the merits of Doe's state tort claims against Mckesson, but found that Doe failed to plead facts that took Mckesson's conduct outside of the bounds of First Amendment-protected speech and association.

On appeal, the 5th Circuit found that Mckesson's conduct was not necessarily protected by the First Amendment. It began by addressing Doe's state tort claims.

La. Civ.C. art. 2320 provides that "[m]asters and employers are answerable for the damage occasioned by their servants . . . in the exercise of the functions which they are employed." A "servant" under the Code "includes anyone who performs continuous service for another and whose physical movements are subject to the control or right to control of the other as to the manner of performing the service." Doe's vicarious liability theory fails because he did not allege facts that support an inference that the unknown assailant "performed a continuous service" for or that his "physical movements [we]re subject to the control or right to control" of Mckesson.

In order to impose liability for civil conspiracy in Louisiana, a plaintiff must prove that (1) an agreement existed with one or more persons to commit an illegal or tortious act; (2) the act was actually committed; (3) the act resulted in plaintiff's injury; and (4) there was an agreement as to the intended outcome or result. The court found that the plaintiff had alleged no facts supporting civil conspiracy, stating:

> Although Officer Doe has alleged facts that support an inference that Mckesson agreed with unnamed others to demonstrate illegally on a public highway, he has not pled facts that would allow a jury to conclude that Mckesson colluded with the unknown assailant to attack Officer Doe or knew of the attack and specifically ratified it.

Finally, Doe alleged that Mckesson was negligent for organizing and leading the Baton Rouge demonstration because he "knew or should have known" that the demonstration would turn violent. Louisiana's "duty-risk" analysis for assigning tort liability under a negligence theory requires a plaintiff to establish that (1) the plaintiff suffered an injury; (2) the defendant owed a duty of care to the plaintiff; (3) the duty was breached by the defendant; (4) the conduct in question was the cause-in-fact of the resulting harm; and (5) the risk of harm was within the scope of protection afforded by the duty breached.

The court found that Doe had alleged sufficient facts to support a negligence claim. Doe "plausibly alleged" that Mckesson breached his duty of reasonable care by intentionally leading the demonstrators to block the highway, a criminal act under La. R.S. 14:97, making it patently foreseeable that the Baton Rouge police response would almost certainly provoke a confrontation between police and demonstrators. Doe also plausibly alleged that Mckesson's breach of duty was the cause-in-fact of his injuries. By leading the demonstrators onto the public highway and provoking a violent confrontation with the police, Mckesson's negligent actions were the "but for" causes of Doe's injuries. The court found that Doe's claim was "sufficiently plausible to allow him to proceed to discovery," noting that its "ruling at this point is not to say that a finding of liability will ultimately be appropriate."

The court further held that Doe did not plead sufficient facts to show that Black Lives Matter is a "suable entity." The trial court took judicial notice that Black Lives Matter is a "social movement" and, thus, could not be a juridical person. The 5th Circuit found that was legal error as whether Black Lives Matter was a "national unincorporated organization" as alleged by Doe was a mixed question of law and fact. However, the court found that Doe failed to plead sufficient facts to support a plausible inference that Black Lives Matter was an entity capable of being sued.

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## U.S. Court of International Trade

***JSW Steel (USA) Inc. v. United States***, Case 1:19-cv-00133 (Ct. Intl. Trade)**.**

JSW Steel (USA) is the American subsidiary of a large Indian steel company. After breaking ground on a new electric arc furnace in Texas and crediting the Trump administration's steel tariffs as the primary justification for up to $1 billion in U.S. expansion investment, the company turned around and sued the Trump administration for failing to grant it an exemption to the same steel tariffs that it applauded. JSW Steel (USA) sued the U.S. Department of Commerce at the Court of International Trade seeking to reverse Commerce's decision denying its request to exclude various categories of steel that it imports from Mexico and China from the Section 232 steel tariffs. The complaint alleged that the Commerce Department's decision is arbitrary and capricious and violates the Administrative Procedures Act (APA).

