Administrative Law

Customary Commercial Practice in a Commercial Acquisition Must Be Supported by a Reasonable Basis

Red River Waste Solutions, L.P., B-411760.2 (Jan. 20, 2016), available at *www.gao.gov/assets/680/674948.pdf.*

On May 8, 2015, the Department of the Army (agency) issued a request for proposals under the Federal Acquisition Regulation (FAR) Part 12 for solid-waste-management services at Fort Polk, La. The solicitation required offerors to submit proposals with prices that reflected all costs on a per-ton basis and permitted the contractor to invoice only on tonnage collected.

Before proposals were due, on July 10, 2015, Red River Waste Solutions, L.P. (Red River) protested the solicitation to the Government Accountability Office (GAO). Red River alleged, among other things, that the solicitation's pricing based on a per-ton basis was inconsistent with customary commercial practice (CCP) and that various estimated quantities under the solicitation were overstated. The agency agreed to take corrective action and, after the GAO dismissed the protest, did make several solicitation amendments, provided additional information, responded to offerors' questions and extended the proposal due date to Oct. 21, 2015. On Oct. 13, 2015, Red River again protested at the GAO, challenging generally the same grounds as before.

A protest is a written objection by an interested party to a solicitation or other (federal) agency request for bids or offers, cancellation of a solicitation or other request, award or proposed award of a contract, or termination of a contract if terminated due to alleged improprieties in the award. *See* FAR 33.101 (2014). Three are available to potential protestors to hear these challenges, and reasons for protesting in each are litigation-strategy dependent. The fora are: (1) the federal agency soliciting the requirement; (2) the Court of Federal Claims; and (3) the GAO. The GAO adjudicates protests under the Competition in Contracting Act of 1984 (CICA), 31 U.S.C. §§ 3551-56. The GAO hears the majority of reported protests. That is likely due to two unique characteristics of a GAO protest — the 100-day decision, and the CICA automatic statutory stay of contract award. *See* 31 U.S.C. §§ 3553(c)-(d); FAR 33.104(b)-(c), (f) (2014).

In this case, Red River alleged two points of error — (1) that the agency's determination that the solicitation's pricing terms were consistent with CCP under FAR Part 12 was not reasonably supported by evidence; and (2) that other terms within the solicitation were not based on the best available information. The CCP question is discussed below.

Reasonable Basis for Customary Commercial Practice

Important to note, CCP is not defined in the FAR; nonetheless, the FAR does suggest that such practice varies from market to-market. *See* FAR § 12.404(b)(2) (2016). Further, CCP is determined on a case-by-case basis. *See generally, Northrop Grumman Tech. Servs., Inc*, B-406523 (June 22, 2012), available at *www.gao.gov/assets/600/592154.pdf* (discussing the requirement to conduct market research to establish CCP).

The question presented before the GAO was whether there exists a reasonable basis for the agency's determination that price-per-ton provisions in the subject solicitation were consistent with CCP. The GAO noted that, to establish CCP, the agency used market research that consisted of: (1) a review of federal government refuse contracts; (2) requests for feedback from industry in a sources sought notice (SSN); and (3) contact with a sales representative from a trash company in New York. These are discussed below.

First, the GAO found the use of other federal government contracts to be an unreasonable method to establish CCP. In the opinion, the GAO found that "contracts with the federal government are not generally considered to be a part of the commercial marketplace." In support, the GAO looked to the FAR's definition of the term commercial item: "[a]ny item, other than real property, that is of a type *customarily used by the general public or by non-government entities for purposes other than government purposes* . . . ." FAR § 2.101 (2016) (emphasis added). Further, the GAO in reliance on its own precedent opined that if government contracts were considered part of the marketplace, everything the government would procure could be considered a commercial item and a significant portion of FAR Part 12 would be rendered superfluous. *See generally, Smelkinson Sysco Food Servs.*, B-281631 (March 15, 1999), available at *https://www.gpo.gov/fdsys/pkg/GAOREPORTS-B-281631/html/GAOREPORTS-B-281631.htm* (explaining that the protest was sustained despite the agency's assertion that the challenged solicitation provisions appeared in other government contracts).

Next, the GAO examined the feedback the agency received from the SSN in January 2015. The agency asked if the potential offerors had any suggestions or comments on the anticipated pricing structure within the subject solicitation. The GAO noted that, of the seven responses received, four suggested pricing should be *monthly* and three had *no comments*. Therefore, the evidence received by the agency seemed to suggest that the CCP reflected monthly, not tonnage, based pricing.

Lastly, the agency relied on contact with a trash company sales representative from New York State that tonnage-based pricing could be used for the subject requirement. However, the GAO pointed out that the administrative record did not contain any documentation from the sales representative, any particular commercial refuse contract to which the referred New York Company was a party, or why the agency considered the sales representative to have specialized expertise and knowledge in this matter.

Consequently, the GAO rejected the agency's assertion that its market research provided a reasonable basis for determining CCP in this case and sustained the protest on this ground. When an agency avails itself of the commercial-item-acquisition process under FAR Part 12, it gets the benefit of a summarized process to quickly procure commonly used items and services. However, it still must follow that process and be able to reasonably support its conclusion that the terms in that FAR Part 12 procurement are consistent with CCP.

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Alternative Dispute Resolution

Drafter Beware: Exercise Caution When Choosing the Law

DIRECTV, Inc. v. Imburgia, 136 S.Ct. 463 (2015).

In 2008, two DIRECTV customers in California brought suit against the company seeking damages for early termination fees that they believed violated California law. Section 9 of the service agreements signed by the customers in 2007 required any disputes be resolved by arbitration. Section 9 also contained a class-arbitration waiver; however, it further stipulated that if the "law of your state" makes the waiver of class arbitration unenforceable, then the entire arbitration provision would be unenforceable. Finally, Section 10 of the agreement made clear that Section 9 "shall be governed by the Federal Arbitration Act."

In 2005, California law provided that the enforcement of class-arbitration waivers in "consumer contract[s] of adhesion" that "predictably involve small amounts of damages" and meet certain other criteria is "unconscionable under California law and should not be enforced." *Imburgia*, 136 S.Ct. at 466 (quoting *Discover Bank v. Sup. Ct.,* 113 P.3d 1100, 1110 (Cal. 2005)). Because neither party disputed that this rule — the "*Discover Bank* rule" — prohibited the class-arbitration waiver in the service agreements and thus invalidated DIRECTV's arbitration clauses with its California customers, the dispute proceeded to litigation.

During the pendency of this litigation in a California court, the United States Supreme Court held the *Discover Bank* rule "stands as an obstacle to the accomplishment and execution of the full purposes and objective of Congress" embodied in the Federal Arbitration Act (FAA). *AT&T Mobility, L.L.C. v. Concepcion*, 131 S.Ct. 1740, 1753 (2011). In other words, the Supreme Court determined that the FAA "pre-empts and invalidates th[e] rule." *Imburgia*, 136 S.Ct. at 466.

After the Court's decision in *Concepcion*, DIRECTV moved the California trial court for an order staying the litigation and compelling arbitration. DIRECTV's request was denied, an appeal ensued, and the California Court of Appeal affirmed. The court reasoned that "just as the parties were free in their contract to refer to the laws of different States or different nations, so too were they free to refer to California law as it would have been" without federal preemption. *Id*. at 467. In other words, the appellate court read the phrase "law of your state" as indicating that state law, without consideration for federal preemption, was to be applied, and, therefore, the parties had contractually agreed to the *Discover Bank* rule. This conclusion was premised on general construction principles of contract law.

