Arbitration Provision Consented to by Performance

Delta Admin. Servs., L.L.C. v. Limousine Livery, Ltd., 15-0110 (La. App. 4 Cir. 6/17/15), ____ So.3d ____, 2015 WL 3814456.

The parties entered into an administrative services agreement containing an "either/or" provision regarding dispute resolution. Option B stated that the agreement was governed by Louisiana law and that the parties must engage in mediation before resorting to arbitration or other methods of dispute resolution, while Option 2B contained only the choice-of-law provision. Both parties signed the agreement without selecting either option. DAS filed a petition for declaratory judgment seeking a determination that the parties had no agreement to arbitrate. Although the court of appeal found that the agreement was ambiguous because it contained both provisions, it held that considering extrinsic evidence of the parties' post-contract actions and the legislative policy favoring arbitration, the trial court did not err in finding that the parties consented by performance to arbitrate disputes arising out of the agreement as authorized by La. C.C.P. art. 1927.

FAA is Reverse Preempted by MFA and Inapplicable to Insurance Issues

Courville v. Allied Prof'l Ins. Co., 13-0976 (La. App. 1 Cir. 6/5/15), 174 So.3d 659.

A foreign insurer of a chiropractor refused to participate in a medical-malpractice lawsuit filed against the chiropractor, his clinic and the insurer. The insurer filed a motion to compel arbitration and stay proceedings based on the arbitration

agreement between the insurer and chiropractor. The district court ruled valid the arbitration clause, which stated that even if a non-party claimant invoked rights under the policy against the insurer, all disputes arising therefrom "shall be resolved by binding arbitration" governed by California law. Moreover, the McCarran-Ferguson Act (MFA), which established a federal policy of deferring to state regulation of insurance matters, effectively "overturns the normal rules of preemption." Thus, the MFA "reverse preempted" the Federal Arbitration Act, rendering it inapplicable to insurance issues. Also, the federal Liability Risk Retention Act of 1986 preempted La. R.S. 22:868, which prohibits enforcement of arbitration provisions for insurance disputes, and made the Louisiana Direct Action Statute, which gives the injured person or his survivors a right of direct action against the insurer, inapplicable to foreign insurers. The court of appeal affirmed the trial court's judgment, allowing arbitration among the insurer, the chiropractor and his clinic, but reversed as to the judgment mandating that the plaintiffs arbitrate because the arbitration agreement was not executed between the plaintiffs and the clinic or chiropractor, but only between the chiropractor and the insurer.

State Court Lacks Jurisdiction over Arbitration Ordered by the Federal Court

Law Office of Paul C. Miniclier, P.L.C. v. La. State Bar Ass'n, 14-1162 (La. App. 4 Cir. 5/27/15), 171 So.3d 1013.

A law office's client terminated her relationship with the law firm and retained associate attorneys who resigned from the law office while working on her case. The firm filed an intervention in the former client's lawsuit seeking fees and costs associated with its representation of the client. The federal district court compelled the client to arbitrate, and a petition to arbitrate legal fees was filed with the Louisiana State Bar Association (LSBA). After the LSBA dismissed the arbitration, the law office filed a separate lawsuit against the LSBA in state court seeking to compel the LSBA to reinstate the arbitration pursuant to the federal court's order. The LSBA responded by filing an exception of lack of subject matter jurisdiction. The state court found that any procedural challenge regarding arbitration of the fee dispute among the law firm, its former law associates and its former clients must be determined by the federal district court that had ordered the arbitration rather than by a state court. State courts do not have subject matter jurisdiction regarding the arbitration of fee disputes when arbitration has previously been ordered by a federal district court.

Mere Error of Fact or Law Cannot Invalidate an Arbitral Award

Crescent Prop. Partners, L.L.C. v. Am. Mfrs. Mut. Ins. Co., 14-0969 (La. 1/28/15), 158 So.3d 798.

A property owner and a builder entered into a construction contract to build multiple structures. Alleging defects in the builder's performance, the property owner moved for arbitration pursuant to the contract's arbitration provision. The last certificate of occupancy was issued on July 24, 2003, at which time La. R.S. 9:2772 provided for a seven-year peremptive period for construction claims. However, the statute was amended in August 2003, decreasing the seven-year peremptive period to five years. The builder's motion for summary judgment alleging that the claims were perempted because they were not timely filed was granted by the arbitration panel and confirmed by the

NOTICE / Attorney Fee Review Board

2001 Louisiana Acts 208 created the Attorney Fee Review Board. The Act allows for payment or reimbursement of legal fees and expenses incurred in the successful defense of state officials, officers or employees who are charged with criminal conduct or made the target of a grand jury investigation due to conduct arising from acts allegedly undertaken in the performance of their duties.

The Board is charged with establishing hourly rates for legal fees for which the State may be liable pursuant to R.S. 13:5108.3. Pursuant to R.S. 13:5108.4, the rates "shall be sufficient to accommodate matters of varying complexity, as well as work of persons of varying professional qualifications."

The Board met on October 6, 2015, and decided that requests for payment or reimbursement of legal fees should be evaluated on a case-by-case basis in accordance with the factors set forth in Rule 1.5 of the Louisiana Rules of Professional Conduct. As directed by statute, the Board set a minimum rate of $125 per hour and a maximum rate of $425 per hour. These rates will remain in effect through 2017.

Attorneys who represent state officials and employees should be prepared to provide their clients and the Board with sufficient information to enable the Board to assess the reasonableness of attorney fees and expenses.

Any questions regarding the Attorney Fee Review Board should be addressed to Louisiana Supreme Court Deputy Judicial Administrator Richard Williams, 1600 N. 3rd St., 4th Floor, Baton Rouge, LA 70802.

district court, but reversed by the court of appeal, which held that the 2003 amendment could not retroactively apply to perempt the property owner's claims. The Louisiana Supreme Court disagreed, concluding that a wrong interpretation of the law does not provide sufficient grounds for vacating the arbitration panel's award. In the absence of evidence indicating the arbitrators' willful misconduct, imperfect execution of their authority, dishonesty, bias, bad faith or any conscious attempt of the panel to disregard Louisiana law, a mere error of fact or law cannot invalidate an otherwise fair and honest arbitral award.

—Ilijana Todorovic
Law Student,
Under the Supervision of
Professor Bobby M. Harges
Member, LSBA Alternative Dispute Resolution Section
Loyola University New Orleans College of Law
7214 St. Charles Ave., CB 901
New Orleans, LA 70118

Knowingly and Voluntarily Consenting to *Stern* Claims

In *Wellness International Network, Ltd. v. Sharif*, 135 S.Ct. 1932 (2015), the Supreme Court analyzed whether bankruptcy judges may adjudicate *Stern* claims where the parties knowingly and voluntarily consent to waive their Article III rights.

Wellness International is a producer of health and nutrition products. Respondent Sharif agreed to distribute Wellness' products; however, the relationship quickly deteriorated. In 2005, Sharif initiated suit against Wellness but repeatedly ignored discovery requests, as well as his other legal obligations. A default judgment was entered in favor of Wellness awarding over $650,000 in attorney's fees.

In 2009, Sharif filed for Chapter 7 bankruptcy. Wellness obtained a loan application that Sharif had filed in 2002 listing more than $5 million in assets. Sharif informed Wellness and his Chapter 7 trustee that he had lied on the application, and that those assets were actually owned by a trust that he operated on behalf of, and for the benefit of, certain relatives.

Wellness filed a five-count adversary complaint against Sharif in bankruptcy court, objecting to the discharge of the debts (Count I-IV) because, among other reasons, Sharif had concealed assets using the trust, and sought a declaratory judgment (Count V) that the trust was Sharif's alter ego, and that the assets should be treated as part of the bankruptcy estate.

Sharif continued to ignore discovery requests, and Wellness filed a motion for sanctions or, in the alternative, a motion to compel. After Sharif failed to fully comply with the court's order, the bankruptcy court issued a ruling denying his request to discharge his debts. The bankruptcy court also

entered a default judgment against Sharif in the adversary proceeding and declared that the assets allegedly held in the trust were actually part of the bankruptcy estate.

