RECENT Developments

"IGSA" is Procurement Contract Subject to GAO's Protest Jurisdiction

Red River Waste Solutions, Inc., B-414367 (March 21, 2017). Accessed at: *https://www.gao.gov/products/B-414367*.

On Jan. 31, 2017, the Army executed an Intergovernmental Support Agreement (IGSA) with the Vernon Parish Police Jury for refuse collection services at Fort Polk, La. An IGSA is a relatively recently enacted special-procurement authority that allows the federal government to enter into an agreement with a state or local government to provide, receive or share certain support services on a sole-source basis. *See,* 10 U.S.C. § 2679(a)(1). The only requirements to use this authority are: (1) the Secretary of the agency concerned must determine if the IGSA will serve the best interest of the agency by enhancing mission effectiveness or creating efficiencies or economies of scale; (2) the IGSA cannot exceed five years; (3) the party to the IGSA that is providing the service must already provide such service for its own use; and (4) if the party to the IGSA that is providing the service decides to subcontract for the provision of the service, such subcontract be awarded on a competitive basis. *See,* 10 U.S.C. § 2679(a)(1)-(4). This IGSA authority is generally exempt from the full-and-open-competition requirements under the Federal Acquisition Regulation (FAR) and the Competition in Contracting Act (CICA), 31 U.S.C. § 3551, *et seq*.

Red River Waste Solutions, L.P. (Red River) was the incumbent contractor providing refuse collection services for Fort Polk. This instant refuse collection requirement was the subject of a protest by Red River at the Government Accountability Office (GAO) in 2016. *See, Red River Waste Solutions, L.P.*, B-411760.2, Jan. 20, 2016, 2016 CPD ¶ 45; discussed in 64 La. B.J 62-63. In that protest, the GAO con-

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cluded that the agency had failed to establish that the terms of the solicitation were consistent with customary commercial practice under FAR Part 12, Acquisition of Commercial Items. Since that decision, Red River continued to perform the requirement pending the anticipated expiration of its contract with the Army on March 31, 2017.

In early 2017, Red River learned that the Army had entered into an IGSA with the police jury for the refuse collection services at Fort Polk. On Feb. 14, 2017, Red River filed a protest with the GAO. In its protest, Red River alleged that the IGSA between the Army and the police jury violated the IGSA-enabling statute — 10 U.S.C. § 2679. Specifically, Red River alleged that: (1) the IGSA violated § (a)(3) of the statute because the police jury did not already provide the services being procured; and (2) the IGSA violated § (a)(4) of the statute because the police jury did not conduct a competition under which Red River could compete for the required services.

On March 6, 2017, the Army moved to dismiss, asserting that: (a) the GAO did not have jurisdiction to review the IGSA under CICA and the GAO's bid-protest regulations; and alternatively, (b) the protest was untimely, (c) Red River was not an interested party and (d) the protest alleged matters of contract administration that are not for consideration by the GAO.

While the GAO agreed with the Army that Red River's protest was untimely and partially a matter of contract administration — and dismissed the protest — the GAO did not agree with the Army's primary argument that the GAO did not have jurisdiction over an IGSA under CICA and its bid-protest regulations. This argument is addressed herein. The GAO did not address the Army's interested-party argument.

GAO and Jurisdiction Under CICA

In its primary argument, the Army asserted that the protest should be dismissed because under CICA and the GAO's bid-protest regulations, the GAO did not have jurisdiction to review an IGSA awarded under 10 U.S.C. § 2679. In that regard, the Army argued that an IGSA was not a procurement contract subject to the provisions of CICA, and that an IGSA was similar to an "other transaction" agreement to which the GAO's bid-protest authority does not extend. The GAO did not find this argument persuasive.

In rendering its decision, the GAO noted that "under CICA and our Bid Protest Regulations, [the GAO] review[s] protests concerning alleged violations of procurement statutes or regulations by federal agencies in the award or proposed award of contracts for the procurement of goods and services, and solicitations that lead to such awards." *See,* 31 U.S.C. §§ 3551(1), 3552; 4 C.F.R. § 21.1(a). The GAO went on to explain that, in instances where an agency has statutory or "other transaction authority" and that agency enters into an agreement under that authority, such agreements are not "procurement contracts" and are generally not reviewed by GAO under its bid-protest function. *See, Rocketplane Kistler*, B-310741 (1/28/08), 2008 CPD ¶ 22 at 3; *Exploration Partners, L.L.C.*, B-298804 (12/19/06), 2006 CPD ¶ 201 at 3.

In contrasting 10 U.S.C. § 2679 to "other transaction" authority, the GAO noted that the statute did not contain any reference to "other transactions." In GAO's view, "if Congress had intended for IGSAs to be something other than procurement contracts, it would have so stated." Further, and more importantly, "there would have been no need to exempt the award of IGSAs, on a sole-source basis, from other provisions of law governing contract awards since, in that context, such an exemption would be redundant and superfluous." Lastly, the GAO noted that the statute anticipates that "the federal government will obtain installation support services under this authority." Therefore, the GAO found an IGSA awarded pursuant to 10 U.S.C. § 2679 to be a procurement under CICA and within its bid-protest jurisdiction.

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U.S. Supreme Court: Not a Violation of FDCPA

Midland Funding, L.L.C. v. Johnson, 137 S.Ct. 1407 (2017).

Aleida Johnson filed for Chapter 13 bankruptcy relief. Midland filed a proof of claim based on unpaid credit card debt. The last charge on the credit card account was more than 10 years prior to the petition date. Under Alabama state law, creditors have six years to enforce the debt; therefore, Midland's claim expired on its face. Accordingly, Johnson objected to the claim, which was disallowed.

Johnson then sued Midland, arguing that filing the obviously time-barred proof of claim was "false," "deceptive," "misleading," "unconscionable" and "unfair," under the Fair Debt Collection Practices Act (FDCPA). The district court dismissed the suit, and the 11th Circuit reversed and remanded. The U.S. Supreme Court granted certiorari.

Johnson argued that a "proof of claim" contemplates an enforceable claim. The Court rejected this argument, noting that a claim is defined as a "right to payment." State law applies to determine whether a person has this right. Under Alabama law, like many states, a creditor maintains a right to payment of a debt even after the claim prescribes. In other words, the remedy expires, but not the right. Additionally, the Bankruptcy Code does not include the word "enforceable" in its definition of a "claim."