In particular, the *Imburgia* court reasoned that Section 10 of the contract, stating that the FAA governed the arbitration provision contained in Section 9, was a general provision, but the provision voiding arbitration if the "law of your state" would invalidate the class-arbitration waiver was a specific provision. Applying longstanding rules of contract interpretation, the court concluded that the specific invalidation provision must control over the general FAA enforcement provision within the DIRECTV agreement. The court further explained that the meaning of the phrase "law of your state" in this specific context was ambiguous and should, therefore, be construed against DIRECTV. The California Court of Appeal affirmed the lower court's order denying DIRECTV's request that the parties be compelled to arbitrate the dispute, and writs of certiorari were granted noting that the United States 9th Circuit Court of Appeals had reached the opposite conclusion on exactly the same question.

Overturning the California court's decision, the Supreme Court explained that the logical conclusion of the appellate court's holding would be to allow the "law of your state" phrase to apply invalid state law to the dispute. *Id.* at 469. Because the Court could find no other examples of a California court applying that meaning to the phrase "law of your state" in other contractual contexts, it concluded that the California court was interpreting the arbitration clause differently than it would other types of contracts. This method of analyzing an arbitration clause, the Court explained, is not allowed under established FAA jurisprudence. *Id.* Further, the Court noted that although the parties could have selected pre-*Concepcion* California law, there was nothing about use of the phrase "law of your state" that indicated that was their intent. *Id*.

Although the Supreme Court's decision in *Imburgia* dealt with a California law and a California state court's decision, its holding should be noted by practitioners in Louisiana and elsewhere. Practically speaking, attorneys drafting arbitration agreements who wish to take advantage of specific state laws favorable to their clients' interests may find those efforts frustrated if, later, federal courts conclude that state laws affecting the arbitrability of the claim are preempted by federal law. Although these state laws may still have independent force where wholly intrastate relationships are in play, and it may very well have been the parties' intent to disregard federal preemptive effects, arbitrators should be aware of *Imburgia*'s potential to undermine their decisions in later enforcement actions when a subsequent change in federal law occurs. Further, where federal law preempts state law in certain areas, drafters of arbitration agreements should be mindful of this fact and carefully draft clauses making absolutely clear which of the two laws is meant to apply.

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Bankruptcy Law

Alter Egos and Corporate Veils

Judgment Factors, L.L.C. v. Packer (In re Packer), 816 F.3d 87 (5 Cir. 2016).

Plaintiff/creditor filed an adversary proceeding against a Chapter 7 debtor objecting to his discharge based on 11 U.S.C. § 727. Plaintiff alleged that various entities owned by the debtor were his alter egos and requested the court reverse pierce their corporate veils. Plaintiff argued that the debtor should have listed these entities' assets in his schedules and those assets should be subject to plaintiff's claims.

On appeal, the 5th Circuit affirmed the lower court's ruling that since plaintiff failed to obtain leave from the trustee to pursue the claims of alter ego and piercing the corporate veil, which constitute property of the debtor's estate and are controlled by the trustee, plaintiff could not seek a judicial determination that any of the debtor's entities were his alter egos.

The 5th Circuit also held plaintiff failed to prove the debtor transferred property belonging to the debtor with the intent to hinder, delay or defraud under section 727(a)(2)(A). In support of its claim, plaintiff argued that the debtor's use of his 100 percent-owned company to pay his personal expenses was an attempt by the debtor to conceal assets. Plaintiff also argued that the debtor's company entered into four contracts worth more than $1 million right before and after the debtor filed for bankruptcy, which was also an attempt to conceal assets. The 5th Circuit found debtor was forthcoming with the trustee and answered all of her questions about his company (and its payment of his personal bills), the contracts of the company and his interactions with the company, and therefore affirmed the lower court's refusal to deny discharge under section 727(a)(2)(A) and (a)(4)(A), which provides for denial of a discharge if the debtor knowingly and fraudulently makes false statements.

Attorneys' Fees and Costs

In re Clean Fuel Technologies II, L.L.C., 544 B.R. 591 (Bankr. W.D. Tex. 2016).

The putative debtor in a Chapter 7 involuntary petition, which was successfully dismissed, filed a counterclaim against the petitioning creditors seeking an award of attorneys' fees and costs pursuant to 11 U.S.C. § 301(i)(1), which provides that a court "may" grant judgment for costs and reasonable attorneys' fees when an involuntary petition is dismissed.

Noting the 5th Circuit has not yet addressed the approach to be used in awarding fees and costs under section 301(i), the bankruptcy court adopted the apparent "majority" approach. The bankruptcy court applied a presumption that attorneys' fees will be awarded; however, the presumption is rebuttable by the petitioning creditor based on the totality of the circumstances. The bankruptcy court adopted this approach recognizing the seriousness of filing an involuntary petition by creating a presumption in favor of awarding fees but also affording the court the discretion to award fees consistent with the "may" language in section 303(i). The bankruptcy court considered the following factors in analyzing the "totality of the circumstances": (1) the merits of the involuntary petition; (2) the role of any improper conduct by the alleged debtor; (3) the reasonableness of actions taken by petitioning creditors; (4) the motivation and objectives behind involuntary bankruptcy filing; and (5) other material factors and considerations including the practical operation of any award.

Based on the following factors, among others, the bankruptcy court found the petitioning creditors properly rebutted the presumption and declined to award the debtor attorneys' fees and costs: (1) the involuntary petition was dismissed due to a recent change in the law that made the creditors ineligible to file the petition; (2) the dismissal was a "close" and "technical" call; (3) the petitioning creditors acted reasonably and in good faith; (4) the putative debtor had ceased doing business and was not paying its creditors; and (5) the fees sought to be paid were by an attorney who was an officer and part owner of the debtor, had no engagement letter and failed to show he was paid by the debtor.

PACA Funds

Kingdom Fresh Produce, Inc. v. Stokes Law Firm, L.L.P. (In re Delta Produce, L.P.), 817 F.3d 141 (5 Cir. 2016)

On appeal of a final fee application order, the main issue before the 5th Circuit was whether the fees and expenses of special counsel for claimants under the Perishable Agricultural Commodities Act (PACA) could be disbursed from the PACA fund. The court held that 7 U.S.C. § 499(e)(c)(2) of PACA required that a PACA trustee (or special counsel) not be paid from trust assets until "full payment of the sums owing" are paid to all PACA claimants. Through the PACA trust provisions, Congress provided unpaid produce sellers with greater protection from risk of default by buyers, and, in turn, the attorneys are required to bear the greater risk of nonpayment.

The court also addressed two jurisdictional issues. First, the court held that the bankruptcy court had jurisdiction over PACA claims because the PACA claimants consented to its jurisdiction, thus refusing to resolve "doubts about the bankruptcy court's constitutional authority to adjudicate PACA claims'" Second, the court held the district court lacked appellate jurisdiction over the first two interim fee orders of the special counsel because they were not final orders and there was no indication that the district court realized they were interlocutory orders and believed there was a benefit to hearing them in a piecemeal manner.

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Corporate and Business Law

Apparent Authority

Fluid Disposal Specialties, Inc. v. UniFirst Corp., 50,356 (La. App. 2 Cir. 1/13/16), 186 So.3d 210.

