Recent Cases in Louisiana Courts

Several recent cases in Louisiana courts addressed mediation and arbitration issues. One decision held that a mediated settlement was reduced to writing by virtue of email exchanges between the mediator and the parties. The decisions discussing arbitration issues addressed how an arbitrator violated the due process rights of one of the parties by failing to grant a continuance; how an arbitration clause in a contract between a homeowner and a home inspection company is not invalid simply because it requires the arbitrator to be a licensed home inspector; and how a party waives a contractual right to mediate and arbitrate by raising the issue for the first time on appeal.

Mediated Settlement Reduced to Writing by Virtue of Email Exchanges

Holt v. Ace American Ins. Co., 14-0380 (La. App. 3 Cir. 10/1/14), 149 So.3d 886.

After the formal mediation of a personal injury dispute, the parties corresponded by email with the mediator and agreed to a settlement. A formal settlement and release agreement was later signed by the parties. The settlement check was dated 50 days after the exchange of emails. However, the case was not dismissed. About 10 months after the email settlement, both parties filed a motion to enforce the settlement agreement. The plaintiffs also sought attorneys' fees and penalties pursuant to La. R.S. 22:1973 because the insurance company failed to pay the settlement amount within 30 days after the agreement was reduced to writing by the email exchange. The court of appeal affirmed the trial court's judgment that the settlement agreement was reduced to writing by the email exchange and awarded the plaintiffs penalties of $5,000 but no attorneys' fees.

Arbitration Award Vacated Because Arbitrator Violated Plaintiff's Due Process Rights

Mayeaux v. Skyco Homes, 13-1053 (La. App. 3 Cir. 7/2/14), ____ So.3d ____, 2014 WL 2958453.

This case involved a redhibitory action filed by the purchaser of a doublewide manufactured home against the seller and manufacturer of the home. The court of appeal found that the arbitrator violated the plaintiff's due process rights by denying the plaintiff's request for a continuance. The request for a continuance was based on the inability of one of the plaintiff's expert witnesses to attend the arbitration hearing on the date set; another of her expert witnesses could attend only a portion of the scheduled arbitration hearing. The arbitrator denied the request for a continuance and ruled that the expert unable to attend could testify by telephone and the other expert could appear at the hearing to testify. After the arbitration hearing, the arbitrator ruled against the plaintiff. The trial court vacated the arbitration award and ordered the matter be resubmitted to arbitration with a different arbitrator.

Although the arbitrator has broad discretion in conducting arbitration proceedings, and mere errors of law or fact are not sufficient to vacate an arbitrator's award, the court of appeal affirmed the district court's determination. The court of appeal found that the arbitration proceedings had not been fundamentally fair to the plaintiff. This is because forcing the plaintiff's expert witness to testify by telephone did not grant that witness the opportunity to hear the defendants' witnesses so that the expert could effectively rebut such testimony.

Arbitration Clause in Contract Not Invalid

Williams v. Keller Williams Realty, 14-0202 (La. App. 4 Cir. 11/5/14), ____ So.3d ____, 2014 WL 6851463.

A homeowner filed suit against a home inspection company due to an alleged improper inspection. The trial court dismissed the claim based on the defendant's exception of prematurity because the contract required arbitration. The homeowner appealed, arguing that the arbitration clause was invalid because it required the arbitrator to be a licensed home inspector. The court of appeal affirmed the district court, finding that there was no evidence in the record that the homeowner was not in equal bargaining power with the home inspection company. Additionally, the court found that no evidence was produced showing that a licensed home inspector could not serve as a neutral decision maker.

Party Waives Contractual Right to Mediate, Arbitrate by Raising Issue for First Time on Appeal

Robert M. Coleman & Partners, Architects v. Lewis, 13-0549 (La. App. 1 Cir. 9/30/14), 2014 WL 4919689 (unpublished).

The plaintiff, an architectural firm, obtained a judgment for money damages against the owners of a commercial office building after the owners refused to pay the architectural fee. The owners appealed and for the first time argued that the jury erred in awarding damages because the contract mandated that all disputes should be submitted to mediation and arbitration. The court of appeal found that by failing to file a dilatory exception raising the objection of prematurity in the trial court, or by raising the arbitration defense for the first time on appeal, the owners had waived any right to demand mediation or arbitration.

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Lack of Credibility and Failure to Maintain Records Warrant Denial of Discharge

In the Matter of Goff, No. 13-41148 (5 Cir. Aug. 22, 2014).

The debtor, Tommy L. Goff, filed for Chapter 7 bankruptcy relief and one of his creditors, Graham Mortgage Corp. (Graham), filed an adversary proceeding to challenge the debtor's ability to discharge his debt for failure to maintain adequate records. After discovery, Graham moved for summary judgment, listing numerous missing documents which prohibited Graham from tracing the debtor's assets. The bankruptcy court granted partial summary judgment in favor of Graham, finding that it satisfied its burden by showing the lack of records kept it from tracing the debtor's finances. The debtor moved for reconsideration of the bankruptcy court's ruling, but since the debtor failed to include any supporting evidence, the bankruptcy court denied the motion.