While in ordinary civil actions, it is "unfair" to knowingly assert a time-barred claim, the Court found the circumstances of a Chapter 13 proceeding to be distinguishable, particularly because debtors initiate the proceedings themselves, and a knowledgeable trustee is available to evaluate each claim. The Court added that a debtor may benefit from a creditor filing an untimely claim because the debt will be discharged and will no longer appear on the debtor's credit report.

Finally, the Court reviewed the legislative history of the Federal Rules of Bankruptcy Procedure, wherein the advisory committee explicitly rejected a proposal that would have required creditors to certify that there were no valid statute-of-limitations defenses. The Court thus held that filing a claim that has prescribed on its face is not a violation of the FDCPA. Justices Sotomayor, Ginsburg and Kagan vehemently dissented.

5th Circuit Affirms Bankruptcy Court's Decision

Selenberg v. Bates (In re Selenberg), 856 F.3d 393 (5 Cir. 2017).

Dianne Bates retained attorney Robert Faucheux to bring her personal injury suit, but Faucheux let the prescriptive period lapse. Bates then hired Carl Selenberg to bring a malpractice claim against Faucheux, but Selenberg also let prescription run. Selenberg informed Bates that he had no malpractice insurance and no money to pay her. After confirming Bates had not hired a new attorney, Selenberg offered her a promissory note in the amount of $275,000 plus attorney's fees. He explained that she would recover nothing if she sought the malpractice claim within the one-year limit, but would have five years to enforce the note against him.

Selenberg never made payments on the note, and Bates sued him in state court nearly two years later. Selenberg subsequently filed for Chapter 7 bankruptcy, staying Bates' lawsuit. Bates sought to have the debt declared nondischargeable under Sections 523(a)(2)(A)-(B) of the

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Bankruptcy Code. Section 523(a)(2)(A) provides, among other things, that debt for money or an extension of credit will not be discharged if obtained by actual fraud. The bankruptcy court held that the debt was nondischargeable because Selenberg effectively settled the malpractice claim with Bates, but failed to advise her to seek independent counsel as required under the Rules of Professional Conduct, which amounted to actual fraud.

On appeal, Selenberg first argued that he had not received an extension of credit from Bates. The 5th Circuit rejected this argument. An extension of credit is defined as an "indulgence by a creditor giving his debtor further time to pay an existing debt." The goal is to protect creditors who are deceived into delaying collection efforts. Here, the court found Selenberg executed the note with the intention of receiving additional time to pay; therefore, Selenberg received an extension of credit.

Second, the court rejected Selenberg's argument that he had not engaged in actual fraud. Actual fraud may be proven by showing that the debtor knowingly made false representations with the intent to deceive the creditor, the creditor relied on the misrepresentations and the creditor sustained losses as a result.

The court found that although Selenberg was honest about his financial situation, his misrepresentation was made by his silence when he failed to inform Bates that she should seek outside counsel before effectively settling the malpractice claim against him. Likewise, Selenberg argued that he never had any intent to deceive because he was honest and included a 25 percent attorney's fee in the note. The court quickly dismissed this argument, reasoning that Selenberg agreed to meet with Bates only after he knew she hadn't hired another attorney, and then convinced her to believe she would be repaid in the future, although he knew he would likely never be able to pay the full amount of the note, much less attorney's fees.

Finally, Selenberg argued that Bates did not suffer any losses. The court disagreed, holding that Bates had lost the chance to sue him for malpractice because he convinced her it would be futile. Additionally, although the note was valued higher than the malpractice claim, Selenberg never had the funds to pay any amount of the note, and then sought to have the debt discharged, permanently eliminating any remedy Bates had against him. Therefore, the court agreed that Selenberg had engaged in actual fraud in receiving the extension of credit; it affirmed the bankruptcy court's decision.

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Reinstatement of Corporations Dissolved Before 2015

In re Krebs Lasalle, Lemieux Consultants, Inc., No. 16-0586 (La. App. 5 Cir. 3/15/17), 215 So.3d 939.

A corporation was dissolved by affidavit in December 2012, and its representatives sought to reinstate it in May 2016. The 2012 version of the section of the Louisiana Business Corporation Law on dissolution by affidavit provided that the secretary of state shall reinstate a corporation dissolved pursuant to that section "only upon receipt of a court order directing him to so reinstate the corporation." That statute did not specify a time limit. *See,* La. R.S. 12:142.1(B) (2012). Under the current version of the Louisiana Business Corporation Act, which became effective Jan. 1, 2015, a terminated corporation may be reinstated only if the corporation, among other things, "requests reinstatement in accordance with this Section no later than three years after the effective date of its articles or certificate of termination." La. R.S. 12:1-1444(A)(2).

The Louisiana 5th Circuit decided that "the law at the time of dissolution governs a request for corporate reinstatement," and that the newly enacted provisions did not apply to limit the corporation's capacity to seek reinstatement, for several reasons. *In re Krebs*, 215 So.3d at 940.

First, the court noted that La. R.S. 12:1-1701 provides that the new Business Corporation Act "applies to all domestic corporations in existence on its effective date that were incorporated under the laws of this state . . . ." Because the corporation in question was not in existence at the time of the new law's effective date, the court found that the Legislature did not intend for La. R.S. 12:1-1444 to apply to it.

Second, the court noted that sections (1) and (2) of La. R.S. 12:1703(A) provide that, generally, the repeal of the old Business Corporation Law does not affect "(1) [t]he operation of the statute or any action taken under it, before its repeal" or "(2) [a]ny ratification, right, remedy, privilege, obligation, or liability acquired, accrued, or incurred under the statute, before its repeal." In the court's view, "[t]he operation of former La. R.S. 12:142.1 involved the option to seek reinstatement at any time" and "the privilege of requesting reinstatement at any time accrued to [the corporation] prior to the repeal of La. R.S. 12:142.1," and, therefore, the repeal of the former law did not affect the corporation's "capacity to seek reinstatement to the extent permitted by" the former law, under which it was dissolved. *Id.* at 942-43.

Third, the court noted that, under La. Civ.C. art. 6 and La. R.S. 1:2, substantive laws are presumed to apply prospectively only. In the court's view, "the new time limitation on a corporation's capacity to petition for reinstatement constitutes a substantive enactment which changed the fundamental rights of a corporation seeking dissolution and reinstatement" and, thus, the reinstatement provisions of La. R.S. 12:1-1444 apply only prospectively to corporations dissolved under the new law. *Id.* at 943.

Having determined that La. R.S. 12:1-1444 and its bar on seeking reinstatement three years after dissolution did not apply to the corporation, the 5th Circuit remanded the case to the trial court to determine whether the corporation met the standards for granting reinstatement under the former law.

