Bankruptcy Law

Creditors Have Low Bar to Meet "Reasonable Reliance" Standard Under § 523(a)(2)(B)

Veritex Comm. Bank v. Osborne (In re Osborne), 951 F.3d 691 (5 Cir. 2020).

The 5th Circuit addressed whether a debt was deemed non-dischargeable under Section 523(a)(2)(B) of the Bankruptcy Code due to a false statement made by the debtor. The court specifically addressed whether the creditor "reasonably relied" on the debtor's written statement.

Under 11 U.S.C. § 523(a)(2)(B), a debt will not be discharged in bankruptcy if the debt was incurred by "use of a statement in writing (i) that is materially false; (ii) respecting the debtor's or an insider's financial condition; (iii) on which the creditor to whom the debtor is liable for such [debt] reasonably relied; and (iv) that the debtor caused to be made or published with intent to deceive . . . ."

In *Osborne*, Dr. Osborne was a well-respected cardiologist who opened his own practice, State of the Heart, P.L.L.C. (SOTHC), in 2012. Dr. Osborne took out a $500,000 loan from Veritex Bank and, along with his wife, personally guaranteed the loan. Veritex required the Osbornes to provide a personal financial statement and further required them to update that financial statement with any unfavorable change in their financial situation. SOTHC also entered into a lease agreement with Philips Medical Capital (PMC) to lease $1,000,000 worth of medical equipment, again with a personal guarantee from the Osbornes. The Osbornes did not notify Veritex of the personal guarantee to PMC.

SOTHC defaulted on the lease with PMC and eventually had a judgment entered against both SOTHC and the Osbornes for $2,139,988.31. The Osbornes did not notify Veritex of the judgment. Instead, the Osbornes requested that Veritex extend the loan past the already expired maturity date. Veritex agreed to an initial 60-day extension, but requested updated financial information before agreeing to a longer-term extension. Mrs. Osborne provided a personal net-worth statement and a financial statement for SOTHC. The updated personal financial statement again failed to mention the personal guarantee on the PMC lease and the judgment rendered against the Osbornes. Nor did the Osbornes mention the guarantee or the judgment in several face-to-face meetings with Veritex representatives. For its part, Veritex obtained a credit report on the Osbornes, which, for whatever reason, did not list the judgment against the Osbornes, and sent follow-up emails to the Osbornes inquiring about their personal liquidity. At no point was Veritex made aware of the personal guarantee of the PMC lease or the judgment against the Osbornes.

As a result, Veritex approved the renewal of the loan. A month later, SOTHC filed for Chapter 11 bankruptcy, quickly followed by the Osbornes filing for Chapter 7 relief. In the Chapter 7 proceeding, Veritex filed an adversary proceeding requesting that the Osbornes not be discharged from their personal guarantee based on Mrs. Osborne's materially false statements.

The bankruptcy court ruled that, as to the initial loan, Dr. Osborne did not intend to deceive Veritex when he failed to mention the personal guarantee and, as to the extension, Mrs. Osborne indeed intended to deceive Veritex by not mentioning the personal guarantee or the judgment in the updated financial statements, but Veritex did not *reasonably* rely on her false statements. Therefore, the debt could be discharged. The district court affirmed.

Veritex and Dr. Osborne both appealed to the 5th Circuit. The 5th Circuit agreed that, in the initial loan application, Dr. Osborne did not intend to deceive Veritex and upheld that portion. The court next turned to the renewal application, specifically whether Veritex reasonably relied on the false statements provided by Mrs. Osborne and whether Mrs. Osborne's false statements could be imputed to her husband.

As the 5th Circuit put it, Section 523(a)(2)(B) is "meant to target bad-faith creditors who ignore red flags with the knowledge that they can later avoid the debtor's discharge . . . ." *Id.* at 699. As part of this inquiry, the court examines three factors — the existence of a "relationship of trust;" any apparent "red flags" that would alert an ordinarily prudent lender to falsehoods; and whether "minimal investigation" would reveal inaccurate representations. *Id.* at 698.

The 5th Circuit focused primarily on Veritex's investigative efforts during the renewal process and found that Veritex asking follow-up questions to the Osbornes and obtaining a credit report on the Osbornes qualified as a "minimal amount of investigation," which did not uncover Mrs. Osborne's deceit. *Id.* at 702. The credit report did not show the judgment against the Osbornes, and Veritex's investigation actually showed that Dr. Osborne, in addition to his private practice, was earning annual speaking fees of $325,000. None of this information amounted to any red flags that would have alerted Veritex that something was amiss.

Lastly, contrary to Dr. Osborne's arguments, the court held that, in keeping with past precedent, Mrs. Osborne's actions could be imputed to her husband. The 5th Circuit had previously held that false statements by one spouse under Section 523(a)(2)(A), which does not require a written statement, could be imputed to the other spouse and that it would be nonsensical to hold that the same rule did not apply when the false statement was made in writing. *Id.* at 703-04. Further, the record revealed that Dr. Osborne had expressly directed Mrs. Osborne to manage both their personal financial affairs and the finances of SOTHC, thereby making her Dr. Osborne's and SOTHC's agent.

The personal guarantee was not dischargeable because of Veritex's reasonable reliance on Mrs. Osborne's materially false statements in renewing the loan.

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Chapter 13 Plan Cannot Pre-Emptively Prohibit Debtor from Seeking Plan Modification Consistent with 11 U.S.C. § 1329

Brown v. Viegelahn (Matter of Brown), No. 19-50177, 2020 WL 3039046, at *8 (5 Cir. June 8, 2020).

The 5th Circuit determined whether conditional language inserted by the bankruptcy court in a Chapter 13 debtor's plan, restricting the debtor's ability to seek modification of his plan post-confirmation, was allowable given 11 U.S.C. § 1329's explicit authorization of debtors seeking certain modifications. The 5th Circuit held that the disputed language, stating "Debtors shall not seek modification of this Plan unless said modification also pays a 100% dividend to unsecured claim," *inter alia*, contravened section 1329's allowance for modification and was, therefore, impermissible. The 5th Circuit observed that its holding would have limited impact on Chapter 13 creditors because modifications of Chapter 13 plans pursuant to section 1329 must meet the same standards imposed at plan confirmation, 11 U.S.C. § 1329(b)(1), and a bankruptcy court may deny modification if it finds modification has not been sought in good faith. Accordingly, a bankruptcy court should not pre-emptively limit a debtor from seeking modification.