Sharif appealed the decision to the district court, which denied as untimely Sharif's motion to file a supplemental brief on the *Stern* issue and affirmed the bankruptcy court's judgment. On appeal, the 7th Circuit acknowledged that the *Stern* objection would ordinarily be waived because Sharif failed to raise it timely. However, because the argument concerned "the allocation of authority between bankruptcy courts and district courts," the general rule would not apply. Because the *Stern* objection raises an issue of separation of powers, the 7th Circuit held that litigants cannot waive it. The 7th Circuit affirmed Counts I through IV of the adversary complaint; however, it determined that Count V raised a "*Stern* claim" because it was "designated for final adjudication in the bankruptcy court as a statutory matter, but prohibited from proceeding in that way as a constitutional matter." The 7th Circuit thus held that the bankruptcy court lacked constitutional authority to enter a final judgment on Count V.

After granting certiorari, the Supreme Court held that bankruptcy judges can adjudicate *Stern* claims with the parties' knowing and voluntary consent. The Supreme Court noted that adjudication by consent is nothing new and was commonly in practice. Modern cases explain that Article III's guarantee of an impartial and independent federal adjudication is a personal right that can be waived.

Reserving a limitation to its holding, the Supreme Court noted that Article III serves an important role in the system of checks and balances. To the extent that a case implicates this structural principle, the parties' consent would not cure the constitutional problem. Apart from structural concerns, the parties' consent to opt out of the Article III protections would have full effect and will not offend separation of powers as long as Article III courts retain supervisory authority over the process.

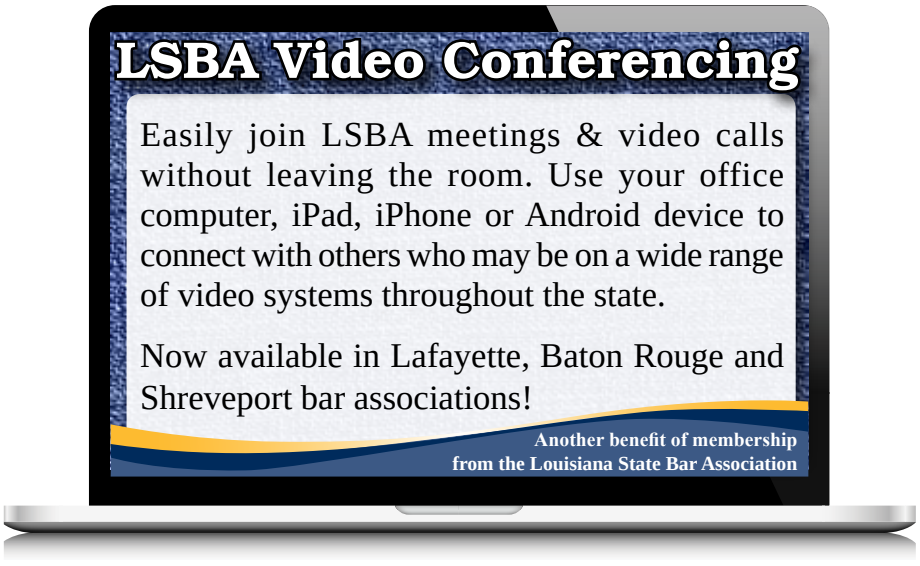
In its reasoning, the Supreme Court analogized the bankruptcy court judges to the role of magistrate judges, stating that a bankruptcy court hears matters only on the district court's reference just as the district court decides to invoke a magistrate judge's assistance. The Court also pointed out that the scope of traditional Article III claims that a bankruptcy court can resolve is quite limited, and the federal judiciary retains the power to take jurisdiction over the matter.

Because of the vast control that the district courts retain over the selection of bankruptcy judges and the cases they adjudicate, the Supreme Court determined that allowing them to decide *Stern* claims would not threaten the integrity of the judiciary or "usurp the constitutional prerogatives of Article III courts."

The Supreme Court noted that its decisions in *Stern*, and its predecessor, *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 102 S.Ct. 2858 (1982), would not alter the result in this case. Both of those cases turned on the parties' lack of consent to have their claims adjudicated in non-Article III courts. The question presented here did not involve an objecting defendant being forced to litigate before a non-Article III court.

Finally, the Supreme Court held that the parties' consent to adjudication need not be express, but still must be knowing and voluntary. Again analogizing this case to the role of the magistrates, the Supreme Court noted that the parties' consent to use a magistrate judge need not be express, so to require express consent in a bankruptcy proceeding would be improper. The Supreme Court remanded the issue of whether Sharif's consent was knowing and voluntary.

—**Cherie Dessauer Nobles**
Member, LSBA Bankruptcy Law Section
and
Tristan E. Manthey
Chair, LSBA Bankruptcy Law Section
Heller, Draper, Patrick, Horn
& Dabney, L.L.C.
Ste. 2500, 650 Poydras St.
New Orleans, LA 70130



Negligent Spoliation of Evidence

Reynolds v. Bordelon, 14-2362 (La. 6/30/15), 172 So.3d 589.

On June 30, 2015, the Louisiana Supreme Court held that Louisiana law does not recognize a cause of action for negligent spoliation of evidence. This resolved a highly disputed issue of Louisiana law.

In this case, the plaintiff was involved in a multi-vehicle accident that totaled his vehicle. After the accident, the plaintiff's insurer took possession of the wrecked vehicle and transported it to a local auction house for sale. The plaintiff then filed suit against the other driver and the manufacturer of his wrecked vehicle and allegedly gave notice to his insurer and the auction house that he would like the wrecked vehicle preserved in its current state as evidence. The auction house subsequently disposed of the wrecked vehicle on behalf of the insurer, and the plaintiff filed claims against both for negligent spoliation of evidence. These defendants filed exceptions of no cause of action, which were granted by the trial court and affirmed by the 1st Circuit. The Louisiana Supreme Court granted a writ and agreed with the courts below that no cause of action exists in Louisiana for negligent spoliation of evidence.

This holding was based on the court's refusal to recognize any general duty to preserve evidence in the context of negligent spoliation. Specifically, the court found that none of the policy considerations supporting the imposition of such a legal duty — deterrence of future conduct, compensation of the victim, predictability, satisfaction of the community's sense of justice, proper allocation of judicial resources, and legislative will/intent — weighed in favor of allowing a cause of action for negligent spoliation. It repeatedly referred to the loss as "speculative" and recognized the cost that such a duty would impose on society as a whole.

The court did not limit its ruling to third-party spoliation and expressly found that the same rationale applies to parties in a pending lawsuit. With respect to negligent spoliation by parties to a lawsuit, it found discovery sanctions, criminal sanctions and the adverse presumption to be equally effective and far more practical remedies. With respect to negligent spoliation by third parties, the court found that, unless and until the Legislature establishes a preservation duty, plaintiffs should take proactive steps — such as entering a contract or obtaining a court order — to protect any relevant evidence outside their possession.

—Emma E. Kingsdorf
Barrios, Kingsdorf & Casteix
Ste. 3650, 701 Poydras St.
New Orleans, LA 70139

Corporations and Religion

Fairchild Pentecostal Church v. Johnson, 15-0068 (La. App. 3 Cir. 6/3/15), 170 So.3d 357.

A church, incorporated as a Louisiana non-profit corporation, split into two factions when its pastor sought to retire and a new pastor took over. When the retired pastor purported to sell the church property, multiple lawsuits were filed, resulting in "a Kafkaesque labyrinth of pleadings." The major issue was whether the church members followed proper procedure in determining who was the pastor.

