Gov. Edwards Mediates Dispute

In 2013, the State and Louisiana State University (LSU) asked BRF Hospital Holdings, formerly known as "Biomedical Research Foundation," to save their two north Louisiana hospitals from closure. In October 2013, the hospitals came under private management by BRF. The privatization of these two hospitals in Shreveport and Monroe, newly renamed University Health and University Health Conway, respectively, is part of a larger effort under LSU Health Care Services Division to cut costs across the 10 state-owned charity hospitals. After deep cuts in state funding were enacted in 2012, the Louisiana Legislature hoped this plan would save the state $100 million annually. Helen Adamopoulos, "Louisiana Panel Approves Privatization of LSU Hospitals," *www.beckershospitalreview.com/hospital-transactions-and-valuation/louisiana-panel-approves-privatization-of-lsu-hospitals.html* (*Becker's Hospital Review*, Sept. 26, 2013). This deal turned over patient care previously handled by LSU at its hospitals and clinics to outside managers. Yet, this privatization process has been anything but easy.

In July 2015, LSU alleged that BRF failed to live up to its contract responsibilities as a breach of public purpose and, therefore, should withdraw as the parent company of the University Health System. "LSU Cuts Ties with BRF as Operating Partner of University Health Hospitals," *www.ksla.com/story/30108684/lsu-cuts-ties-with-brf-as-operating-partner-of-university-health-hospitals* (KSLA 12 News, Sept. 24, 2015). BRF denied these claims and refused to budge. Supporters of BRF said that the State asked more from them than from the State's other partners; however, the Governor said that the hospital's relationship with LSU's Shreveport medical school presented different circumstances. BRF is the only private partner required to increase payments of

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$37 million to be paid to LSU without assurances of supplemental payments from the State. No other private partner was asked to give LSU millions of dollars for electronic-health-records software and licensing without compensation. Seth Dickerson, "BRF: State Offers Raw Deal to Run University Health," *www.citizen-times.com/story/news/2016/09/22/brf-state-offers-raw-deal-run-university-health/90856854/* (*Citizen Times,* Ashville, N.C., Sept. 23, 2016).

As a response to LSU's complaint, BRF asserted it would prefer that LSU withdraw its breach notice and allow third-party mediation to resolve any disputes. LSU had wanted to oust BRF since it was chosen as the hospital operator under former Gov. Bobby Jindal's privatization plan. LSU felt that BRF had failed as operator and did not have enough resources to run the hospitals. In September 2015, LSU announced it would begin cutting ties with BRF and formed a new non-profit to take over.

When BRF refused to withdraw, LSU sued for breach of contract, asking the court to remove the foundation. After a hearing in November 2015, Judge Hernandez in Baton Rouge ruled that LSU failed to negotiate the contract in good faith because it should work collaboratively with the defendant to remedy the alleged public-purpose breach. LSU's case was effectively dismissed because the university had filed its suit too early. "The [agreement] is replete with provisions that require the parties to exhaust all possible remedies to a breach in advance of termination," Judge Hernandez said. Greg Hilburn, "Judge Rules Against LSU in Biomed Case," *www.shreveporttimes.com/story/news/local/2015/11/19/judge-rules-lsu-biomed-case/76064922/* (*The Times,* Shreveport, La., Nov. 19, 2015). "These provisions obligate each party to collaborate towards curing any alleged or perceived breach, including a breach of the public interest as alleged in [LSU's] petition." John Kennedy, "LSU's Bid to Oust Hospital Operator Premature, Judge Rules," *www.law360.com/articles/729717/lsu-s-bid-to-oust-hospital-operator-premature-judge-rules* (Law360, Nov. 20, 2015).

Since taking office in January 2016, Gov. John Bel Edwards has been involved in this dispute at every milestone. When the parties could not reach an agreement regarding the operation of the two hospitals in Shreveport and Monroe, the State began the process of terminating its contract with BRF in September 2016. Edwards said, "When I set out to renegotiate these contracts, I did so in an effort to provide quality health care to our citizens while ensuring that the agreements were in the best interests of the taxpayers." During the 45 days it was supposed to take to terminate the contract, the negotiations continued. Greg Hilburn, "State to BRF: You're out . . . maybe," *www.azcentral.com/story/news/2016/09/22/state-brf-youre-out/90844882/* (*AZ Central*, Sept. 22, 2016).

The biggest dispute between the two concerned how much BRF would pay for physician services provided by medical students. Once the dispute escalated to the point that neither side expressed confidence in the other, Gov. Edwards stepped in to mediate the renegotiation of the contract. The parties were able to reach an agreement in October 2016, thanks to mediation efforts by Gov. Edwards. "Resolution for Conway," *www.thenewsstar.com/story/opinion/2016/10/11/resolution-conway/91917928/* (*The News Star*, Monroe, La., Oct. 12, 2016). Ultimately, BRF agreed to pay $37 million to LSU medical school in exchange for the state government's agreement to reimburse BRF the same amount. The parties also agreed to participate in arbitration to settle all remaining disputes over the amounts that LSU says BRF owes. Both parties were satisfied with the agreement. The utilization of the ADR techniques of mediation and arbitration in combination led to both sides obtaining what they needed to satisfy their respective interests.

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Homestead Exemption

Hennigan v. Smith (In re Smith), No. 16-20241 (5 Cir. 2016), 2016 WL 4394560.

Robert Smith, the debtor, moved from Australia to Texas to care for his aunt until her death. The aunt's will provided that the debtor should receive her property located in Texas where he and the aunt resided (the property) as well as 50 percent of her residual estate. A dispute arose between the debtor and the aunt's executor. After four years of litigation (the litigation), the parties reached a settlement pursuant to which the debtor received the property and forfeited the 50 percent share of the residual estate. One month after he was deeded the property, the debtor filed for Chapter 7 bankruptcy and claimed the homestead exemption on the property.

The debtor's attorneys in the litigation asserted a claim against the debtor based on their contingency fee contract and argued that the debtor should be prohibited from claiming the homestead exemption on the property because he intended on selling the property and returning to Australia. The bankruptcy court ruled that the debtor could claim the homestead exemption because he had lived on the property for eight years and claimed the property as his homestead. The district court affirmed.

On appeal to the 5th Circuit, the attorneys asserted that the debtor always intended to sell the property and move back to Australia, and that he remained on the property only due to the four-year litigation.