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Custody

Tuft v. Tuft, 51,293 (La. App. 2 Cir. 1/18/17), 214 So.3d 916.

Although Ms. Tuft argued that Dr. Tuft needed counseling to assist him with anger management, disciplinary techniques and parenting skills, the court of appeal affirmed the trial court's finding that he was to have unsupervised visitation of the children every other week from Thursday afternoon to Tuesday morning and alternating weeks during the summer. Although Ms. Tuft was named the domiciliary parent, the trial court did not err in instituting a plan of implementation that provided that Dr. Tuft, a pediatric dentist, would be responsible for making decisions regarding the children's dental care. Further, the trial court's order that if they failed to agree on extracurricular activities either could unilaterally choose for the children to participate in an extracurricular activity at that parent's own cost did not impermissibly infringe on her status as domiciliary parent. Further, the court's allowing each party to take the children to the church of his or her choice did not impermissibly infringe on her status as domiciliary parent.

The trial court's award of $10,000 per month in child support was affirmed. Although Ms. Tuft argued that the court impermissibly considered a rare capital gain in her income, the court of appeal affirmed, finding that capital gains could be included in determining a parent's income for child support.

Ms. Tuft contested several exclusions from the child support calculation, but the appellate court affirmed. Mortgage for the home from the child-support calculation was correctly excluded because Ms. Tuft was granted exclusive use of the home. Church gifts were excluded as Ms. Tuft's personal tithes. Holiday gifts and vacations were excluded as personal expenses of the parties. Child care was also excluded because Ms. Tuft was not working or seeking employment.

The trial court did not err in ordering her to pay one-half of the non-covered health expenses, extracurricular expenses and other expenses for the benefit of the children, particularly given that she was receiving $10,000 per month in child support and was financially capable of splitting these expenses — even though his income exceeded hers in the proportion of 76 percent to 24 percent. The trial court did not err in denying interim spousal support because she had sufficient income to maintain her standard of living, even though she was paying the mortgage, a portion of the children's expenses and other expenses for herself, given her income, and the $10,000-per-month child support she was receiving. The trial court erred in not naming a parenting coordinator, particularly given the parties' difficulties in communicating with each other, so the court of appeal remanded for the appointment of a parenting coordinator.

Community Property

Bulloch v. Bulloch, 51,146 (La. App. 2 Cir. 1/18/17), 214 So.3d 930, *writ denied*, 17-0348 (La. 4/13/17), 2017 WL 1534864.

At a hearing on a separate issue, Ms. Bulloch complained that Dr. Bulloch had been coming to the home when she was not there, and the trial court, on its own motion, ordered, on an interim basis, that Ms. Bulloch have exclusive use of the home. She later argued that he was not entitled to rent for her use of the home as rent was not addressed at the time of that award of use and occupancy. However, the court of appeal found that the award was interim and was not made after a contradictory hearing concerning use and occupancy, which was set for a future hearing. The parties were aware of this at the time the interim award was made. Thus, it found that the trial court did not intend to make a final decision on the use and occupancy at the time the interim award was made, and, therefore, Dr. Bulloch's right to seek rent was reserved to him. Thus, the trial court did not err in later awarding him rent.

Dr. Bulloch was a shareholder in the Orthopaedic Clinic. He was also a member of the Advanced Surgery Center (ASC), to which he and other physicians referred patients for surgery. He received distributions from ASC based on his membership interest, not on the number of surgeries he performed, although he was required to perform a certain number of surgeries at ASC or risk being disassociated as a member. Because the ASC operating agreement did not provide for a valuation methodology in the event of divorce or partition of community, although it did in other events, the valuation methodology in the operating agreement did not apply to establish a value for his interest in ASC.

The court found that the valuation of Dr. Bulloch's expert was appropriate, although Ms. Bulloch argued that it was contrary to appropriate valuation methodologies because it failed to consider the entity's growth rate in fixing the capitalization rate and improperly deducted personal goodwill attributable to Dr. Bulloch. Although both experts used an income approach to establish the value, Dr. Bulloch's expert did not include a growth rate in determining the capitalization rate on the theory that Ms. Bulloch would not be entitled to participate in post-judgment growth of ASC. The court of appeal accepted that rationale.

Ms. Bulloch argued that because Dr. Bulloch was neither an employee, officer or board member of ASC, no goodwill could be attributable to him personally. Further, Dr. Bulloch's expert attributed 30 percent of the goodwill to the enterprise and 70 percent to Dr. Bulloch, leading to a deduction of $511,000 from the value of his interest in the entity. He argued that his membership in ASC was an extension of his medical practice and, therefore, included personal goodwill as a result of his bringing patients to the entity. The court of appeal stated that it did not find this rationale "patently unsound" and, thus, deferred to the trial court.

Regarding the Orthopaedic Clinic, the court affirmed the trial court's finding that, because the shareholder agreement provided a formula for the calculation of the value in the event of divorce,

Ms. Bulloch was bound to that value whether or not she signed the shareholder agreement, as Dr. Bulloch had the right to manage the entity and to sign agreements, as the stock was registered in his name alone. Her expert had valued his interest at $1.9 million, in contrast to the $19,500 provided in the shareholder agreement.

Regarding post-termination distributions from ASC, Dr. Bulloch argued that they were his separate property as a result of his efforts post-termination, while Ms. Bulloch argued that they were fruits of the parties' ownership interest in the entity and should, therefore, be classified as community property. The court found that, because the distributions were based on his ownership interest rather than the number of surgeries he performed, they were fruits of his interest, not payments for his labors. Moreover, he was paid for the surgeries by Orthopaedic Clinic, not ASC. Moreover, Dr. Bulloch would have been entitled to receive distributions whether he performed surgeries or not, as long as he was not disassociated from the entity for failure to perform surgeries. The court also noted that his bringing patients to ASC was factored in as part of its goodwill analysis, which was deducted from the valuation of the entity.

The court reversed the trial court's valuation of the former matrimonial domicile, acknowledging that the court could average multiple appraisals, but finding that one of those appraisals — a "drive-by" appraisal — was improper to include in the averaging since there were two full appraisals, which included interior home inspections and were within $5,000 of each other.

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No Proof of Duplicative Payments Required by Owner to be Entitled to Indemnification

Wholesale Elec. Supply Co. v. Honeywell Int'l, Inc., 16-1180 (La. App. 1 Cir. 5/11/2017), ____ So.3d ____, 2017 WL 1968729.

