GAO Will Not Easily Limit Award of Protest Costs in a Clearly Meritorious Protest

In re: Fluor Energy, Technology Services, L.L.C.—Costs, B-411466.3 (June 7, 2016).

In April 2015, Fluor Energy Technology Services, L.L.C., protested to the Government Accountability Office (GAO) the Department of Energy's (Agency) award of a contract for research and development services to Lockheed Martin Corp. In its protest, Fluor generally alleged three points of error: (1) the Agency double-counted various costs in its cost realism analysis of Fluor's proposal; (2) the Agency unreasonably evaluated Fluor's technical proposal; and (3) the Agency conducted an unreasonable best-value (trade off) decision.

After development of the administrative record, the parties conducted an "outcome prediction" alternative-dispute-resolution (ADR) conference with GAO. Outcome prediction is "where GAO will advise the parties of the likely outcome of the protest in order to allow the party likely to be unsuccessful to take appropriate action to resolve the protest without a written decision." *Bid Protests at GAO: A Descriptive Guide*, *www.gao.gov/decisions/bidpro/bid/timetable.html.*

As a result of the ADR conference, GAO advised the Agency that it would likely sustain Fluor's protest of the basis of Fluor's first allegation of error, but was unlikely to object to the Agency's technical evaluation, which was the basis for the second allegation of error.

In response, the Agency informed GAO it intended to take "corrective action;" subsequently, the GAO dismissed the protest as "academic" or moot. Corrective action is an agency's voluntary


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decision to address an issue in response to a protest; it can occur at any time during a protest and may involve a re-evaluation of proposals, a new award decision, an amendment to a solicitation or other actions. *See, Have You Already Filed a Bid Protest?*, *www.gao.gov/legal/have-you-already-filed-a-bid-protest/about*.

As a result of the dismissal, Fluor filed a request for reimbursement of its costs of filing and pursuing the subject protest. The Agency then filed challenges to Fluor's request, alleging that Fluor's recovery should be limited to reasonable protest costs relating to Fluor's first allegation of error only. In support of its challenges, the Agency argued that it believed the other allegations of error were discrete and severable from the first, and that the Agency would have prevailed on those allegations; therefore, Fluor would not be entitled to recovery on those allegations. The Agency gave no further explanation or argument.

Severability of Challenges

Generally, when a procuring agency takes corrective action due to a protest, GAO may recommend the agency reimburse the protester its reasonable protest costs. This happens when GAO determines that the agency unduly delayed taking corrective action in the face of a clearly meritorious protest. *See,* 4 C.F.R. § 21.8(e); *Pemco Aeroplex, Inc.—Recon. and Costs*, B-275587.5, B-275587.6, Oct. 14, 1997 07-2 CPD ¶ 102 at 5. A protest is "clearly meritorious" when a reasonable agency inquiry into the protest allegations would show facts disclosing the absence of a defensible legal position. *See, The Real Estate Ctr.—Costs*, B-274081.7, March 30, 1998, 98-1 CPD ¶ 105 at 3. Generally, when GAO through outcome prediction indicates it would sustain a protest, it is an indication that the protest is clearly meritorious. *See, Nat'l Opinion Research Ctr.—Costs*, B-289044.3, Marcj 6, 2002, 2002 CPD ¶ 55 at 3; *Inter-Con Sec. Sys., Inc; CASS, a Joint Venture—Costs*, B-284534.7, B-2845348, March 14, 2001, 2001 CPD ¶ 54 at 3.

In the case at hand, GAO found Fluor's first allegation of error to be clearly meritorious. The Agency concurred; however, it argued that because the other allegations of error were discrete and severable, Fluor should not recover on those allegations. GAO did not find this argument persuasive and opined that the GAO "generally considers all issues concerning the evaluation of proposals to be intertwined — and thus not severable . . . ." *See, Coulson Aviation (USA) Inc.;10 Tanker Air Carrier, L.L.C.—Costs*, B-406920.6, B-406920.7, Aug. 22, 2013, 2013 CPD ¶ 197 at 5. As an exception, GAO noted that if the issues were "so clearly severable as to essentially constitute a separate protest," the GAO will limit the recommendation of protest costs. *See, e.g., BAE Tech. Servs., Inc.,—Costs*, B-296699.3, Aug. 11, 2006, 2006 CPD ¶ 122 at 3; *Interface Flooring Sys., Inc.,—Claim for Attorney's Fees*, B-225431.5, July 29, 1987, 87-2 CPD ¶ 106 at 2-3.

In the end, the GAO found that the

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Agency did not meet its evidentiary burden on its challenge. Specifically, the GAO found that "the agency has presented no argument or evidence to support its contention that Fluor's other challenges should be severed from its clearly meritorious challenges to the agency's cost realism analysis." Consequently, the GAO refused to deviate from the general rule that all protest issues are intertwined and thus recommended Fluor's protest costs be reimbursed.

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Mediation Helps Family of Murder Victim Heal

"Punishment is not for revenge, but to lessen crime and reform the criminal." This quote, famously attributed to 19th century prison reformer Elizabeth Fry, communicates what many Americans would like the justice system to accomplish. Ideally, the system would teach criminals "the errors of their ways" and how to harmoniously participate in society. Unfortunately, many Americans agree that today's criminal justice system falls short of this goal. The Orleans Parish District Attorney's Office, however, may have found the secret to moving closer to this goal — mediation.

In March 2015, Cornell Augustine, 38, was tending bar at the Spice Bar and Grill. Around 1 a.m., he found himself in a fight with a customer, Ken Daley. That confrontation resulted in Augustine firing seven shots at Gregory Journee, consequently hitting him in the chest, back and arm. Journee died in the street that night. *See,* "Mediation effort produced guilty plea in 2015 7th Ward killing," NOLA.com, *www.nola.com/crime/index.ssf/2016/09/mediation_effort_produces_guil.html*.

The District Attorney's Office had an open-and-shut manslaughter case on its hands as Augustine surrendered peacefully to police less than 30 minutes after the incident. However, Journee's family wanted more than to simply throw Augustine behind bars. Like many families who have lost loved ones as a result of crime, they wanted Augustine to take responsibility for his actions and understand the pain he had caused their family. Moreover, Augustine was ready to accept the consequences of his actions. According to prosecutor Laura Rodrigue, this made Augustine's case a perfect candidate for mediation.

In the past, the Orleans Parish District Attorney has found mediation to be successful in minor cases of theft or property damage, but never before had mediation been attempted in a homicide case. The District Attorney emphasized that for mediation to be successful, it needed cases with the precise combination of a sufficiently repentant defendant and a victim's family willing to consider forgiveness over vengeance. Augustine's remorse and the family's readiness for closure made this case unique.