In Texas, the individual who seeks homestead protection has the burden of establishing the homestead of his property. In determining homestead status, the 5th Circuit looks to the facts as they exist on the date of the bankruptcy filing. The 5th Circuit found that while the debtor made clear he intended to sell the property and move back to Australia, there was no evidence that, when he declared bankruptcy, he lacked the desire to make the property his homestead. The court ruled that "[t]he fact that a party desires to sell the property and move does not defeat the exemption."

Civil Sanctions for Violating Bankruptcy Court Preliminary Injunction

Goldman v. Bankton Fin. Corp. (Matter of SkyPort Global Commc'ns, Inc.), No. 15-20243 (5 Cir. Oct. 12, 2016), 2016 WL 5939415.

SkyPort Global Communications (debtor) entered into a plan of reorganization that provided that the debtor would merge with its sole shareholder, SkyComm Technologies Corp. (SkyComm and, collectively with the debtor, SkyComm parties). The confirmation order enjoined derivative claims filed on either company's behalf, but not direct claims against third parties. Approximately six months after confirmation, a group of 49 investors, the Schermerhorn parties, filed suit seeking $32 million in damages for misdeeds alleg-

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edly committed by the SkyComm parties in their investment and management practices. The debtor and SkyComm removed the lawsuit to the bankruptcy court and sought an injunction while the bankruptcy court determined which claims were prohibited by the injunction in the confirmation order. The bankruptcy court granted a preliminary injunction enjoining the Schermerhorn parties from "pursuing any and all claims or causes of action, derivative or otherwise, against the defendants, and from contacting SkyPort's former or current vendors, employees, and customers without permission of SkyPort's counsel or the bankruptcy court."

After the injunction was entered, Samuel Goldman and Franklin Craig, the attorney and an investment advisor for several of the Schermerhorn parties, continued to contact third parties in violation of the bankruptcy court's injunction. Specifically, Goldman and Craig continuously contacted the debtor's former president, Dawn Cole, and used information from her without her permission.

The debtor discovered the communications and sought to hold Goldman and Cole in contempt. The bankruptcy court issued a 187-page opinion holding Goldman and Craig in contempt and awarded the SkyComm parties attorneys' fees and costs. Goldman and Craig appealed, arguing that (1) the bankruptcy court had no jurisdiction to enter the contempt order because it was criminal in nature; (2) the fees awarded were not reasonable and necessary; (3) the award was erroneous; and (4) according to their understanding of the preliminary injunction, they had not violated its terms.

In affirming the bankruptcy court's decision, the 5th Circuit held that the sanction was a civil sanction rather than a criminal sanction because the sanction restored the SkyComm parties to their position before having to incur attorney's fees and costs to enforce the preliminary injunction. The court held that because the sanction compensated the SkyComm parties for enforcing the injunction and was civil in nature, the bankruptcy court had jurisdiction to award the sanction. The court also held that the fees awarded were reasonable as they were used to compensate the SkyComm parties for expenses incurred in protecting the debtor and enforcing the injunction. Finally, the court rejected Goldman's and Craig's argument that they misunderstood the injunction, finding the injunction was clear and unambiguous, and, therefore, their conduct was not "inadvertent."

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Child Support

State, Dept. of Soc. Servs. v. Reed, 16-0171 (La. App. 5 Cir. 7/27/16), 197 So.3d 817.

The trial court did not err in denying Mr. Reed's motion to reduce child support, finding that he failed to show a material change of circumstances. The court-appointed forensic expert found that his income was "difficult to determine" due to his self-employment and complicated personal income, businesses and assets, as well as income shared with his present wife. Moreover, he was voluntarily underemployed, as he had similar jobs available to him on which he had previously acted as a consultant, but on which he had stopped accepting work. The court also found that he benefitted from expense-sharing with his present wife. The trial court did not err in not including a lump-sum injury settlement received by the mother as part of her support, except for the interest earned on those funds. The trial court did not err in apportioning the forensic expert's costs 75 percent to Mr. Reed and 25 percent to the mother, particularly given the difficulty regarding determining his income and his lack of forthrightness concerning it.

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State ex rel. K.J.W. Minor Child of A.R.W. v. D.J.P., 15-1409 (La. App. 1 Cir. 8/5/16), 199 So.3d 654.

After DCFS filed a petition against the father to establish paternity and child support on behalf of the child, the mother and father could not stipulate before the court's hearing officer that the support would be paid directly to the mother, bypassing DCFS. Moreover, the trial court could not close the DCFS proceeding, as DCFS's request for a medical-support order remained pending, as it was not addressed by the hearing officer or trial court. Notably, the trial court could not simply accept the preprinted form filled out by the hearing officer and make it a judgment, but was required to issue a judgment with decretal language, identifying the parties, and identifying the relief granted, "tailored to the particular circumstances" of the case.

State v. Jones, 16-0175 (La. App. 5 Cir. 8/24/16), 199 So.3d 1201.

The court of appeal remanded this matter to the hearing officer because the trial court's judgment was defective, lacking specific decretal language, and it was unclear whether appropriate procedural steps had been followed concerning the numerous hearings and matters pending.

Divorce

Roebuck v. Roebuck, 16-0221 (La. App. 4 Cir. 8/17/16), 198 So.3d 1210.

Mr. Roebuck's several arguments to nullify a default judgment of divorce against him were all rejected. There was no failure to attempt service upon him since he accepted the service. His filing a nullity action under La. Civ.C. art. 2004 on the grounds of fraud and ill practices in the existing divorce proceeding case number was an improper procedure, as he was required to file a separate petition in order to raise such claims; therefore, his nullity claims under that article were not properly before the court of appeal. The trial court had subject matter jurisdiction over the divorce as Ms. Jones was living in Louisiana and domiciled in the parish in which the petition was filed. The trial court was not required to continue the Louisiana divorce proceeding because a divorce proceeding was also pending in Mississippi. La. C.C.P. art. 532 is discretionary; additionally, the trial court was not made aware of a previously pending matter in Mississippi.

Community Property

Smith v. Smith, 15-1231 (La. App. 4 Cir. 9/14/16), 200 So.3d 1007.

Ms. Smith's loan acquired post-termination, but secured with a community-property asset, was her separate property obligation because it was obtained after the community-property regime terminated. His mismanagement claim that she did not rent part of a double home was rejected because he failed to contravene her testimony that the property actually generated only $10,000 in rent, for which he received reimbursement of $5,000. His claim of mismanagement that she allowed someone to drive the community-property vehicle who then got into a wreck and to-

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taled the car was rejected because he failed to show that she was negligent or acted imprudently.