The debtor, Freddie Lee Brown,

filed for Chapter 13 bankruptcy in the Bankruptcy Court for the Western District of Texas. Brown filed a five-year payment plan, which promised to pay "approximately 100%" of the claims of his unsecured creditors (amounting to $7,728.18) and included monthly payments of $1,080 to pay his secured creditors in full. The Chapter 13 trustee objected on the basis that the plan did not satisfy the requirements of 11 U.S.C. § 1325(a); specifically, the trustee appeared to object that the plan was not feasible and was not proposed in good faith. The trustee asked that the case be dismissed but proposed — if the bankruptcy court was inclined to confirm the plan — that one of two conditions be inserted into the plan.

At the debtor's option, the plan could be required to divert all of the debtor's disposable income for the first seven months to pay the unsecured creditors, at which point the debtor would begin paying a lesser amount. Or the debtor could elect to incorporate the following language:

> The plan as currently proposed pays a 100% dividend to unsecured claims. The Debtors shall not seek modification of this Plan unless said modification also pays a 100% dividend to unsecured claims. Additionally, should this Plan ever fail to pay a 100% dividend to unsecured claims, the Debtors will modify the Plan to continue paying a 100% dividend. If the Plan fails to pay all allowed claims in full, the Debtors will not receive a discharge in this case.

This language was derived from *Molina v. Langehennig*, No. SA-14-CA-926, 2015 WL 8494012, at *1 (W.D. Tex. Dec. 10, 2015) (Hudspeth, J.), and the 5th Circuit referred to the inserted provision as *Molina* language.

The debtor reluctantly agreed to have the *Molina* restriction incorporated into the plan, and the bankruptcy court confirmed the re-payment plan. The debtor then appealed the confirmation order. On appeal, the trustee argued to the 5th Circuit that the plan did not conform with section 1325(a) and, therefore, was not confirmable without the *Molina* language. The debtor countered that the plan fully complied with section 1325(a)'s requirements, therefore, confirmation was mandatory, and the court lacked the discretion to impose any additional, non-statutory conditions on the plan. The 5th Circuit agreed with the debtor that the plan satisfied all of section 1325's requirements but stopped short of finding that a plan which meets section 1325(a) statutory requirements cannot be subjected to additional requirements pursuant to the bankruptcy court's equitable powers granted by 11 U.S.C. § 105. Instead, the 5th Circuit held: "At a minimum, the [*Molina*] provision was not 'necessary or appropriate to carry out' any part of the Code identified in this appeal."

The 5th Circuit then pivoted to section 1329 where the court felt it had "firmer footing" to resolve the case. That provision states, "At any time after confirmation of the plan but before the completion of payments under such plan, the plan may be modified, upon request of the debtor, the trustee, or the holder of an allowed unsecured claim, to" adjust: payment amounts, schedules or the distribution of payments to the creditors. *See*, 11 U.S.C. § 1329(a)(1)-(4). The *Molina* language prevented future modifications from downwardly adjusting the amount to be paid to unsecured creditors. Accordingly, in the 5th Circuit's judgment, the *Molina* provision violated the plain language of section 1329. Noting that section 1329 would not give the debtor opportunity to seek a plan modification that would not be acceptable at confirmation, the 5th Circuit found the dispute over the *Molina* language to be "much ado about nothing." The 5th Circuit vacated the confirmation order and remanded to the bankruptcy court for further proceedings.

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Civil Law and Litigation

First Comes Lightning, Then the Thunder

Milton-Gustain v. Salvage Store, Inc., 19-01854 (La. 2/10/20), 289 So.3d 48.

A previous article, "Lightning Strikes Twice in 5th Circuit, Creating Split with the 4th," (67 *Louisiana Bar Journal* 282, Dec. 19/Jan. 20), covered a pair of 5th Circuit decisions issued on the same day, discussing similar factual and procedural scenarios, with the same dispositions, resulting in a split between the 4th and 5th Circuit. One case, *Milton-Gustain v. Salvage Store, Inc.*, 19-0042 (La. App. 5 Cir. 10/2/19), 280 So.3d 315, reached the Louisiana Supreme Court on a writ of certiorari.

In short, plaintiffs had been unable to obtain the deposition of the only potential eyewitness to the incident because the witness had failed to appear at the properly noticed deposition. Plaintiffs filed a motion to compel, but, before it could be heard, the trial court granted summary judgment for defendant.

The 5th Circuit affirmed the trial court's decision, seeming to state that the passage of time in a case was indicative as to whether a party facing summary judgment had sufficient time to conduct "adequate discovery" per La. C.C.P. art. 966(3). In a stringent dissent, Judge Wicker argued that the court should instead have referred to the multifactor test created in the 4th Circuit's decision in *Roadrunner Transportation System v. Brown*, 17-0040 (La. App. 4 Cir. 5/10/17), 219 So.3d 1265, 1272-73, ultimately arriving at the conclusion that summary judgment was premature because plaintiffs had not been able to obtain adequate discovery in time through no fault of their own.

In a brief *per curiam*, the Louisiana Supreme Court sided with Judge Wicker and the 4th Circuit, citing three 4th Circuit decisions that provide a general principle that the passage of time alone does not necessarily make summary judgment timely because parties must still receive a fair opportunity to present their case.

Justice Weimer dissented, relying on the 5th Circuit's reasoning and further finding the decision to be soundly within the trial court's discretion.

Open 24 Hours

Stevenson v. Progressive Sec. Ins. Co., 19-0637 (La. 4/3/20), 2020 WL 1671565.

The issue here is one of procedure — what the effect of a clerk of court's turning off of a fax machine has on litigants and, therefore, prescription. The Terrebonne Parish clerk of court maintained a policy of shutting off the office's fax machines at close of business (4:30 p.m.) because the unattended machines tended to malfunction overnight. Informally, the clerk's office would keep the machine on after hours by request and have a staff member remain.

Plaintiffs made several attempts to fax-file a petition on the very last day of the prescriptive period, but, because they did so after 4:30 p.m., the clerk's fax machine was not on to receive the signal. Plaintiff successfully filed the next morning, whereupon defendant responded with an exception of prescription, which was granted in the trial court and affirmed in the appellate court. The Louisiana Supreme Court granted certiorari to determine whether the attempted fax-filing interrupted prescription.