After the conclusion of a trial in which the bankruptcy court determined the debtor lacked credibility and justification for his failure to maintain adequate records, the bankruptcy court entered a judgment in favor of Graham and denied the debtor Chapter 7 relief. The district court affirmed.

In reviewing the grant of summary judgment, the 5th Circuit reasoned that Graham bore the initial burden of producing evidence that the debtor failed to keep adequate records. The court found Graham satisfied that burden by retaining accounting experts who demonstrated certain unavailable documents were needed in order to reconstruct the debtor's finances. The burden then shifted to the debtor who must "go beyond the pleadings" and show demonstrative evidence that specific facts exist over which there is a genuine issue for trial. Since the debtor failed to present any evidence in opposition, the 5th Circuit affirmed the bankruptcy court's grant of partial summary judgment. The 5th Circuit further affirmed the denial of the motion for reconsideration, reasoning that the debtor's motion was very brief, contained no legal citations and did not include any attached evidence.

Finally, with regards to the ruling that the debtor's failure to maintain records was not justified, the 5th Circuit discussed the lack of a set standard for such justification. The 5th Circuit reviewed the bankruptcy court's determination that the debtor was a sophisticated debtor but that his sole testimony was not credible. Because the debtor's testimony was the only evidence provided to support his defense of justification, the 5th Circuit affirmed the bankruptcy court's ruling denying discharge for failure to maintain records without justification.

Fraudulent Transfer Defense Limited to Net Value Received

In the Matter of Positive Health Management, 769 F.3d 899 (5 Cir. 2014).

Ronald T. Ziegler was the president and sole shareholder of Positive Health Management, Inc. (PHM). In 2005, First National Bank (First National) made a loan to another entity owned by Ziegler, secured by a building in Garland, Texas (the Garland property). For a few years, PHM used the Garland property for its office space and made a series of payments to First National. PHM later filed for bankruptcy and the trustee sought to recover the payments made to First National as fraudulent transfers under 11 U.S.C. § 548.

The bankruptcy court first assessed whether a constructive fraudulent transfer occurred, which requires that the debtor "received less than a reasonably equivalent value in exchange for such transfer or obligation." 11 U.S.C. § 548(a)(1)(B). The court found that no constructive fraudulent transfer occurred, reasoning that PHM received at least reasonably equivalent value as: (1) the payments kept First National from foreclosing on the property, allowing PHM to continue running its operations and generating cash flow; and (2) the payments were reasonable market rent for the office space. However, as PHM's financial condition was deteriorating and it was facing lawsuits and judgments around the time of the transfers, the bankruptcy court concluded the transfers constituted actual fraud as PHM made the transfers "with actual intent to hinder, delay or defraud." 11 U.S.C. § 548(a)(1)(A).

In reviewing the affirmative defenses available to First National under 11 U.S.C. § 548(c), the bankruptcy court determined that First National "provided value" in exchange for the transfers and acted in "good faith." First National was, therefore, entitled to keep the funds. The district court adopted the report and recommendation of the bankruptcy court and allowed First National to retain all of the funds it received.

On appeal, the 5th Circuit reviewed the fraudulent transfer defense set out in Section 548(c) which requires that a transferee "provided value in good faith" for the transfer. Value is provided when a transferee receives the transfer in question in exchange for "property, or satisfaction or securing of a present or antecedent debt of the debtor." 11 U.S.C. § 548(d)(2)(A). The 5th Circuit reviewed its decision in *Jimmy Swaggart Ministries v. Hayes (in re Hannover Corp.)*, 310 F.3d 796 (5 Cir. 2002), in which it held that "value" is measured from the transferee's perspective. The 5th Circuit reasoned that the "market rent" value found by the bankruptcy court analyzes this "value" from the correct perspective. By "giving up the chance to foreclose and find a new tenant, First National incurred an opportunity cost in the form of foregone market rent." Since First National accepted the loan payments in lieu of rent it would have otherwise earned, the 5th Circuit found First National gave value pursuant to Section 548(c). The 5th Circuit, therefore, affirmed the finding that First National was entitled to the Section 548(c) defense as it acted in good faith and provided value in return.

The trustee further argued that even if the affirmative defense of Section 548(c) applies, the court is required to reduce the value of the transfers by the value of the market rent and award the difference to the estate. Section 548(c) provides that if a transferee has taken in good faith and for value, then it "may retain any interest transferred . . . to the extent that such transferee . . . gave value to the debtor in exchange for such transfer or obligation." While the bankruptcy court found First National was entitled to keep the entirety of the transfers because the rental value was "reasonably equivalent" to the amount of the transfer, the 5th Circuit disagreed. The 5th Circuit reasoned that it is unlikely that the drafters of the Bankruptcy Code intended for "value" under Section 548(c) to mean "reasonably equivalent value," as the "latter term is explicitly used in another subsection of the same statute." *See*, 11 U.S.C. § 548(a)(1)(B)(i). If the phrase "value" is equated to mean "reasonably equivalent value," the 5th Circuit determined that the "to the extent" language of Section 548(c) would be rendered meaningless.