The trial court held a hearing to determine the membership for voting purposes. One faction argued that certain persons were not members because they had not attended regularly, had not tithed, had turned in their keys or were regularly attending church elsewhere. Opining that these factors involved ecclesiastical determinations that were beyond the authority of the court, the trial court determined the membership based purely on the corporate articles, bylaws and corporate law. Also, concerned by allegations at pretrial conferences that new members were being brought in for purposes of litigation rather than for religious reasons, the court determined the voting membership as of immediately before the first suit was filed, which was several months earlier, effectively setting that date as the record date for a meeting of members to decide whether to dismiss the leader of one faction as pastor.

After reviewing jurisprudence to the effect that civil courts may not interfere in ecclesiastical matters of a religious group, but may interpret and enforce corporate articles and bylaws in conjunction with state corporate law to resolve non-ecclesiastical corporate governance issues, the appellate court affirmed, concluding that the trial court analyzed the church's regulations along with state law "without interfering in ecclesiastical matters," and noting the "trial court's careful adherence to the law where the court repeatedly stopped questions and comments by the lawyers that involved church doctrine." Recognizing that the Louisiana non-profit corporation law provides that a board of directors may set a record date only in advance and no earlier than 60 days before a meeting (but does not address what a court may do), the appellate court concluded the trial court's approach "was a reasonable and equitable solution, and perhaps the only solution where the membership dynamic had become a moving target."

Employees' Action Against Employer's Officer

Blank v. Equisol, L.L.C., 14-1462 (La. App. 1 Cir. 6/18/15), 2015 La. App. LEXIS 305 (not designated for publication).

Two brothers, the Blanks, entered into employment agreements with Equisol, L.L.C., a Pennsylvania limited liability company, to be employed as president and vice president of its affiliate, Gulf States Chlorinator and Pump, Inc. (GSC). Parrish was president of Equisol. Three years later, Parrish left his position at Equisol and became the CEO of the parent company of Equisol and GSC. A year later, both Blanks resigned and sued Equisol, GSC and Parrish. Trial proceeded without the defendants present, and they were found liable in solido to both brothers.

In their petition, the Blanks alleged:

> Parrish owed a fiduciary duty to Equisol, and thus to [GSC], to discharge his duties in good faith, with diligence, care, judgment and skill in order to protect and promote the success of the company. Instead, whether through his gross negligence, intentional tortious conduct, or intentional breaches of duty, Parrish has failed to discharge his duties as required by law and thus stands responsible for the acts taken by him as alleged herein.

Parrish argued, among other things, that the Blanks had no right of action. The appellate court disagreed, reasoning that "the Blanks claim that actions by the defendants caused business to be inconvenienced and suffered damages due to breaches of contract and fiduciary duties," and, "[d]ue to Mr. Parrish's close involvement with Equisol," the Blanks had a right of action.

Corporate Formalities

Tracer Protection Servs., Inc. v. Burton, 14-1111 (La. App. 1 Cir. 6/5/15), 2015 WL 3545616 (unpublished), *writ denied*, 15-1313 (La. 10/2/15), ____ So.3d ____, 2015 WL 6113902.

In 2004, Redlich signed an agreement in his individual capacity in which he purportedly sold, among other things, all of the stock in Tracer Protection Services, Inc. (TPSI) to Burton, even though the stock was actually owned by Ansted, Inc. Redlich, however, claimed to be the sole shareholder of Ansted, and the stock in TPSI appears to have been the major asset of Ansted. The trial court found that Redlich was not the sole shareholder of Ansted and that there was no evidence that Ansted had agreed to the sale. The court thus granted partial summary judgment declaring the agreement null and invalid with respect to the sale of the TPSI stock for, among other things, the complete lack of corporate formalities.

The appellate court reversed, noting that Ansted's articles provided that (1) the affirmative vote of 51 percent of the outstanding shares was necessary for the sale of the major part of the assets of the corporation and (2) whenever the affirmative vote of the shareholders was required to authorize or constitute corporate action, written consent to that action signed by only "the shareholders holding that proportion of the total voting power on the question that is required by law or these Articles of Incorporation, [whichever] is the higher requirement, shall be sufficient for the purpose, without necessity for a meeting of the shareholders."

—**Michael D. Landry**
Reporter, LSBA Corporate and
Business Law Section
Stone Pigman Walther Wittmann, L.L.C.
546 Carondelet St.
New Orleans, LA 70130

The MRGO

State v. U.S. Army Corps of Eng'rs, ____ F.Supp.3d ____ (E.D. La. 2015), 2015 WL 5083683.

Following Hurricane Katrina, Congress took a particular interest in the Mississippi River-Gulf Outlet (the MRGO)—the well-known and much-maligned commercial-access route from the Gulf of Mexico to the Port of New Orleans. Specifically, Congress recognized the devastating impacts that this underused, poorly designed and largely unmaintained channel had caused and the need for the federal government to act swiftly to mitigate the potential future harm from this waterway. Congress acted. The MRGO was a component of at least three acts of Congress between 2005 and 2007, all of which contained

various directives to the U.S. Army Corps of Engineers (the Corps) to decommission the MRGO and to undertake the closure and ecosystem restoration of the land devastated by the navigation project. The channel was closed by the construction of a rock dike in 2009, and, in 2012, the Corps reported that the cost of restoring the ecosystem damaged by the construction and poor maintenance of the MRGO was approximately $2.9 billion.

The question of who was responsible for paying this massive cost was at the heart of a lawsuit brought by the State of Louisiana in 2014 against the Corps. Under the Corps' interpretation of the relevant law, the State was obliged to share in the costs of the restoration to the tune of approximately $975 million. Louisiana disagreed with this interpretation, alleging that Congress had mandated full federal funding of the MRGO closure and ecosystem restoration.

This dispute was submitted to Judge Lance Africk of the Eastern District of Louisiana via cross motions for summary judgment in July 2015. On Aug. 27, 2015, two days shy of the 10th anniversary of Hurricane Katrina's landfall, Judge Africk rendered his decision, granting the State's motion for summary judgment and declaring that, under the Administrative Procedure Act and other laws, the federal government was mandated to fully fund the closure and restoration of the MRGO and its ecosystem.

The ultimate question of whether the State is responsible to share in the cost of closing the MRGO and restoring its ecosystem turned on questions of statutory interpretation and whether, in the three primary post-Katrina enactments, Congress left any ambiguity with regard to this issue in which the Corps was entitled to interpretational deference under *Chevron v. National Resources Defense Council*, 104 S.Ct. 2778 (1984).

Although the three laws — supplemental spending bills in 2005 (119 Stat. 2680) and 2006 (120 Stat. 418) and the Water Resources Development Act of 2007 (121 Stat. 1041) — did not contain one concise directive on the MRGO closure and ecosystem restoration funding, Judge Africk found a clear progression of congressional intent and expression in the series of laws, noting that "[t]here is nothing that requires Congress to legislate using the clearest possible language, and although the benefit of hindsight often reveals that legislation could have been more precisely worded, such retrospection does not inject ambiguity into a statute that contains none." (Op. at *9). Because Judge Africk concluded that Congress had clearly articulated that the MRGO closure and restoration was to be fully federally funded, he held that the Corps' contrary interpretation of the law was not entitled to *Chevron* deference. Accordingly, the Corps' conclusion that Congress intended for the State to shoulder a third of the MRGO closure and restoration costs and the Corps' transmission of funding recommendations to Congress for appropriation contingent on Louisiana's agreement to pay nearly $1 billion toward the MRGO closure and ecosystem restoration were arbitrary and capricious and were vacated and remanded to the Corps for reconsideration.

—Ryan M. Seidemann
Member, LSBA Environmental Law Section
Louisiana Department of Justice
Lands & Natural Resources Section
1885 North Third St.
Baton Rouge, LA 70802

Case Alleging DuPont Covered Up Toxic Gas Leaks Gets Second Chance Before a Jury

In a surprising turn of events, a False Claims Act suit filed by a whistleblower employee at a DuPont plant in Ascension Parish was revived after a judge set aside a jury verdict favoring DuPont.