In March 2018, the United States imposed a 25% tariff on steel imports. The President's Executive Order imposing the tariff, issued pursuant to authority granted under the Trade Expansion Act of 1962 (19 U.S.C. § 1862), also directs the Secretary of Commerce to grant tariff exclusions to U.S. businesses for certain steel imports that are not immediately available from U.S. producers in sufficient quantity and quality. The purpose of the exclusions is to "protect downstream manufacturers that rely on products not produced by U.S. domestic industry at this time." *See, Submissions of Exclusion Requests and Objections to Submitted Requests for Steel and Aluminum*, 83 Fed. Reg. 46,026, 46,038-39 (Sept. 11, 2018).

JSW operates a facility in Texas where it manufactures steel plate and pipe for infrastructure projects, including

natural gas and oil pipelines. The company and its Indian parent are investing up to $1 billion to expand and upgrade the plant. Company leadership credited the Trump administration's steel tariffs with providing the flexibility to compete on a more level playing field and to commit necessary resources to the expansion. However, the company utilizes primarily imported steel slab feedstock for its operations. Alleging that the feedstock is unavailable in the U.S. market at its quantity and quality specifications, the company filed an exclusion request seeking exemption from the 25% tariffs on its imports from Mexico and India. The Mexican tariffs have since been lifted after conclusion of the U.S.-Mexico Canada Free Trade Agreement, but tariffs remain on the Indian imports.

The lawsuit contends that the Commerce Department refused to consider the record evidence on U.S. steel quality and quantity and that it issued the same boilerplate denial for each exclusion request. JSW acknowledges the objections from the U.S. steel industry to its request wherein the U.S. producers claimed to have sufficient capacity to satisfy the product demand and quality specifications. The company takes issue with Commerce's alleged failure to verify the domestic industry's assertions and with the fact that the denials are "part of a broader pattern in which the Department has rejected thousands of exclusion requests by providing the same pro forma, conclusory explanation, with no reasoning or analysis." *See,* Complaint, Case No. 19-00133, at ¶34. The complaint seeks redress under the APA for the Department's alleged failure to provide any evidentiary basis for its denial, which is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Id.* at ¶39.

## World Trade Organization

***United States-Certain Measures Relating to the Renewable Energy Sector***, WT/DS510/R (June 27, 2019).

A panel constituted under the auspices of the World Trade Organization (WTO) dispute-settlement system recently issued a ruling against the United States for various domestic-content requirements and subsidies granted by numerous U.S. state governments to the renewable energy sector. India brought the complaint back in 2016, but the panel was not constituted until 2018.

India's complaint asserts that the U.S. state governments of Washington, California, Montana, Massachusetts, Connecticut, Michigan, Delaware and Minnesota enacted various laws, regulations and programs that provide an unfair advantage to U.S. domestic products in the development of the U.S. renewable-energy sector, in violation of, *inter alia*, U.S. commitments under Article III:4 of the General Agreement on Tariffs and Trade 1994. Article III:4 is a bedrock non-discriminatory principle requiring WTO members to afford imported products treatment that is "no less favourable than that accorded to like products of national origin" with respect to internal laws and regulations. In short, WTO members are not allowed to enact laws or regulations that discriminate in favor of domestic products against imported products. India contends that the eight U.S. states enacted a plethora of renewable-energy tax rules and incentive programs that favor the inclusion of U.S.-made products to the detriment of imported products.

The legal relationship between U.S. states and the federal government in international economic matters is sometimes controversial. On the one hand, the federal government is constitutionally tasked with regulating international commerce. On the other, all powers not allocated to the federal government are reserved to the states by the 13th Amendment. U.S. state economic-development-incentive programs heighten this constitutional tension when states enact laws or programs that implicate international commerce but otherwise likely fall within the states' constitutional prerogative. The U.S. Supreme Court's most recent statement in this area is *Crosby v. National Foreign Trade Council*, 530 U.S. 363 (2000), where it struck down a Massachusetts law forbidding state procurement contracts to companies doing business with the country of Burma. The Court's holding was limited inasmuch as it found that the state law was preempted because of federal sanctions against Burma.

U.S. WTO commitments include specific obligations to take all reasonable measures necessary to bring U.S. states into conformity with the federal government's international trade commitments. *See,* GATT Art. XXIV:12 ("Each contracting party shall take such reasonable measures as may be available to it to ensure observance of the provisions of this Agreement by the regional and local governments and authorities within its territories."). In this case, the WTO panel concluded that the United States is violating its WTO obligations and commitments because the U.S. state programs do not comply with WTO rules. The WTO dispute-settlement panel ordered the WTO to request that the United States bring the non-conforming measures into compliance with WTO rules. It remains to be seen how the various U.S. states

will react to the ruling and what, if any, reasonable measures the federal government will seek to employ against the states. Economic-development-incentive programs appear to fall squarely within the constitutional prerogative of the states, so the road to resolving this dispute remains unclear. If the United States refuses to comply, or asserts that it lacks the ability to force the states the change their laws, India will be entitled to impose retaliatory tariffs against U.S. exports in amounts commensurate with the level of trade impacted by the U.S. state programs.