Courts have netted the amounts received in fraudulent transfers against the value given to the debtor as "a good faith transferee is entitled to the protections of Section 548(c) when it gives any value in return, but only to the extent of that value." When a transferee receives a fraudulent transfer, Section 548(c) requires netting to the extent the value of the transfer exceeds the consideration given in return. Therefore, the 5th Circuit held that the trustee was entitled to recover the difference between the payments First National received (the value of the loan payments) and the value it gave in return (the value of the market rent).

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Corporate and Business Law

LBCA Adopts "Universal Demand" Requirement for Shareholder Derivative Proceedings

The revised and renamed Louisiana Business Corporation Act (LBCA), effective Jan. 1, 2015, adopts a "universal demand" requirement for a shareholder to bring a derivative proceeding asserting a right on behalf of the corporation. This requirement is a departure from previous Louisiana corporate law, as well as current Delaware law.

Demand on Corporation Now Required in All Instances

The LBCA now requires a shareholder to always make written demand on the corporation to take "suitable action" prior to commencing a derivative claim to enforce the right on behalf of the corporation (La. R.S. 12:1-742). The corporation then has 90 days to respond to the shareholder's demand. A majority vote of "qualified directors" (at a meeting of the board of directors at which the qualified directors constitute a quorum) or a committee appointed by the board of directors consisting of two or more qualified directors is sufficient for the corporation to reject the shareholder's demand (La. R.S. 12:1-744). Either of those groups can reject the shareholder's demand if they have "determined in good faith, after conducting a reasonable inquiry upon which its conclusions are based, that the maintenance of [a] derivative proceeding is not in the best interests of the corporation" (La. R.S. 12:1-744(A)). If a derivative proceeding is commenced after a shareholder's demand has been rejected, the petition must allege either that a majority of the board of directors were not qualified directors at the time the rejection was made; that the decision to reject the demand was not made in good faith after a reasonable inquiry; or that a derivative proceeding was not in the best interests of the corporation. If a majority of qualified directors rejected the shareholder's demand, the burden falls on the shareholder to prove that the decision was not made in good faith, after reasonable inquiry, or that a derivative proceeding is in the best interests of the corporation. If there was not a majority of qualified directors at the time the rejection was made, the burden of proof falls on the corporation. A derivative proceeding commenced prior to rejection of the shareholder's demand shall be dismissed by the court if the relevant party sustains its burden of proof.

A "qualified director" entitled to act on a shareholder demand is defined by La. R.S. 12:1-143 as a director who, at the time, does not have a material interest in the outcome of the proceeding or a material relationship with a person who has such an interest. "Material relationships" include familial, financial, professional, employment or other relationships "reasonably expected to impair the objectivity of the director's judgment." Section 143 defines a "material interest" as an actual or potential benefit or detriment, other than one extended to the corporation or its shareholders generally, that would be expected to impair the objectivity of the director's judgment (La. R.S. 12:1-143 B).

Revised Pleading Requirements

The LBCA also amends the pleading requirements formerly contained in La. C.C.P. art. 615. Previously, art. 615 drew a distinction between derivative proceedings treated as class actions from those that required the joinder of all shareholders as parties. La. R.S. 12:1-142.1 no longer draws this distinction and only requires the joinder of the corporation and the obligor of the obligation being enforced as defendants. Additionally, the petition must allege that the shareholder was a shareholder at the time of the act or omission or became a shareholder through a transfer by operation of law from someone who was a shareholder at that time, and the shareholder "fairly and adequately represents the interests of the corporation in enforcing the right" (La. R.S. 12:1-142.1).

Departure from Louisiana and Delaware Corporate Law

Adoption of the universal demand requirement is a departure from previous Louisiana law and current Delaware corporate law. Under previous Louisiana law, a shareholder had to make written demand on the corporation unless a majority of the board of directors members were named as defendants in the suit. *Robinson v. Snell's Limbs & Braces of New Orleans, Inc.*, 538 So.2d 1045 (La. App. 4 Cir. 1989); *Smith v. Wembley Indus., Inc.*, 490 So.2d 1107 (La. App. 4 Cir. 1986). This rule allowed plaintiffs to avoid having to make written demand on the corporation by naming a majority of its board of directors as defendants. The universal demand requirement also deviates from current Delaware law, which is premised on a series of judicial decisions determining when demand on the corporation is "futile." This cumbersome analysis requires a court to make a determination at the complaint stage of the proceeding as to whether the directors are potentially subject to personal liability sufficient to disqualify them from determining whether to reject a plaintiff's demand on the corporation.

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Relevancy of *Mens Rea* and Criminal Intent in Modern Prosecutions

State v. Prince, 14-0740 (La. App. 3 Cir. 12/10/14),____So.3d____,2014WL6946175.