The case, *Simoneaux v. E.I. duPont de Nemours & Co.*, No.12-219 (M.D. La. 6/25/15), 2015 WL 3905069, involved former DuPont employee Jeffrey M. Simoneaux, who filed under the False Claims Act (FCA) alleging that DuPont knowingly violated the Toxic Substances Control Act by leaking carcinogenic sulfur trioxide gas for five months. The FCA, 15 U.S.C. § 2601 *et seq.*, allows individuals to sue on the government's behalf and receive a share of funds recovered through the lawsuit, if any. In his petition, Simoneaux claimed that he noticed a leak in the system at the sulfuric acid plant in Burnside, La., and that the company both failed to take action and retaliated against him for attempting to document the leak and his inability to repair it.

By the time the case reached the jury, it was undisputed that DuPont's process equipment did leak and DuPont employed temporary measures — *i.e.*, a vacuum-hose recovery system to capture the leaks while the plant continued to operate. The jury was presented with the question: Do you find by a preponderance of the evidence that DuPont obtained information that reasonably supported the conclusion that the leaks of chemicals or chemical mixtures at its Burnside facility presented

a substantial risk of injury to health or the environment?

Had the jury answered "yes," it would have been directed to answer another question as to whether DuPont knowingly concealed information about the leaks in order to avoid paying fines. However, on Jan. 23, 2015, the jury answered "no," and the case against DuPont was dismissed. (The jury also found that there had been no retaliation against Simoneaux for his efforts to disclose the leaks.)

Plaintiff then filed a motion for relief from judgment under Rule 60(b)(3), alleging that (1) DuPont failed to disclose "newly discovered leak calculation spreadsheets" and (2) DuPont failed to disclose a recent OSHA citation, both of which had been called for in discovery.

The newly discovered leak-calculation spreadsheets provided "significantly more quantifiable information about the subject leaks than the calculations previously made available to Relator . . . regarding leak quantity, concentration, duration and capture rates." (Op. at *3). This was important to the case — and bad for DuPont — because DuPont had argued that "dose makes the poison" and Simoneaux had no evidence of the dose or quantity and concentration of the gas leaks at the plant. The court found that the information on the spreadsheets, which would have provided additional information about the size, scope and duration of the leaks, would have enhanced Simoneaux's ability to fully and fairly present his case.

Likewise, the court took a dim view of DuPont's failure to disclose five OSHA violations issued approximately two months before trial. DuPont argued that there was no intent or effort to hide the citation, which had been publicly posted at the plant and made available on the Internet. Simoneaux argued that DuPont's failure to disclose the OSHA citation made it impossible for him to rebut DuPont's defense that it had not been subject to regulatory action on the leak issue despite being highly regulated. The court agreed, holding that Simoneaux had established by clear and convincing evidence that the newly discovered leak calculations and the OSHA citation were called for in discovery, and that "DuPont's failure to produce them is misconduct for the purposes of Rule 60(b)(3)." The court found that the "unavailability of this evidence impacted the integrity of the trial process and prevented [Simoneaux] from fully and fairly presenting his case." (Op. at *7).

The reversal of a jury verdict is a major upheaval and enormously costly, which the court acknowledged: "The Court is loathe to set aside the hard work and deliberative process of the jury, and the Court does not do so lightly, but the Court's duty to uphold the integrity of the judicial process requires the result reached herein."

—**Lauren E. Godshall**
Member, LSBA Environmental Law Section
Curry & Friend, P.L.C.
Ste. 1200, Whitney Bank Bldg.
228 St. Charles Ave.
New Orleans, LA 70130

Community Property

Wood v. Wood, 14-0405 (La. App. 5 Cir. 11/25/14), 165 So.3d 181.

Ms. Wood filed a petition alleging that Mr. Wood had mismanaged and closed the former community business and had established a new business in the same location, performing the same services. The trial court sustained his exceptions of no cause of action and vagueness and granted his motion for summary judgment. The court of appeal reversed and remanded, finding that the allegations were sufficient to state a cause of action because La. Civ.C. art. 2369.3 not only applied to spouses, but continued to apply to the parties, even after they were divorced; and that the entity was "former community property" because even though the community regime had been terminated, the property had not yet been partitioned. The allegations were also sufficient to put Mr. Wood on notice of the claims against him and were not vague. His claim that he had no continuing duty to prudently manage the former community entity under La. Civ.C. art. 2369.3 because it could no longer be managed consistently with the way it had been managed prior to termination of the regime was without merit. Because a genuine issue of material fact existed as to his ability to continue to manage the entity as it had been managed, the motion for summary judgment was also reversed.

Durden v. Durden, 14-1154 (La. App. 4 Cir. 4/29/15), 165 So.3d 1131.

Ms. Durden's response to a request for admissions that Mr. Durden owned his home, land and a shed prior to their marriage was insufficient on its own to prove his ownership of the land. He presented no other documentation evidencing he actually owned the land on which the parties built a home during their marriage using community property. Thus, the court of appeal, on its own, found that his motion for return of separate property failed to state a cause of action and reversed the trial court's order declaring that the property was his and evicting her from the home.

Moreover, because she had previously been granted use of the home under La. R.S. 46:2135, the legal implication was that the home was not his separate property as that statute does not allow one spouse to be awarded use of the other spouse's separate property. Admissions are directed toward facts, not ultimate legal conclusions, and must address specific facts, rather than the general reference to "land." Moreover, the ownership of the property was clearly at issue throughout the pleadings. Finally, the trial court also erred in not following the mandates of La. R.S. 9:2801 in determining the ownership of contested property, as there had been neither descriptive lists nor traversals filed, and the determination that the land belonged to him was, effectively, a piecemeal partition.

Interim Spousal Support

LaRocca v. LaRocca, 14-0255 (La. App. 5 Cir. 10/29/14), 164 So.3d 207, *writ denied*, 14-2512 (La. 2/27/15), 159 So.3d 1068.

Ms. LaRocca's motion to extend the period for the payment of interim spousal support, which was filed more than 180 days after the parties' divorce, was not untimely, as the statute does not establish a time period within which such a motion must be filed. Mr. LaRocca argued that once the interim spousal support terminated as a matter of law, it could not be resurrected by a motion filed more than 180 days after the divorce. Good cause to extend the interim-spousal-support period past 180 days can be found for compelling reasons — circumstances beyond the parties' control — and can be based upon the parties' "age, work history, and education." Moreover, "the initial assessment of the *eligibility* requirements under La. C.C. art. 113 for interim spousal support are not the same as for the *extension* of support." The dissent argued that once the right to support had been extinguished, it could not be revived.

Custody/Co-Domiciliary Parents

Hodges v. Hodges, 14-1575 (La. App. 1 Cir. 3/6/15), 166 So.3d 348.

The 1st Circuit addressed the split between the circuits regarding whether a trial court can designate the parents as co-domiciliary parents, finding that when the court awards equal physical custody it can designate the parents as co-domiciliary parents if in the best interest of the child; but the court must also render a joint-custody-implementation order or find that there is good cause not to issue an implementation order. That order must address the parents' responsibilities for the child's health, education and welfare, not just the physical custody schedule. The Louisiana Supreme Court has granted a writ, which should resolve this circuit split. *Hodges v. Hodges*, 15-0585 (La. 5/15/15), 169 So.3d 380.

Child Support/ Abandonment

Adams v. Adams, 14-0387 (La. App. 1 Cir. 3/11/15), 166 So.3d 1066.

After a partial hearing in 1998, the court continued the matter but orally awarded interim child support. In 2013, Ms. Adams filed a motion to make past-due child support executory, for contempt and to modify the child support award. Mr. Adams filed an exception of no cause of action. The court then signed a judgment ruling that the prior support award was an interim order, but remained in effect. Mr. Adams' motion for new trial was denied. Before Ms. Adams' motions were set, Mr. Adams filed an ex parte motion to have the court acknowledge that her proceedings had been abandoned, which the court signed, dismissing the case without prejudice. On appeal, the court reversed the dismissal, finding that his exception of no cause of action and motion for new trial, filed before his motion for abandonment, evidenced "an intent to seek judicial resolution of the dispute on the merits and a willingness or consent to achieve judicial resolution." Thus, he had waived his right to claim abandonment due to his own actions. The court noted, in a footnote, "Having found that Mr. Adams revived the action, we pretermit discussion as to whether there was a final, appealable judgment that precluded abandonment."