Vector Electric Controls, Inc., as contractor, was issued three work orders (the projects) in accordance with a Master Service Agreement with Honeywell International, Inc., as owner, to perform construction work at Honeywell's facility in Baton Rouge. In conjunction with the projects, Wholesale Electric Supply

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Co. supplied electrical supplies and materials to Vector. After Vector failed to make timely payment, Wholesale filed three liens in accordance with the Louisiana Private Works Act, La. R.S. 9:4801, which represented the amounts due and owing from Vector to Wholesale. Thereafter, Wholesale filed suit against Honeywell under the Private Works Act seeking to enforce the liens.

Subsequent to the institution of the suit by Wholesale, Honeywell filed a third-party demand against Vector seeking indemnification under the Private Works Act and the Master Service Agreement between Vector and Honeywell. In response, Vector filed a reconventional demand against Honeywell asserting that Honeywell was negligent in its management of the projects, which caused Vector to be delayed and to experience labor inefficiencies.

Thereafter, Wholesale filed a motion for summary judgment against Honeywell seeking the principal sum due of $1,251,397.56. Prior to a hearing on the matter, Honeywell and Wholesale entered into a consent judgment for the full principal amount due as well as judicial interest on the principal demand. Subsequently, Honeywell paid Wholesale in full, and a satisfaction of judgment was filed acknowledging Honeywell's full and complete satisfaction of the judgment.

Several months later, Honeywell filed a motion for summary judgment against Vector arguing that there was no genuine issue of material fact as to the issue that Vector owed Honeywell indemnification under the Private Works Act and the Master Service Agreement. After a hearing on the matter, the trial court entered judgment in favor of Honeywell, holding that Honeywell was in fact entitled to statutory and contractual indemnification from Vector for the amounts Honeywell paid to Wholesale to have the liens cancelled. Thus, the trial court awarded the full principal amount paid by Honeywell to Wholesale as well as judicial interest.

On appeal, Vector contended that the trial court erred in finding that Honeywell was entitled to indemnification because (1) Honeywell did not provide "evidence to demonstrate the amount [Honeywell] sought to be indemnified was ever invoiced by or paid to Vector," (2) Honeywell's own fault and/or breach of contract caused Vector's inability to pay, and (3) evidence showed that Honeywell owed Vector amounts that were well above the judgment paid by Honeywell to Wholesale. *Id.* at *5.

Vector's first argument, relating to the indemnification issue, was that Honeywell failed to meet its burden of proof because it had "not presented any evidence proving [Honeywell] paid 'twice' for the material and supplies provided by Wholesale and used by Vector on the projects." Vector did not dispute the payment made by Honeywell to Wholesale; rather, it argued that Vector's non-payment was directly a result of Honeywell's failure to pay it for "additional labor, materials, equipment rentals, and overhead on the projects." The court of appeal, in agreeing with the trial court, explained that, under La. R.S. 9:4802(F), Honeywell was entitled to indemnification from Vector. The court did not reach the issue of contractual indemnification under the Master Service Agreement. *Id.* at 4.

The court recognized that La. R.S. 9:4802(F) "requires a subcontractor to indemnify the owner, the contractor, and/or any subcontractor from or through whom rights are derived 'for amounts paid by them for claims under this part . . . .'" *Id.* at n.5. It further reasoned that, despite the evidence of Honeywell's mismanagement of the projects introduced by Vector, that evidence had no bearing on the issue of indemnification under the Private Works Act. Furthermore, the court explained that it found no legal support for Vector's assertion that Honeywell was required to show that it paid "twice" and/or show that it had no liability to Vector before invoking its right to indemnification under the Private Works Act.

The court next reviewed Vector's argument that compensation should have been applied to defeat the motion for summary judgment; it held that compensation did not apply. Citing *Independent Living Center, Inc. v. State,* 93-0776 (La. App. 1 Cir. 6/24/94), 638 So.2d 1202, 1205, the court explained that compensation was not applicable because "a disputed debt is not liquidated and cannot be admitted as susceptible of compensation, unless the one who asserts compensation has in hand the proof of the existence of the disputed debt and is thus in a position to prove it promptly." *Id.* at 5. Given that the amount Vector claimed was due was disputed and pending, the court held that Vector was not entitled to rely on compensation. As a result, the court of appeal affirmed summary judgment in its entirety.

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Maritime Tort: Allision and Discretionary Immunity

Populis v. State, 16-0655 (La. App. 5 Cir. 5/31/17), ____ So.3d ____, 2017 WL 2350144.

The ferryboat M/V NEW ROADS, owned by the Louisiana Department of Transportation and Development (DOTD) and operated by Captain Ledet, was departing from the west bank landing in Edgard carrying passengers and vehicles across the Mississippi River to a landing in Reserve when it allided with a barge moored to a fleet adjacent to the Edgard landing. Several passengers, including Mr. Populis, were injured. Suits filed by the injured passengers alleged fault/negligence for, *inter alia,* failure to keep a proper lookout, failure to exercise reasonable diligence, failure to maintain reasonable and proper control of the M/V NEW ROADS, unseaworthiness due to the incompetence of the vessel's crew, and failure to have competent crew keeping lookout and properly stationed and attentive to their duties. The actions were consolidated on plaintiffs' motion. A plaintiffs' motion for summary judgment alleging 100 percent liability of the defendants was denied.

Defendants moved for summary judgment seeking dismissal of all claims, arguing that Captain Ledet's actions on the day of the allision were discretionary, and they were immune from liability pursuant to La. R.S. 9:2798.1. Defendants' motion was denied. The trial court found that Captain Ledet's negligence caused the allision and awarded damages of $18,000 to $24,000 per passenger/plaintiff. On appeal, defendants argued, *inter alia,* error in denying their motion for summary judgment on the issue of whether Captain Ledet and DOTD were protected from liability through discretionary immunity under La. R.S. 9:2798.1.

La. R.S. 9:2798.1 states, in pertinent part:

> B. Liability shall not be imposed on public entities or their officers or employees based upon the exercise or performance or the failure to exercise or perform their policymaking or discretionary acts when such acts are within the course and scope of their lawful powers and duties.
>
> C. The provisions of Subsection B of this Section are not applicable:
> (1) To acts or omissions which are not reasonably related to the legitimate governmental objective for which the policymaking or discretionary power exists; or
> (2) To acts or omissions which constitute criminal, fraudulent, malicious, intentional, willful, outrageous, reckless, or flagrant misconduct.

The Louisiana Supreme Court has held that the application of discretionary immunity is a question of fact to be determined at trial. The court must consider whether the conduct in question occurred at the "operational level." The immunity statute does not protect governmental entities against legal fault or negligent conduct at the "operational level," but confers immunity only for policy decisions, that is, decisions based on social, economic or political concerns. Once a discretionary decision is made, the government entity is not protected from liability for conduct in carrying out the discretionary decision.