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## Abortion Protected, But Not Drinking on the Job

A district court in the Eastern District of Louisiana recently found that abortion is encompassed within the statutory text of Title VII, 42 U.S.C. § 2000e(k), prohibiting adverse employment actions "because of or on the basis of pregnancy, childbirth, or related medical conditions." *Ducharme v. Crescent City Déjà Vu, L.L.C.*, ____ F.Supp.3d ____ (E.D. La. 2019), 2019 WL 2088625. The court noted that "[w]hile abortion is not a medical condition related to pregnancy in the same way as gestational diabetes and lactation, it is a medical procedure that may be used to treat a pregnancy related medical condition." The court also found that because the Louisiana Pregnancy Discrimination Act (LPDA), La. R.S. 23:342, includes the exact same language as Title VII, it is subject to the same interpretation. Although the 5th Circuit has yet to weigh in on the issue, the 3rd and 6th Circuits, the only two appellate courts to have addressed the issue, have found that it is.

However, Ducharme, who alleged she was fired because she had an abortion, could not avoid dismissal of her discrimination claims under Title VII and the LPDA where she admittedly drank on the job and could not demonstrate the decision maker had any anti-abortion animus. Additionally, several coworkers, including the bartender's boyfriend, were also fired for drinking on the job, belying any allegation that she was treated differently than those who did not have abortions.

### Pertinent Facts

In September 2017, Ducharme, a bartender at a bar and grill, told her manager that she had become pregnant and planned

to have an abortion. She requested two days off to have the procedure, and the manager accommodated the request. The manager declared that she was not upset about the employee having an abortion and had no real opinion about abortion generally. However, the employee testified that the manager began treating her "crappily" and "indifferently" after learning of the employee's planned abortion.

While the employee was off work for her abortion, another employee alerted the manager that he had seen the employee drinking many times while on the clock. The manager confirmed through her review of security tapes that the employee had not only been drinking on the job, but had given another person a drink without charging for it. The company terminated the employee for drinking on the job and also terminated the employee's boyfriend, who was also captured on video surveillance drinking while on the job.

The employee sued the bar and the manager, alleging they violated Title VII and the LPDA when they terminated her.

### Abortion Recognized as Protected Characteristic Under Title VII and LPDA

The employer argued that the employee's claims should be dismissed because neither Title VII nor the LPDA recognize pregnancy as a protected characteristic. The court rejected the employer's argument that abortion did not fall within the text of the two statutes at issue and found that a woman who was terminated from employment because she had an abortion was terminated because she was affected by pregnancy, and thus Title VII and the LPDA extend to abortions.

### Employee's On-the-Job Drinking not Protected

However, the court granted the employer's summary judgment motion, concluding that the employee was fired for drinking on the job, not because she had an abortion. The employee could not produce competent evidence that other employees who did not have abortions but drank or used drugs on the job were not fired. Moreover, the court rejected the employee's attempt to demonstrate disparate treatment by distinguishing between drinking on the job and being intoxicated on the job. The employee claimed she and her boyfriend were fired for simply drinking or "taking just one sip," while others who were terminated were drinking so much they were seriously impaired. The court found this to be a distinction without a difference as both drinking on the job and being intoxicated on the job were terminable offenses.

It was undisputed that the employee was drinking alcohol on the job. The employee admitted she drank on the job at least monthly, and the employer produced security camera footage showing her doing so. It was also undisputed that this conduct violated the rules as stated in the employer's handbook and that the employee was aware of these rules.

Although the employee was fired the same day she underwent an abortion, the 5th Circuit has held that "[a]lthough the temporal proximity between the employer learning of the plaintiff's pregnancy and her termination may support a plaintiff's claim of pretext, such evidence — without more — is insufficient." *Fairchild v. All Am. Check Cashing, Inc.*, 815 F.3d 959, 968 (5 Cir. 2016).