A shop foreman of Fluid Disposal Specialties, Inc. was contacted frequently by a sales representative of UniFirst Corporation, a uniform supplier. Ultimately, the Fluid foreman signed his name on a form service agreement presented by the sales representative. Later, after the charges turned out to be higher than anticipated, Fluid objected, maintained the foreman did not have authority to bind Fluid to the agreement, and stopped using UniFirst's services. UniFirst instituted arbitration proceedings based on an arbitration clause in the agreement. Fluid sued in state court and obtained an injunction barring the arbitration based on its foreman's lack of authority.

On appeal, the court stated:

> An agency relationship is never presumed; it must be clearly established. . . . The burden of proving apparent authority is on the party seeing to bind the principal. A third party may not blindly rely on the assertions of an agent, but has a duty to determine, at his peril, whether the agency purportedly granted by the principal permits the proposed act by the agent.

The court noted that, although Fluid was identified as a corporation on the upper part of the form agreement, the foreman had simply signed his name on the signature line without indicating he was signing as a representative of Fluid. Noting that the foreman was also a dispatcher for Fluid, the court opined that "[t]here is nothing inherent in either of these positions that would lead a third party to believe that [the foreman] had authority to enter into an expensive and long-term agreement on behalf of Fluid." The court found that "[t]he corporate officers of Fluid who had authority to bind the company never had any contact with [the sales representative] and never made any manifestations to her that [the foreman] had authority to sign an agreement on behalf of the company." The court concluded the foreman did not have apparent authority (or actual authority), and Fluid was not bound by the agreement or its arbitration clause.

Liability of LLC Member

Wilson v. Two SD, L.L.C., 15-0959 (La. App. 1 Cir. 12/23/15), 186 So.3d 159, *writ denied* (La. 04/08/16), ____ So.3d ____, 2016 WL 1660755; and ***Nicholas v. BBT***

Constr. Mgmt., L.L.C., 15-1009 (La. App. 1 Cir. 12/23/15), 2015 WL 9466864.

These two cases each addressed whether an LLC member was personally liable under either the "breach of professional duty" or the "negligent or wrongful act" exception to the liability shield for LLC members in La. R.S. 12:1320(D).

Alleging deficiencies in the construction plans used for their new house, plaintiffs in *Wilson* sued both the limited liability company that provided the plans and the individual member of the company who had previously created the plans. The member did not personally participate in the project, but the plans bore a legend stating they were his property.

Considering the negligent or wrongful act exception on appeal, the court reasoned that evidence of the member's ownership of the plans, alone, was "insufficient to establish a separate tort duty sufficient to engage his personal liability," where the obligation to provide the plans arose from the agreement between the plaintiffs and the company. *Wilson*, 186 So.3d at 115. As none of the other factors pointed toward liability, the court concluded that the negligent or wrongful act exception did not apply. As for the breach of professional duty exception, the court reasoned that "professional" refers only to persons engaged in a profession identified in Title 12 (such as an architect), and not to persons who falsely hold themselves out to be such professionals. Commenting that "such misrepresentations might give rise to causes of action on other grounds," the court concluded that the member had "no personal liability for the alleged deficiencies in the plans" and granted summary judgment in favor of the member. *Id.* at 115-16.

In *Nicholas*, the plaintiff entered into a contract for the construction of a home with a limited liability company. The contract was signed on behalf of the company by its manager, who was also its sole member. The plaintiff paid the entire contract price up front. After completing about 40 percent of the work, the company ceased work on the project. The plaintiff sued both the company and the member. After the plaintiff obtained a default judgment, the member alone appealed.

The appellate court concluded that the breach of professional duty exception did not apply, as an individually licensed contractor is not considered a professional under La. R.S. 12:1320(D) and the record did not even show that the member had such a license. Regarding whether the member had committed a negligent or wrongful act, after noting the plaintiff had asked the defendants to "refund the unused portion of the contract price" but they had refused to do so, the court found that the member's failure to return the unused funds could be characterized as a tort, such as conversion, could be perceived as a crime of theft, and "was clearly not required by or in furtherance of the contract." The court added that, even if the member was acting within the structure of the LLC, that factor alone would not be determinative, and affirmed the default judgment against the member personally.

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Custody

Hodges v. Hodges, 15-0585 (La. 11/23/15), 181 So.3d 700.

The Supreme Court held that the law does not allow for "co-domiciliary" parents. There is either sole custody, joint custody or joint custody with a designation of one parent as the domiciliary parent. Moreover, when there is joint custody, there must be a joint-custody-implementation plan, and that plan must address the allocation of physical custodial time, as well as allocate the legal authority and responsibility of the parents. The court is not required to designate a domiciliary parent and may allocate decision-making authority through the implementation order.

Sorrells v. Sorrells, 15-0500 (La. App. 3 Cir. 11/4/15), 178 So.3d 288.

A Lake Charles police department Internal Affairs Report regarding Ms. Sorrells' then-boyfriend, whom she later married, although hearsay, was appropriately admitted, since for impeachment purposes, rather than for the truth of the contents of the report itself. Moreover, the court noted that evidentiary rules are relaxed in child custody matters under Louisiana Code of Evidence art. 1101(B)(2). There was no error in the trial court's interviewing the children in chambers without a court reporter because one of the children testified at trial and the court did not consider the other child's in-chambers testimony.

Hilkirk v. Johnson, 15-0577 (La. App. 4 Cir. 12/23/15), 183 So.3d 731, *writ denied*, 16-0083 (La. 2/19/16), 186 So.3d 1172.

The trial court determined that the mother had alienated the daughter from the father. The court ordered that the child be immediately transferred to the father's custody and that the mother have limited contact with the child for seven months. The court-appointed custody evaluator testified that that was the only method to break the cycle of alienation and reestablish the relationship between the child and the father. The court of appeal reversed, finding that Mr. Johnson had not met the requirements of *Bergeron*. It reviewed the record *de novo* and found that the continuation of primary custody with the mother would not be harmful or deleterious to the child and that the harm caused by removing the child would not be substantially outweighed by the advantages of doing so. However, since the child had been in the father's physical custody for approximately 10 months, it remanded for the trial court to determine whether the child should be moved from the father back to the mother and whether a domiciliary parent should be named. It further ordered that contact be reinstated between the mother and child pending the trial court's hearing to address the ongoing physical custody arrangement.

Cloud v. Dean, 15-1050 (La. App. 3 Cir. 1/13/16), 184 So.3d 235, *writ denied*, 16-0216 (La. 3/4/16), ____ So.3d ____, 2016 WL 1042946.

A custody judgment under the Post-Separation Family Violence Relief Act (PSFVRA) does not give rise to the *Bergeron* standard when the spouse has completed the required treatment and counseling and seeks to amend the judgment. Effectively, once a court finds that a parent has a history of perpetuating family violence and orders domestic-violence counseling, the court does not proceed to the child custody case itself until the treatment to resolve the problem has been concluded. A finding that a spouse is abusive under the PSFVRA gives rise to a presumption that prohibits that parent from being awarded custody. Moreover, the judgment being rendered is not intended to be a permanent custody arrangement, since once the parent completes the required counseling/treatment, he can file to establish custodial rights upon a full hearing of the custody matter.

Interim Spousal Support

Hogan v. Hogan, 49,979 (La. App. 2 Cir. 9/30/15), 178 So.3d 1013, *writ denied*, 15-2018 (La. 1/8/16), 182 So.3d 953.