Generally, a state court applies maritime or admiralty law to a case involving injury of a passenger on a vessel. Under general maritime law, the plaintiff must demonstrate that there was a duty owed by the defendant, breach of that duty, injury sustained by the plaintiff and a causal connection between defendant's conduct and plaintiff's injury. It has been held that, when a moving vessel allides with a stationary object, the former is presumed at fault. Here, testimony was that,

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although it was dark and the barges may or may not have been lighted, nothing was unusual about the weather or the river's level and currents. Captain Ledet was aware of the barges, which had been moored next to the landing for 20 years, and the ferryboat had adequate crew to post lookouts, which was apparently not done. He considered use of the ferryboat's searchlight unnecessary and elected to continue the cross-river trek following the allision. The appellate court found that the trial court did not err in denying defendants' motion; the judgment of the trial court as to negligence without discretionary immunity was affirmed.

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United States

Venezuela v. Helmerich & Payne Int'l Drilling Co., 137 S.Ct. 1312 (2017).

The U.S. Supreme Court issued a ruling that tightens the reins of court jurisdiction over expropriation cases under the Foreign Sovereign Immunities Act (FSIA). The case involved claims by a U.S. oil company and its Venezuelan subsidiary that Venezuela illegally expropriated and nationalized their oil rigs in Venezuela. Venezuela sought dismissal of the lawsuit on FSIA sovereign immunity grounds. The oil companies opposed the motion, citing the FSIA's expropriation exception, which allows cases to proceed against sovereign entities where a sovereign expropriates property "in violation of international law." Venezuela replied that the taking was not "in violation of international law" because the expropriation exception does not apply to the taking of property of its own nationals. The parties agreed that the threshold question before the district court was whether the exception applies based on the stipulated facts, and assuming the plaintiffs' allegations as true. The district court ruled the exception inapplicable to the Venezuelan subsidiary because the subsidiary is a national of Venezuela. The court allowed the parent company's case to proceed because Venezuela's actions deprived the parent of its rights as the sole shareholder of the subsidiary.

Using a nonfrivolous pleading standard, the Court of Appeals for the District of Columbia Circuit found that both the parent's and subsidiary's claims satisfied the expropriation exception. On *writ of certiorari*, the U.S. Supreme Court accepted the case to determine what is necessary to defeat sovereign immunity under the FSIA expropriation exception. Justice Breyer noted that the court of appeals did not decide whether the plaintiffs' allegations and the stipulated facts are sufficient to show a taking in violation of international law. Rather, the court of appeals merely found that the plaintiffs might have such a claim. The court of appeals established a very low threshold for application of the exception, requiring only that the plaintiffs assert a "nonfrivolous" claim of expropriation.

The Court squarely examined this threshold jurisdictional issue, asking the question: "What happens in a case where the party seeking to rely on the expropriation exception makes a nonfrivolous, but ultimately incorrect, claim that his property was taken in violation of international law?" *Id.* at 1316. The Court answered the question as follows:

> In our view, a party's nonfrivolous, but ultimately incorrect, argument that property was taken in violation of international law is insufficient to confer jurisdiction. Rather, state and federal courts can maintain jurisdiction to hear the merits of the case only if they find that the property in which the party claims to hold rights was indeed "property taken in violation of international law." Put differently, the relevant factual allegations must make out a legally valid claim

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that a certain kind of right is at issue (*property* rights) and that the relevant property was taken in a certain way (in violation of international law). A good argument to that effect is not sufficient. But a court normally need not resolve, as a jurisdictional matter, disputes about whether a party actually held rights in that property; those questions remain for the merits phase of the litigation.

. . . But, consistent with foreign sovereign immunity's basic objective, namely, to free a foreign sovereign from *suit*, the court should normally resolve those factual disputes and reach a decision about immunity as near to the outset of the case as is reasonably possible.

Id. at 1316-17.

In sum, courts must now address the threshold question of sovereign immunity and its exceptions at the outset of the case on the substantive factual and legal merits of the issue.

North American Free Trade Agreement

United States Notice of Intent to Modernize the North American Free Trade Agreement (May 18, 2017).

The Trump administration formally notified Congress on May 18 of its intent to enter trade negotiations with Canada and Mexico to modernize the North American Free Trade Agreement (NAFTA). NAFTA was negotiated 25 years ago, at a time when the digital economy hardly existed. The Notice of Intent triggers various deadlines under Trade Promotion Authority legislation that will lead to formal negotiations with the NAFTA partners. It is unclear at this point precisely what the administration will seek from a new, modernized NAFTA. Nonetheless, any new agreement will have to pass through Congress by up or down vote without amendments.

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Split in U.S. Courts of Appeals: Whether Sexual Orientation Discrimination Is Cognizable Under Title VII

In recent months, two federal courts of appeals reached conflicting decisions regarding the application of Title VII to employment-discrimination claims based on sexual orientation. In those decisions, the courts disagreed on the interpretation of Title VII's command that employers may not discriminate "because of . . . sex." 42 U.S.C. § 2000e-2(a)(1). The different decisions rendered by these courts have set the stage for the Supreme Court to address and shape the developing law of sexual-orientation discrimination.

By way of background, in *Price*

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Waterhouse v. Hopkins, 109 S.Ct. 1775 (1989), the Supreme Court interpreted Title VII to include a prohibition on employment discrimination based on nonconformity with gender-based stereotypes. Later, in *Oncale v. Sundowner Offshore Services, Inc*., 118 S.Ct. 998 (1998), the Court held that same-sex sexual harassment is cognizable. Relying on these precedents, plaintiffs seeking protection from sexual-orientation discrimination have argued that discrimination based on actual or perceived sexual orientation is also cognizable as discrimination "because of . . . sex." Defendants, on the other hand, have argued that Congress never intended the definition of "sex" within Title VII to encompass sexual orientation. Defendants also point to Congress' repeated refusal to pass legislation that would expressly expand Title VII to include sexual-orientation-based claims.