Community Property: Enforcement

Caballero v. Caballero, 15-2039 (La. 5/3/16), 198 So.3d 1163.

After Ms. Caballero obtained a judgment for an equalizing payment from Mr. Caballero in their community-property partition, she attempted to seize his alleged membership interest in an LLC. The LLC filed an exception of lack of subject matter jurisdiction and a motion to quash a subpoena duces tecum. The Family Court overruled the exception of lack of subject matter jurisdiction; the appellate court granted writs and reversed, sustaining the exception; and the Supreme Court granted writs and reversed the 1st Circuit Court of Appeal. The Supreme Court found that the Family Court's jurisdiction was broad enough to encompass enforcing a community-property-partition judgment through garnishment of a third-party LLC under its jurisdictional parameters set forth in La. R.S. 13:1401. The Court discussed, distinguished and analogized to prior jurisprudence addressing similar arguments. Because the enforcement arose from a judgment arising from the parties' community-property regime and partition, the Family Court retained jurisdiction to enforce the judgment, including jurisdiction encompassing third parties. The Court stated: "To interpret La. R.S. 13:1401 otherwise would hamper judicial economy and increase expense and delay."

Domestic Abuse

Shaw v. Young, 15-0974 (La. App. 4 Cir. 8/17/16), 199 So.3d 1180.

On a matter of first impression, the 4th Circuit found that cyberstalking met the criteria for domestic abuse to obtain a protective order under the Louisiana Domestic Abuse Assistance Law, La. R.S. 46:2131, *et seq*. Both stalking and cyberstalking are "offenses against the person" in the Louisiana Criminal Code, and, because they constitute harassment under the stalking statute, La. R.S. 14:40.2, they also qualify as domestic abuse under La. R.S. 46:2136. Facebook postings by Mr. Young regarding Ms. Shaw were part of the abuse. The trial court did not err in denying Mr. Young interim and final spousal support because, even though he had little income, she had no ability to pay support. The trial court did not err in not addressing the fault issue since, in any event, Ms. Shaw was unable to pay any support to Mr. Young.

Spousal Support

Brown v. Brown, 50,833 (La. App. 2 Cir. 8/10/16), 200 So.3d 887.

The trial court did not err in accepting Ms. Brown's testimony regarding assets, income and need for interim spousal support and in rejecting his claims regarding his ability to pay, primarily due to his failure to produce documents and his "evasive" and "contradictory" testimony regarding his previously very profitable business that he "shut down." Ms. Brown's actions concerning financial transactions of which Mr. Brown was not aware until the petition for divorce was filed did not constitute fault because they did not contribute to the breakup of the marriage. The trial court did not err in awarding her final spousal support after considering her need and his ability to pay based on his past earnings as he filed no income-and-expense list and failed to provide a current tax return or financial records. The trial court did not err in ordering him to pay $12,500 to her for past-due support and $14,000 to her attorney for fees incurred on contempt rules due to his failure to pay support from the time of the first order through the appeal.

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No Piercing Corporate Veil to Member of Construction Company

Provosty v. ARC Constr., L.L.C., 15-1219 (La. App. 4 Cir. 11/2/16), ____ So.3d ____, 2016 WL 6473022.

Plaintiffs contracted with ARC Construction, L.L.C., to build a new home in Orleans Parish. After encountering numerous setbacks and disputes with ARC Construction, plaintiffs filed suit against ARC Construction and all of its members for negligence, bad faith breach of contract, misrepresentation, misappropriation of funds, fraud and violations of the Louisiana Unfair Trade Practices Act. Plaintiffs later amended their suit to ask the court to hold all of the defendants solidarily liable under the "piercing the corporate veil/alter ego" doctrine on the basis of fraud and undercapitalization. Defendant Icehouse Capital Management, L.L.C., was a member of ARC Construction, and the managing member of Icehouse was Marc Winthrop.

After the trial resulted in a jury verdict in favor of plaintiffs, the district court rendered judgment finding the members of ARC Construction, including Icehouse, solidarily liable to plaintiffs. Subsequently, Icehouse filed a motion for new trial as to its solidary liability, asserting that an erroneously worded jury interrogatory caused juror confusion. The trial court granted Icehouse's motion for new trial, and a bench trial was held as to the individual liability of Icehouse, through Winthrop, for the fraud perpetrated against plaintiffs. The trial court rendered judgment in favor of Icehouse, dismissing it from all liability, and plaintiffs appealed both the granting of the motion for new trial and the dismissal of Icehouse from liability.

The 4th Circuit affirmed the granting of the motion for new trial, holding that the jury interrogatory was erroneously worded such to imply that Icehouse (which itself was a member of ARC Construction) was also a member of a separate limited liability company that was also a member of ARC Construction. The 4th Circuit agreed with the trial court that there was clearly an error in identifying Icehouse as a member of the other limited liability company and further held that the trial court neither abused its discretion nor committed a legal error in granting Icehouse a new trial.

In challenging the dismissal of Icehouse as solidarily liable along with the other defendant members of ARC Construction, plaintiffs averred that the trial court committed legal error in its analysis and application of *Bossier Mill Work & Supply Co. v. D. & R. Const. Co.*, 245 So.2d 414 (La. App. 2 Cir. 1971), which the trial court found

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inapplicable to pierce the corporate veil of ARC Construction as to Winthrop. Plaintiffs argued that pursuant to *Bossier*, a member of a corporation can be held individually liable for fraud through the theory of piercing the corporate veil, when he or she had equal authority and participation in the management of the financial affairs of the corporation, knew of the fraud or deceit being practiced on a third party and profited from the fraud. The district court had rejected the application of *Bossier* to Winthrop, further holding that there was a lack of proof of fraud, so as to hold Winthrop personally liable under the fraud exception under La. R.S. 12:1320(D).