Procedure/Contempt

Hedlesky v. Hedlesky, 15-0117 (La. App. 3 Cir. 6/3/15), 166 So.3d 1221, *writ denied*, 15-1308 (La. 10/2/15), ____ So.3d ____, 2015 WL 6114354.

After obtaining a community-property-partition judgment against Ms. Hedlesky for $263,485.10, Mr. Hedlesky stopped paying child support, claiming an offset of the two judgments. The trial court denied her rule for contempt, finding that he was entitled to the offset. The court of appeal reversed, finding that the strong policy of the state required court intervention before a child-support judgment could be modified without the express agreement of both parties. It distinguished *Saunier v. Saunier*, 47 So.2d 19 (La. 1950), a Louisiana Supreme Court case that had allowed a partial setoff, and also found that statutory developments since then provided great protection for child-support awards. In sum, self-help is not allowed, and he should have sought judicial intervention before unilaterally modifying the support award.

—David M. Prados
Member, LSBA Family Law Section
Lowe, Stein, Hoffman, Allweiss & Hauver, L.L.P.
Ste. 3600, 701 Poydras St.
New Orleans, LA 70139-7735

Collateral Source Rule

Hoffman v. 21st Century N. Am. Ins. Co., 14-2297 (La. 10/2/15), ____ So.3d ____, 2015 WL 5776131.

Hoffman, injured when his vehicle was rear-ended by Elzy, sued for damages. In a bench trial, the court found Elzy 100 percent at fault, and awarded $4,500 in general damages and $2,478 for special medical expenses. Hoffman appealed, alleging that the amount for special medical expenses was erroneous, noting that he had presented evidence of expenses totaling $4,528. The appellate court found that the trial court, having been presented with two conflicting medical bills, chose the lesser, which choice was not manifestly erroneous, and affirmed the judgment.

Included in the medical expenses were two MRIs at $1,500 each. In fact, Hoffman's attorney had negotiated with the imaging center for a $950 reduction in the charge, and the company accepted payment of $2,050 rather than $3,000. Hoffman contended that, under the collateral source rule, he was entitled to the total billed amount, without reduction for adjustments or write-offs. The Louisiana Supreme Court granted certiorari to determine the *res nova* issue of whether the collateral source rule applies to the "written-off" portion of a medical expense when the plaintiff's attorney negotiated the write-off.

Under the collateral source rule, a tortfeasor may not benefit, and an injured plaintiff's tort recovery may not be reduced because of monies received by the plaintiff from sources independent of the tortfeasor's procuration or contribution. The rule has ancient roots in the common law. In *The Propeller Monticello v. Mollison*, 58 U.S. (17 How.) 152, 15 L.Ed. 68 (1854), two ships, *Propeller* and *Northwestern*, collided, sinking the *Northwestern*, whose insurer paid for the loss of the ship and its cargo. The issue before the Supreme Court was whether the owner of the other ship was released from liability because of the payment. The court held that "the contract with the insurer is in the nature of a wager between third parties, with which the trespasser has no concern. The insurer does not stand in the relation of a joint trespasser, so that satisfaction accepted from him shall be a release of others." Originally a common-law doctrine, the rule has been accepted jurisprudentially by Louisiana courts, though not incorporated in Louisiana statutes. Several public-policy purposes are served. A tortfeasor should not gain an advantage from outside benefits provided to the victim independently of any act of the tortfeasor. The rule promotes tort deterrence and accident prevention. Absent such a rule, victims would be dissuaded from purchasing insurance or other forms of reimbursement available to them.

The court applied the principle of La. Civ.C. art. 2315 that the wrongdoer is responsible only for the damages she has caused. Hoffman suffered no diminution of his patrimony to obtain the write-off, and Elzy cannot be held responsible for any medical expenses Hoffman did not actually incur and need not repay. The court adopted "a bright-line rule that such attorney-negotiated discounts do not fall within the ambit of the collateral source rule because to do otherwise would invite a variety of evidentiary and ethical dilemmas for counsel."

—**John Zachary Blanchard, Jr.**
Past Chair, LSBA Insurance, Tort, Workers' Compensation and Admiralty Law Section
90 Westerfield St.
Bossier City, LA 71111

Insurance Claims

Kelly v. State Farm Fire & Cas. Co., 14-1921 (La. 5/5/15), 169 So.3d 328.

The Louisiana Supreme Court was tasked with answering two certified questions from the U.S. 5th Circuit: 1) whether an insurer could be found liable for a bad-faith failure-to-settle claim when the insurer never received a firm settlement offer; and 2) whether an insurer could be found liable for misrepresenting or failing to disclose facts that are not related to the insurance policy's coverage.

Kelly was injured after being struck in a motor-vehicle accident with Thomas, a driver insured with State Farm. Kelly's attorney attempted to settle the claim with State Farm but ultimately rejected its offer. Kelly eventually obtained an excess judgment against Thomas and State Farm. After State Farm paid its policy limits, Kelly entered into a compromise with Thomas whereby Thomas assigned to Kelly his rights to pursue a bad-faith action against State Farm. Kelly brought claims against State Farm for failing to notify Thomas of Kelly's settlement letter and failing to settle the claim.

Breaking down the first certified question into two operative clauses, the Supreme Court first asked whether an insurer *could* be held liable for a bad-faith failure-to-settle claim. The court articulated that insurers owe their insureds the duty to act in good faith when dealing with claims against their insureds. Further, the court instructed that, under jurisprudence and the plain language of La. R.S. 22:1973(A), both the insured and third-party claimants are entitled to enforce this duty through bad-faith failure-to-settle claims. *Kelly*,

169 So.3d at 338-39.

Turning to the second component of the first question, the court held that a firm settlement offer is not required in order to hold an insurer liable due to the insurer's affirmative duty to conduct a thorough investigation, "to adjust claims fairly and promptly," and "to make a reasonable effort to settle claims with the insured or the claimant, or both." In arriving at this conclusion, the court wrote that the insurer's duty should not be subject to whether the insurer received a firm settlement offer, but instead is based on the evidence the insurer develops during the claims process. *Id.* at 341; *see also, Smith v. Audubon Ins. Co.*, 95-2057 (La. 9/5/96), 679 So.2d 372, 377.

Proceeding to answer the second certified question, the court undertook a statutory analysis of La. R.S. 22:1973(B)(1), which provides: "Any one of the following acts, if knowingly committed or performed by an insurer, constitutes a breach of the insurer's duties imposed in Subsection A: (1) Misrepresenting pertinent facts or insurance policy provisions relating to any coverages at issue." The court read the "or" language of the statute as disjunctive and held that the statute prohibits both the misrepresentation of "pertinent facts" and the misrepresentation of "insurance policy provisions relating to any coverages at issue," thereby separating the requirement that the misrepresentation of pertinent facts relate to coverages at issue. Accordingly, the court answered the second question in the affirmative, finding that an insurer *can* be held liable for misrepresenting or failing to disclose facts that are not related to the insurance policy's coverage. *Kelly*, 169 So.3d at 343-44.

By opening up the requirements for a bad-faith claim, the *Kelly* opinion will have implications across the spectrum of insurers, their insureds and third-party claimants. However, this decision is not expected to open the floodgates of insurance bad-faith claims. As the court remarked in *dicta*, "tight [reins] must be kept on a cause of action for insurer settlement practices." *Id.* at 343, n. 34.

—**Michael S. Finkelstein**
Wolfe, Begoun & Pick, L.L.C.
Ste. 100, 818 Howard Ave.
New Orleans, LA 70113

United States

Department of Commerce, International Trade Administration, 80 Federal Register 46793-46795 (8/6/15).