The Court's decision centered on the interpretation of La. C.C.P. art. 253 ("When a clerk of court establishes such a system, he shall adopt and implement procedures for the electronic filing . . . .") and La. R.S. 13:850 ("All clerks of court shall make available for their use equipment to accommodate facsimile filing in civil actions."). The majority noted that the decree to make equipment "available" is not the same as keeping the clerk's office open, nor is it qualified by any time restrictions. The fax filing would have been successful but for the clerk's office shutting the machine off; thus, the clerk of court failed to make its machine "available" per the statute.

Furthermore, allowing each clerk of court's office to unilaterally make its own rules about the availability of the fax machines would result in inconsistencies from parish to parish about timely filing. Moreover, the "unpublished exception" unfairly favored only those attorneys who were aware of it, thereby prejudicing the rest. Further, the majority found this "exception" was discretionary. The clerk's office policy effectively shortened prescriptive periods, which would conclude at midnight on the last day of the period, and was, therefore, invalid. Thus, the unsuccessful fax-filing interrupted prescription.

Justice Weimer concurred in the decision, and stated concern over the unpublished nature and lack of disclosure of the policy of turning the machine off but making it available upon request. It suggests that had the clerk published its policy, Justice Weimer would not have disturbed the clerk's discretion in implementing the policy.

Justice Crain dissented, interpreting the relevant statutes *in pari materia* to state that a clerk of court *must* make the fax machine available during mandated office hours, but only *may* make it available at other times; that the office policy of turning off the machines was not improper and did not shorten the prescriptive period under those rules; that the unpublished policy was not unfair because attorneys could easily apprise themselves of it by calling the office; that the clerk was only statutorily obligated to accept filings during mandated business hours; and that the issue more properly fell under *contra non valentem*.

For now, it appears that clerks around the state will be leaving their fax machines on providing all-hours opportunity to file.

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Corporate and Business Law

Writs of Mandamus Directed at Corporations

Bernard v. La. Testing & Inspection, Inc., 19-0575 (La. App. 3 Cir. 2/5/20), 290 So.3d 239.

On Aug. 19, 1968, Vernon Bernard (Vernon) purchased 1,500 shares of stock in Louisiana Testing and Inspection, Inc. (LTI) from an existing shareholder. When he died in 2015, ownership of the stock certificate representing the 1,500 shares was transferred to Alan Bernard (Bernard) under the terms of a settlement agreement. However, according to Bernard, he lost the physical stock certificate in a house fire. Bernard asserted that his ownership of these shares constituted a 15% ownership interest in LTI and had requested to inspect the records of LTI. After being denied access to the records by LTI and Joseph H. Guilbeaux, Bernard filed a petition for writ of mandamus to inspect and copy LTI's corporate books.

Under La. C.C.P. art. 3864, a writ of mandamus may be directed to a corporation to compel "the recognition of the rights of the corporation's members or shareholders." Bernard asserted the shareholder right pursuant to Section 1-602 of the Louisiana Business Corporation Act, which provides shareholders holding at least 5% of the outstanding shares of the corporation the right, if certain statutory conditions are met, "to inspect and copy, during regular business hours at a reasonable location specified by the corporation, any and all of the records of the corporation."

The trial court found that Bernard failed to meet the burden of proof for a writ of mandamus, based on the evidence submitted to the trial court by Bernard, namely his own testimony, the testimony of his brother, his sister and the succession attorney, and a copy of the stock certificate. Bernard appealed.

The appellate court determined the standard of review for the trial court's denial of a writ of mandamus was manifest error. To prevail in obtaining his writ of mandamus, Bernard had to prove to the trial court by a preponderance that he was a shareholder of LTI. Regardless of the trial court's finding that certain testimony given by Bernard and his brother was not credible, the appellate court determined that Bernard met his burden of proof through other "unrefuted objective evidence of ownership" presented at trial. Specifically, the undisputed testimony of the sister and the succession attorney established that Vernon Bernard possessed the original stock certificate, which, after Vernon's death, was delivered to Bernard. In addition, Guilbeaux testified that Vernon purchased the shares, verified that the stock certificate was issued to Vernon and identified his own signature on the copy of the stock certificate.

However, the appellate court noted that while possession is prima facie evidence of corporate ownership, it is not "conclusive evidence, or actual ownership." Therefore, the court had to determine whether the defendants met the "heavy burden" of challenging Bernard's objective evidence of ownership. The defendants provided multiple arguments. The defendants asserted that Vernon failed to give proper consideration for the original purchase of the 1,500 shares. The court quickly dismissed this argument as the evidence "overwhelmingly refute[d]" it; namely, Vernon paid $3,000 and offered his drilling rig for LTI's use on multiple occasions, all of which Guilbeaux admitted in his testimony. The defendants also asserted that Vernon terminated or resigned from his ownership sometime in the 1970s. According to Guilbeaux, LTI's procedures were for a shareholder to return his stock certificate and receive reimbursement of his capital contribution when he left the company; however, Vernon did not return his stock certificate and did not receive a reimbursement. Therefore, the court determined that Vernon had not resigned or terminated his ownership.

The appellate court also dismissed the defendants' peremptory exceptions of no right of action and acquisitive prescription. With respect to acquisitive prescription, prior case law confirmed that corporate stock is susceptible to acquisitive prescription. The court noted that the possession must be "continuous, uninterrupted, peaceable, public and unequivocal." To prove Guilbeaux acquired ownership of the stock through acquisitive prescription, he must have had possession of the stock sufficient to "disturb" Vernon and Bernard's ownership. The defendants rested their argument primarily on documents where Guilbeaux listed himself as sole owner of LTI that were filed with the Secretary of State and the IRS and in his wife's succession. The court found that these filings were insufficient to put Vernon "on notice that his dominion was being challenged, and, therefore, cannot amount to public or unequivocal possession by Mr. Guilbeaux." Similarly, the court dismissed the exception of no right of action. Bernard's cause of action, a petition for a writ of mandamus to inspect and copy the corporate books of LTI, required that he be a shareholder of LTI. Because the defendants failed to prove that Bernard did not have an ownership interest in LTI, the court also dismissed this exception.

The appellate court reversed the trial court's decision and granted Bernard's writ of mandamus to inspect and copy LTI's corporate books. The decision is appealable.