Most damning to the employee's pregnancy discrimination claim was the complete absence of any support for any alleged anti-abortion animus by the manager. It was uncontroverted that the manager had never said anything about abortion or religion to the employee any time during their 18-month, "very good" relationship.

In sum, an employee who has an abortion in Louisiana may now be able to assert that she is protected from being terminated or otherwise discriminated against on that basis, but undergoing the procedure does not immunize the employee from the application and enforcement of legitimate workplace rules.

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# Secret Santa

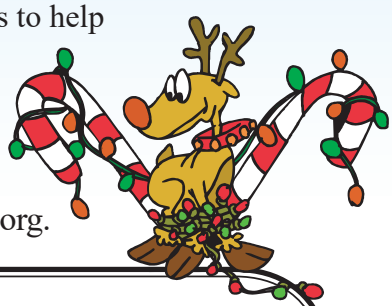
**SIGN UP EARLY!**
Sign up early and receive your informational packets in November!

## Brightening the holidays for needy children

The Louisiana State Bar Association/Louisiana Bar Foundation's Community Action Committee is inviting Bar members and other professionals to brighten the holidays for needy children by participating in the 23rd annual Secret Santa Project.

- Sponsors will shop with inspiration from the child's "Wish List."
- Informational packets will be distributed in November.
- No required minimum or maximum amount on gifts.
- Gift collection will run from 9 a.m. to 4 p.m. on Wednesday, Dec. 4 through Friday, Dec. 6, 2019.
- More details about gift-wrapping, drop-off, etc., will be included in the informational packet.

The Secret Santa Project also welcomes monetary donations to help buy gifts for children not adopted. For more information, visit *www.lsba.org/goto/SecretSanta*.



For more information or questions about the Project, contact Krystal Bellanger Rodriguez at (504)619-0131 or secretsanta@lsba.org.

Name: _____

Firm/Company: _____

Mailing Address: _____

City/State/Zip: _____

Phone: _____

Fax: _____

E-mail: _____

I would like to sponsor _____ child(ren). Preferred age range (not guaranteed) _____
*(12 and under)*

**To participate, fax this form to Krystal Bellanger Rodriguez at (504)566-0930.**


## Co-ownership and Authority to Operate

Acts 2019, No. 350, amended Mineral Code article 164 (La. R.S. 31:164) to provide that if a co-owner of land creates a mineral servitude that burdened his interest, the servitude owner can conduct mineral operations, provided that the owner acquires the consent of co-owners owning at least an undivided 75% interest in the land (the fractional interest of the co-owner who created the servitude should count toward the total amount of consenting interests). The same legislation amended Mineral Code article 166 (La. R.S. 31:166) to provide that if a co-owner of land creates a mineral lease covering his interest, the lessee may operate with the consent of co-owners owning at least an undivided 75% interest in the land. Finally, the 2019 legislation amended Mineral Code article 175 (La. R.S. 31:175) to provide that, if land is subject to a mineral servitude and the mineral servitude itself is co-owned, a co-owner can conduct operations if co-owners owning at least an undivided 75% interest consent. Under the original version of these articles that were enacted with the Mineral Code, unanimous consent was required. This was changed to 90% in 1986 and to 80% percent in 1988.

## Use of Oilfield Site Restoration Fund

Acts 2019, No. 193, amends La. R.S. 30:86 to authorize use of money from the Oilfield Site Restoration Fund to respond to emergencies declared by the Commissioner of Conservation pursuant to R.S. 30:6.1. Act No. 193 also amends R.S. 30:93.1 to provide that, if money from the Fund is used to respond to an emergency, the Commissioner must seek recovery of those funds from any party that has operated or held a working interest in the site where the emergency occurs.

## State Leases, Including a Provision for a Security Interest

Acts 2019, No. 403, provides that the State Mineral and Energy Board may include in state mineral leases issued after July 31, 2019, a clause that grants a security interest in minerals produced pursuant to the lease (or lands pooled therewith and attributable to the leased premises) to secure the lessee's obligation to pay lease royalties or other sums due under the lease.

## Additional Reclamation Fee for Coal and Lignite Mines

Acts 2019, No. 150, amends La. R.S. 30:906.1 to impose on all persons holding a permit under the Surface Mining and Reclamation Act an annual reclamation fee of $6 for each acre of land included within the approved mine permit area. The revenue is to be used for enforcing the Louisiana Surface Mining and Reclamation Act. This annual fee is in addition to the existing fee under 30:906.1 of 8 cents per ton of coal and lignite produced.