The U.S. Department of Commerce, International Trade Administration, published a Federal Register notice of determination indicating how it intends to apply certain statutory directives contained in the Trade Preferences Extension Act of 2015.

This legislation provides a number of amendments to the U.S. antidumping (AD) and countervailing duty (CVD) laws, including: (1) modification of the provisions addressing adverse facts available in AD or CVD proceedings; (2) modification of the "material injury" definition applicable in AD or CVD proceedings; (3) changes to "ordinary course of trade" and "particular market situation" definitions in AD proceedings; (4) alteration to the treatment of distorted prices or costs in AD cases; and (5) changes to the procedures for accepting mandatory respondents in AD and CVD proceedings. The legislation does not contain dates of application for any of the amendments.

The Department of Commerce issued the Federal Register notice to notify litigants that it will implement the amendments immediately. Immediate application will certainly raise some scrutiny, for example where a remand determination is made after implementation of the changes.

Court of Justice of the European Union

Schrems v. [Irish] Data Protection Comm'r, C-362/14 (Oct. 6, 2015).

The European Court of Justice (ECJ) issued a significant decision on a request for preliminary ruling from the Irish High Court. The ECJ invalidated the U.S.-E.U. "safe harbor" agreement regarding the transfer of personal data between the E.U. and U.S. The case was initiated by Schrems in a complaint lodged at the Irish Data Protection Commissioner. Schrems is an Austrian national residing in Austria and a Facebook social media user since 2008. Some or all of his personal data is transferred from Facebook's Irish subsidiary to Facebook servers in the U.S. for processing. This personal-data transfer triggers several important E.U. privacy safeguards that were examined in the complaint.

Schrems' complaint surrounds the 2013 revelations made by Edward Snowden regarding U.S. law enforcement and intelligence activities involving personal data. In particular, the complaint asserts that U.S. law and practice does not ensure sufficient protection of his personal data transferred to Facebook servers, and the surveillance activities in the U.S. violate his fundamental rights. *Schrems*, at 28. The Irish authority rejected the complaint, in part, on the ground that the U.S.-E.U. "safe harbor" agreement ensures the U.S. provides adequate protection to personal data. *Id.* at 29, citing European Commission Decision 2000/520/EC (July 26, 2000).

Schrems challenged the Irish Commissioner's decision at the Irish High Court.

The High Court criticized the "significant over-reach" of U.S. intelligence activities and the lack of procedures for E.U. citizens to address indiscriminate surveillance. The High Court further found that the "mass and undifferentiated accessing of personal data is clearly contrary to the principle of proportionality and fundamental values protected by the Irish Constitution." *Id.* at 33. The case before the Irish High Court presented an issue of E.U. law insofar as Schrems' complaint raises the legality of the E.U.'s "safe harbor" decision. *Id.* at 35. Accordingly, the High Court stayed the proceeding and referred the question of whether it has authority to investigate a complaint raised by an E.U. citizen that a third country does not afford an adequate level of personal-data protection. *Id.* at 36.

The ECJ accepted the referral and ruled that the U.S.-E.U. "safe harbor" agreement contained in Decision 2000/520 is invalid and violates the fundamental rights provided to E.U. citizens under the Charter of Fundamental Rights of the European Union (E.U. Charter) and community law.

The ECJ first ruled that no provision of the "safe harbor" directive prevents the national supervisory authorities from independently examining whether the transfer of one person's data to a third country complies with E.U. law. *Id.* at 63-65. The ECJ then found that the European Commission's "safe harbor" decision fails to make an adequate determination regarding the level of protection of fundamental rights afforded by the U.S. *Id.* at 75. The Court specifically criticized the Commission's failure to address the fact that U.S. law allows national security, public interest and law enforcement rights to prevail over the "safe harbor" scheme without limitation when a conflict arises. *Id.* at 86. The ECJ added that U.S. legislation allowing public authorities broad access to electronic communications compromises the very essence of the fundamental right to respect for private life. *Id.* at 87.

The ECJ directed the Irish authority to examine the merits of Schrems' complaint, and decide whether Facebook's transfer of European subscribers' data to the U.S. should be suspended for lack of adequate protection. The decision caused immediate waves on both sides of the Atlantic. U.S.-E.U. negotiators are frantically working on a new safe-harbor data-sharing agreement. Some observers suggest that only comprehensive surveillance reform in the U.S. can address the deficiencies outlined by the ECJ.

—Edward T. Hayes
Chair, LSBA International Law Section
Leake & Andersson, L.L.P.
Ste. 1700, 1100 Poydras St.
New Orleans, LA 70163

Mineral Lessee's Obligations to Its Lessor

McCarthy v. Evolution Petroleum Corp., 14-2607 (La. 10/14/15), ____ So.3d ____, 2015 WL 5972515.

The Louisiana oil and gas industry watched this case with bated breath. *McCarthy* involves the interpretation of a mineral lessee's obligations to its lessor, pursuant to article 122 of the Louisiana Mineral Code. Article 122 specifically states that a mineral lessee *does not* owe a "fiduciary obligation" to his lessor. However, the Louisiana 2nd Circuit Court of Appeal concluded, in *McCarthy II* (discussed below), that lessees might owe an implied duty to disclose information to their lessor regarding the future development of minerals.

Plaintiffs are former mineral royalty owners. They claimed that Evolution Petroleum, the lessee, fraudulently induced the sale of plaintiffs' royalty interests by misrepresenting the future value of the minerals. According to plaintiffs, Evolution did not tell the royalty owners (who were elderly or unsophisticated in oil-and-gas matters) that it was in the process of negotiating a sale of the Delhi Unit to Denbury, another oil-and-gas company that would later perform tertiary recovery of about 30 to 40 million barrels of oil by injecting carbon dioxide into the underlying formations. Plaintiffs alleged in their petition that it was Evolution's plan, following the sale to Denbury, to retain certain royalty interests obtained from plaintiffs and profit therefrom on about 9 to 14 million barrels of oil. Evolution also did not tell any of the royalty owners about the proven reserves underlying the Delhi Unit. Because Evolution failed to disclose this information, plaintiffs argued that the sale should be rescinded.

Evolution filed a peremptory exception of no cause of action. The trial court granted that exception. Plaintiffs appealed to the 2nd Circuit, which reversed and remanded the case to the district court with instructions requiring plaintiffs to amend and restate their causes of action. *See, McCarthy v. Evolution Petroleum Corp.*, 47,907 (La. App. 2 Cir. 2/27/13), 111 So.3d 446, *writ denied*, 13-1022 (La. 6/28/13), 118 So.3d 1097 (*McCarthy I*).

Plaintiffs amended their petition, and Evolution again filed an exception of no cause of action. It was also granted. Plaintiffs appealed, again, to the 2nd Circuit. *See, McCarthy v. Evolution Petroleum Corp.*, 49,301 (La. App. 2 Cir. 10/15/14), 151 So.3d 148 (*McCarthy II*). Plaintiffs alleged that the exception should not have been granted because it was clear from the pleadings that Evolution purposefully omitted production valuation information *viz.* the Denbury deal in order to undervalue its offer(s) to purchase plaintiffs' royalty interests. The 2nd Circuit found that the failure to disclose such information could constitute fraud by silence given the mineral lessor/lessee relationship between the parties. The appellate court further found that because Evolution was planning a long-term development plan, as a reasonably prudent operator, Evolution was obligated to inform its lessors about those plans and not remain silent.

Evolution appealed *McCarthy II* to the Louisiana Supreme Court. Evolution argued that the 2nd Circuit's ruling was not supported by current law, nor was it supported by the express words of Louisiana Mineral Code article 122. Following full briefing by both sides and oral argument, the Louisiana Supreme Court agreed. On Oct. 14, 2015, the court reversed the 2nd Circuit's decision in *McCarthy II* and reinstated the ruling of the trial court.