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Clean Water Act Requires Permits for Certain Discharges into Groundwater

County of Maui, Hawaii v. Haw. Wildlife Fund, 140 S.Ct. 1462 (2020).

The Supreme Court issued a Clean Water Act (CWA) opinion concluding that a CWA permit is required when there is either a direct discharge from a point source into navigable waters or when there is the "functional equivalent" of a direct discharge.

The case involved Maui's wastewater treatment system, which collects and partially treats sewage, then pumps four million gallons of it every day through a half mile of groundwater into the Pacific Ocean. Plaintiffs, environmental groups, brought a citizen's suit under the CWA, arguing that this discharge through the groundwater system was the discharge of a pollutant into navigable waters without a permit. The Supreme Court agreed, explaining that this discharge to groundwater was "the functional equivalent" of a discharge from a point source; going from point source to groundwater to ocean did not change the underlying need for a permit.

The 6-3 opinion relied on legislative intent as well as EPA's own historical record of requiring permits for groundwater-based discharges where there was a geologic and temporal connection between groundwater injections and the subsequent release into navigable waters. The Supreme Court opinion drew a line between the underlying 9th Circuit decision, which suggested that all groundwater discharges may require a permit, and the EPA's newly issued Waters of the United States rule, which states that the CWA does not regulate discharges to groundwater, and came down somewhere in the middle with the "functional equivalent of a direct discharge" language used in the holding.

Ongoing LDEQ Enforcement Action Doesn't Bar a Tort Suit

Schaumberg v. Parish of Jefferson, 19-0140 (La. App. 5 Cir. 2/19/20), 292 So.3d 154.

Plaintiff, a property owner in Jefferson Parish, sued the parish over its operation of a landfill, alleging nuisance under La. Civ.C. art. 667 and requesting an injunction pursuant to La. C.C.P. art. 3601. Plaintiff alleged that "foul, noxious odors and/or substances have emanated from the JP Landfill into and onto the persons and properties of neighboring communities, including into and onto Petitioner's immovable property." Plaintiff further suggested that the nuisance might be a result of the landfill being operated with "inadequate and antiquated" leachate-collection and gas-collection systems.

Plaintiff concluded that art. 667, which prohibits a landowner from using his or her property in such a way as to "deprive his neighbor of the liberty of enjoying his own, or which may be the cause of any damage to him," provided a cause of action. The parish, however, responded that the suit should be barred because La. R.S. 30:2026(B)(4)(a) precludes citizen suits against any party that is "[u]nder any order issued pursuant to [the Louisiana Environmental Quality Act (LEQA)] to enforce any provision of [the LEQA]." Here, the parish had been issued a compliance order from LDEQ directly addressing the inadequate leachate-collection system and the failure to cover the waste — similar to the issues identified by the plaintiff in his petition.

The court sided with the plaintiff and disagreed with the parish, which had asserted that the nuisance claims under art. 667 were essentially an attempt to bring a citizens' suit to enforce LDEQ regulations. The court noted that while it was indeed true that the statute bars citizen suits where LDEQ is already taking action, that statute (La. R.S. 30:2026) specifically allows for the possibility of other kinds of lawsuits outside the realm of citizens suits under LEQA. Plaintiff's suit clearly alleged tort claims under art. 667 and did not seek to enforce environmental laws. There was a distinction between asserting a nuisance claim that was caused by a probable violation of environmental laws and a claim seeking to enforce a probable violation of environmental laws.

The 5th Circuit accordingly reversed a lower court ruling on the parish's exception of no right of action and remanded for further proceedings.

Bayou Bridge Pipeline Moves Forward

Atchafalaya Basinkeeper v. U.S. Army Corps of Engineers, No. CV 18-23-SDD-EWD, 2020 WL 1450750 (M.D. La. March 25, 2020).

In the continuing legal and political saga of the Bayou Bridge pipeline development, the Middle District granted motions for summary judgment by the Army Corps of Engineers and Bayou Bridge, and denied a motion for summary judgment filed by various environmental plaintiffs. The Corps issued permits to Bayou Bridge for a pipeline across the Atchafalaya Basin capable of carrying nearly half a million barrels a day of crude oil.

Plaintiffs claimed that the Corps' pre-permit review failed to assess critical environmental impacts arising from project construction and operations and a long history of alleged noncompliance of prior Corps pipeline permits in violation of the National Environmental Policy Act and that the Corps failed to consider oil spill risks in violation of the Clean Water Act. The Corps disagreed, pointing to its lengthy and in-depth inquiry with Bayou Bridge, requiring substantial revisions and updates to draft environmental analyses and requesting and obtaining additional data and information, as well as requesting comments and information from the public and other agencies

The court, in reviewing the administrative record, determined that there was no basis for a finding that the Corps neglected its legal obligations to perform an independent review of the oil spill risks from the project and that this record of lengthy review was sufficient to satisfy the requirements for the issuance of the permits to the pipeline.

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Family Law

Property

Fairbanks Dev., L.L.C. v. Johnson, 53,427 (La. App. 2 Cir. 4/22/20), 2020 WL 1933214.

Prior to their marriage, Jessica Peterson and Charles Johnson bought two tracts of immovable property, using Peterson's separate property, but placing both parties' names on the act of sale as purchasers. Subsequently, Peterson sold her interest to Fairbanks Development and granted Fairbanks an option to purchase any interest she might have in Johnson's presumptive interest if she were found to be the sole owner. Fairbanks then sued Johnson to determine ownership of the remaining tract of land, which it sought to partition by licitation.

The trial court found that both properties were Peterson's separate property, as Johnson did not contribute to the purchase price. The court of appeal reversed, finding that the law, which it found to be clear, required the property to be classified based on the parties' intent at acquisition, which was presumed to be equal co-ownership. Because Peterson did not rebut the presumption of co-ownership, but, in fact, testified that the parties intended to acquire the property together, the property was acquired by them as equal, undivided co-owners.

The appellate court emphasized that the issue was the parties' intent at the time of acquisition, as the acquisition document evidenced that they were acquiring it as co-owners. The trial court erred in focusing on the disagreements between the parties at the end of their subsequent marriage. However, the court affirmed the trial court's order that the property, which was now owned in indivision between Fairbanks and Johnson, had to be partitioned by licitation, as it could not be equally divided so as to be partitioned in kind.