## No Claim Against Mineral Lessee for Crop Damages

***Precht v. Columbia Gulf Transmission, L.L.C.***, ____ F.Supp.3d ____ (W.D. La. 2019), 2019 WL 3368600.

Columbia Gulf Transmission constructed a natural gas pipeline across land owned by a limited liability company, pursuant to a right-of-way agreement that required Columbia to pay for any damage to crops. In addition, though, in return for a specified payment, the landowner had released Columbia for any future claims the landowner might have for crop damages. Flavia and Kelly Precht later sued Columbia, alleging that they were farming the land pursuant to a verbal farming lease. In resolving cross motions for summary judgment, the court resolved several issues.

First, citing La. Civ.C. art. 2004, the court noted that a party can contract in advance to release another party from future liability for simple negligence (as opposed to gross negligence). Thus, the release was not invalid altogether, as the Prechts argued. But the release did not apply to claims brought by someone other than the landowner. Thus, the release did not bar the Prechts' claim.

Second, because the contractual clause that obligated Columbia to pay for damages to crops did not limit this obligation to paying for damages to crops that *belonged to the mineral lessor*, the clause appeared to be a *stipulation pour autrui* (third party beneficiary contract) under La. Civ.C. art. 1978. Thus, the clause could benefit a farming lessee. Accordingly, Columbia was not entitled to a summary judgment dismissing the Prechts' contractual claims. However, the Prechts were not entitled to a summary judgment that Columbia had contractual liability to them under the *stipulation pour autrui* because there was a genuine issue of material fact as to whether the Prechts actually had a valid verbal farming lease.

Third, Columbia sought dismissal of the Prechts' tort claims on grounds that the Prechts could not show that they owned the crops that were damaged. The court agreed. La. Civ.C. art. 491 provides that, as to third persons, crops are presumed to belong to the owner of the land unless separate ownership is shown by an instrument filed for registry in the conveyance records of the parish where the land is located. This presumption is conclusive. That is, the presumption applies even if the third person knows that the crops belong to some person other than the landowner. Accordingly, Columbia was entitled to a dismissal of the Prechts' tort claims for damage to their crops.

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## Three-Year Prescription

***In re Med. Review Panel of Lindquist***, 18-0444 (La. App. 5 Cir. 5/23/19), 274 So.3d 750.

Lindquist underwent surgery in 2013. X-rays of his spine two days post-operatively showed a metal artifact in the surgery site, and the surgeon noted it in a progress note. Lindquist was not informed of the artifact.

Four years later, following an MRI of his spine, Lindquist was advised of the presence of the foreign object, after which he filed suit. The defendants filed an exception of prescription based on the three-year period of La. R.S. 9:5628. Lindquist argued that the failure to inform him of the artifact constituted fraudulent concealment, invoking the doctrine of *contra non valentem*. Thus, prescription did not begin to run until he learned of its presence four months before filing his panel complaint. The defendants countered that Lindquist was not prevented from bringing his suit within three years because the presence of the foreign object was documented in his medical records, which were continuously available to him. The trial court granted the exception.

The appellate court noted this *res nova* issue of whether a health-care provider, who is aware of such a situation but fails to disclose such to the patient, has engaged in conduct that rises to the level of concealment, misrepresentation, fraud or ill practices sufficient to trigger the application of the third category of *contra non valentem* to interrupt the prescriptive period set forth in La. R.S. 9:5628.

The appellate court distinguished earlier cases that imposed the three-year limitation on malpractice actions when neither the patient nor the defendant was aware of its presence. In the instant case, the defendant allegedly was aware of the presence of the artifact, as evidenced by Lindquist's medical record.

The court decided that, at this preliminary stage of the proceedings, it would make no findings as to whether there was any malpractice. But assuming Lindquist's allegations were true, the court found that the failure to disclose the results of the x-rays was a fraudulent act that prevented him from filing a malpractice claim and that prescription was suspended until he learned of the presence of the foreign object. The mere availability of the information in Lindquist's records did not serve as sufficient constructive knowledge to start the running of prescription. Instead, the court wrote, it was what he "*knew or should have known,*" not what he "*could* have known." *Id.* at 761, quoting *Lennie v. Exxon Mobil Corp.*, 17-0204 (La. App. 5 Cir. 6/27/18), 251 So.3d 637, 646, *writ denied*, 18-1435 (La. 11/20/18), 256 So.3d 994. The trial court's ruling on the exception of prescription was reversed.