The Supreme Court found that, under article 122, a lessee does not have an obligation to disclose information about future development to his lessor. That is not part of the panoply of obligations of a reasonably prudent operator under Louisiana law. Further, the clear and unambiguous language of article 122 states as much. Thus, in the absence of a contractual duty between the parties requiring the lessee to disclose such information, article 122 cannot impliedly create such a duty. As to the claim of fraud by affirmative misrepresentation, the court found that plaintiffs' petition fails to establish such a claim in the absence of a fiduciary duty owed by the lessee. The court, relying in part on legislative history and prior jurisprudence, found that Louisiana law historically sought to protect a mineral lessee's valuation of its future business prospects. Therefore, just because plaintiffs were not happy with the deal they struck with Evolution (after the fact), the court would not step in to unwind that deal.

Expedited Permit Processing Rules

The Louisiana Department of Natural Resources, Office of Conservation, has proposed rules relating to an Expedited Permit Processing Plan (LAC 43:XIX, Subpart 20, Sections 4701, 4703, 4705, 4707 and 4709, as authorized by Act 362 of the 2015 Legislative Session). Applicants/operators will be able to request that the Office of Conservation expedite the processing of permits, modifications, orders, licenses, registrations or variances. Whether such expedited consideration will be provided is at the discretion of the Commissioner of the Office of Conservation. There are certain eligibility requirements, and a fee will be associated with the application for expedited consideration, which will be determined by the Commissioner.

The proposed rules may be found at Louisiana Register, Vol. 41, No. 8, Aug. 20, 2015, pp. 1569-1572. A public hearing was held on Sept. 28, 2015, and comments were submitted by the public on Sept. 30, 2015.

—**Keith B. Hall**
Member, LSBA Mineral Law Section
Louisiana State University
Paul M. Hebert Law Center
1 E. Campus Drive
Baton Rouge, LA 70803
and
Colleen C. Jarrott
Member, LSBA Mineral Law Section
Slattery, Marino & Roberts, A.P.L.C.
Ste. 1800, 1100 Poydras St.
New Orleans, LA 70163

Panel Opinion, Informed Consent and Pleading Loss of Chance of Survival

Matranga v. Parish Anesthesia of Jefferson, L.L.C., 14-0448 (La. App. 5 Cir. 5/14/15), 170 So.3d 1077, *writ denied*, 15-1168 (La. 9/18/15), ____ So.3d ____.

Plaintiffs appealed the admissibility of the panel opinion and a jury verdict in favor of medical-malpractice defendants, wherein the jury was given an unredacted copy of the underlying panel opinion. Plaintiffs asserted that the opinion should have been redacted to exclude the panel's findings of fact, which unduly confused and prejudiced the jury. Pursuant to La. R.S. 40:1299.47(G), whenever a medical-review panel is confronted with a material issue of fact that bears on liability, the panel is required to "simply acknowledge the material issue and defer to the factfinder's consideration." Plaintiffs contended that where a medical-review panel oversteps that limitation, those factual findings should be redacted from its opinion before it may be admitted as evidence in a subsequent civil action. The 5th Circuit agreed, holding that the trial court committed a prejudicial error of law by admitting the unredacted opinion into evidence.

Although plaintiffs' original claim was based on a lack of informed consent, the parties later stipulated that informed consent would not be an issue at trial. In the panel opinion, the panelists concluded that "the medical records indicate that a consent form was signed by the patient, and risks for anesthesia were discussed with the patient." Plaintiffs argued that this finding was not probative to any triable, material fact of the case. They further argued that allowing the jury to review the panel's opinion on informed consent was "inherently confusing and prejudicial to the jury," as it was improperly suggestive that the patient was willing to risk injury and death to undergo preoperative anesthesia.

The 5th Circuit agreed that there was no triable question regarding the patient's informed consent, and thus the issue was irrelevant and should have been excluded. However, the court declined to consider "whether irrelevant evidence of informed consent in a medical malpractice is *per se* prejudicial." The court noted that although other jurisdictions "regularly" address whether informed-consent evidence might prejudice a jury when informed consent is not at issue at the trial, "Louisiana appellate courts have not substantively addressed this issue." The court likewise declined to opine on whether the admission of informed-consent evidence is *per se* prejudicial where informed consent is not an issue at trial. It noted, however, that "the danger of jury confusion was especially acute because of the factual issues which predominated at trial" and found that this error, in conjunction with the trial court's failure to instruct the jury on loss of chance of survival, mandated reversal.

Defendants also argued that the trial court erred in excluding from its jury instructions an explanation of Louisiana law on the loss of chance of survival. Defendants contended that because the petition did not explicitly assert a loss-of-chance-of-survival claim, plaintiffs could not recover under that theory, citing *Smith v. State, Department of Health & Hospitals*, 95-0038 (La. 6/25/96), 676 So.2d 543, 547. Defendants asserted that *Smith* held that "loss of chance of survival is not recoverable as an element of damage in either a wrongful death or survival action." *Matranga*, 170 So.3d at 1094. Thus, defendants argued, a loss-of-chance-of survival claim could not be "read into" those causes of action.

The 5th Circuit rejected defendants' argument, including their interpretation of *Smith*, stating:

> *Smith* does not stand for the proposition that plaintiffs in a wrongful death or survival action are prohibited from supporting their theory of recovery with regard to causation using the loss of chance of survival doctrine. Instead, *Smith* revolves around the method of calculating damages in a case where a plaintiff claims loss of chance of survival.

The court then observed that "it is well established that Louisiana is a fact pleading state" and that plaintiffs can recover any relief to which they are entitled under the pleadings and evidence. Though plaintiffs did not specifically plead loss of chance of survival, the claim was properly asserted because plaintiffs claimed the patient died as a result of defendants' malpractice. The 5th Circuit thus held that the trial court erred in omitting the jury instruction on loss of chance of survival. But, as with the 5th Circuit's finding on the admission of informed consent evidence, this holding was likewise issued with limitations:

> As discussed above with regard to evidence of [the patient's] informed consent, we decline to opine as to whether the trial court's refusal to instruct the jury on lack of chance of survival, in isolation, constitutes reversible error. However, in this case, in which evidence of [the patient's] advanced age and declining health was a persistent theme throughout trial, we find that the trial court's failure to instruct the jury on loss of chance of survival probably contributed to the jury's verdict. This prejudicial error, together with the admission of the portion of the Medical Review Panel on informed consent, contributed to the verdict to the extent that the jury was unable to dispense justice, mandating reversal of the jury's verdict.

The jury's verdict was reversed and the case was remanded for a new trial.

Summary Judgment and La. R.S. 9:2794

LeBoeuf v. Hospital Serv. Dist. No. 1, 14-1730 (La. App. 1 Cir. 9/21/15), 2015 WL 5547469.

Ms. LeBoeuf passed away following a complicated, and contested, course of medical care. Her children filed a request for a medical-review panel regarding the propriety of her treatment and the cause of her death. The panel issued a unanimous opinion favorable to the defendants and her children then filed suit. The defendants moved for summary judgment, based on the plaintiffs' lack of any expert medical opinion to substantiate their claims. Defendants supported their own position with the unanimous panel

opinion and asserted that if plaintiffs did not submit expert medical testimony contradicting it, the claim must be dismissed. During oral argument in the trial court, "plaintiffs' counsel admitted they had no expert nor did they have any intention of obtaining one." Plaintiffs conceded that they could not prove defendants caused Ms. LeBoeuf's death; nevertheless, they claimed that they could maintain a loss-of-chance-of-survival claim, which they asserted need not be supported by expert testimony.

The trial court granted defendants' summary judgment.

Plaintiffs appealed, relying primarily on La. R.S. 9:2794(B), which provides that "(a) party . . . shall have the right to subpoena any physician . . . for a deposition or testimony at trial, or both, to establish the degree of knowledge or skill possessed, or degree of care ordinarily exercised" as described in La. R.S. 9:2794(A). Plaintiffs asserted that the use of the word "shall" in this statutory subsection is mandatory, thus concluding that this provision grants the parties in any medical-malpractice proceeding "the absolute right to proceed to trial and once there, the right to subpoena a physician to satisfy their burden of proof." How, then, they argued, could summary proceedings be used to deprive them of an *absolute* right?