In affirming the dismissal of Icehouse as solidarily liable, the 4th Circuit agreed with the trial court that facts in *Bossier* were distinguishable from those in the present matter. While there was conflicting testimony as to whether Winthrop was involved in the day-to-day management of ARC Construction, the trial court resolved that he was not and that he was not physically present at ARC Construction to have been involved in the daily management of the corporation. Further, no evidence was presented to indicate that fraud perpetrated against plaintiffs by other members of ARC Construction was communicated to Winthrop, or that he directly acted to defraud the plaintiffs. Winthrop's inquiries into payments made by plaintiffs coupled with the financial updates he received on ARC Construction's financial status did not equate to fraud on his part or knowledge of fraudulent activity committed by any of the other ARC Construction members and/or employees. Lastly, Winthrop, via Icehouse, did not profit from plaintiffs being defrauded.

Unlicensed Contractor Entitled to *Quantum Meruit*

Crescent City Cabinets & Flooring, L.L.C. v. Grace Tama Dev. Co., 16-0359 (La. App. 4 Cir. 10/19/16), ____ So.3d ____, 2016 WL 6094372.

Grace Tama contracted with Crescent City for the purchase and installation of kitchen and bathroom cabinets and countertops throughout a 40-unit apartment complex owned by Grace Tama. After paying 40 percent of the contract value as a material deposit, Grace Tama made only partial payments toward the remaining balance under the contract, leaving a balance of approximately $42,000. Crescent City filed a lien against Grace Tama's property on which the work was performed and then subsequently filed suit to enforce its lien. Grace Tama answered and reconventioned, alleging that any money owed was offset by damages suffered because Crescent City was unlicensed, uninsured and unqualified, and further seeking costs incurred from correcting alleged problems and repairing damage to the property caused by Crescent City.

During the bench trial, the owner of Crescent City admitted that neither he nor Crescent City had a contractor's license. He further testified that the remaining balance due represented Crescent City's overhead and profit on the sale of the materials (approximately $20,000) and the actual cost of the labor ($22,800) without profit or overhead. Grace Tama's owner, in turn, testified that payment was withheld because Crescent City did not possess a contractor's license, did not obtain insurance as required under the contract, performed improper work and caused damages to the property that Grace Tama had to repair.

After the close of Crescent City's case, Grace Tama moved for an involuntary dismissal. On the following day, the trial court rendered judgment finding that Louisiana law required Crescent City to obtain a contractor's license in order to enter a commercial construction contract, and, therefore, the contract between Crescent City and Grace Tama was null and void. However, the trial court awarded Crescent City an amount sufficient to compensate Crescent City for the actual cost of the materials and labor pursuant to the *quantum meruit* doctrine.

In affirming the decision of the trial court, the 4th Circuit cited to the long line of jurisprudence that has allowed for contractors to recover the value of the actual cost of materials and labor, including general overhead, and a reasonable or fair profit, in the absence of a contract under the doctrine of *quantum meruit*. The 4th Circuit further noted that there is no special rule as to the type of evidence required to support a *quantum meruit* claim and refused to overturn the trial court's judgment as an abuse of discretion in awarding Crescent City the balance of the actual cost of the labor and materials in light of the evidence of the contract (even considered null and void), the invoices, and the testimony regarding the actual costs of the labor and materials.

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LHWCA and Collateral-Source Rule

dePerrodil v. Bozovic Marina, Inc., 842 F.3d 352 (5 Cir. 11/17/16).

Plaintiff Robert dePerrodil, a 70-year-old employee of Petroleum Engineers, Inc., filed suit against Bozovic Marine after sustaining injuries while aboard a vessel operated by Bozovic. While returning to port, the vessel encountered high seas. Captain Bozovic confronted a 10-foot wave by properly accelerating full throttle into it but improperly failing to decelerate after cresting. dePerrodil, who was situated in the wheelhouse, fell, sustaining injuries to his back. dePerrodil filed suit against Bozovic in the United States District Court for the Western District of Louisiana.

Pursuant to the LHWCA, dePerrodil's employer carried workers' compensation insurance for dePerrodil. The LHWCA carrier paid $57,385.50 for dePerrodil's medical expenses.

Following a bench trial, the trial court concluded Bozovic was negligent for failure to request that dePerrodil go to the passenger area of the vessel, failure to stay apprised of the weather conditions, and "erratic operation" of the vessel. At the conclusion of the trial, dePerrodil was allocated 10 percent liability and Bozovic Marine was allocated 90 percent. dePerrodil was awarded a total of $984,395.52, which included the full amount of billed medical expenses, $186,080.30, although the LHWCA carrier had paid only $57,385.50. In calculating future lost wages, the court used an above-average work-life expectancy of 75 years, as recommended by an expert vocational-rehabilitation counselor.

Bozovic appealed, contending that it did not breach its duty of reasonable care because the risks encountered were open and obvious to dePerrodil, a longshoreman with four decades of experience in the Gulf of Mexico. Bozovic contended that the captain did not have a duty to protect dePerrodil from the open-and-obvious risk of losing his balance in rough seas.

The 5th Circuit rejected this argument, explaining that the accident would have occurred regardless of whether dePerrodil knew the risks of rough seas. The court found that although dePerrodil was aware of the weather, the captain's operation of the vessel could not be considered an "open and obvious" risk.

The 5th Circuit next turned to Bozovic's argument that the trial court should not have awarded dePerrodil the full amount of his "billed" medical expenses, as opposed to the medical expenses actually paid by the LHWCA carrier. The court noted that there was no direct authority regarding the treatment of written-off LHWCA medical expenses in the maritime-tort context. After reviewing analogous state and maritime law authorities, the court concluded that the trial court erred in this aspect of the judgment. The court stated that "LHWCA medical-expense payments are collateral to a third-party tortfeasor only to the extent paid." Thus, it held that a plaintiff in a maritime tort action may not recover for medical expenses billed but not paid.

Finally, the court turned to Bozovic's argument that the trial court should have calculated future wage losses based on the Bureau of Labor Statistics (BLS) average work-life expectancy of 72, as opposed to age 75. In reviewing the evidence on this point, the 5th Circuit noted that dePerrodil presented a vocational-rehabilitation counselor who concluded that it was "very reasonable" that dePerrodil would work until age 75. This conclusion was based on dePerrodil's testimony that he and his wife had an

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agreement that he would work until age 75, his work history, his earnings records and his healthcare providers' recommendations for future treatment.

The 5th Circuit distinguished two prior decisions on this issue and found that the trial court did not err in using the 75-year work-life expectancy. The court explained that dePerrodil fully developed the evidentiary basis for such a departure from the BLS average.