## Medical Review Panel Evidence

***In re Med. Review Panel for Brock***, 19-0480 (La. App. 4 Cir. 6/19/19), 274 So.3d 1275.

Does the trial court have the authority to impose restrictions on evidence submitted to a medical-review panel? La. R.S. 40:1231.8(D)(2) references things that "may" be submitted, *e.g.*, medical records, and concludes that "any other form of evidence allowable by the medical review panel" may be submitted.

The plaintiffs issued subpoenas to the Orleans Parish coroner and to the executive director of the Louisiana State Board of Medical Examiners, intending to submit the records to the medical-review panel. The defendants moved to quash the subpoenas, arguing that the "catchall provision" at the end of the statute warranted strict construction "in the context of the MMA," in that the information sought was irrelevant to the medical treatment at issue. Unpersuaded by plaintiffs' contention that it lacked the authority to make that determination, the trial court granted the motion to quash.

The appellate court noted that the issue of whether a trial court, in the pretrial context, has the authority to impose restrictions on the type of evidence a panel member may consider was *res nova* in Louisiana.

The court found instructive Indiana's malpractice statute, on which Louisiana's malpractice act was modeled. Indiana courts consistently have held that a trial court may not function as a gatekeeper of evidence that may be submitted to a medical-review panel or that a panel member may consider, quoting *Griffith v. Jones*, 602 N.E.2d 107, 110 (Ind. 1992). In *Griffith*, the Supreme Court of Indiana observed:

> In view of the fact that the legislature clearly intended for the medical review panel to function in an informal manner in rendering its expert medical opinion, we believe that the legislature did not simultaneously intend to empower trial courts to dictate to the medical review panel concerning either the content of the panel's opinion or the manner in which the panel arrives at its opinion, or the matters that the panel may consider in arriving at its opinion. In other words, the grant of power to the trial court to preliminarily determine matters is to be narrowly construed.

Without any Louisiana statutory or jurisprudential law that allows a court to act as gatekeeper of admissible panel evidence, the appellate court decided the pertinent statute "places no restrictions on the type of evidence that may be produced to [a] medical review panel. Moreover, this provision grants [a] medical review panel the authority to determine the evidence it will consider." *Id.* at 1279.

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## Boat Broker Does Not Disqualify Isolated or Occasional Sale Exclusion

***Tortuga Charters, L.L.C. v. Tax Collector, Parish of St. Tammany***, BTA Docket No. L00637 (4/15/19).

Randy Smith, sheriff and ex-officio tax collector for St. Tammany Parish (collector), assessed Tortuga Charters, L.L.C., for sales/use tax and related amounts relating to Tortuga's purchase of a particular vessel. Tortuga paid the tax at issue under protest and filed suit for recovery at the Louisiana Board of Tax Appeals (BTA).

Tortuga filed a motion for summary judgment asserting that the vessel was purchased in a non-taxable occasional or isolated sale under the occasional sale exclusion, La. R.S. 47:301(10)(c)(ii)(bb). Tortuga bought the vessel from a third-party seller with the aid of a broker in the business of facilitating such vessel sales. The collector asserted the position that both the broker and the seller were persons engaged in the business of selling such vessels, and thus the occasional sale exclusion does not apply.

The question presented was whether the definition of an occasional sale in the occasional sale exclusion, as a matter of law, excludes sales involving a broker. In reviewing the statutory language of La. R.S. 47:301(10)(c)(ii)(bb), the BTA found that its plain language does not state that a broker can never be involved in an occasional sale. The BTA noted that it could not find any case law in support of such position. The BTA referenced a conclusion by the Louisiana Department of Revenue in Revenue Ruling 15-001 that the language of La. R.S. 47:301(10)(c)(ii)(bb) does not state that a broker can never be involved in an occasional sale. Moreover, as tax exclusions must be interpreted in the taxpayer's favor, the BTA refused to stretch the language to include the restriction on a broker being involved in such transactions as urged by the collector.