Because of Mr. Hogan's egregious failure to produce documents, failure to pay support and failure to comply with court orders, as well as his collaboration with his fiancé to hide his income, it was not error for the trial court to continue his obligation to pay interim spousal support beyond the six months after the parties' divorce and for as long as he owed arrearages, particularly given the destitute position he placed her and the children in as a result of his "reckless financial shenanigans." He was also found in contempt for nonpayment of support, including a jail sentence and probation pending his compliance. The court found that he was voluntarily underemployed and had "engaged in a deliberate, malicious scheme to reduce his reportable income in order to frustrate his support obligations."

Child Support

Boudreaux v. Boudreaux, 15-0536 (La. 10/14/15), 180 So.3d 1245.

In this child support matter, the Supreme Court granted writs, reversed the court of appeal and reinstated the trial court's judgment, allowing Mr. Boudreaux to obtain support-enforcement services under La. R.S. 46:236.1.2 and La. R.S. 46:236.2, as a payor parent, even though he was not delinquent in his support payments and was not actually receiving public benefits.

Procedure

Mier v. Mier, 15-0378 (La. App. 3 Cir. 11/4/15), 178 So.3d 270.

There is no cause of action in Louisiana by children against a parent's paramour for alienation of affection. The children's attempt to characterize their allegations as tortious interference with a contract was rejected, particularly given the very limited situation in which that cause exists.

Community Property

Succ. of Sylvester, 15-0125 (La. App. 5 Cir. 12/9/15), 181 So.3d 250.

Immovable property purchased in both spouses' names in Florida was not community property, but passed to the surviving co-owner alone after the other co-owner's death under Florida law. The Louisiana conflict of law articles regarding spouses were inapplicable, since this was a succession matter. The surviving spouse was not entitled to reimbursement for expenses to maintain community properties because she had use of that property to the exclusion of other co-owners by allowing her children to use the property or to use it for storage, and an offset under La. Civ.C. art. 806 applied.

Benedetto v. Benedetto, 15-0373 (La. App. 5 Cir. 12/9/15), 182 So.3d 344.

Spouses are not required to appear in court to receive authority to terminate their community regime and to enter into a separate property regime under La. Civ.C. art. 2329. The court's finding that the agreement serves as the best interest of the parties, and that they understand the governing rules and principles of the regime, can be satisfied by the joint petition and the parties' sworn affidavits and/or certifications.

Divorce

Matthews v. Matthews, 15-0499 (La. App. 5 Cir. 12/23/15), 184 So.3d 173.

Ms. Rogers' use of marijuana during the marriage for medicinal purposes, of which Mr. Matthews was aware and had not complained, did not rise to fault to preclude her from receiving final spousal support. The court found that while daily drug usage could be considered "habitual intemperance," it also found that "the consumption must be to such an extent that it substantially interferes with the spouse's marital duties or inflicts great mental anguish upon the other spouse." *Id.* at 178. Here, Ms. Rogers was able to perform the tasks typically expected of a homemaker, including taking care of the children. He also complained that she was at fault for denying his sexual advances, but the court rejected this, too.

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Insurance, Tort, Workers' Compensation & Admiralty Law

Tort: Federal Officer Removal Statute

Savoie v. Huntington Ingalls, Inc., ____ F.3d ____ (5 Cir. 2016), 2016 WL 1138841.

Joseph Savoie was a laborer at Ingalls' Avondale Shipyards from 1948-96 when Avondale was principally engaged in building ocean-going vessels for the U.S. Navy. The contractual specifications for these vessels included the use of asbestos for thermal insulation. The government exercised quality-control supervision to ensure compliance with the specifications. Savoie contracted mesothelioma, allegedly caused by exposure to asbestos. Before his death, Savoie filed suit in state court against Ingalls and its prior incarnations, including Avondale, and their insurers. The defendants timely removed to federal court under the federal officer removal statute, and the plaintiffs sought remand. The federal district court construed all of plaintiff's claims as negligence claims and found that federal jurisdiction did not exist because the shipyard retained discretion in its safety policies and could have complied with both the government's requirements for the vessels' construction and its state law duties of care. Plaintiffs appealed.

The statute governing removal, 28 U.S.C. § 1447(d), holds that orders remanding to state court are not reviewable, with two exceptions — certain civil rights cases, and remand orders involving the federal officer removal statute. The first federal officer removal statute was enacted in 1815 to address state court claims brought by shipowners against federal customs officials in New England states that opposed a trade embargo with England enacted during the War of 1812. Thus it predates the general federal question jurisdiction statute by 60 years. It addresses a historic concern about state court bias. Among its purposes is to ensure that federal officers have a federal forum in which to assert federal immunity defenses.

Two inquiries are the subject of this appeal: first, whether the federal government was directing the defendant's conduct and whether that federally-directed conduct caused plaintiff's injuries, *i.e.*, a causal nexus. The district court did not find such causal nexus, and thus did not reach the final inquiry, whether the defendant asserts a colorable federal defense. The court noted that, while the principal of limited federal court jurisdiction generally compels resolution of any doubts about removal in favor of remand, the legislative and judicial history of the removal statute clearly mandate that, when federal officers and their agents are seeking a federal forum, section 1442 is to be interpreted broadly in favor of removal.

Plaintiff's claims mostly allege the shipyard's negligence in failing to act when it would have been reasonable to take some additional measures, *e.g.,* providing clean, respirable air and proper ventilation, necessary showers and special clothing, and warning of the dangers of exposure to asbestos. The Savoies' negligence claims thus challenge discretionary acts of the shipyard free of federal interference. As a result, the government's directions to the shipyard via the contract specifications did not cause the alleged negligence, and those claims do not support removal.

The Savoies assert strict liability causes of action under La. Civ.C. art. 2317. The court noted that removal of the entire case is appropriate so long as a single claim satisfies the federal officer removal statute. The court quoted Professors Maraist and Galligan for the proposition that the Legislature effectively eliminated strict liability under article 2317 in 1996, turning it into a negligence claim, by requiring knowledge or constructive knowledge under article 2317. However, the court found that pre-1996 law governed because Savoie worked at the shipyard "for almost half a century prior to Louisiana's abolition of strict liability," and survival claims based on asbestos exposure are governed by the law in effect when the exposure occurred.

The court then considered whether the survival claims alleging strict liability based on mere use of asbestos give rise to federal jurisdiction. The court stated:

> [O]ur best reading of Louisiana law is that a strict liability plaintiff need only prove the following: (1) that the asbestos-containing products that caused his damages were in the "care, custody and control" of the defendant; (2) that the asbestos-containing products had a "vice, ruin, or defect that presented an unreasonable risk of harm"; and (3) "that the vice, ruin, or defect was the cause-in-fact of the plaintiff's damage." . . . This analysis of the elements of strict liability under pre-1966 Louisiana law largely resolves the "causal nexus" inquiry for federal officer removal.

The court noted that the Savoies' strict liability claims "rest on the mere use of asbestos, and that use at the shipyard was pursuant to government directions via contract specifications. Unlike claims based on negligence, those based on strict liability do not turn on discretionary decisions made by the shipyard." The court stated that it had previously recognized that strict liability claims support federal officer removal when the government obligates the defendant to use the allegedly defective product that causes the plaintiff's harm.