Successful defenses using an accused's lack of *mens rea* or criminal intent have become increasingly rare. One conclusion of the U.S. House Judiciary Committee's Task Force on Over-Criminalization is that "there are now more than 4,000 federal criminal provisions plus hundreds of thousands of federal regulations that impose criminal penalties, often without requiring that criminal intent be shown to establish guilt." In this case, the 3rd Circuit Court of Appeal buttressed these basic legal principles by reversing both the conviction and habitual-offender status of the defendant and entering a judgment of acquittal for lack of proof that the defendant intended any criminal act to be committed.

Acadia Parish sheriff's deputies claim to have received a tip from an unnamed source informing them that Daniel Brandon Prince, a detainee in their jail, would be receiving a package containing contraband. When the package arrived, it was marked as "legal mail" and addressed from an attorney in Crowley. Jail officials brought Prince into a private room, instructed him to open the box, and then arrested him for four counts of introducing contraband into a penal institution for the marijuana, rolling papers, pornography and cigarettes found inside, a violation of La. R.S. 14:402(A).

The State billed Prince with four counts, one for each category of contraband. However, the trial court dismissed three counts after a double jeopardy challenge in a motion to quash. An Acadia Parish jury became deadlocked after the first trial, but a second jury found Prince guilty of one count of

"*attempted* introduction of contraband into a penal institution," La. R.S. 14:402(B). He was sentenced to five years at hard labor, which was increased to 25 years after the State successfully deemed him a habitual offender. The Louisiana Appellate Project sought relief on multiple grounds, including insufficiency of evidence.

"Attempts" make up a special category of crimes, "a separate, but lesser grade of crime," governed by La. R.S. 14:27. Virtually every set of responsive verdicts given to juries before deliberation under La. C.Cr.P. art. 814 contains at least one attempt. However, more is required than just a failure to complete what would have been a crime. The State must prove that the act constituting the attempt was done with *specific intent* to commit the predicate crime. Specific intent is, in turn, defined as "that state of mind which exists when the circumstances indicate that the offender actively desired the prescribed criminal consequences to follow his act or failure to act." La. R.S. 14:10(1).

When reviewing the sufficiency of the evidence, "an appellate court must determine that the evidence, viewed in the light most favorable to the prosecution, was sufficient to convince a rational trier of fact that all of the elements of the crime had been proven beyond a reasonable doubt." *State v. Bryant*, 12-0233, p. 5 (La. 10/16/12), 101 So.3d 429, 432 (*quoting State v. Tate*, 01-1658 (La. 5/20/03), 851 So.2d 921). In this case, the identity of the sender was never determined, and the court agreed with the Appellate Project's assertion that "[a]ll that was proven was that the package contained marijuana, it was addressed to Daniel Prince and that, at the direction of law enforcement, he opened the package in their presence."

Given that the jury chose to find Prince guilty of an attempt, the court held that the State was required to prove specific intent but failed to address that element. Accordingly, the 3rd Circuit reversed the conviction, entered a judgment of acquittal, and vacated and set aside the habitual-offender adjudication.

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Judge Clark Concludes Act 544 is Unconstitutional

Act 544 was signed into law following the 2014 Louisiana legislative session. It amends Louisiana's Coastal Zone Management Act, adding a new subsection (O) to La. R.S. 49:214.36. That new subsection (O) provides, in pertinent part:

> O. (1) Except as provided in this Subpart, no state or local governmental entity shall have, nor may pursue, any right or cause of action arising from any activity subject to permitting under R.S. 49:214.21 *et seq.*, 33 U.S.C. § 1344 or 33 U.S.C. § 408 in the coastal

area as defined by R.S. 49:214.2, or arising from or related to any use as defined by R.S. 49:214.23(13), regardless of the date such use or activity occurred. . . .

(4) Nothing in this Section shall prevent or preclude any person or any state or local governmental entity from enforcing contractual rights or from pursuing any administrative remedy otherwise authorized by law arising from or related to a state or federal permit issued in the coastal area pursuant to R.S. 49:214.21 *et seq.*, 33 U.S.C. § 1344 or 33 U.S.C. § 408.

(5) Nothing in this Section shall alter the rights of any governmental entity, except a local or regional flood protection authority, for claims related to sixteenth section school lands or claims for damage to property owned or leased by such governmental entity. . . .

Section 2. The provisions of this Act shall be applicable to all claims existing or actions pending on the Act's effective date and all claims arising or actions filed on or after that date.

On Oct. 31, 2014, Judge Janice Clark of the 19th Judicial District Court for East Baton Rouge Parish issued a minute entry in which she concluded the newly minted Act 544 is unconstitutional. Judge Clark signed a judgment to that effect on Dec. 3, 2014.