Regarding potential reimbursement claims that Peterson may have had against Johnson for improvements made to the property with her separate funds, the court found that while she sought reimbursement from him in a cross-claim, little evidence was presented at trial, and "because Peterson transferred her interest in the property to Fairbanks, it is unclear whether any rights she had to reimbursement remained hers, passed to Fairbanks, or were extinguished." The court concluded that as those matters were not raised on the appeal before it, they were "issues for another day."

UCCJEA

Harvey v. Harvey, 19-1635 (La. App. 1 Cir. 5/11/20), 2020 WL 2319755.

While residing in Florida, the parties divorced and entered into a judgment in Florida addressing custody and child support. The entire family then moved to Louisiana for over one year, and, subsequently, the mother and two of the children moved back to Florida. After she returned to Florida, the father filed a petition to modify custody and support in Louisiana, which the district court granted. The court of appeal reversed, finding that Louisiana lacked subject matter jurisdiction under the UCCJEA to modify the Florida custody judgment.

Although Louisiana may have been the home state for an initial custody determination, it lacked subject matter jurisdiction to modify the pre-existing Florida judgment as there was no evidence showing that Florida had relinquished its jurisdiction or that Louisiana would be a more convenient forum and the mother and the children now resided in Florida. Louisiana also lacked jurisdiction under the Uniform Interstate Family Support Act (UIFSA) to modify the Florida support order because the obligee resided in Florida, not Louisiana, and Louisiana did not have jurisdiction under the UIFSA provisions.

Donations

Didier v. Simmons, 19-1100 (La. App. 1 Cir. 5/11/20), 2020 WL 2319140.

Mr. and Mrs. Didier filed a petition to revoke a donation to their son-in-law after he admitted having an extramarital affair. They argued that his lying to them and their daughter about the affair and the humiliation and embarrassment caused to them as a result, including the betrayal of their trust, was grounds to revoke the donation to him because of cruel treatment toward them. The trial court granted the son-in-law's exception of no cause of action. The court of appeal affirmed the granting of the exception of no cause of action. It found that the allegations were "too general and vague to state a cause of action against Appellee for cruel treatment *towards* Appellants" but found that appellants were entitled to an opportunity to amend their petition to attempt to state a cause of action. It, therefore, dismissed that part of the judgment dismissing their suit and remanded to allow them the opportunity to amend. One judge dissented, stating that he would have found that the plaintiffs sufficiently alleged a cause of action on the grounds that the son-in-law's actions were "'naturally offensive' to them, not just to their daughter." He would have denied the exception and allowed evidence to be presented at trial.

Use and Occupancy

Anthony v. Anthony, 19-1198 (La. App. 1 Cir. 5/26/20), 2020 WL 2730813.

In both parties' initial petitions, they sought use and occupancy of the matrimonial domicile, and, alternatively, rental value for the other's use. However, those rules were not heard until the partition trial itself. Ms. Anthony resided in the home from the time of the filing of her initial petition for divorce until the home was destroyed by a flood. The trial court, at the partition trial, awarded her use and occupancy retroactively from the date of the filing of her petition until the date the home was destroyed. It also awarded Mr. Anthony, retroactively, rent for her use. The court of appeal reversed, finding that the court could not retroactively award use and occupancy or rent. Moreover, rental value could be awarded only at the time use and occupancy was awarded, unless the rental value was deferred to the partition.

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Fidelity, Surety and Construction Law

Circuit Split on Proper Procedure for Determining Liquidated Damages Under Public Works Contract

Law Industries, L.L.C. v. Bd. of Supervisors, LSU, No. 2018-CA-1756 (La. App. 1 Cir. 3/2/20), ____ So.3d ____.

The Louisiana 1st Circuit Court of Appeal in *Law Industries, L.L.C. v. Bd. of Supervisors of LSU* held that, in the event a plaintiff utilizes the mandamus procedure under La. R.S. § 38:2191, then the trial court must determine what sum is owed under the parties' contract, including the amount of liquidated damages payable under the contract. This decision was recently reaffirmed in *Coast 2 Coast Construction, L.L.C. v. Parish of St. Tammany*, 2019-CA-1311 (La App. 1. Cir. 6/16/20), ____ So.3d ____.

In *Law Industries*, the 1st Circuit was asked to determine whether, in a mandamus proceeding, "the trial court may deduct the amount of liquidated damages provided for in a public contract from the total amount due under that contract . . . ." In that case, Law Industries had entered into a contract with LSU for Law Industries to renovate the Beach Volleyball Team Shower Facilities at LSU in Baton Rouge. The project was required to be completed within 60 days or Law Industries would be subject to $500 per day in liquidated damages. After Law Industries failed to timely complete the project, LSU put Law Industries on notice of its intent to assess liquidated damages due to the failure to timely complete the project. Upon acceptance of the project by LSU, Law Industries provided LSU with a final invoice which LSU refused to pay.

Subsequently, Law Industries filed a mandamus action against LSU seeking the final amount due under the contract and argued that even if liquidated damages were due that defendant was required to remit the "total amount due" under the contract without assessing liquidated damages. In turn, the court heard argument on the mandamus petition and denied Law Industries' writ of mandamus and dismissed Law Industries' claim with prejudice determining the defendant had the right to withhold liquidated damages under the contract and had an offset to the amount owed to Law Industries.

On appeal, Law Industries, relying on the Louisiana 4th Circuit Court of Appeal decision in *Woodrow Wilson Construction Co., L.L.C. v. Orleans Parish School Board*, argued that the trial court erred in its interpretation and application of the mandamus statute. Specifically, Law Industries argued that *Woodrow Wilson* provides "that as a public entity, the defendant cannot rely on the liquidated damages clause in the parties' contract to avoid paying the plaintiff because defendant is statutorily required to do so under La. R.S. 38:2191(D)." In addition, *Woodrow Wilson* requires that disputes over liquidated damages are required to be litigated in an ordinary proceeding.

In response, the 1st Circuit explained that "[Law Industries'] reliance on *Woodrow Wilson* is misplaced, and we respectfully choose to not follow its ruling." It went on to hold that La. R.S. 38:2191 mandates that Law Industries may utilize a mandamus proceeding to order a public entity to pay any sums owed under a public contract, but in such an event, the trial court must determine in the summary proceeding, "what sum is owed under the parties' contract, including the amount of liquidated damages payable under the contract's provisions."