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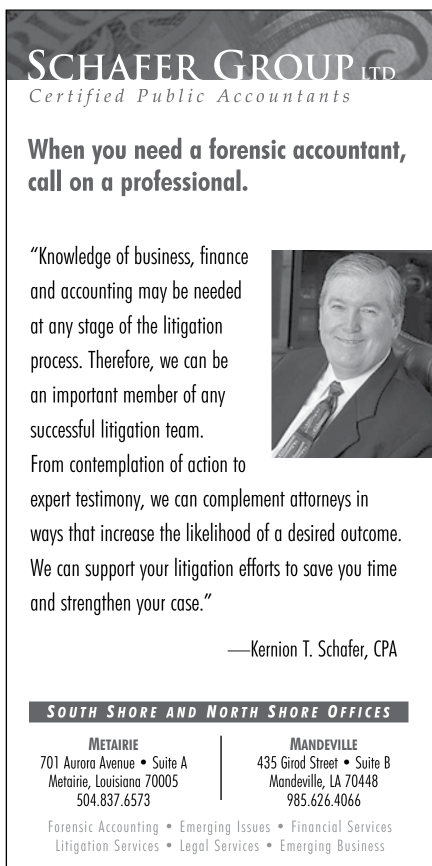

Presidential Authority over International Commerce

President Donald J. Trump was elected partially on a platform of implementing a new direction in U.S. trade policy. During the campaign, he suggested that his administration would unilaterally impose increased import tariffs on imported goods from countries engaging in unfair trade, in particular, China. Campaign rhetoric aside, the U.S. Constitutional system strikes a delicate balance between the legislative and executive branches in international trade matters. The Constitution delegates to Congress authority to regulate international commerce, including the ability to collect and levy taxes, tariffs and duties. The President lacks unilateral competence over international commerce and tariffs, yet the Oval Office is charged with negotiating international agreements and conducting foreign affairs. Over time, Congress has delegated some of its international commerce authority to the President. The most controversial of these delegations is the so-called "Fast Track" or "Trade Promotion Authority," whereby the President negotiates and executes Free Trade Agreements and submits them to Congress for an up-or-down vote without amendment or markup. Until this election cycle, very little attention was given to congressional delegations of trade authority to increase tariffs.

The following is a brief outline of three delegated tariff powers allowing the President to act unilaterally under certain conditions. Note that the mere presence of delegated authority does not validate action under such authority. Even assuming the congressional delegation is valid and the President's exercise of such authority comports with the delegating statute, the United States has "bound" its tariff rate obligations under various international trade agreements. Most notably, the United States has committed itself to Most Favored Nation tariff treatment under the multilateral agreements comprising the World Trade Organization (WTO). This obligation prevents the United States from imposing tariffs above its "bound" rates except in specific situations recognized by the WTO Agreements, such as in antidumping, countervailing duty and safeguard cases. Unilateral action increasing tariff obligations beyond the "bound" rates outside of these specific exceptions raises the immediate prospect of litigation under the WTO Dispute Settlement Understanding. Nonetheless, the President does have such statutory authority under U.S. law. Three examples follow.

► **Section 232 of Trade Expansion Act of 1962** (19 U.S.C. § 1 862 (b)-(c)): If the Secretary of Commerce determines that imports are entering the U.S. market "in such quantities or under such circumstances as to threaten to impair the national security," the President may take unilateral action "necessary to adjust the imports of such article so that the imports will not threaten or impair the national security." Section 232 may be initiated by interested parties, the head of any department or agency, or self-initiated by the Department of Commerce. This law has been used in many different situations involving imports that can threaten or impair national security, including uranium, steel products and semiconductors. One notable section 232 investigation involved imports of crude oil and refined petroleum products that could impact U.S. energy security.

► **Section 301 of Trade Act of 1974** (19 U.S.C. § 2 411): The President has authority to increase U.S. tariff obligations where "an act, policy, or practice of a foreign country" (1) violates or denies U.S. benefits under any trade agreement; or (2) is unjustifiable and burdens or restricts U.S. commerce. This provision is primarily used by the United States to increase tariffs on products in a so-called "retaliation list" generated after obtaining WTO authority to suspend bound tariff obligations. The long-running dispute between the United States and the EU over EU restrictions on hormone-treated beef generated more than 10 years of U.S. retaliation on various EU imports.

► **Section 338 of U.S. Tariff Act of 1930** (19 U.S.C. § 1338(a)): The President has authority to unilaterally declare new tariffs and duties whenever a foreign country (1) imposes unreasonable charges, extractions, regulations or limitations on products of the United States where such are not applied to products of other foreign countries; or (2) discriminates in fact against the commerce of the United States. Assuming the President makes the requisite section 338 determination, the statute authorizes increased duties beyond bound rates up to 50 percent of the particular product's value, and the ability to block the subject imports if discrimination continues after the duty imposition. One notable historical record regarding section 338 involves a 1949 telegram from then-U.S. Secretary of State Dean Acheson to a consular official in Shanghai regarding potential deployment of section 338 in response to Chinese discrimination against U.S. trade.

World Trade Org.

United States-Conditional Tax Incentives for Large Civil Aircraft, WT/DS487/R (Nov. 28, 2016).

A WTO dispute-settlement panel recently issued its decision in a dispute brought by the EU against the United States involving conditional tax incentives issued by the State of Washington related to the development, manufacture and sale of large aircraft. The State of Washington passed legislation offering approximately $8.7 billion in tax breaks in exchange for Boeing's development and construction of a 777Xwing plant in Everett, Washington. The EU asserted that the State of Washington's aerospace tax incentives are illegal subsidies under the WTO Subsidies and Countervailing Measures Agreement (SCM). The EU targeted seven tax incentives, including a reduced business and occupation tax rate, credits against business taxation, and other state tax exemptions. The EU asserted that the tax incentives contained domestic-content requirements in violation of Articles 3.1(b) and 3.2 of the SCM Agreement. Subsidies with domestic-contents requirements require the use of domestic goods over imported goods in order to qualify for the subsidy.

The panel first determined that each of the seven aerospace tax measures at issue satisfied the definition of subsidy (*i.e.*, conferred a monetary benefit) under Article 1 of the SCM Agreement. The panel then found that the subsidies were not *de jure* (directly) contingent on the use of domestic over imported goods and, therefore, were not inconsistent with the SCM Agreement. However, the panel did find that one of the subsidies was *de facto* (in effect) contingent on the use of domestic over imported goods and thus WTO inconsistent. That particular subsidy involved a reduced business and occupation tax rate for the manufacturing or sale of commercial airplanes under the 777X program. The United States announced its appeal of the panel ruling on Dec. 16, 2016.