Judge Clark presides over the matter filed by the Louisiana Oil and Gas Association (LOGA) against Attorney General James D. (Buddy) Caldwell. LOGA filed its suit seeking to invalidate the attorney general's approval of the resolution authorizing retention of counsel by the Southeast Louisiana Flood Protection Authority-East (SLFPA-E) with regard to SLFPA-E's separate suit against oil, gas and pipeline companies for damages caused to the coastal wetlands. SLFPA-E intervened into LOGA's suit to protect SLFPA-E's interest in its contract with its attorneys, and, after trial on the matter, Judge Clark dismissed LOGA's suit, labeling it as "frivolous."

Proponents of Act 544 contend the new law prevents SLFPA-E from pursuing the claims asserted in its pending suit for damages to coastal wetlands. Notably, Act 544 appears to spare the 20-plus lawsuits filed on behalf of Jefferson Parish and Plaquemines Parish in which the parishes seek to enforce the coastal-use permits issued in their geographical jurisdictions.

Following the enactment of Act 544, SLFPA-E filed a motion for entry of final judgment in LOGA's suit. SLFPA-E's motion outlined the reasons Act 544 does not apply to SLFPA-E, the reasons Act 544 is unconstitutional and, thus, the reasons Act 544 should have no impact on Judge Clark's earlier rulings dismissing LOGA's suit.

In addressing the issues presented, Judge Clark agreed. In her Oct. 31, 2014, minute entry, she concluded Act 544 is "an unconstitutional violation of the separation of powers under Article II, Section 2 of the Louisiana Constitution" insofar as it seeks to retroactively abrogate her previous determination that SLFPA-E is an independent political subdivision. Judge Clark specifically found that Act 544 "treads upon the province and duty of the judiciary to interpret the law," emphasizing "that no other branch of government can exercise power reserved to another branch." She further concluded the passage of Act 544 was an unconstitutional violation of constitutional-notice requirements. Finally, she concluded Act 544 is an unconstitutional violation of the public-trust doctrine under Louisiana Constitution Article IX, Section 1 "pursuant to which the state may not take away claims from governmental entities that enable them to redress issues with coastal restoration particularly insofar as those are related to hurricane protections."

The issue of Act 544's unconstitutionality remains unsettled as Judge Clark's judgment remains subject to appellate review. The issue also awaits treatment by Judge Nannette V. Jolivette Brown of the U.S. District Court for the Eastern District of Louisiana in SLFPA-E's suit for damage to coastal wetlands. As to the latter, the issue was raised in defendants' joint motion to dismiss heard by Judge Brown on Nov. 12, 2014, and in SLFPA-E's motion for partial summary judgment heard by Judge Brown on Dec. 10, 2014.

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Community Property

Allen v. Allen, 13-2778 (La. 5/7/14), 145 So.3d 341.

After a detailed review of the rules of statutory construction and analysis, the Louisiana Supreme Court reversed the court of appeal and reinstated the trial court's holding that the family court divisions of the 22nd Judicial District Court have subject-matter jurisdiction over the partition of separate property between divorcing spouses. The court stated that:

> it is logical and consistent with the intent of the legislature to have one forum determine all matters relating to divorce and division of former spouses' property, regardless of whether the property is community or separate.

Succession of Meyerer, 13-1015 (La. App. 1 Cir. 3/19/14), 146 So.3d 574.

Mr. Meyerer's two daughters, after his death, sued his second wife, claiming that proceeds she received from his 401(k) plan and surviving-spouse benefits she received from his pension plan should have been paid by her to them. Their claim was based on a separate property agreement Mr. Meyerer and she had signed stating that she transferred to him any interest she had or might acquire in those plans. They sought to enforce the contract to require her to pay them what she had received. Her motion for summary judgment was granted because Mr. Meyerer had not changed the beneficiary designation on the plans and no Qualified Domestic Relations Orders had been executed. Thus, the employer appropriately paid the funds to the second wife. Moreover, the separate property contract provided that the obligations therein were "personal obligations only of each party." Therefore, her obligation to transfer her interest in the plans to him was enforceable only by him; since he did not enforce it prior to his death, his daughters could not enforce it.

Spousal Support

Pepper v. Pepper, 49,185 (La. App. 2 Cir. 6/25/14), 146 So.3d 276.

Because the partition of Mr. Pepper's U.S. Postal Service Thrift Savings Plan was not actually litigated or adjudicated in the previous partition judgment and settlement, *res judicata* did not apply to Ms. Pepper's supplemental petition to partition it, even though her previous descriptive list referred in a "string of terms" to his "Retirement/Pension/Annuity/Thrift Savings Plan." She testified that she did not discover that he had a Thrift Savings Plan separate from his pension plan until after the partition had occurred.

Richards v. Richards, 49,260 (La. App. 2 Cir. 8/13/14), 147 So.3d 800.

After the parties' daughter turned 18 and

graduated from high school, Ms. Richards filed a rule to reinstate spousal support, which had previously terminated upon her beginning to receive Social Security disability benefits. Following a remand, in which the court of appeal determined that she was entitled to seek support under those circumstances, the trial court denied her request. The court of appeal reversed, finding that she had "an acute and devastating financial need" based on her serious health issues and that even with Social Security, because the child support had terminated, she was in need of support, although "the loss of child support cannot be the sole reason for reinstituting final periodic spousal support."