The mediation consisted of gathering the parties in a room and discussing grievances. Augustine was forced to listen attentively and respond to the condemnations of a family that had lost a loved one due to his negligence. Augustine then had the opportunity to explain his actions, to apologize for the event and, most importantly, to accept responsibility. Both the prosecutor and defense attorneys commented that they had never witnessed anything like this before. At the end of the mediation, Augustine agreed to enter a guilty plea to the manslaughter charge and to serve 30 years in prison, a step down from the potential life sentence that he could have received at trial.

In a society with vast mistrust of the criminal justice system, mediating cases as well suited as Augustine's could provide people with closure they otherwise would not get. Had these parties gone to trial as opposed to mediation, they would have waited even longer for a resolution, past the trial and any subsequent appeals. Furthermore, the victim's family would have had to sit in a trial and listen to the defense counsel argue the many ways in which the defendant did not deserve to be found guilty or receive a life sentence. Most importantly, Augustine may never have had the chance to apologize to the family of the victim, an act that granted closure to both himself and the victim's family. Additionally, with a determination of charges and sentencing happening at the mediation, all parties eliminated the uncertainty of trial and were able to discuss whether a certain charge or a certain sentence may have been more or less appropriate. Adding this element of control to the situation can cause the defendant to better understand his sentence and why it has been set, and provides the family of the victim the opportunity to take part in the decision making process, which in itself can aid in healing.

The National Institute of Justice and the American Bar Association have supported what they call Victim-Offender Mediation for some time now, suggesting that the process (1) supports the

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healing process of victims by providing a safe and controlled setting for them to meet and speak with the offender on a strictly voluntary basis, (2) allows the offenders to learn about the impact of the crime on the victim and to take direct responsibility for their behavior, and (3) provides an opportunity for the victim and offender to develop a mutually acceptable plan that addresses the harm caused by the crime. *Victim-Offender Mediation*, National Institute of Justice, *www.nij.gov/topics/courts/restorative-justice/promising-practices/pages/victim-offender-mediation.aspx.*

These mediations are strongly encouraged particularly in the case of juvenile offenders. The National Institute of Justice also reports that a multi-state study of victim-offender-mediation programs involving juveniles found that victims who met with their offender in the presence of a trained mediator were more likely to be satisfied with the justice system than similar victims who went through the normal court process. The same study reported that victims were significantly less fearful of being re-victimized, and fewer offenders who participated in mediation recidivated; furthermore, participating offenders' subsequent crimes, if they occurred, tended to be less serious.

While mediation is certainly not appropriate for every homicide case, the Orleans Parish District Attorney's Office should continue to look for cases such as these that provide more closure for the parties, allow defendants to take responsibility for their actions, and give parties an opportunity to move on after a final resolution of a matter.

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Bankruptcy Law

Standing to Appeal a Bankruptcy Court Order

Mandel v. Mastrogiovanni Schorsch & Mersky (In re Mandel), 641 F. App'x 400 (5 Cir. 2016).

The issue was whether the Chapter 7 debtor had standing to appeal a bankruptcy court order allowing claims against his estate by the appellees.

Prior to the bankruptcy filing, the debtor and a second principal shareholder of a company called White Nile Software, Inc. were involved in extensive litigation over the company. The state court appointed a receiver to represent the interests of the company in the litigation. The receiver hired a law firm

to represent her, and the parties agreed to split the costs of the receiver and her law firm. In the meantime, the debtor filed for Chapter 11 bankruptcy protection, and the receiver and law firm filed claims against the debtor's estate for their compensation. The bankruptcy court entered a Claim Allowance Order (an order allowing the claim), and the debtor appealed to the district court.

In the meantime, the bankruptcy court appointed a Chapter 11 trustee who decided not to pursue the appeal initiated by the debtor. The debtor's case was then converted to a Chapter 7 bankruptcy.

During the case, the receiver and law firm filed a complaint objecting to the dischargeability of their claims and to the debtor's discharge. The bankruptcy court continued the trial on that complaint and, therefore, never ruled on the dischargeability of the claims that were the subject of the appeal brought by the debtor.

On appeal, the district court found that the debtor lacked standing to pursue the appeal and dismissed the case as moot; the debtor appealed to the 5th Circuit.

While the 5th Circuit recognized that a debtor-out-of-possession rarely has sufficient interest to appeal a bankruptcy court order because it is the trustee's obligation to represent the estate, it held otherwise here in light of the dischargeability complaint.

First, the 5th Circuit found a successful appeal of the Claim Allowance Order would have a dispositive impact on the determination of the discharge complaint because if the district court ruled in favor of the debtor on the appeal, there would be no claims to find nondischargeable. The 5th Circuit recognized that "[c]ourts have generally held that '[a] Chapter 7 debtor qualifies as a 'person aggrieved'. . . if he can demonstrate that defeat of the order on appeal . . . would affect his bankruptcy discharge.'"

Second, the 5th Circuit found that the "Claim Allowance Order function[ed] as an adjudication of Appellees' claims against [the debtor]." The court reasoned:

> Absent the stay in the bankruptcy proceedings, the Appellees could march straight into court with the Claim Allowance Order in hand and pursue their claim directly against him individually. Courts have held that challenges to nondischargeable debt are not moot precisely because of the possibility of future proceedings directly against the debtor. (Footnote omitted.)

Therefore, the court found the debtor was a "person aggrieved," meeting the requirements to maintain standing for his appeal.

False Oaths on Assets and Interests

Comu v. King Louie Mining Enters., L.L.C. (In re Comu), No. 15-10804 (5 Cir. 6/9/16), 2016 WL 3209220.

In 2009, the debtor filed for Chapter 7 bankruptcy as the result of a default judgment against him in a civil action for fraud initiated by the appellees. The debtor attended a creditor's meeting where he testified that his debts were true and accurate. He subsequently had his debts, including the default judgment, discharged by the bankruptcy court. The appellees filed an adversary proceeding to revoke the discharge, and the bankruptcy trustee intervened, claiming the debtor intentionally failed to disclose significant assets. The bankruptcy court ruled in favor of the appellees and trustee, finding the debtor made numerous false oaths with intent to defraud and withheld numerous assets and valuable interests. The bankruptcy court also found that there was "ample evidence" that the appellees were not aware of the false oaths and hidden assets until after the discharge.