The court then remanded the case to the district court to consider whether the defendant possessed a colorable federal defense. The shipyard proposed two — the federal contractor defense, and a preemption defense under the Longshore and Harbor Worker's Compensation Act — and the district court had considered neither.

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International Law

U.S. International Trade Commission

In re Primary Unwrought Aluminum, Inv. No. TA-201-____ (April 18, 2016).

The United Steelworkers (USW) launched a major volley in the international trade game by filing a Section 201 safeguard petition against imported aluminum. The last successful Section 201 case was brought on imported steel, with tariffs being imposed by then-President George W. Bush on March 5, 2002. The USW petition seeks to impose up to a 50 percent tariff on aluminum imports from China and other countries that are allegedly causing serious injury to the domestic aluminum injury. The aluminum safeguard petition comes during a very sensitive time in the trade world. Chinese steel overcapacity is dominating trade headlines, while President Obama prepares to submit the Trans-Pacific Partnership Agreement to Congress and many presidential candidates heap criticism on U.S. trade policies.

The USW petition seeks relief pursuant to Section 201 of the Trade Act of 1974, which allows the U.S. President to provide unilateral trade relief in the form of tariffs if the International Trade Commission (ITC) determines that imports are a substantial cause of serious injury to the domestic industry. Section 201 actions are rare inasmuch as they require tariffs to be employed on a Most Favored Nation basis, meaning that they are applied to imports irrespective of country of origin. An ordinary Section 201 investigation takes approximately six months. The USW is seeking to shrink the typical time frame by requesting a finding of "critical circumstances," which if found gives the President only 30 days to apply some type of provisional relief while the full investigation proceeds.

U.S. Congress

Miscellaneous Tariff Bill Process, H.R. 4923 and S. 2794 (114th Congress).

The U.S. House and Senate introduced companion legislation on April 13, 2016, to restart the Miscellaneous Tariff Bill (MTB) process that has languished since 2012. The House bill, American Manufacturing Competitiveness Act of 2016, establishes a new process for American businesses to seek tariff relief. This particular process has been on hold because House Republican rules consider the benefits of miscellaneous tariff relief to be earmarks, which are banned under House rules. The new process shifts consideration from Congress to the ITC. U.S. businesses will now file a petition for tariff relief directly with the ITC, which issues a report to Congress with appropriate recommendations after a public comment period. The ITC will continue to use MTB standards, including the requirement of no domestic production. The House Ways & Means Committee and the Senate Finance Committee will review the ITC's recommendations and draft a MTB proposal.

Customs Bill

As previously reported in this section, the Trade Facilitation and Trade Enforcement Act (Customs Bill) was recently signed into law by President Obama. One particular provision of the Customs Bill is already being implemented by U.S. business. The legislation eliminates the "consumptive demand" exception to the prohibition on importing goods produced by convict, forced or indentured labor. U.S. Customs and Border Protection issued a Detention Order on March 29, 2016, preventing shipments of soda ash, calcium chloride, caustic soda and rayon fiber from the Chinese company Tangshan Sanyou Group based on suspicions that it is using prison labor in the production of those goods.

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Labor and Employment Law

EEOC Files Title VII Suits Alleging Sexual Orientation Discrimination

On March 1, 2016, the U.S. Equal Employment Opportunity Commission (EEOC) filed two actions in two federal district courts asking the courts to recognize sexual orientation discrimination as sex discrimination under Title VII.

The two suits are *EEOC v. Pallet Companies*, filed in the U.S. District Court for the District of Maryland, Baltimore Division, and *EEOC v. Scott Medical Health Center*, filed in the U.S. District Court for the Western District of Pennsylvania. The *Pallet* case involves a lesbian employee whose superior allegedly harassed her because of her sexual orientation. Complaint at 3-4, *EEOC v. Pallet Companies,* No. 1:16-cv-00595-RDB (D. Md. Mar. 1, 2016). The complaint alleges that after the employee reported the harassment to her employer, the employer fired her. *Id.* at 4. The *Scott Medical* case involves a gay male employee whose supervisor also allegedly harassed him because of his sexual orientation. Complaint at 3-4, *EEOC v. Scott Medical Health Center*, No. 2:16-cv-00225-CB (W.D. Pa. Mar. 1, 2016). The complaint alleges that when the defendant employer failed to take action to prevent the harassment, the employee resigned to avoid working in a hostile environment. *Id.* at 4.

In both complaints, EEOC argues that the defendant-employers' actions amounted to discrimination based on sexual orientation, which discrimination "necessarily entails treating an employee less favorably because of [his or her] sex." *Scott Medical*, No. 2:16-cv-00225-CB, at 4; *Pallet,* No. 1:16-cv-00595-RDB, at 5. In essence, the EEOC argues that sexual orientation discrimination amounts to sex discrimination because it arises out of the homosexual employee's failure to conform to his or her harasser's notions of gender norms. *See id.*

Title VII of the Civil Rights Act prohibits employers from discriminating based on "race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a). However, Title VII does not expressly prohibit discrimination based on an employee's LGBT status. Furthermore, although lower federal courts are split on the issue, the Supreme Court has yet to rule on whether Title VII's prohibition against sex discrimination covers LGBT-related discrimination.

The EEOC, the agency charged with interpreting and enforcing Title VII, is authorized to bring Title VII enforcement suits. 42 U.S.C. §§ 2000e-5(f)(1) and (3). While the EEOC has brought suit alleging that discrimination based on an employee's transgender status constitutes Title VII sex discrimination (*see, e.g.*, *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 100 F. Supp. 3d 594, 595 (E.D. Mich. 2015)), *Pallet* and *Scott Medical* are the first EEOC suits to allege sex discrimination based on sexual orientation. The suits are part of the EEOC's Strategic Enforcement Plan, which prioritizes coverage of "lesbian, gay, bisexual and transgender individuals under Title VII's sex discrimination provisions, as they may apply." U.S. Equal Emp't Opportunity Comm'n, *Strategic Enforcement Plan (SEP)*, at 10 (Dec. 17, 2012), available at: *www.eeoc.gov/eeoc/plan/upload/sep.pdf.* Thus, *Pallet* and *Scott Medical* represent the EEOC's latest strategic move in a continuously developing area of Title VII law.

The EEOC is also engaged in LGBT-related Title VII litigation within the 5th Circuit. In *EEOC v. Boh Bros. Construction Co.*, the 5th Circuit ultimately upheld a jury verdict in favor of the EEOC, holding that the EEOC had sufficiently shown that the harasser discriminated against the employee on the basis of sex because the harassment arose from the employee's failure to conform to the harasser's subjective perception of gender stereotypes. 731 F.3d 444, 451, 460 (5 Cir. 2013). In *Broussard v. First Loan Tower, L.L.C.*, the EEOC intervened in a suit filed in the Eastern District of Louisiana by Tristan Broussard, a transgender man. 2016 U.S. Dist. LEXIS 29523, at *5-7 (E.D. La. March 8, 2016). Broussard's suit alleges that Loan Tower committed sex discrimination when it fired him for refusing to sign a statement agreeing to act as a woman at work. *Id.* at *6. Using the rationale from *Boh Bros.*, the EEOC argues that transgender discrimination involves gender stereotyping and violates Title VII. Memorandum in Support of Motion to Intervene at 2, No. 2:15-cv-01161-CJB-SS. The court stayed both Broussard's and the EEOC's suits while Broussard and Tower Loan undergo arbitration. *Broussard,* 2016 U.S. Dist. LEXIS 29523 at *7-8. The EEOC made similar arguments in an amicus brief to the 5th Circuit in *Eure v. Sage Corp.* on behalf of the transgender plaintiff-appellant, arguing that where a plaintiff alleges transgender discrimination, he necessarily states a sex discrimination claim because transgender discrimination involves consideration of gender stereotypes. *Fact Sheet: Recent EEOC Litigation Regarding Title VII & LGBT-Related Discrimination*, Equal Opportunity Employment Commission, *https://www.eeoc.gov/eeoc/litigation/selected/lgbt_facts.cfm* (last updated March 1, 2016). However, the appellant ultimately withdrew the appeal. *Id.* Adding to the relevance of these issues in Louisiana, Governor John Bel Edwards recently issued an executive order directing that no state employer may discriminate on the basis of sexual orientation or gender identity "in any matter pertaining to employment by the state." La. Exec. Order No. JBE 2016-11 (April 13, 2016).