Custody

Wilson v. Finley, 49,304 (La. App. 2 Cir. 6/25/14), 146 So.3d 282.

Joint custody with the father designated as domiciliary parent was in the child's best interest because the child had lived primarily with the father's family throughout his life and was doing well under the arrangement that the parties had been functioning under, even though neither parent alone was fully capable of caring for the child.

Fradella v. Rowell, 49,350 (La. App. 2 Cir. 8/13/14), 147 So.3d 817.

After Mr. Fradella's wife died, the maternal grandparents obtained a consent judgment awarding them visitation with their grandchildren. They subsequently filed a rule for contempt against Mr. Fradella for interfering with their visitation. The court found Mr. Fradella in contempt for interference and for failing to provide the grandparents with information regarding the children's school and extracurricular activities. The court also modified the visitation schedule to more easily facilitate the grandparents' visitation, which the court found did not violate Mr. Fradella's constitutional rights as a parent because it did not change the amount of visitation but simply modified the schedule to be more workable.

Lawrence v. Lawrence, 49,373 (La. App. 2 Cir. 8/13/14), 147 So.3d 821.

A change of circumstances existed to modify the prior award because the stipulated shared-custody agreement was not working, the parties were unable to function under it, and they were involved in constant litigation. After examining the custody factors, the court of appeal affirmed the trial court's change of custody to Mr. Lawrence as primary domiciliary parent.

T.D. v. F.X.A., 13-0453 (La. App. 1 Cir. 1/9/14), 148 So.3d 187.

The trial court ordered that the parties' 17-year-old child attend an out-of-state boarding school. The mother tried to suspensively appeal. While the appeal was pending, the father filed a rule to change custody and for contempt. The court of appeal ruled that the judgment related to custody and could not be suspensively appealed. The father's rule for contempt was granted after the trial court found that the mother failed to cooperate with having the daughter attend the school.

The mother had filed an exception of no cause of action, claiming that the prior judgment was a considered judgment, requiring the father to meet the *Bergeron* standard to modify the prior judgment, which had also continued in effect the custodial arrangement. The trial court denied the exception of no cause of action and subsequently awarded sole custody to the father. It also vacated its prior order requiring the child to attend the out-of-state boarding school.

The court of appeal reversed, finding that because the prior judgment dealt with custody, the father was required to meet the *Bergeron* standard since that decision "essentially stripped [the mother] of her domiciliary parent status, which was a change of custody." Further, after analyzing the difference between a criminal and civil contempt, it found that the court had held the mother in criminal contempt, which it reversed because the father had failed to prove her contempt beyond a reasonable doubt. Finally, it reversed the award of sole custody to the father. The denial of physical custody to the mother was also an abuse of discretion and was reversed.

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Juror's Complaint

Warger v. Shauers, ____ S.Ct. ____ (2014), 2014 WL 6885952.

On Aug. 4, 2006, Gregory Warger and Randy Shauers were involved in an automobile accident in Pennington County, South Dakota. Warger suffered serious injuries in the crash and subsequently filed a negligence action against Shauers in federal court. The case proceeded to a jury trial in September 2010, which resulted in a verdict in favor of Shauers.

Shortly after the trial, one of the jurors contacted Warger's attorney and informed him that the jury forewoman may have unduly biased the panel during deliberations. According to the complaining juror, the forewoman told the other jurors during deliberations that her daughter was at fault

in a similar collision and that a lawsuit would have ruined her daughter's life. The complaining juror subsequently signed an affidavit to this effect, alleging that the forewoman "was influenced by her own daughter's experience, and not the facts, evidence, and law that was presented." *Warger v. Shauers*, (W.D. S.D. 3/28/12), 2012 WL 1252983, at *8 (unpublished). Relying on the statements in this affidavit, Warger's attorney filed a motion for new trial based on the alleged misconduct of the forewoman in lying during *voir dire* about her ability to be impartial.

Although the district court acknowledged that a new trial is appropriate when a party presents admissible evidence of juror bias, it ultimately denied Warger's motion because it found the complaining juror's affidavit to be inadmissible under Federal Rule of Evidence 606(b). Rule 606(b) bars the use of juror testimony regarding statements made during the jury's deliberations in any proceeding inquiring into the validity of that jury's verdict, unless the testimony pertains to (1) extraneous prejudicial information brought to the jury's attention, (2) an outside influence improperly brought to bear on jurors, or (3) a mistake made in filling out the verdict form. On appeal, the 8th Circuit agreed that the juror affidavit fell squarely within the exclusionary provisions of Rule 606(b) and affirmed the district court's ruling in its entirety.