The debtor appealed the revocation to the district court, which affirmed. On appeal to the 5th Circuit, the debtor did not challenge the finding that he failed to disclose assets; instead, he challenged the conclusion that the creditors did not know about the fraud prior to the discharge. The 5th Circuit found that the district court had plenty of evidence to support its findings, including the testimony of both the appellees and the trustee that they had not learned of the debtor's financial situation or the scope of his fraud until after discovery conducted in 2013. Without contradictory evidence and because the debtor had no other persuasive argument to overturn the revocation, the 5th Court determined that there was no error and affirmed.

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Enforcing Creditor Rights After Dissolution by Affidavit

Krebs, Lasalle, Lemieux Consultants, Inc. v. G.E.C., Inc., 16-24 (La. App. 5 Cir. 7/27/16), 197 So.3d 829.

In 2011, Krebs, Lasalle, Lemieux Consultants, Inc. (KLL) executed an Asset Purchase Agreement whereby the corporation transferred certain assets and liabilities to the defendant, G.E.C., Inc. In connection with the purchase agreement, G.E.C. executed a promissory note in favor of KLL. In December 2012, prior to the payment of all sums owed by G.E.C. under the note, KLL was voluntarily dissolved by affidavit pursuant to former La. R.S. 12:142.1.

In November 2013, almost a full year after the dissolution of KLL, the corporation's former shareholders filed a petition to enforce the promissory note. The shareholders alleged that G.E.C. was in default and that, as the former shareholders of KLL, they were entitled to enforce the note as holders in due course. G.E.C. responded to the suit with an exception of no right of action, which the trial court sustained subject to the plaintiffs' right to amend to add KLL as a party. Rather than amend, the shareholders filed a separate action on behalf of the defunct corporation, again seeking to enforce the promissory note against G.E.C. The cases were consolidated and ultimately came before the Louisiana 5th Circuit after the trial court concluded that KLL had no right of action and dismissed the corporation's claims with prejudice.

The Louisiana Business Corporations Act (LBCA) became effective on Jan. 1, 2015, more than two-years *after* KLL was dissolved by affidavit. On appeal, KLL argued that the trial court erred in concluding that the corporation lacked the right to enforce the note because the LBCA, specifically La. R.S. 12:1-1405, allows a dissolved corporation to continue its corporate existence to wind up and liquidate its affairs, which includes the "collecting [of] its assets." The 5th Circuit rejected KLL's contention that the new law afforded the dissolved corporation a right of action against G.E.C., finding that La. R.S. 12:1-1405 "changed the fundamental rights of the parties concerning the dissolution of corporations. Therefore, the . . . statute qualifies as a substantive enactment and is applied prospectively" only, not retroactively, to corporations that dissolved prior to its enactment. *Id.* at 832. Thus, the issue of whether KLL had a right to enforce the note after dissolution would need to be resolved under the law in effect at the time KLL was dissolved. La. R.S. 12:142.1.

For guidance on KLL's right to maintain the suit after dissolution, the court turned to *Gendusa v. City of New Orleans*, 93-1527 (La. App. 4 Cir. 2/25/94), 635 So.2d 1158, *writ denied,* 94-1508 (La. 9/23/94), 642 So.2d 1296. In *Gendusa,* the Louisiana 4th Circuit addressed the right of a corporation's former shareholders to collect the debts owed to the corporation after it had been dissolved by affidavit. "Where a corporation has such outstanding claims or obligations, the appropriate method of dissolution is through a voluntary liquidation, with appointment of a liquidator and the orderly collection of claims, payment of debts and transfer of assets." *Id.* at 1162. Based on this reasoning, the *Gendusa* court held that, while public policy dictated the survival of claims against a corporation following its dissolution by affidavit, there was no reciprocal mandate that shareholders, in possession of relevant information concerning their corporation's inchoate claims, be protected against the loss of those claims upon the voluntary dissolution of the corporation by affidavit. Accordingly, shareholders seeking to collect a debt owed to a corporation dissolved by affidavit pursuant to La. R.S. 12:142.1 lacked the right to pursue the action.

Following the analysis of the *Gendusa* court, the 5th Circuit found that at the time of its dissolution, KLL was aware of the corporation's inchoate claims against G.E.C., and despite this knowledge, chose to voluntarily dissolve itself by affidavit rather than utilize a liquidator, who would have been vested with the authority to preserve the corporation's inchoate claims against G.E.C. The court concluded that following KLL's dissolution by affidavit, the corporation forfeited the right to enforce its claims against G.E.C. Thus, it affirmed the trial court's ruling sustaining the exception of no right of action and dismissing KLL's claims with prejudice.

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Reversal of Fortune: U.S. 5th Circuit Overturns State's MRGO Victory

Just over a year ago, in a suit by the State of Louisiana against the U.S. Army Corps of Engineers, Eastern District of Louisiana Judge Lance Africk ruled that, after Hurricane Katrina, Congress clearly and unambiguously directed the Corps to close and restore the Mississippi River Gulf Outlet (MRGO) at full federal expense. *Louisiana v. U.S. Army Corps of Engineers,* 126 F.Supp.3d 697 (E.D. La. 2015). In August 2016, on appeal to the U.S. 5th Circuit, a three-judge panel partially reversed and vacated Judge Africk's decision. *Louisiana v. U.S. Army Corps of Engineers*, 834 F.2d 574 (5 Cir. 2016). In a ruling authored by Judge Edith Jones, the 5th Circuit held that the State was timely in filing its lawsuit regarding the closure of MRGO, but that Congress was ambiguous in its post-Katrina enactments with regard to the MRGO closure. The 5th Circuit also held that the State's lawsuit regarding the ecosystem restoration of the MRGO was premature. Essentially, the 5th Circuit's decision and its dicta therein suggest that the approximately $3 billion cost of restoring the damage to Louisiana's coastal ecosystem wrought by that failed navigation project must be borne by both Louisiana and the United States.

Part of the appeal related to the timelines of the State's original suit in 2014 and the other part to the State's substantive allegations that the Corps improperly followed Congress' directive for the closure of MRGO. The thrust of the timeliness portion of the case focused on what was the triggering event in the MRGO saga that began the tolling of the six-year statute of limitations for actions under the Administrative

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Procedure Act (APA). For this inquiry, the court looked to the time at which the State incurred legal consequences as a result of the Corps' action. The court found that the event did not occur when the Corps made any decisions regarding the closure and ecosystem restoration of MRGO. Instead, the court reasoned that an APA final agency action occurred only when the State signed an agreement with the Corps that obligated the State to participate in the closure of the MRGO. For this reason, the six-year statute of limitations had not run as to the closure of the MRGO when the State filed suit in 2014, as the document in question — a memorandum of understanding — was signed in 2008. This portion of the decision tracked the State's arguments precisely. The State had argued that none of its claims were prescribed because all of the events on which this suit was based flowed from the signing of that document in 2008.