The 1st Circuit rejected this argument on multiple procedural grounds, first noting that La. C.C.P. art. 966(A)(2) expressly provides that the summary judgment mechanism is permitted in "every action, except those disallowed by Article 969." C.C.P. art. 969 explicitly states that summary judgment is impermissible only regarding certain matters ancillary to divorce proceedings. Second, the court rejected plaintiffs' interpretation of La. R.S. 9:2794(B), finding that it constituted an improper interpretation of the intent of the totality of that statute, especially when considered *in pari materia* with article 966. Accordingly, the court found La. R.S. 9:2794 "does not grant a party in a medical malpractice case the absolute right to satisfy his burden of proof at trial, thereby prohibiting disposition by summary judgment."

—Robert J. David
Gainsburgh, Benjamin, David, Meunier & Warshauer, L.L.C.
Ste. 2800, 1100 Poydras St.
New Orleans, LA 70163-2800

Constitutional Challenge to HCR No. 8 of 2015 Regular Session

On Aug. 13, 2015, the Louisiana Department of Revenue (LDR) issued Statement of Acquiescence No. 15-001 to announce that the LDR will acquiesce in a final, non-appealable judgment rendered by a court of competent jurisdiction in the matter of *Louisiana Chemical Ass'n v. State*, 19th Judicial District Court, Docket No. 640501, Section 24, regarding the constitutionality of House Concurrent Resolution No. 8 (HCR 8) of the 2015 Regular Session of the Legislature. The Louisiana Chemical Association (LCA) sued the State, alleging that the passage of HCR 8 was unconstitutional by asserting that the legislation passed was not in conformity with constitutional procedural requirements. Although the LDR disagrees that the passage of the legislation at issue was unconstitutional, the LDR's Statement of Acquiescence was issued in the event that there is a final, non-appealable judgment holding that HCR 8 is unconstitutional.

HCR 8 of the 2015 Regular Session of the Legislature suspended the exemptions from the tax levied pursuant to R.S. 47:331 for sales of steam, water, electric power or energy, and natural gas, including but not limited to the exemptions found in R.S. 47:305(D)(1)(b), (c), (d) and (g), and any other exemptions provided in those portions of Chapter 2 of Subtitle II of Title 47 of the Louisiana Revised Statutes of 1950, which provide for exemptions for business utilities from state sales tax. The effective date of the suspension of these exemptions was July 1, 2015.

The business-utilities exemptions suspended by HCR 8 are as follows:

I. Utilities listed under La R.S. 47:305(D)(1)(b),(c), (d) and (g) as follows:

(b) Steam.

(c) Water (not including mineral water or carbonated water or any water put in bottles, jugs or containers, all of which are not exempted).

(d) Electric power or electric energy and any material or energy sources used to fuel the generation of electric power for resale or used by an industrial manufacturing plant for self-consumption or cogeneration.

(g) Natural gas.

II. Utilities in La. R.S. 47:305(D)(1)(h), which are all energy sources when used for boiler fuel, except refinery gas.

III. Utilities in La. R.S. 47:305.51, which are those utilities used by steelworks and blast furnaces.

Code of Professionalism

► My word is my bond. I will never intentionally mislead the court or other counsel. I will not knowingly make statements of fact or law that are untrue.
► I will clearly identify for other counsel changes I have made in documents submitted to me.
► I will conduct myself with dignity, civility, courtesy and a sense of fair play.
► I will not abuse or misuse the law, its procedures or the participants in the judicial process.
► I will consult with other counsel whenever scheduling procedures are required and will be cooperative in scheduling discovery, hearings, the testimony of witnesses and in the handling of the entire course of any legal matter.
► I will not file or oppose pleadings, conduct discovery or utilize any course of conduct for the purpose of undue delay or harassment of any other counsel or party. I will allow counsel fair opportunity to respond and will grant reasonable requests for extensions of time.
► I will not engage in personal attacks on other counsel or the court. I will support my profession's efforts to enforce its disciplinary rules and will not make unfounded allegations of unethical conduct about other counsel.
► I will not use the threat of sanctions as a litigation tactic.
► I will cooperate with counsel and the court to reduce the cost of litigation and will readily stipulate to all matters not in dispute.
► I will be punctual in my communication with clients, other counsel and the court, and in honoring scheduled appearances.

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

In response to the passage of HCR No. 8, the LCA filed a declaratory judgment action alleging various procedural constitutional arguments. The LCA has attempted to file suit on behalf of alleged industrial, chemical and petrochemical manufacturers with facilities and operations within Louisiana.

Pending the outcome of the lawsuit, taxpayers may pay the sales taxes as they become due and then file an administrative claim for refund under La. R.S. 47:1621, using the LDR Claim for Refund of Overpayment Form (R-20127). If a final, non-appealable judgment is issued by a court of competent jurisdiction declaring HCR No. 8 to be unconstitutional, then LDR will acquiesce that the sales tax payments made pursuant to HCR No. 8 are overpayments within the meaning of La. R.S. 47:1621 regardless of whether the taxpayer initiated its own lawsuit or paid under protest. All claims for refund must be filed in accordance with the prescriptive period imposed by La. R.S. 47:1623.

—Antonio Charles Ferachi
Member, LSBA Taxation Section
Director, Litigation Division
Louisiana Department of Revenue
617 North Third St.
Baton Rouge, LA 70821

Inventory Tax Credit Permitted on Equipment Rented Prior to Sale

In *Louisiana Machinery Co. v. Bridges*, 15-0010 (La. App. 1 Cir. 9/18/15) (not designated for publication), 2015 WL 5515156, Louisiana's 1st Circuit ruled on a taxpayer's ability to receive inventory-tax credits on equipment that the taxpayer rented while holding for sale. The taxpayer in this case held all of its equipment for sale at any time, but it rented some of its equipment in order to reduce the purchase price so that more customers could afford to purchase the equipment. The taxpayer included the equipment in inventory for purposes of *ad valorem* taxes and claimed a credit under La. R.S. 47:6006 for inventory taxes paid on its equipment. After an audit, the Department of Revenue disallowed a portion of the taxpayer's inventory-tax credit on the basis that rental property could not be held for sale and could not qualify as "inventory." The taxpayer filed a petition for refund with the Board of Tax Appeals, which agreed that the taxpayer was entitled to the full amount of the credit, and the Department appealed.

La. R.S. 47:6006 allows manufacturers, distributors and retailers to claim a credit against Louisiana income or corporation franchise tax for *ad valorem* taxes paid on inventory. On appeal, the Department argued that "inventory" for purposes of this tax credit applies only to items sold and not those leased or rented and that the taxpayer was not a "retailer" when it leased the equipment because the taxpayer was not engaged in a sale. While La. R.S. 47:6006 defines "retailer" as a person engaged in the sale of products to the ultimate consumer, it does not define "inventory." However, under the *ad valorem* tax statutes, all goods held in inventory as finished goods by retailers are considered "inventory," without any other restrictions. The court explained that courts cannot add restrictions to tax statutes that are not present, and nothing in the statute restricted the credit only to those goods that have only been sold without being rented first. The court also relied on precedent in *Southlake Development Co. v. Sec. of Dep't of Rev.*, 98-2158 (La. App. 1 Cir. 11/5/99), 745 So.2d 203, in allowing the use of the definition of "inventory" for purposes of *ad valorem* taxes since La. R.S. 47:6006 does not define the term. Upon finding (1) that the taxpayer was engaged in the sale of products to the ultimate consumer and, therefore, a "retailer," and (2) that the equipment at issue was held for sale in the ordinary course of its business, even if it had been previously rented, and, therefore, was "inventory," the court affirmed the decision of the Board of Tax Appeals.

—Christie B. Rao
Member, LSBA Taxation Section
McGlinchey Stafford, P.L.L.C.
601 Poydras St., 12th Flr.
New Orleans, LA 70130