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Legal, Operational Implications of EEOC's Updated Strategic Enforcement Plan

On Oct. 17, 2016, the U.S. Equal Employment Opportunity Commission (EEOC) issued its revised Strategic Enforcement Plan (SEP) for Fiscal Years 2017-2021, which makes publicly available its updated priorities for enforcement of federal EEO laws across certain protected classes of individuals. The EEOC generally identifies its substantive area priorities for 2017-2021 as follows: (1) eliminating barriers in recruitment and hiring; (2) protecting vulnerable workers, including immigrant and migrant workers, and underserved communities from discrimination; (3) addressing selecting emerging and developing issues; (4) ensuring equal pay protections for all workers; (5) preserving access to the legal system; and (6) preventing systemic harassment.

But what do these strategic priorities actually entail, and how will EEOC's new measures affect employers in the public and private sectors? This article will offer a summary and recommendations for clients and businesses based on these new enforcement priorities.

Eliminating Barriers in Recruitment and Hiring

The EEOC maintains its stance of eradicating discrimination in recruiting and hiring of workers, but has placed an increased focus on "class-based recruitment and hiring practices that discriminate against racial, ethnic, and religious groups, older workers, women, and people with disabilities." Particularly, the SEP places increased scrutiny on hiring in the fields of technology and law enforcement whenever there is evidence of a systemic lack of diversity. Related areas of investigation will be application processes that are viewed as restrictive (*e.g.*, computer programs or websites that may be inaccessible to persons with disabilities) and data-driven candidate selection tools (*e.g.*, pre-employment tests, background checks, medical questionnaires).

Take-Away: Re-examine your recruiting and hiring procedures. Confirm that online recruiting tools are equally accessible by individuals with physical or other disabilities. Review whether your pre-employment background checks and screening processes (1) are appropriately tailored to the requirements of the job, and (2) do not exclude applicants from certain positions, or "funnel" them to certain positions, based on race or other demographics.

Protecting Vulnerable Workers from Discrimination

The EEOC recognizes that immigrant and migrant workers, as well as members of underserved minority communities, are often unaware of their federal employment rights and face socio-economic barriers such as "work status, language, financial circumstances, or lack of work experience."

Take-Away: Employers operating in geographic areas with significant populations of foreign workers or within underserved African-American, Native American, Latino or other minority communities should ensure that their employment practices do not adversely impact these individuals. Important in this process could be a larger emphasis on training for employees and managers regarding EEO policies and internal-complaint procedures.

Addressing Selected Emerging and Developing Issues

This subject tends to garner the most interest from employers because it indicates how the EEOC sees the developing landscape of discriminatory employment practices and how it is likely to allocate its resources to ramp up enforcement in certain substantive areas. The five issues specified by the SEP are: (1) qualification standards and leave policies that adversely impact disabled employees; (2) increased accommodations for pregnant workers; (3) discrimination against lesbian, gay, bisexual and transgender (LGBT) individuals; (4) "employee" status of workers in certain temporary, contractual or "on-demand" lines of work; and (5) discrimination against Muslim and Sikh employees and those of Arab, Middle Eastern or South Asian descent based on stereotypical racial, cultural or social perceptions.

Take-Away: Be aware of EEOC's areas of increased focus on workers who are disabled, pregnant, LGBT or Muslim/Sikh/Arab/Middle Eastern/South Asian, and incorporate information on these protected categories into your workplace training tools for managers, supervisors and employees. To the extent necessary, determine whether your workers should be deemed "employees" for purposes of EEOC jurisdiction (most federal employment statutes apply to business with at least 15 to 20 employees).

Ensuring Equal Pay Protections for All Workers

While continuing its focus on pay practices and systems that are discriminatory on the basis of sex under the Equal Pay Act and Title VII, the EEOC is expanding its purview to encompass compensation systems that "discriminate based on any protected basis." Thus, the EEOC will shift its focus from purely gender-based pay disparities to practices that appear to discriminate based on race, ethnicity, age, disability or other protected characteristics.

Take-Away: Analyze employee pay rates, pay bands and actual pay records to confirm that any disparities within certain job classifications do not statistically appear to be based on protected class status, but rather on legitimate business reasons (*e.g.*, length of service, level of education or industry experience).

Preserving Access to the Legal System

The EEOC will continue to challenge policies and procedures that discourage individuals from exercising their rights

under employment discrimination statutes, limit access to the EEOC or impede its investigation efforts. The SEP lists three areas of primary focus in this area: (1) waiver, releases and mandatory arbitration provisions complicate or prohibit filing of charges with EEOC or assisting in its investigation or prosecution of claims; (2) failure to maintain employee data and records as required by EEOC regulations; and (3) "significant retaliatory practices" that chill the exercise of workplace rights.

Take-Away: Evaluate whether your employment and severance agreements, including any included mandatory arbitration provisions, releases or waivers, might have a negative effect on an employee's rights to pursue charges with the EEOC or other state/local EEO agencies or to assist in EEOC investigations. To the extent necessary, work with legal counsel on revising these agreements to appropriately preserve these rights. Also, confirm record-retention policies to ensure that applicant and employee data is properly maintained and accessible.

Preventing Systemic Harassment

The EEOC notes that harassment continues to be the most frequently reported workplace issue it confronts, making up more than 30 percent of all charges filed, with sex, race and disability harassment being complained of with the highest frequency. The EEOC will aim its investigative efforts at employers who appear to maintain a policy, practice or pattern of harassment. According to the SEP, the agency will encourage "holistic prevention programs, including training and outreach" to curb future violations, in addition to seeking monetary relief for victims and injunctive relief to prevent ongoing incidents of harassment.

Take-Away: Implement training for managers, supervisors and employees, emphasizing the many forms that workplace harassment may take (*e.g.*, verbal or physical, opposite-sex or same-sex, known or perceived disabilities). Remind employees periodically about the process for reporting workplace harassment, and consider expanding the available methods to include a hotline or email complaint procedure.