At this point, the court deviated from the State's arguments and bifurcated the issues of timeliness for the closure of the MRGO channel — which was based on the signing of the 2008 document — and any activities related to the restoration of the MRGO ecosystem. With regard to the latter, the court found that the State's challenge was premature, as no correlative document had been signed related to ecosystem restoration. For this reason, the court vacated as premature Judge Africk's ruling that Congress was clear when it directed the Corps to restore the MRGO ecosystem at full federal expense. In effect, the court held that Louisiana had to obligate itself to incurring substantial financial responsibilities for the restoration of the MRGO ecosystem in order to challenge the correctness of that obligation.

The most puzzling component of the court's analysis followed the prematurity finding. Rather than merely dismissing the suit as premature, and after stating that it had no jurisdiction to reach the merits of the State's claims regarding the correctness of the Corps' or the State's interpretation of the applicable law relating to the funding of the MRGO ecosystem restoration, the court did just that — it opined on the merits of the case. While the merits portion of the case applies directly only to the closure of the MRGO, the 5th Circuit stated that Judge Africk's interpretation that Congress had clearly and unambiguously directed that the restoration of the ecosystem damaged by the MRGO was to be undertaken at full federal expense was incorrect. The 5th Circuit, applying the analysis in *Chevron, U.S.A., Inc. v. Natural Res. Def. Council*, 104 S.Ct. 2778 (1984), stated that Congress had been vague when it instructed the Corps to undertake the MRGO work and, because of this vagueness, the Corps was entitled to *Chevron* deference in its interpretation of the law. Thus, the court felt that the Corps' interpretation that the State of Louisiana should share in the costs of restoring the damaged MRGO ecosystem was correct. Nonetheless, as the merits decision simply affirmed the Corps' decision to fund the construction of the closure of the MRGO at full federal expense, with the State responsible for the costs of land-rights acquisition and future operation and maintenance, it is unclear whether the ecosystem restoration should be funded in similar fashion or whether the Corps has discretion under *Chevron* to provide for the construction of the ecosystem restoration work to be at a 65 percent/35 percent cost share.

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Custody

Duhe v. O'Donnell, 15-0683 (La. App. 5 Cir. 5/26/16), 193 So.3d 455.

An extrajudicial agreement signed by the parties providing that the child would attend private school for PK-4 only and would then attend public school after PK-4 was unenforceable because child custody arrangements are "not forever binding and may be modified and/or vacated by the court. Child custody and child support decrees are never final and are always subject to modification." Further, a later judgment superseded this agreement, since the agreement did not incorporate any prior agreement between the parties.

Bailey v. Bailey, 16-0212 (La. App. 1 Cir. 6/3/16), 196 So.3d 96, *writ denied*, 16-1426 (La. 8/2/16), 196 So.3d 605.

Because the trial court failed completely to address the relocation factors before granting the mother's request to relocate, the trial court's decision was legally erroneous, entitling the court of appeal to review the matter *de novo* (had the court considered the relocation factors, then the court of appeal would have reviewed for abuse of discretion). The court found that her proposed move to Mississippi, 5.5 hours away, would dramatically affect the father's ability to remain involved in the children's lives. Moreover, she failed to introduce any evidence supporting what advantages may have existed for her and the children by moving. It also remanded the matter for the court to name a domiciliary parent, despite its ordering that the parties have "equal authority in making all major decisions." (As the court of appeal ordered joint legal custody with equal decision-making authority, its remand to name a domiciliary parent would make sense only if limited to the issue of physical custody, as equal legal custody was established.)

Albitar v. Albitar, 16-0167 (La. App. 5 Cir. 6/30/16), 197 So.3d 332.

Mr. Albitar enrolled counsel for the limited purpose of filing exceptions to Ms. Albitar's petition for divorce and incidental relief. After those exceptions of personal and subject matter jurisdiction and venue were denied — as the court found that Ms. Albitar had established residency in St. Charles Parish and that Mr. Albitar, a resident of Saudi Arabia, had sufficient significant connections with Louisiana for Louisiana to exercise personal jurisdiction over him — the trial court then proceeded to hear the merits. The court first clarified procedural errors regarding the appeals and appeal delays related to the fact that there were two judgments, one on the exceptions on which counsel had made a limited appearance, and another on the

merits, in which no counsel appeared. The court then affirmed that Ms. Albitar was domiciled in St. Charles Parish for purposes of the divorce suit; that the court had personal jurisdiction over Mr. Albitar for purposes of the incidental relief; and that St. Charles Parish was the parish of the child's home state for custody proceedings under the UCCJEA.

Child Support

Wiles v. Wiles, 15-1302 (La. App. 4 Cir. 5/18/16), 193 So.3d 397.

After Ms. Wiles filed a petition for divorce under article 102, the parties reached a consent judgment for Mr. Wiles to pay child support. Because no rule to show cause to obtain the divorce was filed within two years of service of the original petition, the request for divorce was abandoned. However, the consent judgment for child support continued and was not "abandoned" when the divorce action itself was abandoned. The court distinguished child support actions from alimony pendente lite/interim-spousal-support arrangements, which are dependent on the divorce proceeding, and which would terminate on abandonment of the divorce action.

Brossett v. Brossett, 49,883 (La. App. 2 Cir. 6/24/15), 195 So.3d 471.

The trial court did not err in imputing a $20,000 monthly income to Mr. Brossett after reviewing his income tax records, bank statements, deposits, spending and lifestyle, all of which were very complicated and confusing and contradicted the parties' claimed lifestyle. The court found that it was almost impossible to determine what his actual income was but that sufficient reason existed to support the imputation of that sum.

Property

Carmichael v. Brooks, 16-0093 (La. App. 3 Cir. 6/22/16), 194 So.3d 832.

In this community property partition, Ms. Carmichael was awarded $22,000 as a credit representing one-half of Social Security benefits to be received by Mr. Brooks, which would otherwise not be classified as community property as a result of the federal peremption regarding Social Security benefits. The court found that La. R.S. 9:2801.1 was constitutional and not in contravention of federal law. Although there was expert testimony concerning the calculation, the court noted that the expert made numerous assumptions, but it accepted the expert's valuation nevertheless. Unfortunately, the court's explication of the methodology for determining the claim is not entirely clear.