In March of this year, the 11th Circuit sided in favor of a defendant, holding 2-1 that a plaintiff failed to state a Title VII claim based on her status as a lesbian. *See, Evans v. Ga. Reg. Hosp.,* 850 F.3d 1248 (11 Cir. 2017). In that case, the panel majority held that it was bound by a precedent from the former 5th Circuit, *Blum v. Gulf Oil Corp*., 597 F.2d 936, 938 (5 Cir. 1979). According to the majority, it could not stray from the prior precedent until that decision is overruled by "a clearly contrary opinion of the Supreme Court or of this Court sitting en banc." 850 F.3d at 1256. In contrast, the dissent argued that *Blum* had already been abrogated by *Price Waterhouse.* According to the dissent, sexual-orientation discrimination is necessarily discrimination based on impermissible sex-based stereotypes. "[T]he employer discriminates against the employee because she does not conform to the employer's prescriptive stereotype of what a person of that birth-assigned gender should be," and thus the employer discriminates "because of . . . sex." *Id.* at 1264. The plaintiff has already filed for a rehearing en banc.

Reaching a conclusion opposite to *Evans*, the en banc 7th Circuit in April held that sexual-orientation discrimination is actionable under Title VII. *See, Hively v. Ivy Tech Cmty. Coll. of Ind.*, 853 F.3d 339 (7 Cir. 2017). Overruling prior circuit precedent, the *Hively* majority cited several reasons why sexual-orientation discrimination should be considered a form of sex discrimination. First, the court found that sex discrimination occurs when a woman married to another woman is treated differently from a man married to a woman. *Id.* at 345. Second, the court found that it is impossible to draw a line between claims based on gender nonconformity, which are actionable under a sex-stereotyping theory after *Price Waterhouse*, and those based on sexual orientation. *Id.* at 346. The court found that any discrimination that may occur "based on the fact that the complainant — woman or man — dresses differently, speaks differently, or dates or marries a same-sex partner, is a reaction purely and simply based on sex." *Id.* at 347. Third, the court analogized to *Loving v. Virginia*, 87 S.Ct. 1817 (1967), where the Court held discrimination because one associates with a person of a different race was a form of race discrimination. Hence, according to the *Hively* majority, discrimination that occurs because one associates with a person of the same sex similarly is sex discrimination. *Id.* at 342.

The dissenters in *Hively* argued that the majority's interpretation over-strained the phrase "because of sex." Under their view, "discrimination 'because of sex' is not reasonably understood to include dis-

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crimination based on sexual orientation, a different immutable characteristic." *Id.* at 363 (Sykes, J., dissenting). The dissent also chastised the majority for its *Loving* analogy because in the dissent's view, while miscegenation laws are inherently racist, discrimination based on sexual orientation is not inherently sexist. *Id.* at 368. The dissent also faulted the majority for drawing on *Price Waterhouse* because it was not a proper comparison, stating that "heterosexuality is not a *female* stereotype; it is not a *male* stereotype; it is not a *sex-specific* stereotype at all." *Id.* at 370.

As noted, a petition for rehearing en banc has been filed in the *Evans* case, and it is widely expected that the decision in *Hively* will be appealed to the Supreme Court. The current circuit split between *Evans* and *Hively* may increase the likelihood that the Court will grant *certiorari* and issue a ruling to resolve the dispute on a nationwide basis. Attorneys who handle Title VII cases would be wise to watch for further developments in this area.

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Res Judicata; Final Judgments; Oyster Lease

White v. Cox Operating, L.L.C., 16-0901 (La. App. 4 Cir. 4/5/17), ____ So.3d ____, 2017 WL 1245003.

Defendant, Cox Operating, L.L.C., allegedly damaged oyster beds owned by Wade White while drilling oil and gas wells. White complained that Cox was driving pilings into the oyster beds and that Cox was not using agreed-upon avenues of ingress and egress to the drill sites. White contacted Cox about these issues, and Cox agreed to cover any damages to the oyster leases. Cox then entered into a settlement with White to compensate him for any damage to the oyster leases. White later filed a lawsuit against Cox for the damage caused by the pilings. In response, Cox filed exceptions based on *res judicata* and no right of action, and a reconventional demand for breach of contract (breach of the settlement agreement).

The trial court granted Cox's exception of *res judicata* without hearing any testimony or accepting any evidence. White appealed. At the appellate level, Cox filed a motion to dismiss, arguing that the Louisiana 4th Circuit Court of Appeal did not have subject matter jurisdiction because the ruling of the trial court on the exception was not a final judgment pursuant to La. C.C.P. art. 1915. The appellate court disagreed and found that because all of White's claims against Cox were dismissed with the granting of the exception of *res judicata*, pursuant to article 1915(A)(1), the judgment was final.

As to the ruling regarding *res judicata*, the 4th Circuit found that, because the parties did not introduce any evidence or testimony to the trial court during the hearing on the exception and because the issue was not decided by a preponderance of the evidence, the judgment must be vacated and remanded to the trial court for further proceedings and the creation of a record that can be reviewed by the appellate court.

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Subsequent Purchaser Doctrine; Mineral Leases; Contamination

Guilbeau v. Hess Corp., 854 F.3d 310 (5 Cir. 2017).

This case involves the subsequent-purchase doctrine as it applies to mineral leases. Hess Corp. and its predecessors-in-interest operated oil-and-gas leases on a piece of property for a number of years. In 1973, those operations ceased and the wells were plugged and abandoned. In 2007, Kenneth Guilbeau purchased the property on which the operations had been conducted. Guilbeau sought to sue third parties for environmental contamination from the oil-and-gas operations; however, Guilbeau's purchase agreement did not include any assignment of rights to sue for pre-purchase damages.

Guilbeau filed a lawsuit against Hess, arguing that his property was contaminated by Hess's operations. Hess sought summary judgment based on the subsequent-purchaser doctrine, arguing that, in the absence of an assignment of the right to sue, Guilbeau had no claim for pre-purchase damages. Guilbeau countered that the doctrine does not apply to claims based on mineral leases. The district court disagreed and granted Hess's motion for summary judgment. Guilbeau appealed.

The U.S. 5th Circuit Court of Appeals affirmed the trial court's ruling. The 5th Circuit engaged in an in-depth analysis of Louisiana case law in support of its decision, including *Eagle Pipe* (Louisiana Supreme Court), *Global Marketing Solutions, L.L.C.* (1st Circuit), *Walton* (2nd Circuit), *Boone* (3rd Circuit) and *Bundrick* (3rd Circuit). All of these cases hold that the subsequent-purchaser doctrine applies to cases involving expired mineral leases. Damage to property is a personal right, not a real right that transfers with the property at the time of sale. Thus, the sale documents must contain a specific assignment from the seller to the purchaser subrogating or assigning that personal right to the purchaser. Without it, the purchaser has no recourse for environmental contamination against a third party. Pursuant to Louisiana law, the consensus is clear — the subsequent-purchase rule does apply to cases involving expired mineral leases.