Other Developments and Closing Thoughts

To effectively implement these substantive area priorities, the EEOC intends to engage in coordinated efforts among its district offices to streamline investigations, exchange information and ideas, and coordinate enforcement efforts. To this end, the agency has expressed its commitment to a three-pronged approach: (1) a "targeted approach" whereby the EEOC will proactively identify and investigate priority cases; (2) an "integrated approach" whereby it will implement uniform procedures to create a more consistent system of collaboration and coordination between its various offices and staff; and (3) an "accountability" initiative to underscore its goal of meeting public expectations for enforcement of EEO laws.

In light of these new enforcement priorities, employers should review and discuss the SEP (available on EEOC's website, *https://www.eeoc.gov/eeoc/plan/sep-2017.cfm*) and create an action plan for implementing new or modified policies to address and correct any potentially problematic issues.

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For the past nine years, the Louisiana State Bar Association has convened a "Conclave on Diversity in the Legal Profession," as a "conclave" signifies "an assembly or gathering, especially one that has special authority, power or influence." Join the LSBA for the 10th anniversary celebration of the Diversity Conclave on **March 24, 2017, in New Orleans,** with keynote speaker Samuel Reeves (senior vice president and counsel at Walmart, Inc.), workshop presenter Dr. Shawn Marsh and other dignitaries. **Reserve your spot and register before Feb. 17, 2017**, for a discounted rate - visit *https://www.lsba.org/CLE/*.

Unrecorded Ratification of Unit Agreement

AIX Energy, Inc. v. Bennett Props., L.P., No. 13-cv-3304 (W.D. La. 9/26/16), 2016 WL 5395870.

In this case, the parties disputed whether a mineral servitude had terminated. The landowners argued that the servitude had terminated by prescription of nonuse because there had not been any production or drilling on the servitude tract for more than 10 years. Other parties argued that production from the unit well for a drilling unit that was created by agreement had interrupted prescription. Neither the landowners nor their predecessor-in-interest had signed the agreement, but the predecessor-in-interest had signed division orders that purported to ratify the agreement, and he had accepted payments from unit production. The court held that this was sufficient to constitute a ratification of the unit agreement.

The landowners argued that even if their predecessor-in-interest had ratified the agreement, they were not bound by it because the ratification was not reflected in the public record. The United States District Court for the Western District of Louisiana disagreed, relying on La. Civ.C. art. 3339, which provides that third persons are bound by certain things even if they are not evidenced in the public record. That article states:

> A matter of capacity or authority, the occurrence of a suspensive or a resolutory condition, the exercise of an option or right of first refusal, *a tacit acceptance*, a termination of rights that depends upon the occurrence of a condition, *and a similar matter pertaining to rights and obligations evidenced by a recorded instrument* are effective as to a third person although not evidenced of record. (Emphasis added.)

The court concluded that the ratification was "a similar matter." Thus, the landowners were bound by the unrecorded ratification and the servitude was still alive because prescription had been interrupted by unit production.

Mandatory Reports from Unit Operator

XXI Oil & Gas, L.L.C. v. Hilcorp Energy Co., 16-0269 (La. App. 3 Cir. 9/28/16), ____ So.3d ____, 2016 WL 5404650.

La. R.S. 30:103.1 provides that whenever a compulsory unit includes "lands producing oil or gas, or both, upon which the operator . . . has no valid oil, gas, or mineral lease," the operator must provide certain sworn financial reports to any unleased owners who request such reports. La. R.S. 30:103.2 puts teeth into this requirement by providing that, if the operator fails to send these reports to "the owner or owners of unleased oil and gas interests" who request them, and the operator also fails to timely correct such an omission after written notice, the operator will "forfeit his right to demand contribution from the owner or owners of the unleased oil and gas interests for the costs of the drilling operations of the well."

In this case, XXI Oil & Gas held rights as a mineral leaseholder in a compulsory drilling unit operated by Hilcorp. In a prior decision, the 3rd Circuit held that certain information provided by Hilcorp was not sufficient to satisfy the La. R.S. 30:103.1 reporting requirements because the information was not sworn. Here, the 3rd Circuit addressed the question of whether La. R.S. 30:102.2's penalty provision can apply with respect to land that is under lease, but not under lease to the operator.

Hilcorp argued that the penalty would not apply in such a situation because La. R.S. 30:102.2 refers to a forfeiture of the "right to demand contribution from the owner or owners of the *unleased* oil and gas interests." (Emphasis added.) Hilcorp asserted that the most natural reading of "unleased" means not under lease to anyone. The 3rd Circuit disagreed (with one of the three judges on the panel dissenting), holding that, for purposes of La. R.S. 30:103.2, "unleased" means not under lease to the operator.

It is noteworthy that in an unrelated case earlier this year, a federal district court faced the same legal question and gave a contrary answer, holding that for purposes of La. R.S. 30:103.2, "unleased" means not under lease to anyone. *See, TDX Energy, L.L.C. v. Chesapeake Operating, Inc.*, No. 13-1242 (W.D. La. 3/24/16), 2016 WL 1179206. The Louisiana Supreme Court has never ruled on this legal question.

Challenge to Recusals

Hughes v. Johnson, No. 15-7165 (E.D. La. 10/20/16), 2016 WL 6124211.

In two legacy litigation cases in 2015, the Louisiana Supreme Court required Justice Jefferson D. Hughes to recuse himself from the court's decision whether to grant the plaintiffs' writ applications. (The lower courts had dismissed the plaintiffs' claims in each of the two cases based on the subsequent-purchaser doctrine.) The ground for the recusal was that an organization that had received large donations from a law firm that often represents plaintiffs in legacy litigation cases had spent a considerable sum of money supporting Hughes' election to the Louisiana Supreme Court. Justice Hughes challenged the recusal orders by filing a federal court action in which he asserted that the orders violated his constitutional rights. The United States District Court for the Eastern District of Louisiana dismissed Justice Hughes' suit without prejudice, holding that the 11th Amendment to the U.S. Constitution deprived the court of subject matter jurisdiction.

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Uniformity of Exemptions and Exclusions for Local Taxing Authorities Is Required

Arrow Aviation Co. v. St. Martin Parish School Bd. Sales Tax Dept., 16-1132 (La. 12/6/16), ____ So.3d ____, 2016 WL 7118912.

The St. Martin Parish School Board Sales Tax Department (the collector) inspected the tax returns of Arrow Aviation Co., L.L.C. Arrow leases and repairs helicopters, including shipping repaired helicopters to customers outside of Louisiana. During the audit period, the collector found that Arrow failed to pay a use tax or charge a parish sales tax to its customers. The collector issued an assessment for additional tax, interest and penalties.