As *Pallet*, *Scott Medical* and similar suits percolate through the federal court system, it is unclear whether the Supreme Court will ultimately recognize a prohibition against LGBT-related discrimination within Title VII's sex discrimination clause, or whether the Court will wait for Congress to decide whether to amend Title VII to include an express prohibition against sexual-orientation and gender-identity discrimination. In sum, the EEOC's latest efforts in this developing area of law are worth watching.

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Mineral Law

Well Drilling Issue

St. Tammany Parish Gov't v. Welsh, 15-1152, ____ So.3d ____ (La. App. 1 Cir. 3/9/16), 2016 WL 918361.

In 2014, the Louisiana Commissioner of Conservation issued a permit to Helis Oil to drill a well at a site in St. Tammany Parish. There were no buildings or structures within one mile of the proposed site, which had been used as a pine tree farm for at least 30 years, but the area was zoned for residential use and St. Tammany Parish's zoning ordinances purported to prohibit drilling at the site. The Parish filed suit against the Commissioner, seeking a declaratory judgment that the Parish's prohibition on drilling was enforceable. Helis intervened on the side of the Commissioner, and a nonprofit organization intervened on the side of the Parish.

The Commissioner argued that the Parish's prohibition on drilling is preempted by La. R.S. 30:28, which provides that political subdivisions of the state are "hereby expressly forbidden, to prohibit or in any way interfere with the drilling of a well . . . by the holder of . . . a [duly-authorized] permit." The district court agreed and dismissed the case. The Parish appealed.

The Louisiana 1st Circuit affirmed, holding that La. R.S. 30:28 expressly preempts the Parish's prohibition on drilling. The court also stated that Louisiana's comprehensive system of oil and gas statutes implicitly preempts any local regulation of oil and gas activity. The court rejected arguments that certain provisions in the Louisiana Constitution that grant zoning authority and other powers to local governments prevent La. R.S. 30:28 from preempting the Parish's ban on drilling. The court noted that each of those provisions contains a qualifier that the authority being granted is subject to any "general laws" of the State.

Finally, the appellate court rejected an argument that La. R.S. 33:109.1 prohibited the Commissioner from granting a drilling permit that would be inconsistent with the Parish's master land use plan. The court explained that the statute merely provides that state agencies must "consider" such local plans, and that the record demonstrated that the Commissioner considered the Parish's plan.

Full Ownership or Right of Way?

Keystone Energy Co. v. Denbury Onshore, L.L.C., 15-0999, ____ So. 3d ____ (La. App. 3 Cir. 3/30/ 16).

In this concursus proceeding, the parties disputed whether a 1904 notarial act transferred full ownership of certain land in Jefferson Davis Parish to Union Pacific Railroad Company's predecessor or whether the 1904 act conveyed only a right of way. If it conveyed ownership, Union Pacific and its lessee, Keystone Energy Company, L.L.C., would own mineral rights in the land. If not, other persons would own those rights.

Three copies of the 1904 act existed. A handwritten version was recorded in Orleans Parish in 1904 (a copy of this version was recorded in Jefferson Davis Parish in 2010). A typed copy was recorded in Calcasieu Parish in 1904 (as of 1904, the land in question was part of Calcasieu Parish). An identical typed version appears in the records of Jefferson Davis Parish, which was later carved from Calcasieu. The handwritten and typed versions are virtually identical, except that the typed versions include a caption to the left of the text that includes the phrase "right of way."

Keystone and Union Pacific argued that the 1904 act conveyed ownership. Denbury Onshore, L.L.C., and Hilcorp, the current operators of the unit well on the property, argued that the act conveyed only a right of way. Following a hearing on cross motions for partial summary judgment, the trial court ruled that the 1904 act conveyed ownership and that Union Pacific and Keystone, therefore, were entitled to production revenues being held in the registry of the court.

Denbury and Hilcorp appealed. They argued that the handwritten version was not binding on third persons because it was not recorded in Jefferson Davis Parish until 2010, after they had acquired their rights. The Louisiana 3rd Circuit rejected this argument, concluding that the district court had not relied on the 2010 recordation of the handwritten version. The district court relied on the 1904 recordation of the typed version and had simply disregarded the caption that included the phrase "right of way." The 3rd Circuit concluded that this was proper. It was clear that the caption had been added by a clerk in the recordation office. The 3rd Circuit stated that there was no genuine dispute regarding the facts that the caption had not been part of the original act and that the act had been recorded in 1904 in Calcasieu Parish, where the land was located at the time.

Denbury and Hilcorp also argued that the act unambiguously conveyed only a right of way. They pointed to language in the act that referred to "right of way." The 3rd Circuit disagreed with their argument that the acts unambiguously conveyed only a right of way. But the court concluded that the act was ambiguous — that is, the act did not unambiguously convey full ownership. Further, extrinsic evidence regarding the meaning of the act was conflicting. Accordingly, neither Keystone and Union Pacific on the one hand, nor Denbury and Hilcorp on the other, were entitled to summary judgment. The 3rd Circuit, therefore, reversed and remanded for further proceedings.

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Professional Liability

Sterilization of Hospital Equipment and the Medical Malpractice Act

Dupuy v. NMC Operating Co., 15-1754 (La. 3/15/16), 187 So.3d 436.

Several news reports have appeared concerning the seemingly nationwide issue of sterilization of surgical and diagnostic equipment. The issue in *Dupuy* was whether a claim for the failure to properly maintain and service surgical equipment used in the sterilization process could properly fall within the ambit of the Medical Malpractice Act.

The plaintiff developed a post-operative infection following spinal surgery and filed a lawsuit in which he contended, among other things, that the hospital "fail[ed] to properly sterilize and/or clean surgical instrumentation" used during the surgery and/or that its employees failed to use proper "aseptic technique" prior to surgery. The hospital filed exceptions of prematurity based on its qualified health-care-provider status, which entitled it to a medical-review panel.

The district court found that one of the plaintiffs' allegations fell outside the ambit of the Act. The appellate court denied the hospital's writ without comment. The Supreme Court, however, granted the hospital's writ.

In its argument to the Supreme Court, the hospital contended that the lower courts misapplied the *Coleman v. Deno* factors, 01-1517 (La. 1/25/02), 813 So.2d 303, which are used to determine whether a cause of action sounds in medical malpractice or general tort. It argued that one of the obvious obligations of a hospital is to provide patients with clean and sterile facilities, which necessarily includes proper cleaning of instruments, and thus the Act applied. The plaintiffs countered that the mandatory strict construction of the Act and the *Coleman* factors resulted in applicability of general tort liability.