Well Cost Reporting

TDX Energy, L.L.C. v. Chesapeake Operating, 857 F.3d 253 (5 Cir. 2017).

The parties disputed whether non-operator lessees can invoke La. R.S. 30:103.2. The statute provides that, in certain circumstances, the operator of a compulsory unit forfeits its right to collect well costs from non-operators if the operator fails to timely provide information that is requested pursuant to La. R.S. 30:103.1. Relying on 30:103.2's language stating that the forfeiture can be invoked by owners of "unleased" interests, the district court held that a non-operator lessee cannot invoke the penalty. But the U.S. 5th Circuit reversed.

Relying on La. R.S. 30:103.1's language suggesting that the owner of any interest not leased by the operator can make a 30:103.1 information request, and the court's reasoning that 30:103.1 and 30:103.2 work together, the 5th Circuit held that non-operator lessees can invoke the forfeiture when the circumstances required for an operator's forfeiture of rights otherwise are satisfied. The 5th Circuit also decided certain questions relating to a prior version of the Risk Fee Statute, La. R.S. 30:10.

Disclosure: Author Keith B. Hall submitted an *amicus* brief arguing that non-operator lessees cannot invoke La. R.S. 30:103.2.

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Prescription

In re Med. Review Panel of Hurst, 16-0934 (La. App. 4 Cir. 5/3/17), ____ So.3d ____, 2017 WL 1719051.

Hurst presented to University Medical Center's emergency room on May 21, 2013. He was diagnosed with an upper respiratory infection and cough, for which he was treated and discharged that same day "in good condition," with instructions to see his primary care physician for a recheck and routine health maintenance.

Hurst filed a malpractice claim two years later that alleged negligence in failing to test for and failing to diagnose his condition. His complaint referenced a "discovery date" of Jan. 1, 2015, when his chest pain became "unbearably worse."

The defendants' exception of prescription was granted. Hurst appealed.

The complaint was prescribed on its face; thus, Hurst bore the burden of proving that he did not have constructive knowledge of facts sufficient to "excite attention and put [him] on guard and call for inquiry." *Id.* at *6, citing *Campo v. Correa*, 01-2707 (La. 6/21/02), 828 So.2d 502, 511-12.

Hurst testified during the hearing on the exception that he had not filed earlier because he "didn't have concrete knowledge of what was going on here in my chest," that lawyers he had spoken with suggested the possibility that his problems may have been caused by his having been exposed to certain chemicals, and at some point "around, say, like August of 2014," the possibility of a medical malpractice case was raised. He testified that he had to do more research but that he never got "concrete knowledge" about his situation. The appellate court found that Hurst failed to allege facts "with particularity . . . to show that [he] was unaware of the malpractice prior to the . . . alleged date of discovery," thus failing to satisfy his burden of proof. The judgment granting appellee's exception of prescription was affirmed.

Breland v. Willis Knighton Med. Ctr., 51,150 (La. App. 2 Cir. 2/15/17), 212 So.3d 724.

Mr. Breland was taking Lactulose, a drug used to treat a medical condition that would cause his ammonia level to rise. Absence of the drug could lead to complications that included confusion, agitation and toxemia. He underwent hernia surgery at Willis Knighton North. One month later, he began to experience abdominal pain and returned to the same hospital on July 27, 2014. Mrs. Breland contended that she informed an emergency room nurse and an emergency room physician of Mr. Breland's need for Lactulose and, thereafter, over the next two days, she repeated this request seven times, but the medication was not administered until the morning of July 29, at which time a one-half dose was given. Complications, including confusion, followed by a refusal to take Lactulose, consistent with elevated ammonia level ensued, leading to his death on July 31.

Mrs. Breland consulted an attorney about two months after her husband's death; he later confirmed her suspicions concerning medical negligence. Suit was filed on July 20, 2015, and a medical-review panel was requested on Aug. 14, 2015. The defendants filed an exception of prescription, which the trial court granted. Mrs. Breland's attorney requested leave to amend "the petition," which was denied. The trial judge found that Mrs. Breland was well aware of problems involving the failure to give the medication, especially since she was a nurse, and that her petition was "very detailed," leading the court to conclude that there was no amendment she could make to her original petition that would overcome the defendants' exception of prescription.

Without distinguishing in the opinion the lawsuit from the panel request, the appellate court reversed the trial court's decision and remanded the case to allow Mrs. Breland to amend her petition "to include the discovery date of the alleged malpractice" pursuant to La. C.C.P. art. 934. The court noted that article "has been liberally applied by courts to allow for the amendment of petitions in the interest of sustaining justice and for various policy reasons." The court knew, from her memorandum in opposition to the exception, that she claimed that the date of discovery was May 29, 2015; thus, the amendment might allow her to overcome the exception.

The defendants' main argument against allowing the amendment was that it would not remove the basis for the trial court's ruling, in that the only way Mrs. Breland could amend her petition would be to change her allegations. The court of appeal disagreed because Mrs. Breland never mentioned the discovery date in the original petition; thus, including it in an amendment "would raise some *possibility* that the claim had not prescribed." The court determined, in advance of the amendment, that the new information "might" affect the exception, and its allowance would allow Mrs. Breland an opportunity to proceed with her case and the defendants the opportunity to maintain their argument against proceeding.

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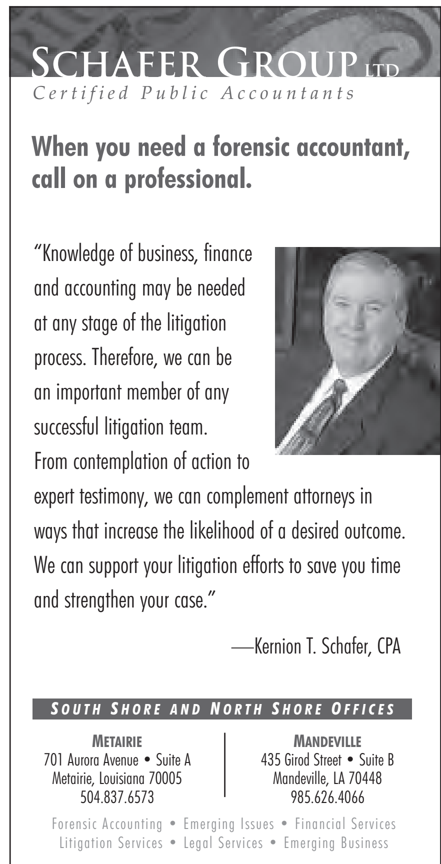


Resolution to Suspend Exemptions Was Not Unconstitutional

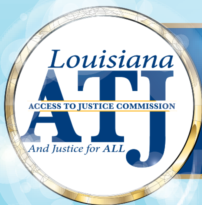
La. Chem. Ass'n v. State, 16-0501 (La. App. 1 Cir. 4/7/17), ____ So.3d ____, 2017 WL 1293472.