The Supreme Court granted certiorari and, in a unanimous opinion authored by Justice Sotomayor, held that Rule 606(b) applies to preclude the use of juror testimony in a post-verdict motion seeking a new trial based on another juror's dishonesty during *voir dire*. The Court deemed Rule 606(b) applicable in all proceedings where a verdict may potentially be rendered invalid, which certainly includes a motion for new trial. The Court also deemed Rule 606(b)'s statutory exceptions inapplicable to situations involving juror dishonesty during *voir dire*. Specifically addressing the "extraneous prejudicial information" exception, the Court found its applicability to be limited to information deriving from a source external to the jury. Finally, the Court reviewed Rule 606(b)'s common law origins and found its holding to be consistent with Congress' legislative intent.

The Supreme Court's decision resolved a growing circuit split on the issue of whether Rule 606(b) should apply to bar a juror from testifying about the alleged dishonesty of another juror during *voir dire* in a post-trial challenge to the jury's verdict. Before it was handed down, the 5th Circuit generally found Rule 606(b) to be inapplicable in such circumstances. Thus, a major effect of the Supreme Court's holding will be to bring 5th Circuit courts in line with Louisiana state courts, which have long held that juror-deliberation evidence is inadmissible in subsequent challenges to the verdict. *See, State v. Cloud*, 959, 58 So. 827, 829 (1912).

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Insurance: UM Coverage

Green ex rel. Peterson v. Johnson, 14-0292 (La. 10/15/14), 149 So.3d 766.

Dave Peterson, while driving a motorcycle he co-owned with Benjamin Gibson, was killed in a collision with a vehicle driven by Michael Johnson. Ashanti Green filed suit on behalf of her and Peterson's two minor children, naming, *inter alia*, Allstate Insurance Co. as a defendant in its capacity as Gibson's automobile insurer on the grounds that uninsured/underinsured motorist (UM) coverage was provided to Peterson under that policy. Allstate moved for summary judgment, arguing that Peterson did not have UM coverage under the policy as the definitions for "insured person" and "insured auto," as set forth in the *liability section* of the policy, were not met. Plaintiff contended the motorcycle met the "insured auto" definition necessary for coverage as an after-acquired vehicle as set forth in the *UM section* of the policy. The district court granted the motion, dismissing Allstate, and the court of appeal affirmed. Both courts relied upon the holdings in *Magnon v. Collins*, 739 So.2d 191 (La. 1999), and its progeny that "a person who does not qualify as a liability insured under a policy of insurance is not entitled to UM coverage under the policy."

The Supreme Court distinguished its holdings in this line of cases as having been in reference to Louisiana's UM statute. "UM coverage is determined by contractual provisions and by applicable statutes. Under the UM statute, currently LSA-R.S. 22:1295, the requirement of UM coverage is an implied amendment to any automobile liability policy, even when not expressly addressed, as UM coverage will be read into the policy unless validly rejected." (Footnote omitted.) Gibson's policy contractually provided both liability and UM coverage.

> We find no ambiguity in the Gibson policy; the parties clearly intended to extend greater UM coverage to after-acquired vehicles, by defining an "insured auto" to encompass any "land motor vehicle". . . , than for liability coverage, which was limited to "four wheel" autos.

Thus, by its own contractual terms, the coverage requirements and limitations of the UM statute were inapplicable to the Gibson policy. Reversed and remanded.

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U.S.-Cuba Relations

On Dec. 17, 2014, President Obama announced the most significant move of the American government in 50 years to ease sanctions with Cuba. The United States severed diplomatic ties with Cuba in 1961, and Cuba was ejected from the Organization of American States in 1962. After 18 months of negotiations facilitated by Canada, the Vatican and even Pope Francis, the White House announced the reestablishment of diplomatic relations with Cuba, as well as various measures to ease trade, travel and financial restrictions associated with the economic embargo.

The administration's actions do not lift the economic embargo, which is held together by various complementary statutes and regulations. While executive authority can certainly ease parts of the economic sanctions that have been in place for decades, it cannot change substantive elements maintained by legislation. The Helms-Burton Act of 1996 and the Cuban Democracy Act of 1992 are a few pieces of legislation that need congressional action to fully liberate the embargo. The President's announced changes will operate through amendments to regulations issued by the Department of Treasury's Office of Foreign Assets Control (OFAC), which administers the Cuban Assets Control Regulations, and the Department of Commerce's Bureau of Industry and Security (BIS), which maintains various Export Administration Regulations pertaining to Cuba.

Some of the key components of the President's "new course" on Cuba include:

► Reestablishing diplomatic relations, including the opening of a U.S. embassy in Havana;

► Allowing for general travel licenses under the 12 existing categories of permissible Cuban travel, making it easier for Americans to provide services to Cubans in the 12 categories;

► Raising remittance levels from $500 to $2,000 per quarter for general donative remittances to Cuban nationals;

► Authorizing expanded commercial sales and exports to Cuba, including building materials for private residential construction, goods for use by the private sector and agricultural equipment;

► Increasing allowable imports by U.S. visitors to $400 worth of goods, $100 of which can consist of alcohol and tobacco products;

► Permitting U.S. banks to open correspondent accounts at Cuban financial institutions and allowing the use of U.S. credit and debit cards by travelers in Cuba;

► Increasing the commercial export of various items to facilitate Cubans' access to communications, including consumer-communication devices, related software, applications, hardware and services;

► Discussion of disputed maritime boundaries in the Gulf of Mexico; and

► Initiating a review of Cuba's designation as a State Sponsor of Terror.