The *Dupuy* court found persuasive that other courts had found that infectious diseases acquired during surgery were "treatment related." Two Louisiana appellate court cases and a Louisiana Eastern District case were cited by the court, each of which ruled that the claimed negligence was treatment-related and thus deserved the protections of the Act. The court also cited two cases in which it had previously found that the acts of negligence were not treatment related, but distinguished them from *Dupuy,* as neither case involved infection or aseptic sterilization.

The court found unpersuasive the plaintiff's argument that the failure to maintain and service the sterilization equipment occurred *before* the patient entered the hospital, as it found no requirement in the Act that the negligent act must be "contemporaneous with a patient's treatment in order to fall under the MMA." To buttress this conclusion, the court said that the Act itself specifies that "training and supervision" of health-care providers is within the definition of malpractice, and it opined that those measures "necessarily" occur before treatment.

The plaintiff's argument that maintenance and service of sterilization equipment may have been performed by "plant operations, rather than by physicians" was likewise unconvincing to the *Dupuy* court, as "[n]othing in the statute's plain language limits its application to direct treatment" by any health-care provider. Thus, the Act "necessarily includes actions which are treatment related and undertaken by the Hospital in its capacity as a health care provider — even if those actions are not performed directly by a medical professional."

The court then discussed the remainder of the *Coleman* factors, which it concluded likewise favored coverage under the Act*, i.e.,* medical testimony would be required, without which the plaintiffs would be unable to meet their burden of proof; and the incident occurred in the context of a physician-patient relationship.

The district court's denial of the hospital's exception of prematurity was error, and as such, it was reversed.

What about Credentialing?

The 3rd Circuit was presented with the question of whether "negligent credentialing" of a physician constituted medical malpractice that was subject to the Act. *Billeaudeau v. Opelousas Gen. Hosp. Authority*, 15-1034 (La. App. 3 Cir. 4/6/16), ____ So. 3d ____, 2016 WL 1358014.

Here, the patient had a stroke, and the plaintiffs filed a request for a panel to review Dr. Zavala's treatment. They also filed a lawsuit against the hospital based on the general tort of the negligent credentialing of a physician in emergency medicine and stroke diagnosis. The district court granted the plaintiff's partial summary judgment motion, finding credentialing negligence outside the Act's coverage and certified it as a final judgment, from which the defendants appealed.

As did the Supreme Court in *Dupuy, supra*, the *Billeaudeau* court examined the alleged negligent acts pursuant to the *Coleman v. Deno* factors, first noting the difficulty of applying those factors to a negligent credentialing claim, which it declared was not "purely a medical decision." For example, the first *Coleman* factor asks whether the particular wrong is treatment-related, but this patient's claim was that the hospital was negligent in hiring a physician to treat him who was inexperienced in both emergency medicine and stroke diagnosis.

Citing its earlier case of *Plaisance v. Our Lady of Lourdes Regional Medical Center, Inc.*, 10-0348 (La. App. 3 Cir. 10/6/10), 47 So.3d 17, *writ denied,* 10-2520 (La. 1/14/11), 52 So.3d 904, wherein it had "engaged in an exhaustive examination of each of the *Coleman* factors," the *Billeaudeau* court said that the particular wrong in *Plaisance* — despite a negligent credentialing claim by the plaintiffs — was treatment-related. The court explained that in light of the allegations as to substandard care, the court had to review the treatment that the physician provided as well as the hospital's decisions thereafter. In *Billeaudeau*, however, the court did not have to review the treatment to determine whether the hospital was negligent in hiring the physician; thus, the court concluded the first *Coleman* factor weighed against associating negligent credentialing with medical malpractice.

Conversely, whether the wrong required expert testimony to determine there was a breach (the second *Coleman* factor) weighed in favor of finding the claim to be covered by the Act. However, again using *Plaisance* as a guide, the court noted that the expert testimony in *Billeaudeau* would be of a different nature than what was required in *Plaisance*.

The court decided credentialing methods did not involve the assessment of the patient's condition, *i.e.*, the third *Coleman* factor, thus, militating against the applicability of the Act.

The fourth *Coleman* question is whether the negligence "occurred in the context of the physician-patient relationship, or was within the scope of activities which a hospital is licensed to perform." Again, citing *Plaisance*, 47 So.3d at 22, the court explained that La. R.S. 40:2114(E) provides that hospitals shall establish the rules concerning qualifications for clinical privileges for all of their health-care providers. Thus, the *Billeaudeau* court decided that credentialing was within the scope of those activities, weighing in favor of treating the claim as malpractice.

Would the injury have occurred if the patient had not sought treatment? The oddity of this fifth *Coleman* factor was noted by the court in *Billeaudeau*: "We find this to be a particularly circular type of analysis." If a patient never sought treatment, the claim obviously never would have been filed, a circumstance that is almost always present in these types of cases. Here, while the patient's injuries were surely related to the treatment provided by Dr. Zavala, the hospital's credentialing decisions were not necessarily tied to the treatment he rendered. The court agreed with the trial court's observation that it was difficult to apply this factor to the case before it, but nevertheless concluded that this factor also weighed against treating the claim as malpractice. Likewise, the sixth *Coleman* factor (whether the tort was intentional) is seldom an issue in deciding coverage under the Act, as was the case in *Billeaudeau*, and the court found that the final factor was not applicable.

The *Billeaudeau* court opined that this claim for negligent credentialing did not warrant the protections of the Act. In reaching that conclusion, it noted its mindfulness that the limitations of the Act are in derogation of general tort law and should be strictly construed in favor of plaintiffs, citing *Williamson v. Hospital Service District No. 1 of Jefferson*, 04-0451 (La. 12/1/04), 888 So.2d 782. It also wrote that the Legislature amended the definition of malpractice in 2001 (La. R.S. 40:1299.41(A)(8)) to include "acts or omissions" in the training or supervision of health-care providers and noted three later attempts to add "credentialing" in the definition of malpractice: "Each of these bills failed to become law. We will not create law by judicial fiat when, as here, the legislature clearly failed to do so."

The judgment of the trial court was affirmed.

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Taxation

Inventory Tax Credit-Lease/Rental Equipment

Bridges v. Bullock, 50,297 (La. App. 2 Cir. 2/19/16), ____ So.3d ____, 2016 WL 683817.

The 2nd Circuit Court of Appeal affirmed a decision by the Louisiana Board of Tax Appeals (BTA) that held equipment that was leased/rented before the item was sold qualifies as "inventory" for purposes of the inventory tax credit provided by La. R.S. 47:6006.

Kenneth and Margaret Bullock are members of JPS Equipment, L.L.C., a multi-member Louisiana limited liability company in the business of selling and leasing new and used construction equipment. JPS is treated as a partnership for federal and state income tax purposes, so that the tax consequences of its business activities "flow through" to its members. As a result, the Bullocks are allowed to claim on their joint individual tax return their proportionate share of any inventory tax credit the law allows for ad valorem taxes paid by JPS.

For income tax years 2004, 2005 and 2006, the Bullocks claimed inventory tax credits for ad valorem taxes paid by JPS for construction equipment that had been leased prior to sale. The Louisiana Department of Revenue (LDR) allowed the credit for taxes paid on items reported to the local tax assessors as inventory and issued a refund. However, the LDR disallowed the portion of the inventory tax credit claimed by the Bullocks for taxes paid on leased equipment and denied that portion of the requested refund.