The Louisiana Chemical Association and other taxpaying companies (plaintiffs) filed a petition for declaratory judgment against the Louisiana Department of Revenue, the Louisiana Legislature and the Louisiana Tourism Promotion District (defendants) regarding House Concurrent Resolution 8. That resolution, passed during the 2015 legislative session, suspended certain exemptions for state sales-tax laws from July 1, 2015, until 60 days after the 2016 Regular Session of the Legislature. Plaintiffs asserted that HCR 8 was unconstitutional because it purported to suspend a law without the required two-thirds vote of each house of the Legislature; that it did not satisfy the requirements of the Louisiana Constitution; that it was in direct conflict with existing laws and, thus, could not be given effect; and, alternatively, that it was impermissibly vague and ambiguous, such that it violated due process.

The defendants jointly moved for summary judgment, asserting that there were no genuine issues of material fact that the plaintiffs' arguments were without merit and their case should be dismissed. Plaintiffs filed a cross motion for summary judgment. The district court denied the plaintiffs' motion, granted the defendants' motion and dismissed plaintiffs' case with prejudice. Plaintiffs appealed.

Plaintiffs asserted HCR 8 is inconsistent with, and superseded by, Acts 2004, No 4, § 3 (1st Ex. Sess.). The court held that HCR 8 is a later expression of legislative will that is controlling and dismissed this argument. They also asserted that the Legislature's failure to specifically state that it was suspending Acts 2004, No 4, § 3 (1st Ex. Sess.) renders HCR 8 null and void. The court found that the objective of HCR 8 is to suspend the enacted and effective exemptions for business utilities contained in Chapter 2 of Subtitle II of Title 47, not to suspend the temporary inoperability of these exemptions, which had ceased five years earlier.

In addition, plaintiffs asserted that HCR was unconstitutional under Article III, §§ 14, 15, 16, 18 and 20, and Article VII, § 2 of the Louisiana Constitution. The court held that the language of Article VII, § 2 does not provide that the suspension of an exemption of an existing tax shall require the enactment of a law by two-thirds of the elected members of each house of the Legislature.



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Providing Justice for ALL

"I strive to make time for pro bono work, with some days more successful than others. We're all so busy and never truly catch up, so it's easy to justify never volunteering. However, we have to remember that a large percentage of our population cannot afford an attorney on an hourly basis. Often, their issues can be resolved through consultation or limited commitment. So, when a program such as "Lawyers in Libraries" offers an efficient, controlled environment in which to assist those in need, there really is no excuse not to participate."

Salvador I. Bivalacqua, Attorney at Law
Galante & Bivalacqua, LLC • New Orleans, LA

The court reasoned that a repeal of an existing tax would be a permanent change, whereas a suspension (which is time limited) of an exemption is not the same thing as a permanent repeal. The court also held that as HCR 8 is not a bill, the tax levy raises the revenues, and granting of the exemption does not change the underlying tax levy, suspending an exemption is not a revenue-raising measure that must originate in the house.

Finally, the court dismissed the plaintiffs' argument that HCR 8 is unconstitutionally vague and ambiguous because it makes no reference to La. R.S. 51:1286; it makes no cross-reference that makes the sales tax exemptions in La. R.S. 47:305 applicable to the taxes imposed by La. R.S. 47:331 and 51:1286(A); and it purports to suspend "any other exemptions" for "business utilities" without defining the term "business utilities." The court held HCR 8 "suspends all of the exemptions from the tax levied pursuant to R.S. 47:331 for sales of steam, water, electric power or energy, and natural gas," and such language is not vague or ambiguous.

—**Antonio Charles Ferachi**
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Advising Clients in Light of Looming TEFRA Repeal

Governing documents of all entities taxed as partnerships should be reviewed and modified in light of recent federal tax law developments (and related anticipated state law changes). Section 1101 of The Bipartisan Budget Act of 2015 (BBA) substantially changes how the Internal Revenue Service may conduct audits of flow-through entities taxed as partnerships. The BBA eliminates long-standing audit rules enacted in the Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA) and replaces them with new centralized partnership-audit rules, effective for returns filed for partnership tax years beginning after Dec. 31, 2017. To provide guidance to taxpayers on how the BBA regime will be implemented, the IRS re-released proposed regulations on June 13, 2017, and has invited comments in anticipation of a hearing on the proposed regulations currently scheduled for Sept. 18, 2017. The proposed regulations were initially released on Jan. 18, 2017, but were withdrawn on Jan, 20, 2017, in light of the Trump Administration's freeze on all new and proposed federal rule making.

The BBA, and the related IRS-proposed regulations, make significant changes to the way partnerships will be audited for tax years beginning after Jan. 1, 2018, including that: (1) the "tax matters partner/member" under the TEFRA audit rules is replaced with a "partnership representative," who will have the *sole authority* to act on behalf of the partnership; (2) unless certain partnerships makes an election to "push out" additional taxes owed as a result of an audit to the audited ("reviewed") year partners, such additional taxes will now be paid by the partnership; and (3) as a trap for the unwary, the new audit rules will apply to all partnerships except for those that are qualified to "elect out" and properly make such an election annually.

The significant changes brought about by the BBA and the proposed regulations warrant substantive amendments to the governing documents of entities taxed as partnerships. While a detailed and thorough review of the entity's organizational documents and operating agreement is necessary to determine the particular language of any such substantive changes, the documents should be amended to: (1) address the change from the "tax matters partner/member" to the "partnership representative" and the expanded role of such representative and to designate the partnership representative, as well as to impose any limits on the partnership representative's authority to act as may be required; (2) grant the partnership the ability to recover any taxes paid by the partnership that are attributable to any deficiency for taxes imposed upon a partner (particularly taxes resulting from the "push out" election referenced above); and (3) grant the partnership the authority to "elect out" of the BBA regime and make other elections established by the BBA regime.

With respect to the state tax impact, there are many as yet unanswered questions. Even after the state provides guidance, many more are likely. Louisiana does not tax partnerships as taxpayers and will have to adapt applicable law to address those instances in which partnerships will become taxpayers under the BBA. Nevertheless, the Jan. 1, 2018, effective date of the BBA is approaching. Thus, the time for providing notice and counsel to your clients is quickly running out.

—**Jaye A. Calhoun**
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