Succession of O'Krepki v. O'Krepki, 16-0050 (La. App. 5 Cir. 5/26/16), 193 So.3d 574, *writ denied*, 16-1202 (La. 10/10/16), ____ So.3d ____, 2016 WL 6212958.

In a pre-nuptial contract establishing a separate property regime, it is not necessary to reserve fruits of one's separate property as separate property, as the separate property regime excludes all provisions of the community property regime. Thus, article 2339, which provides that fruits of separate property are community property, did not apply.

Acurio v. Acurio, 50,709 (La. App. 2 Cir. 6/22/16), 197 So.3d 253.

The trial court ruled that the parties' pre-nuptial marriage contract establishing a separation of property regime could not be introduced at the time of the property partition because it was not an authentic act and, although an act under private signature, was not duly acknowledged prior to the marriage. The court relied on *Ritz v. Ritz*, 95-0653 (La. App. 5 Cir. 12/13/95), 666 So.2d 1181, *writ denied*, 96-0131 (La. 3/8/96), 669 So.2d 395; and *Deshotels v. Deshotels*, 13-1406 (La. App. 3 Cir. 11/5/14), 150 So.3d 541, which held that the acknowledgment had to be accomplished prior to the marriage. The 2nd Circuit reversed, noting the above two cases, but distinguishing them by holding that there was no statutory time requirement for the acknowledgment to occur prior to the marriage and that "the purpose of the acknowledgment is simply for the parties to recognize the signatures as their own."

Haley v. Haley, 50,602 (La. App. 2 Cir. 5/31/16), 197 So.3d 202.

Immature "pre-merchantable" trees on Ms. Haley's separate property were not fruits, since the property was not a tree farm. The trees thus were a capital asset of the land, not a crop being managed for continuous production and exploitation for regular profit.

Final Spousal Support

Gordon v. Gordon, 16-0008 (La. App. 4 Cir. 6/8/16), 195 So.3d 687.

Mr. Gordon's monthly payments to Ms. Gordon under an interim order requiring him to pay support pending the trial on her rule for final spousal support were not acknowledgments so as to interrupt the abandonment period regarding her rule. His payments were conditional payments based on the consent judgment and should not have lulled her into believing that he would not contest her rule for final support, since the interim judgment was not intended to be indefinite.

Procedure / Special Master

Casey v. Casey, 15-1269 (La. App. 4 Cir. 6/29/16), 196 So.3d 748.

The notice requirement under the Special Master statute does not allow for notice to be provided by attaching the Special Master's report to a rule for contempt. However, it is satisfied when the Special Master files the report and sends notice to the parties that he has done so. The court did not address the statute's requirement that the notice be "served upon all parties," essentially finding that the Special Master's mailing the report to the parties with the statement that it had been filed and that his letter constituted notice was sufficient.

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Insurance, Tort, Workers' Compensation & Admiralty Law

Attorney Fee Awards: Exceptions to the "American Rule"

Moench v. Marquette Transp. Co. Gulf-Inland, L.L.C., ____ Fd.3d ____ (5 Cir. 2016), 2016 WL 5485122.

Moench owned the SES EKWATA, a 116-foot-long, fiberglass-hulled vessel that was moored at a fleeting facility on the Atchafalaya River, which was swollen to historic levels, creating extreme cross-currents. The M/V SALVATION, a steel-hulled tug owned and operated by Marquette, was proceeding on the river with two barges in tow. Having reached a holding point, the SALVATION's captain left the controls to get a cup of coffee, while the deckhand on watch was below deck. When the captain returned, the river's currents had taken control of the SALVATION. Failing to regain control, the captain decided to allide with the EKWATA to avoid damaging his tow, causing severe damage to the EKWATA.

Moench sued, invoking the admiralty and maritime jurisdiction of the district court and asserting general maritime law negligence and unseaworthiness claims against Marquette, which contested liability up to and through trial. Moench's expert testified that the EKWATA's pre-casualty value was $850,000 to $1.5 million. Marquette's three experts set the value at $50,000 to $120,000. All agreed that the vessel was a total loss, *i.e.*, not economically repairable. After a bench trial, the district court found Marquette at fault, awarding Moench $322,890 in damages and $295,436.09 in attorney fees. Marquette appealed, asserting, *inter alia,* error in imposing attorneys' fees as a sanction for its handling of the case.

> The general rule in federal court, the so-called "American Rule," is that litigants are responsible for their own fees. Federal courts, however, possess "inherent power" to assess fees as sanctions when the losing party has "acted in bad faith, vexatiously, wantonly, or for oppressive reasons." . . . Pursuing "an aggressive litigation posture" is not an abuse of the judicial process, "[b]ut advocacy simply for the sake of burdening an opponent with unnecessary expenditures of time and effort clearly [is]." (Citations and footnotes omitted.)

Marquette persistently contested liability, though it was obviously liable, based on the circumstances of the case and the actions of its captain. Two of its experts could not properly name the vessel at issue. One expert opined on value without including comparables, without considering the vessel's equipment, without an accurate description of the vessel, and without reliable underlying information, and a second expert "not only failed to correct the *glaringly* incorrect information in [that] report, but

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incorporated it into his own." The district court's decision was affirmed. See the full report for the 12 *Johnson* factors to be used in calculating attorney fees.

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Prescription Interrupted by Timely Filing Suit in Federal Court

Arnouville v. Crowe, 16-0046 (La. App. 1 Cir. 9/16/16).

Three plaintiffs filed suit on April 11, 2011, in the U.S. District Court for the Eastern District of Louisiana against a defendant driver and her insurer following an automobile collision in Tangipahoa Parish on April 13, 2010. The plaintiffs based their federal court lawsuit on diversity jurisdiction pursuant to 28 U.S.C. § 1332, alleging that they were domiciled in Louisiana while the defendant driver and her insurance company were domiciled in Arkansas and Missouri, respectively.

Defendants filed a motion to dismiss based on lack of subject matter jurisdiction, alleging that the parties were not diverse, as the defendant, Ms. Crowe, was a Louisiana resident at the time the federal court complaint was filed. The court denied defendants' motion, indicating that the motion was premature but permitting defendants leave to file a motion for summary judgment following adequate time for discovery.

On June 20, 2012, defendants refiled their Motion to Dismiss for lack of subject matter jurisdiction. While the motion was pending, on June 28, 2012, the plaintiffs filed suit in the 21st Judicial District Court based on the April 13, 2010, motor vehicle collision. On July 11, 2012, the federal court entered an order dismissing plaintiffs' claims. The order memorializes that plaintiffs and defendants consented to a voluntary dismissal of the federal court action, without prejudice to the state court proceedings.