The Bullocks filed a petition with the BTA alleging that they were entitled to the inventory tax credit for taxes paid on the property leased before sale. The BTA found that every item for which a credit was requested was held for sale and that the items were rented to promote their sale. The BTA further found that JPS is a retailer engaged in the sale of products to the ultimate consumer and, as members of JPS, the Bullocks are entitled to the credit for ad valorem taxes paid on the inventory of JPS as requested. The LDR sought judicial review. The district court agreed with the BTA, reasoning that there is nothing in the statute that provides that an item held for resale cannot be rented while it is in inventory awaiting a buyer. The district court affirmed the BTA judgment, but did not order payment of the refund amount sought by the Bullocks. The LDR and the Bullocks appealed the judgment.

The LDR argued that the district court and BTA erred in finding that inventory includes leased property and that the forums below improperly interpreted the statute providing the tax credit. The court relied on the testimony of the Bullocks that JPS seeks to sell all of its equipment and that many customers lease the equipment for a period of time before a purchase. The Bullocks testified that at times, when a customer wanted to buy a particular type of equipment that was being leased, JPS had provided a similar piece of equipment to the lessee and then sold the equipment that had been leased. The court held the testimony supported the BTA's finding that all of the items were goods awaiting sale, thereby constituting the inventory of JPS, and that JPS is a retailer engaged in the sale of products to the ultimate consumer. The court remanded the matter to the BTA to determine the specific amount of refund due the Bullocks.

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Rental of Sports Facility Not Rental of Immovable; Subject to Sales Tax on Services

Topshelf Sports v. Simpson, 15-1111 (La. App. 3 Cir. 3/23/16), 186 So.3d 1288.

The Louisiana 3rd Circuit Court of Appeal has upheld the BTA's decision in favor of Lafayette Parish School System Sales Tax Division (LPSS). The LPSS had determined that the facility, Topshelf Sports, Inc., which "rented" space for sports activities and other activities, was charging for taxable admission to its facilities under La. R.S. 47:301(14)(b)(i), making the facility liable for failing to collect sales taxes, and also for penalties and interest. Topshelf rented its recreational facility in Youngsville, La., for a variety of activities, including sporting and trade events, exhibitions and birthday parties. The facility was equipped with a skating rink, volleyball court, locker rooms, bathrooms and a concession stand, which Topshelf operated at its discretion. Though Topshelf did collect state taxes on concession items sold, no tax was collected on the rental charges. Topshelf argued that amounts collected from customers were for the rental of an immovable, thus not subject to sales tax. The BTA sided with LPSS, finding that Topshelf was providing "sale of services" within the meaning of R.S. 47:301(14)(b)(i).

The appellate court upheld the BTA's decision, stating that R.S. 47:301(14)(b)(i) provides that the "Sales of Services" includes:

> The sale of admissions to places of amusement, to athletic entertainment other than that of schools, colleges, universities, and recreational events, and the furnishing, for dues, fees or other consideration of the privilege of access to clubs or the privilege of having access to or the use of amusement, entertainment, athletic or recreational facilities.

Despite Topshelf's contention that its customers were paying "rent" in exchange for full use of the facility, the court found that it was a "mischaracterization," noting that Topshelf never at any time fully relinquished possession of the building as would occur under a non-taxable "lease" agreement as envisioned by the Legislature. Thus, the court found that LPSS rightfully taxed Topshelf for its sale of services pursuant to R.S. 47:301(14)(b)(i).

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Trusts, Estate, Probate & Immovable Property Law

108-Year-Old Mineral Lease Survives

Regions Bank v. Questar Expl. & Prod. Corp., 50,211 (La. App. 2 Cir. 1/13/16), 184 So.3d 260.

Pursuant to civilian tradition, Louisiana law prohibits perpetual leases as an infringement on ownership and has long viewed 99 years as the time at which a lease becomes perpetual. The issue presented to the 2nd Circuit was whether mineral leases are exempt from this general rule.

The three mineral leases at issue in the case were executed in 1907 and granted for a primary term of 10 years "and as much longer thereafter as gas or oil is found or produced in paying quantities . . . ." Plaintiffs sought a judicial declaration of termination by operation of law based on La. Civ.C. art. 2679, which limits the duration of a lease to 99 years. The trial court concluded that article 2679 was inapplicable to mineral leases and dismissed the case. Plaintiffs appealed.

The 2nd Circuit agreed with the trial court's findings, reasoning that the general lease provision cannot apply to mineral leases because mineral leases have their own maximum term as provided by the Mineral Code. Specifically, the Louisiana Mineral Code provides for a maximum primary term of 10 years and a maximum secondary term based upon continued drilling or mining operations or production. La. R.S. 31:115. The Civil Code, on the other hand, provides for a maximum term based on a stated number of years. Accordingly, the court held that "the general lease provision providing that a maximum lease term is 99 years clearly conflicts with the maximum term established for mineral leases as provided by the Mineral Code."

While the appellate court found that the Civil Code's term limitation of 99 years did not apply to mineral leases, it agreed that perpetual leases are void from their inception. However, the appellate court reasoned that the leases at issue were not perpetual, but rather, by way of the habendum or "thereafter" clause, were based on the occurrence of an express resolutory condition. The habendum clause, the use of which the court noted is standard practice in the industry, is two-tiered. The first is of a definite duration and the second is of an indefinite duration. The leases at issue provided for a primary term of 10 years within which to commence drilling. Only then would a secondary term commence, and would continue only so long as there is an established oil or gas well that is actually producing or capable of producing in paying quantities. That the "secondary term" is limited to 99 years is contrary to the concept of maintaining a lease for as long as minerals are producing in paying quantities. As a result, the appellate court found that the trial court properly determined that the leases were not perpetual in nature, and therefore not void ab initio as against public policy.

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Code of Professionalism

► My word is my bond. I will never intentionally mislead the court or other counsel. I will not knowingly make statements of fact or law that are untrue.

► I will clearly identify for other counsel changes I have made in documents submitted to me.

► I will conduct myself with dignity, civility, courtesy and a sense of fair play.

► I will not abuse or misuse the law, its procedures or the participants in the judicial process.

► I will consult with other counsel whenever scheduling procedures are required and will be cooperative in scheduling discovery, hearings, the testimony of witnesses and in the handling of the entire course of any legal matter.

► I will not file or oppose pleadings, conduct discovery or utilize any course of conduct for the purpose of undue delay or harassment of any other counsel or party. I will allow counsel fair opportunity to respond and will grant reasonable requests for extensions of time.

► I will not engage in personal attacks on other counsel or the court. I will support my profession's efforts to enforce its disciplinary rules and will not make unfounded allegations of unethical conduct about other counsel.

► I will not use the threat of sanctions as a litigation tactic.

► I will cooperate with counsel and the court to reduce the cost of litigation and will readily stipulate to all matters not in dispute.

► I will be punctual in my communication with clients, other counsel and the court, and in honoring scheduled appearances.

Following approval by the Louisiana State Bar Association House of Delegates and the Board of Governors at the Midyear Meeting, and approval by the Supreme Court of Louisiana on Jan. 10, 1992, the Code of Professionalism was adopted for the membership. The Code originated from the Professionalism and Quality of Life Committee.