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Labor and Employment Law

Supreme Court Holds LGBT Employment Discrimination Unlawful

Bostock v. Clayton Cty., Georgia, ____ S.Ct. ____, 2020 WL 3146686 (2020).

The U.S. Supreme Court on June 15, 2020, issued arguably the most significant decision in employment law history — and certainly the most consequential employment decision ever concerning LGBT rights — *Bostock v. Clayton County, Georgia*. The textualist opinion, resolving a trilogy of cases, clarifies the scope of Title VII of the Civil Rights Act of 1964 (Title VII) in regard to LGBT issues. Thirty-four years ago, in *Bowers v. Hardwick*, 478 U.S. 186 (1986), the Supreme Court upheld a Georgia law which imprisoned LGBT persons for intimate conduct in the privacy of their homes. In 2015, the Court ruled in *Obergefell v. Hodges*, 576 U.S. 644 (2015), that same-sex couples have a fundamental right to marry. LGBT rights came full circle in 2020, back to Georgia, where the County of Clayton fired Mr. Bostock for being gay.

The Court heard oral argument in the three cases in October 2019 — *Altitude Express Inc. v. Zarda* (*Zarda*), *Bostock v. Clayton County* (*Bostock*) and *R.G. & G.R. Harris Funeral Homes v. EEOC* (*Harris Funeral Homes*). The overarching question presented is whether Title VII's prohibition against sex discrimination encompasses sexual orientation or transgender status. More simply, does Title VII protect LGBT persons?

In *Zarda*, the plaintiff, a skydiving instructor, alleged that the employer fired him because he was gay. The 2nd Circuit Court of Appeals ruled that sex orientation discrimination is "because of sex" under Title VII. In *Bostock*, the employer fired a long-term employee because he joined a gay softball league. The 11th Circuit Court of Appeals held that sexual orientation is not covered by Title VII. In *Harris Funeral Homes*, the EEOC and private plaintiff alleged that the employer fired the plaintiff because she informed the employer she was a transgender woman and intended to present as such at work. The 6th Circuit ruled that discrimination against a person based on transgender status violates Title VII.

In 2012, the EEOC held, in *Macy v. Holder* — articulating in detail the reasons supporting its new position — that transgender discrimination violated Title VII. In 2015, the EEOC held in *Baldwin v. Foxx* that discrimination on the basis of sexual orientation violates Title VII. *Baldwin* cited the 5th Circuit Court of Appeals' decision in *EEOC v. Boh Brothers*, 731 F.3d 444, 459-60 (5 Cir. 2013) (*en banc*), which held that same-sex harassment because of nonconformity to sex stereotypes — including through use of homophobic epithets — is actionable under Title VII, per the Supreme Court's decision in *Price Waterhouse*. There, the Court ruled unlawful an employer's discriminating against a female partner because she was insufficiently "feminine." The Court emphasized that Title VII was "intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes." *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989). In *Oncale*, Justice Scalia wrote for the majority holding that same-sex harassment violates Title VII, notwithstanding the fact that it was not the principal evil that Congress had envisioned. *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79 (1998). Instead, Justice Scalia emphasized, "It is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed." *Id.*

Justice Gorsuch, writing for the majority, joined by Justices Roberts, Breyer, Ginsberg, Kagan and Sotomayor, held that LGBT discrimination is inherently "because of sex" and violates Title VII, under its plain meaning. Justices Alito, Thomas and Kavanaugh dissented. From the outset, Justice Gorsuch cut to the chase:

> Today, we must decide whether an employer can fire someone simply for being homosexual or transgender. The answer is clear. An employer who fires an individual for being homosexual or transgender fires that person for traits or actions it would not have questioned in members of a different sex. Sex plays a necessary and undisguisable role in the decision, exactly what Title VII forbids.

Bostock v. Clayton Cty., Georgia, 2020 WL 3146686, at *3 (U.S. June 15, 2020).

Analytically, the opinion is straightforward: "It is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex." *Id.* at *7.

Justice Gorsuch addressed and unequivocally rejected each of the dissents' arguments. The Court rejected the notions that Title VII cannot cover LGBT discrimination because it doesn't name that characteristic explicitly, or that Congress has failed to pass other legislation aimed at protecting LGBT rights. The Court also rejected the argument that if an employer discriminates against male and female LGBT persons alike, there is no Title VII violation. The Court noted that religious defenses were not presented, and there were no issues presented concerning bathrooms or grooming codes, and, therefore, such disputes would be for another day.

Justice Gorsuch cogently concluded:

> Ours is a society of written laws. Judges are not free to overlook plain statutory commands on the strength of nothing more than suppositions about intentions or guesswork about expectations. In Title VII, Congress adopted broad language making it illegal for an employer to rely on an employee's sex when deciding to fire that employee. We do not hesitate to recognize today a necessary consequence of that legislative choice: An employer who fires an individual merely for being gay or transgender defies the law.

Id. at *18.

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Mineral Law

Company Had Duty to Correct Inaccurate Production Reports Sent to Federal Government

Statoil USA E&P, Inc. v. U.S. Dep't of Interior, 801 Fed. Appx. 232 (5 Cir. 2020).

Statoil USA E&P, Inc. held an oil-and-gas lease on the Outer Continental Shelf. In August 2010, the federal government's Office of Natural Resources Revenue (ONRR) found "significant volume variances" when comparing natural-gas-production information reported by Statoil to information supplied by gas-plant operators. ONRR sent an order to Statoil instructing Statoil to correct its reports within 30 days. Statoil did not do so.

ONRR contacted Statoil about the variances again in January 2011 and May 2011. Statoil acknowledged that its prior reports were inaccurate, but it failed to correct them. In August 2011, ONRR threatened to impose penalties for a "knowing or willful failure to maintain accurate information." *Id.* at 235. Statoil still failed to correct its reports.

In February 2012, ONRR sent a notice of civil penalty to Statoil. ONRR relied on 30 U.S.C. § 17119(d), which authorizes the imposition of a penalty against any person who "knowingly or willfully prepares, maintains, or submits false, inaccurate, or misleading reports, notices, affidavits, records, data, or other written information." ONRR stated that the penalty was being imposed for a "knowing and willful maintenance of incorrect information on gas sales volumes reported."