In state court, defendants filed a peremptory exception of prescription, arguing that plaintiffs' claims had prescribed since the state court lawsuit was filed over two years after the date of the collision. After a hearing on defendants' exception, the trial court denied the exception, holding that the filing of the lawsuit in federal court interrupted prescription, as the case had been pending a court of competent jurisdiction and had not been dismissed. Defendants later reurged their exception, which was again denied. Defendants sought supervisory review to the 1st Circuit, which denied writs until final judgment was rendered. *Arnouville v. Crowe*, 14-1678 (La. App. 1 Cir. 11/26/14).

The plaintiffs proved victorious following a trial on the merits on Dec. 4, 2014. During trial, defendants proffered evidence relating to Ms. Crowe's domicile in 2011. After trial, defendants filed a motion for new trial, which was denied. On appeal, defendants alleged that the trial court erred in denying their Exception of Prescription and in denying their Motion for New Trial.

On *de novo* review, the 1st Circuit affirmed the trial court's multiple rulings, holding that plaintiffs had interrupted prescription by timely filing suit in a court of competent jurisdiction and that the trial court did not abuse its discretion in denying defendants' Motion for New Trial. The 1st Circuit noted that the federal court had maintained its subject matter jurisdiction over the lawsuit by denying defendants' earlier Motion to Dismiss.

Notably, the matter was still pending in federal court at the time suit was filed in state court. Citing La. Civ.C. arts. 3462 and 3463, the 1st Circuit wrote, "Until there was a decision by the federal court that it lacked jurisdiction, the federal suit served to interrupt prescription, an interruption that continued as long as the federal suit was pending." Thus, as the dismissal had not yet been ordered by the federal court at the time the lawsuit was filed in state court based on the same incident, the case remained pending in federal court, which was sufficient to interrupt prescription under Louisiana law.

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U.S. Court of Appeals for the Federal Circuit

Viet I-Mei Frozen Foods Co. v. United States, 2016 U.S. App. LEXIS 18312 (Fed. Cir. Oct. 11, 2016).

In a classic case of "be careful what you wish for" in the U.S. international-trade remedy-review process, the U.S. Court of Appeals for the Federal Circuit recently affirmed a Court of International Trade (CIT) decision sustaining the U.S. Department of Commerce's (Commerce) rejection of Viet I-Mei's request to withdraw itself from voluntary respondent review in the 4th Administrative Review of the Antidumping Order on shrimp.

The 4th Administrative Review of the Antidumping Order on shrimp began in 2009. Because of the large number of shrimp exporters, Commerce followed its normal practice of selecting the largest two companies for mandatory examination. Viet I-Mei was not selected but exercised its right to request that Commerce review it individually as a voluntary respondent. The rationale behind the request is that it would receive an individual dumping rate instead of the "all others" separate rate that non-mandatory respondents receive. Commerce declined Viet I-Mei's request and eventually assigned it a 3.93 percent "all others" dumping margin for the 4th Administrative Review period. Vietnam is a non-market economy, and Commerce applied a 25.76 percent dumping margin to all companies that did not demonstrate freedom from government control.

Viet I-Mei filed suit in the CIT challenging Commerce's refusal to examine it as a voluntary respondent. After several years of litigation, the CIT agreed with Viet I-Mei and ordered Commerce to reconduct its 4th Administrative Review by examining Viet I-Mei as a voluntary respondent. Two months after Commerce

published Federal Register notice that it would re-conduct the review as required by the CIT, Viet I-Mei had a change of heart and sought to withdraw its request for individual examination, citing the costs and administrative burdens associated with an individual review.

Commerce did not respond to Viet I-Mei's request to withdraw. Indeed, Commerce warned the company that if it did not respond to supplemental questionnaires, it would be subject to an adverse-facts-available dumping finding. Viet I-Mei did not respond to the questionnaires and maintained its request to withdraw. Commerce conducted the review based on the information available and applied the 25.76 percent rate to Viet I-Mei as an adverse-facts-available finding.

Viet I-Mei appealed Commerce's reconducted 4th Administrative Review results, arguing that Commerce abused its discretion in disallowing its request to withdraw from the voluntary review. The CIT affirmed Commerce's new results, noting that Commerce is under no statutory or other regulatory obligation to terminate a voluntary-respondent examination once requested. The Federal Circuit affirmed the CIT ruling that, if anything, "Commerce's regulations point away from granting an individual respondent's request to cancel an individual examination it had requested." 2016 U.S. App. LEXIS 18312, * 22.

The end result of over six years of protracted litigation is that Viet I-Mei's antidumping rate for all shrimp exported to the United States during the 4th Administrative Review period jumps from 3.92 percent to 25.76 percent.

Permanent Court of Arbitration

Republic of Philippines v. People's Republic of China, PCA Case No. 2013-9 (July 12, 2016).

An arbitration panel convened at the Permanent Court of Arbitration (PCA) issued a final award concerning the rights of marine entitlements in the South China Sea. The Philippines initiated proceedings against China in 2013 at the PCA under the United Nations Convention on the Law of the Sea (UNCLOS). Both the Philippines and China properly ratified UNCLOS.

The dispute surrounds Chinese actions in the South China Sea, a 1.4-million-square-mile area that includes several hundred small reefs, islands and other mostly uninhabitable areas. China asserts jurisdiction and sovereignty over this entire area within its so-called "Nine-Dash Line." The Philippines claims that Chinese activity in the area interferes with its exclusive-economic-maritime zone under UNCLOS. China did not appear or participate in the arbitration. However, it did issue various diplomatic notes and a "position paper" wherein it asserted historical rights in

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the area and denounced the arbitration panel's jurisdiction over issues of territorial sovereignty.

The panel first used UNCLOS Article 288 to determine the propriety of its own jurisdiction. The panel affirmed its jurisdiction on the ground that the claims made by the Philippines involve the interpretation or application of UNCLOS. On the merits, the arbitral panel found that China's claim to historical rights in the area directly conflicts with UNCLOS' allocation of rights and maritime zones. To the extent China did have historical rights in the area, its rights were extinguished by UNCLOS as incompatible with the maritime zones set forth therein. Moreover, the panel determined that the waters of the South China Sea are part of the high seas available to navigation and fishing by vessels from any nation. Any historical navigation and fishing by China in the area represents the exercise of high seas freedoms, and not any particular historical right.