Arrow paid the assessment under protest and filed suit to recover. Arrow asserted that the collector failed to apply a legislative tax exclusion, La. R.S. 47:301(14)(g)(i)(bb), which excludes from state and local sales tax the charges for repairs on certain property delivered to customers out of state. When Arrow delivered repaired helicopters to customers located in other states, it did not charge a sales tax. The collector replied by asserting that none of the tax authorities in St. Martin Parish adopted the exclusion.

Both parties also sought declarations on the constitutionality of the exclusion. Under the Louisiana Constitution, Article VI, § 29(D)(1), the Legislature may provide for "exclusions uniformly applicable to the taxes of all local governmental subdivisions, school boards, and other political subdivisions whose boundaries are not coterminous with those of the state." The district court ruled that the collector did not have to apply the exclusion to its assessment of Arrow and found the 2013 version of the exclusion was unconstitutional. The 2013 version of the exclusion was mandatory for tax authorities in East Feliciana Parish and optional for all other parishes, municipalities and school boards. Specifically, the district court ruled the 2013 version of the exclusion was unconstitutional because it mandated that East Feliciana Parish grant the exclusion, while at the same time gave other parishes the option to grant the exclusion. The district court then severed the mandatory language applicable to East Feliciana Parish. The

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effect, going forward, is tax authorities in St. Martin Parish do not have to apply the exclusion authorized by La. R.S. 47:301(14)(g)(i)(bb).

In reviewing the district court's ruling, the court found that the 2013 amendment to the exclusion does not treat all local governmental subdivisions, school boards and other political subdivisions the same because tax authorities in all parishes are not able to apply the exclusion in the same form, manner or degree. The exclusion being mandatory for tax authorities in East Feliciana, but optional for those in other parishes, was an example of non-uniformity prohibited by the state Constitution. The court held that, under Article VI, § 29(D)(1), the exclusion provided by La. R.S. 47:301(14)(g)(i)(bb), as amended in 2013, is unconstitutional. The court ordered that the offending language in La. R.S. 47:301(14)(g)(i)(bb), as amended in 2013, applicable to tax authorities in East Feliciana Parish, be severed and removed.

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Louisiana State and Local Use Tax Collection by Remote Vendors

Since most individual Louisiana consumers and many small- to mid-sized Louisiana businesses still believe that purchases may be made tax-free over the Internet, Louisiana, like many other states, has attempted to require remote vendors to collect these taxes. The fact that Louisiana consumers are not self-reporting and paying Louisiana state and local use taxes on Internet purchases is impacting state revenues. Complicating matters for state and local tax collectors, in *Quill Corp. v. North Dakota*, 112 S.Ct. 1904 (1992), the U.S. Supreme Court held that the Commerce Clause of the U.S. Constitution limited any state's jurisdiction to require out-of-state retailers collect its use taxes. The rationale was that, unless the remote vendor has property or workers in the state, the vendor did not have sufficient connection with the state (nexus) to be required to do anything for that state. The U.S. Supreme Court said that simply having tax-owing customers in the state was not enough. Unfortunately for the states, including Louisiana, most consumers do not voluntarily pay use tax on Internet purchases (in fact, most Louisiana consumers remain unaware of the obligation or the fact that use taxes can be paid on the Louisiana state income tax return). In response, the states have sought ways to assert that *Quill* does not apply and to nonetheless compel non-resident vendors to collect use tax.

Despite constitutional concerns, states' efforts to compel out-of-state retailers to collect state and local use taxes appear to be paying off, for Louisiana in particular. On Dec. 19, 2016, a spokesperson for online retailer Amazon.com stated that Amazon would begin collecting Louisiana state and local use tax on purchases shipped to recipients in Louisiana. Amazon's statement may be in response to the U.S. Supreme Court's denial of certiorari in *Direct Marketing Ass'n v. Brohl*, 814 F.3d 1129 (10 Cir. 2016), *cert. denied*, No. 16-267 (Dec. 12, 2016), ____ S.Ct. ____, 2016 WL 4565072, which upheld a Colorado law that requires an online retailer with no in-state physical presence to provide the Colorado Department of Revenue with information on taxable purchases made by Colorado customers. In 2016, Louisiana enacted a similar law, Act No. 569, H.B. 1121, 2016 Regular Session (effective July 1, 2017), that requires a remote retailer to provide information to both the Louisiana Department of Revenue and to the purchaser about purchases delivered in Louisiana if the retailer's cumulative annual gross receipts from taxable sales delivered to Louisiana made by the retailer and its affiliates exceed $50,000 in a calendar year.

During 2016, Louisiana also enacted a "click-through nexus law," Act No. 22, H.B. 30, 2016 First Extraordinary Session (effective March 14, 2016), which requires an out-of-state retailer with in-state affiliates to collect and remit use taxes if the retailer's cumulative gross receipts from sales of tangible personal property to customers in Louisiana that are referred to the retailer through the affiliate exceed $50,000 during the preceding 12 months. In response to the click-through nexus law, Amazon ended its Louisiana affiliate program.

Louisiana's click-through nexus law applies *only* to an out-of-state retailer with Louisiana affiliates. Therefore, an out-of-state retailer without Louisiana affiliates may be subject to Louisiana's notification law if its sales delivered to Louisiana exceed the gross-receipts threshold. Further, an out-of-state retailer without a Louisiana affiliate program whose gross receipts from purchases delivered to recipients in Louisiana may be required to provide the Louisiana Department of Revenue a list of customer names, dates and amounts of purchases, and, if known by the retailer, whether the item purchased is exempt from sales-and-use taxes.

It is important to understand that a taxpayer's receipt of a notice under the Louisiana notification law does not mean that the taxpayer's purchase is taxable. Louisiana sales-and-use tax law contains a host of exclusions and exemptions, and the out-of-state retailer issuing the notice is not required to determine whether a purchase is excluded or exempt from taxation. Moreover, in certain instances, the notice may be issued to a taxpayer that Louisiana is prohibited from taxing by federal law, *e.g.*, Commerce Clause or the 14th Amendment Due Process Clause of the U.S. Constitution. Therefore, a person who receives a use-tax notice from an out-of-state retailer should carefully review the transactions listed in the notice and consider contacting a tax professional if the taxability of a transaction is at issue.

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