Statoil challenged the penalty, arguing to an administrative law judge that the company had not "maintained" inaccurate reports because the reports were stored in ONRR's online database. Thus, ONRR had "maintained" the data. Statoil had not. The administrative law judge rejected that argument. Statoil appealed to the Department of Interior's Board of Land Appeals, but the board affirmed. Statoil appealed to the U.S. District Court for the Southern District of Texas, but the district court affirmed. Statoil then appealed to the U.S. 5th Circuit.

The 5th Circuit also rejected Statoil's arguments and affirmed. The court noted that, in the Webster's Third New International Dictionary, one meaning of "maintain" is "to keep in a state of repair, efficiency, or validity." The court concluded that, for purposes of 30 U.S.C. § 1719(d), a lessee must correct reports that it knows are false, inaccurate or misleading in order to avoid liability for having maintained inaccurate records. The court stated that it makes little sense to interpret § 1719(d)'s sanctions for maintaining inaccurate records to apply only when a company has physical possession of the inaccurate information. Indeed, stated the 5th Circuit, "[i]n the context of an *online* record-keeping system, a distinction based on physical possession makes even less sense." *Id.* at 236-37.

The 5th Circuit also stated that Statoil's interpretation of § 1719(d) would "lead to bizarre results" because it would only penalize a company for maintaining inaccurate internal records and would not penalize a company for failing to correct inaccurate data supplied to the federal government, even though that data is the information that the government is most likely to use. *Id.* at 237.

Significant Improvement in Management of Active, Orphan Wells, But Additional Improvement Desirable

In 2014, the Louisiana Legislative Auditor issued a report on the Louisiana Office of Conservation's management of active and orphan wells. The auditor concluded that Conservation was not conducting a sufficient number of inspections of wells; there were too many wells for which Conservation did not require financial assurance (security to ensure the proper plugging and abandonment of wells at the end of the wells' lives); when financial assurance was required, the amount often was too low; and Conservation lacked an effective program for dealing with operators' failures to comply with regulations. The auditor made 21 recommendations.

In March 2020, the auditor released a report that examined Conservation's progress toward complying with the recommendations the auditor made in 2014. The auditor found that Conservation has fully or partially implemented all 21 recommendations. For example, the fraction of wells for which Conservation requires financial assurance has increased from 25% of wells to 66.3% of wells, and Conservation has increased the amount of financial assurance required. Conservation has improved its inspection process and developed procedures that specify when the agency should issue compliance orders and impose penalties for active wells failing inspection and when Conservation should conduct re-inspections. Further, Conservation has amended its regulations to help ensure that operators schedule the plugging and abandonment of inactive wells that have no future utility, rather than delaying the plugging and abandonment by stating the wells have future utility.

However, the auditor found that Conservation's management of wells should be improved further. For example, although Conservation has increased the amount of financial assurance required, the amount of financial assurance is still below the typical cost to plug and abandon a well. The auditor found that in 2019 the average cost to plug and abandon an onshore well less than 3,000 feet deep was about $4.76 per foot, but that the required financial assurance was only $2 per foot. The average cost to plug and abandon deeper onshore wells was approximately $35.84 per foot, but the required financial assurance was $4 per foot. In addition, the auditor found that Conservation was not conducting enough re-inspections. The auditor's full report is available online at: *http://app.lla.state.la.us/PublicReports.nsf/0/C9D7297FEA93568D86258528006BA4F8/$FILE/0001FA2E.pdf?OpenElement&.7773098*.

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Professional Liability

Filing Fees Per Qualified Defendant

Kirt v. Metzinger, 19-1162 (La. 4/3/20), ____ So.3d ____, 2020 WL 1671571.

The plaintiffs filed a medical-review-panel request in which they named three defendants. The plaintiffs were notified that a $100 filing fee for each defendant was required. Two weeks later, the plaintiffs amended the panel request to add defendants Taquino and an "Unidentifiable CRNA." A check for $500 was enclosed with this amendment "to cover the filing of this request for medical review panel." One month later, the plaintiffs filed a second amended panel request in which they advised that they were unable to identify the unknown CRNA, and they added as a new defendant Parish Anesthesia. The PCF responded that Parish Anesthesia was a qualified healthcare provider and that verification was being obtained on Taquino, but there was no mention of an additional filing fee. Months later, the plaintiffs identified Martin as the formerly unknown CRNA. The PCF responded, confirming that Martin and Taquino were PCF qualified and requesting an additional $100 filing fee. The plaintiffs did not timely pay the additional $100 filing fee, whereupon the PCF advised that the request to add Martin as a defendant was "invalid and without effect."

The medical-review panel found no breach of the standard of care by any party, including Martin. The plaintiffs then filed suit against all defendants. Soon thereafter, summary judgment was granted for the three first-named defendants. Thereafter Taquino, Martin and Parish Anesthesia filed exceptions of prescription in which they contended that the panel requests were invalid because of the failure to pay the final filing fee of $100. Prescription, they contended, had not been suspended for any claim. The plaintiffs argued that several requests for panel review were filed, including a separate request for Taquino and Parish Anesthesia respectively, and the filing fees for those requests were timely paid. The plaintiffs conceded that their failure to pay the $100 fee to add Martin invalidated the claim against her but contended that this "should not retroactively invalidate claims already perfected against Taquino and Parish Anesthesia."

The trial court decided that, because there were six qualified providers named, a filing fee of $600 was required. The plaintiffs paid only $500, and the failure to pay the full amount rendered the plaintiffs' entire complaint invalid and all claims prescribed. The court of appeal affirmed.

The Supreme Court noted the trial court's ruling that the PCF is obligated to advise which claimants are "qualified" and the amount of the filing fee. The Court acknowledged that untimely payments render a request for review invalid. The defendants again argued that the plaintiffs' failure to pay the additional $100 filing fee for their claims against Martin rendered "the entire request for review," including the original and all amended panel requests, "invalid and without effect 'as to all defendants.' Therefore, prescription was never suspended as to any defendant." The Court wrote:

> Finding the lower courts' interpretation inconsistent with the statutory language, we hold the failure to timely pay a filing fee invalidates only the request to review a malpractice claim against the specific qualified healthcare provider for whom no fee was timely paid. This interpretation gives effect to all parts of the statute, particularly Subparagraphs (c), (e), and (g), which provide a claim-based, "per qualified defendant" filing fee . . . .