China refuses to accept the decision and continues to perform navigational and enforcement patrols in the area.

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Exclusion of Evidence; Environmental Damage

Mary v. QEP Energy Co., ____ F.Supp.3d ____ (W.D. La. Aug. 25, 2016), 2016 WL 4487804.

Plaintiffs claim that defendant QEP Energy Co. is a bad-faith trespasser of plaintiffs' property because QEP, among other things, improperly constructed a 16-inch pipeline (instead of a 12-inch pipeline) across plaintiffs' property outside the bounds of the servitude. Plaintiffs sued QEP based on La. Civ.C. art. 486 (disgorgement of profits). An element of disgorgement of profits is bad-faith possession ("[A] possessor in bad faith is bound to restore to the owner the fruits he has gathered, or their value."). Plaintiffs attempted to introduce evidence of environmental damage to show QEP's bad faith. QEP filed a motion *in limine* to exclude such evidence on the basis that it was irrelevant. The district court agreed and found that any evidence of environmental damage was not relevant to plaintiffs' disgorgement-of-profits claim. The court found that plaintiffs' claim boiled down to the fact that plaintiffs believed that QEP wrongfully possessed portions of the property at issue by constructing a short segment of pipeline outside of the designated boundaries of the servitudes granted to QEP. The court found that the "presence or absence of environmental damage around the well site or production facilities [had] no bearing upon the determination of whether QEP was in good faith or bad faith when it built the pipeline." Thus, the court granted QEP's motion to exclude.

New FAA Regulations: Rules for Drones 55 Pounds or Less

Drones are being used more and more by the oil and gas industry. On Aug. 29, 2016, the U.S. Federal Aviation Administration (FAA) issued new regulations relating to small unmanned aircraft ("sUAS," more commonly known as "drones"). The new regulations are codified at Title 14 of the Code of Federal Regulations as Part 107. Some of the new regulations include requirements that:

► all drone operations must be performed during daylight hours or civil twilight hours (30 minutes before sunrise or 30 minutes after sunset) with appropriate anti-collision lighting;

► while being operated, the drone must be within the visual line of sight of the remote pilot (*i.e.*, person operating the drone). This means that the unmanned aircraft must remain close enough to the remote pilot that the pilot can see and avoid other aircraft without the aid of any device, except glasses or contacts;

► a drone may not operate (1) over any persons not directly participating in the operation, (2) under a covered structure, or (3) inside a covered stationary vehicle;

► a drone must yield the right-of-way to other aircraft. The maximum altitude for a drone is 400 feet above ground level or, if higher, within 400 feet of a structure. The maximum groundspeed is limited to 100 mph (87 knots);

► a drone cannot be operated from a moving car (unless in a sparsely populated area) or a moving aircraft;

► drones cannot be operated carelessly or recklessly;

► a drone cannot carry hazardous materials;

► a pre-flight inspection must be conducted by the remote pilot to ensure that the drone will not violate any state or federal laws;

► a person may not operate a drone if he or she knows or has reason to know of any physical or mental condition that would interfere with its safe operation; and

► external load operations are allowed only if the object being carried by the drone is securely attached and does not adversely affect the flight characteristics or controllability of the drone.

The new regulations establish certain operator-certification requirements. In order to operate a drone, a person must either hold a remote-pilot-airman certificate with a drone rating or be under the direct supervision of a person who holds a remote-pilot certificate. To qualify for a remote-pilot certificate, a person must demonstrate aeronautical knowledge by either: (a) passing an initial aeronautical knowledge test at an FAA-approved testing facility, or (b) hold a Part 61 pilot certificate, complete a flight review within the prior 24 months, and complete a small-drone online training course. The cost to receive the certification is about $150. A candidate must be vetted by the Transportation Security Administration (TSA) in the interest of national security. All drone pilot candidates must be at least 16 years of age or older.

Once a remote-pilot certificate has been obtained, the pilot must make available to the FAA, upon request, the drone

itself for inspection and testing, and any associated documents/records required to be kept by law. A pilot must report to the FAA, within 10 days, any operation that results in serious bodily injury, loss of consciousness or property damage of at least $500. A pilot must also ensure that the drone complies with the existing registration requirements specified in 14 CFR § 91.203(a)(2). An FAA airworthiness certificate is not required to operate a drone, but the remote pilot must conduct a preflight check of the drone to ensure that it is safe for operation.

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Does Suspension of Prescription Apply Only to Those Who Participated in Panel Proceedings?

Truxillo v. Thomas, 16-0168 (4 Cir. 8/31/16), ____ So.3d ____, 2016 WL 4557666.

Following the death of her mother, her daughter filed a medical review panel request. The panel rendered its opinion over two years later, following which the daughter filed a wrongful death lawsuit. Six days later, a supplemental and amending petition was filed, adding as a plaintiff the son of the decedent.

A defendant filed a peremptory exception of prescription based on the son's not having been included as a claimant in the panel proceedings. The trial court granted the exception and dismissed his claims, following which he appealed.

The issue presented by the son's appeal was *res nova*: Does the suspension of prescription under the MMA, specifically La. R.S. 40:1231.8 A(2)(a), apply only to those who participated in the panel proceedings?

The court noted that prescription is suspended during the pendency of a medical review panel, for 90 days following notification to the plaintiff of the panel's opinion, plus the additional time unused between the date of the alleged malpractice and the filing of the panel request. In the instant case, the original petition was timely filed, as was the amending petition; thus the only question is whether the claim of the previously unidentified child was also suspended during the pendency of the panel proceedings.

Though the MMA states that a request for review "shall contain, at a minimum, . . . [t]he names of the claimants," there is nothing in the MMA that bars one who was not named as "a claimant" in the panel request from filing a lawsuit after the conclusion of the panel proceedings. Furthermore, La. R.S. 40:1231.1 A(4) shows that irrespective of how many people sustained damages as a result of the injuries or death to any one patient, "All . . . are considered a single claimant." This language "clearly contemplates" that a single panel request protects the rights of all potential claimants, and La. R.S. 40:1231.1 E(1) does not specify that only those who participated in panel proceedings may file suit.

The court's ultimate conclusion was that a medical review panel request "need not be invoked by each and every person who may ultimately have a claim in medical malpractice," and the suspension of prescription triggered by a request for review "accrues to the benefit of all persons who have claims arising out of the alleged medical malpractice, including

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those who did not participate in requesting the medical review panel."