However, the BTA ultimately denied Tortuga's motion for summary judgment, finding that the record did not make

clear that the seller of the vessel was not in the business of selling boats. The only evidence submitted by Tortuga as to the seller's business was an addendum to the vessel-purchase agreement in which the alleged owner of the seller stated that it is not a dealer in used vessels, and that the sale of the vessel constituted an occasional sale of used equipment as defined in the Louisiana tax code. Tortuga did not produce an affidavit by the seller's owner nor any other corroborating evidence. As such, the BTA found that the record was insufficient to grant summary judgment.

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## Presence of In-State Beneficiary Alone Does Not Empower State to Tax Undistributed Trust Income

***N.C. Dep't of Rev. v. Kimberley Rice Kaestner 1992 Family Trust***, 139 S.Ct. 2213 (2019).

The North Carolina Department of Revenue assessed a tax deficiency on the undistributed income of a New York trust whose only connection to North Carolina was a trust beneficiary who was a North Carolina resident. North Carolina is one of few states that tax undistributed trust income based solely on the residence of beneficiaries. The trust kept all physical records in New York and had no direct investments in North Carolina. The trust agreement gave the Connecticut trustee exclusive control over the distribution of trust income and provided the trustee with the right to roll the trust over into a new trust ahead of its scheduled termination date. The trustee paid the tax under protest and sued for a refund, winning against the Department of Revenue throughout the North Carolina legal system.

The trial court held that North Carolina's tax violated both the dormant Commerce Clause and the Due Process Clause. The North Carolina appellate courts affirmed the trial court's decision solely on due process considerations. The U.S. Supreme Court granted a petition for writ of certiorari to the North Carolina Department of Revenue on appeal from the North Carolina Supreme Court.

The only legal issue before the Supreme Court was whether the Due Process Clause prohibited North Carolina from taxing the undistributed trust income. The Court found that North Carolina did not have sufficient "minimum connection" to tax the trust because the North Carolina beneficiary did not receive any distributions in the tax years in question, had no right to control the trust assets and was not legally certain to ever receive any trust income if the trustee continually rolled the trust over.

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## May Parol Evidence Resolve Ambiguity to Create a Predial Servitude?

In *Brunson v. Crown Brake, L.L.C.*, 18-994 (La. App. 3 Cir. 6/19/19), ____ So.3d ____, 2019 WL 2607202, the Louisiana 3rd Circuit reviewed whether the language of recorded documents was sufficient to create predial servitudes.

Ballina sold 190.02 acres to Galloway by a 2008 Act of Exchange, with a metes and bounds legal description attached, a description of the servitude and reference to an unrecorded November 2008 plat. The plat attached to the Act of Exchange was dated December 2008 and did not reference a servitude. In 2011, Ballina transferred 2.89 acres to the Tarvers, who later sold to Close in 2014. Close also purchased 5.87 acres of adjacent land from Galloway. In 2017, the Brunsons purchased from Ballina a 6.1-acre tract adjacent to Galloway's land and began building their home. Crown Brake purchased the 190-acre tract from Galloway in September 2017 and claimed a 50-foot-wide servitude through the middle of the Brunsons' partially constructed home. Crown Brake claimed the servitude base on language attached to the 2008 Act of Exchange. The Brunsons filed a petition for declaratory judgment and injunctive relief, claiming the servitude did not exist. The trial court allowed evidence outside of the 2008 Act of Exchange and found that two predial servitudes existed in favor of Crown Brake based on the parties' intent.

The use and extent of a servitude is governed by the title that creates it, and any doubt as to the existence of a servitude is resolved in favor of the servient estate. Servitudes must be express and cannot be implied from vague or ambiguous language. As a predial servitude must be recorded to be effective against third persons, the third parties in this lawsuit are bound by only the 2008 Act of Exchange, Exhibit A and the December 2008 plat survey, not the unrecorded November 2008 plat. As there was no identification of the servient estate in these documents, doubt arises as to the "existence, extent, or manner of exercise" of the alleged predial servitude. This ambiguity must be resolved in favor of the servient estate.

However, the court is not to interpret the intent of the contracting parties when dealing with third parties. The 3rd Circuit found that the recorded documents failed to express the nature, location and extent of a predial servitude. Thus, the trial court's judgment was reversed, and the 3rd Circuit granted judgment declaring that the recorded 2008 Act of Exchange did not create a predial servitude.

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