The Court noted that these plaintiffs failed to pay a fee only for a claim against one defendant, which led the Court to ask and answer:

> Under these circumstances, when Subparagraph(e) declares "the request for review of a malpractice claim" invalid and without effect, the question is *which* request for review, and more specifically, *which* malpractice claim? The language of Subparagraphs (c) and (e) reveals the answer: the claim against the specific qualified healthcare provider for whom no filing fee was paid.

Since the statute requires payment of "*a filing fee . . . per named defendant*," the language "suggests a distinct charge for each qualified defendant, not a global fee for the entire proceeding." The Court further reasoned that "[t]he statute does not assess a fee 'per panel proceeding' or 'per request for review.' Rather, it imposes a fee of a specific amount for each named defendant . . . ."

The statutory language requiring a filing fee for "each identified qualified healthcare provider" convinced the Court to decide that the "notion of one 'filing fee' for every panel proceeding cannot be reconciled with the different payment deadlines that arise when the PCF sends separate letters confirming defendants' qualified status. A single filing fee cannot be subject to different payment deadlines." The Court "reject[ed] the overgeneralization in prior appellate court decisions that when a claimant in a multi-defendant proceeding fails to timely pay the 'full filing fee,' the 'entire request for review' is invalid and without effect as to all named providers." The PCF's duties are "mandatory and ministerial in nature to facilitate the medical review process. In that regard, the PCF stands in the same position as clerks of court." In this case, "the PCF was specifically instructed to use the $500 check to cover the filing fee for the defendants named in the proceeding at that time," including Taquino — which it did — whereas the plaintiffs' failure to pay the additional $100 to add Martin resulted in only that claim prescribing.

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Taxation

COVID-19's Impact on State Taxation

Due to the COVID-19 public health emergency, the Louisiana Department of Revenue (LDR) extended the filing and payment due dates for several state taxes. The Department issued Revenue Information Bulletins 20-008, 20-009 and 20-011, and Revenue Ruling 20-002 to provide guidance.

Revenue Information Bulletin 20-008

► Provided an extension for the February 2020 sales tax returns for a filing and payment extension to May 20, 2020. This extension includes General Sales Tax, Automotive Rental Excise Tax, Hotel Occupancy Tax and other local sales taxes administered by LDR. It also provided that electronic filing and payments specific to sales tax returns are temporarily suspended.

► Provided an extension for the February 2020 excise tax returns for a filing and payment extension to May 20, 2020. This extension includes wine shipped direct to consumers and Louisiana and Parish and Municipal Beer Tax.

► Provided an extension for audits and litigation. No manual formal assessments would be issued on audited accounts. Extensions available upon request for cases in field audit, review or litigation stages at LDR.

► Provided an extension of prescription of tax assessments. Suspension effective beginning March 16, 2020, through at least June 5, 2020. Extension is specific to the time delays for appeals to the Louisiana Board of Tax Appeals and courts.

Revenue Information Bulletin 20-009

► Provided an extension for the 2019 income and franchise tax returns for a filing and payment extension to July 15, 2020. This extension includes partnership, individual, fiduciary and corporation tax types. It provided fiscal year filers with a due date between March 1 and May 30, a 60-calendar-day extension from the original due date. These are automatic extensions; no extension requests are necessary.

Revenue Information Bulletin 20-011

► Provided an extension for the February 2020 severance tax returns for a filing and payment extension to June 25, 2020.

Revenue Ruling 20-002

► Provided guidance on first and second quarter 2020 declaration payments. Payment extension unavailable, but safe-harbor payment calculation granted to avoid underpayment of estimated tax penalty. Payments must be made by statutory due date, and the payments must be at least 90% of the amount paid on the corresponding previous year payments.

► Provided guidance on late filed elections of pass-through entity tax. LDR will treat late filed elections as timely if filed before July 16, 2020.

► Provided guidance on an extension of time to acquire tax credit or execute a binding agreement to transfer a tax credit. In order for a taxpayer who purchases a credit to use the credit on a return, Louisiana law requires that either (1) the effective date of the transfer of the tax credit or (2) the execution of a binding agreement to transfer the tax credit must occur on or before the due date of the return, without regard to any extension granted. The deadline has been extended for a credit transfer or for the execution of a binding agreement to transfer such credit by 30 days for income and franchise-tax returns with an original due date between March 1 and May 30, 2020.

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Does the Governor's Suspension of Legal Deadlines in Title 47 Relate to Legal Proceedings Alone?

On March 16, 2020, Gov. John Bel Edwards issued Proclamation JBE 2020-30, which, among other things, provides that "[l]egal deadlines, including liberative prescription and peremptive periods applicable to legal proceedings . . . are hereby suspended . . . including, but not limited to . . . Title 47 of the Louisiana Revised States, Revenue and Taxation . . . ." The suspension was originally in effect until Monday, April 13, 2020, and was further extended through subsequent proclamations until June 5, 2020.

In previous emergency/disaster declarations, including those issued in the aftermath of Hurricanes Katrina and Rita and the flooding in East Baton Rouge and surrounding parishes in 2016, the governor's proclamations simply suspended liberative prescription and peremptive periods and "deadlines in legal proceedings." Those proclamations' language was not as expansive as the most recent suspensions of all legal deadlines within a particular statutory title. Title 47 of the Louisiana Revised Statutes imposes many legal deadlines not directly related to active legal proceedings, including deadlines to file returns and pay/remit taxes; protest proposed assessments; pay taxes under protest; file claims for refund or credit; and respond to a tax assessment. The title not only includes deadlines for taxes levied and administered by the state of Louisiana, but also for local ad valorem; sales/use; and occupational license taxes. These deadlines impact, among other things, interest and penalties and the dates on which they begin to accrue — which makes the interpretation of Gov. Edwards' suspension particularly important.

The Louisiana Department of Revenue (LDR) and local collectors interpret the proclamation consistent with earlier emergency proclamations, as applying solely to deadlines in legal proceedings. Indeed, the LDR issued several policy documents purporting to extend certain filing and payment deadlines, taking the position that the governor's proclamations did not extend those deadlines. But the Louisiana Tax Commission, which administers property taxes, appears to interpret the suspension as applying to all deadlines, including filing/payment deadlines. The issue of whether the governor's proclamation suspends all deadlines, including those not directly related to legal proceedings, is an important one for Louisiana taxpayers and will likely be tested in future proceedings.

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