The appellate court found that the Louisiana Supreme Court's opinion in *Warren v. La. Med. Mut. Ins. Co.*, 07-0492 (La. 12/2/08), 21 So.3d 186, *on reh'g*, (6/26/09), supported its opinion. In *Warren*, two survivors of an alleged malpractice victim proceeded through panel and thereafter timely filed a lawsuit. Two years thereafter (and more than three years after the alleged malpractice), an amended petition was filed seeking to add another wrongful death claimant. The trial, appellate and Supreme Courts all allowed the claim under the relation-back doctrine of La. Civ.C. art. 1153. However, the Louisiana Supreme Court on rehearing reversed itself, finding that the relation-back doctrine was inapplicable in medical malpractice cases because those claims "are governed exclusively by the specific provisions of the Act regarding prescription and suspension of prescription," *Warren*, 07-0492, 475 So.2d at 208, thus concluding that the amending petition had prescribed. The significance of *Warren* to the instant case was "that the *Warren* Court did not find, as it readily could have, that the second daughter's claim was prescribed because she had not been included in the medical review panel request. Had the Court so found, it would not have needed to consider whether the amended petition related back."

In the case at bar, the court of appeal reversed the granting of the defendant's peremptory exception of prescription and remanded the case to the trial court.

Plaintiff Alleges Intentional Tort to Avoid MMA

White v. Glen Retirement Sys., 50,508 (2 Cir. 4/27/16), 195 So.3d 485.

A resident of the Glen Retirement System (Glen) sustained injuries when she fell out of her bed. Her legal representative (White) sued for damages, alleging that Glen committed an intentional tort and breached fiduciary duties and contract obligations that were not covered by the MMA. She also filed a medical review panel request for claims she contended did fall under the MMA's umbrella.

Glen filed an exception of prematurity, asking that the lawsuit be dismissed because its allegations clearly established a medical malpractice claim. White countered that the claims included in the lawsuit, though basically the same as those included in the panel request, also alleged that the resident was a known fall risk, who also suffered from dementia and behavioral disturbances that required 24-hour care. Thus, White alleged, it was obvious to Glen that her risk level was such that she required every precautionary measure, including round-the-clock close monitoring. Glen's failure to provide this care was "intentional and custodial in nature," which removed it from the ambit of the MMA, *e.g.*, placing her bed in the highest position from the floor and intentionally returning her to the same bed after the fall without notifying either her physician, a registered nurse or her family, thus acting "with the conscious goal of avoiding detection" of its negligence.

Glen conceded that the bed was in the highest position at the time of the resident's fall and that it should have been in a lower position with complete guard protection. However, the evidence showed that although the family was not notified, Glen staff did notify the resident's physician, and the bed had been lowered to its lowest position before they left her room. The defendant's evidence led the court to determine that the claim of intentional tort was unsupported by evidence. The court further found that "the primary claim concerning the failure to position the bed relates . . . to the negligent rendering of care, and the assessment of the patient's condition and [was] not merely a custodial act claim." Thus, the conduct fell within the ambit of the MMA, and the exception was granted.

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Court Denies Qualification to Sales Tax Exemptions/ Exclusions Related to Medicare

Crowe v. Bio-Medical Application of La., L.L.C., 14-0917 (La. App. 1 Cir. 6/3/16), ____ So.3d ____, 2016 WL 3126425.

Bio-Medical Application of Louisiana, L.L.C., operates a dialysis facility in Washington Parish. Bio-Medical submitted a claim for refund of Washington Parish sales taxes for various purchases of prescription drugs administered to patients suffering from End Stage Renal Disease (ESRD). Bio-Medical alleged that such purchases were exempt or excluded from local taxation to the extent that it administered the drugs to Medicare patients treated at its facility. Specifically, Bio-Medical asserted that La. R.S. 47:315.3 provides for a refund of taxes on sales "paid by or under the provisions of Medicare," that La. R.S. 47:301(10)(u) provides a broad exclusion from local taxes for sales of tangible personal property made "under the provisions of Medicare," and that La. R.S. 47:337.9(F) provides an exemption from local sales tax for prescription drugs purchased "through or pursuant to a Medicare Part B and D plan." On cross motions for summary judgment, the district court ruled that Bio-Medical's purchases did not qualify under the aforementioned exemptions or exclusions. Bio-Medical appealed the district court's ruling as it related to La. R.S. 47:301(10)(u) and 47:337.9(F).

Bio-Medical contended that La. R.S. 47:301(10)(u) is clear and unambiguous, arguing that any sale made under the provisions of Medicare that the taxpayer defines as "instructed or required by the Medicare statute or rules" is excluded from sales tax. Bio-Medical further contended that the legislative history prior to

the enactment of La. R.S. 47:301(10)(u) supports its position. Bio-Medical argued that Act 60 of the 2001 Regular Session, now codified in Section 301(10)(u), does not limit the provisions to transactions involving Medicare patients or require direct payment by Medicare as the Legislature removed the language "paid by" as contained in La. R.S. 47:315.3, effectively broadening the scope of the exclusion.

The court disagreed and held the language "sale . . . made under the provisions of Medicare" contained in La. R.S. 47:301(10)(u) was ambiguous. The court found the legislative history of the enactment of the provision showed the Legislature did not intend to broaden the applicability of the exclusion to include third-party transactions such as those at issue in this case. The court noted that Medicare is not a party to these transactions, which are structured such that these sales are not paid by Medicare; the particular drugs purchased, the price negotiated, the vendor used and the payment of sales tax thereon are not controlled or governed "under the provisions of Medicare"; and only a portion of the drugs purchased in these sales are ultimately administered to Medicare patients and thereafter potentially reimbursed as part of the delivery of dialysis services to a Medicare patient. Even reading the statute liberally in favor of the taxpayer, the court concluded that reading this provision to apply to third-party sales of prescription medication would require a strained interpretation.

The court also held that La. R.S. 47:337.9(F) is clear that it grants an exemption from local sales tax only as to prescription drugs purchased through or pursuant to "a Medicare Part B or D plan." The court found the clear language, which must be interpreted strictly against the taxpayer, supported the reading of the statute as not applying to bulk drug sales between a dialysis clinic and pharmaceutical vendor (sales in which the provisions of Medicare play no part in determining which drugs are purchased, which vendor is used, what price is paid or whether sales tax is charged) to supply the entire population of the clinic's ESRD dialysis patients, including Medicare and non-Medicare patients. Finding that the drugs at issue were purchased for administration to all patients and that the purchases were not made through any Medicare Part B or D plan and are not paid by Medicare, the court agreed with the district court that Bio-Medical was not entitled to the sales tax exemption pursuant to La. R.S. 47:337.9(F).

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