H-2B International Worker Program

Comite de Apoyo a los Trabajadores Agricolas v. Perez, ____ F.3d ____, (3 Cir. 2014), 2014 U.S. App. LEXIS 23001.

A recent appellate decision brings some clarity to an international labor issue that has been winding its way for nearly a decade through various levels of bureaucracy at the Department of Labor, numerous committees and subcommittees of the United States Congress and multiple district and appellate courts. The subject matter is the so-called H-2B worker program that allows U.S. employers to hire international workers on a temporary basis to supply unskilled, non-agricultural labor. The program historically pits U.S. employers against U.S. domestic and international labor organizations. The H-2B program is designed to accommodate temporary international labor that does not displace available U.S. labor. One key determinative component of the program is the prevailing wage. As part of the Department of Labor's investigation into whether U.S. labor is available to perform the job at hand, the Department must look at prevailing wages for the occupation. Employers generally prefer to use privately funded wage surveys that can potentially provide more in-depth information on local labor-market conditions. Labor groups prefer the Department use broader national wage surveys when making prevailing-wage determinations. The Department's prevailing-wage determination establishes what the employers are required to pay, either to available U.S. workers or their temporary international substitutes. The H-2B program is vital to many Louisiana industries, including the shrimp and crawfish processing sectors.

The 3rd Circuit reviewed a decision of the Eastern District of Pennsylvania dismissing a challenge by several labor groups against the Department of Labor on ripeness grounds. 2014 U.S. App. LEXIS 23001, *3. Plaintiffs challenged several Department of Labor regulations pertaining to the prevailing-wage determination under the H-2B program, contending the regulations violate the Administrative Procedures Act. *Id.* at *4. The district court dismissed the complaint on the ground that it was not ripe for adjudication insofar as the Department of Labor should be allowed to promulgate regulations on labor issues without judicial intervention. *Id.* at *18-19.

The 3rd Circuit accepted the appeal and immediately dispelled the district court's concern about judicial temperance, noting that "in view of the subject nature of this litigation, we are concerned with the congressional policy to protect American workers from a depression of their wages attributable to the entry of foreign workers into the domestic labor market." *Id.* at *2. After recounting the tortured history of the numerous iterations of the Department of Labor's rulemaking on implementing various aspects of the H-2B prevailing-wage determination measures, as well as the numerous congressional interventions frustrating same, the court concluded that the case was ripe for review because the Department of Labor was currently using a specific prevailing-wage determination procedure, despite not having issued final rulemaking. *Id.* at *2. The Department's ongoing practice was a *de facto* final agency decision, making judicial review appropriate. *Id.* at *21. The court noted in this respect that "workers in this country are being prejudiced by the current administration of the H-2B program . . . ." *Id.* at *31.

The court concluded that the Department of Labor's current practice of allowing private wage surveys violated the Administrative Procedures Act. From a procedural standpoint, the court ruled that the Department had not explained its rationale for allowing private wage surveys when valid national wage rates are available for the same purpose. *Id.* at *32-33. Moreover, the court found the agency action arbitrary in light of its prior endorsement of valid national wage rates as the more appropriate, comprehensive and accurate method of determining the prevailing-wage rate for the H-2B program. *Id* at *38. The court vacated the current rule allowing for local wage surveys and directed "that private surveys no longer be used in determining the mean rate of wage for occupations except where an otherwise applicable OES survey does not provide any data for an occupation in a specific geographical location . . . ." *Id.* at *43.

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National Labor Relations Board Developments

Purple Commc'ns, Inc., 361 NLRB No. 126 (Dec. 11, 2014), 2014 WL 6989135.

In this decision, the National Labor Relations Board (NLRB) prompts employers to review their policies prohibiting non-business-related use of employer-provided email systems. The NLRB reviewed the administrative law judge's finding that the electronic-communications policy of the employer (a sign language service provider) prohibiting non-business use of its email system by employees was lawful and not objectionable. The specific issue before the NLRB was employees' rights under Section 7 of the National Labor Relations Act to effectively communicate with one another regarding self-organization and other terms and conditions of employment. The NLRB ultimately held that employee use of email for statutorily protected communications on non-working time must presumably be permitted by employers who have chosen to give employees access to their email systems.

In so ruling, the NLRB overturned its previous decision in *Guard Publ'g Co.*, 351 NLRB 1110 (2007), which held that, under ordinary circumstances, even employees who have been given access to their employer's email system have no right to use it for Section 7 purposes. The NLRB explained its previous decision focused too much on the employer's property rights rather than on the importance of email as a means of workplace communications, and, as such, failed to adequately protect employee rights under the Act.

The NLRB emphasized its decision is "carefully limited" in the following ways:

► First, it applies only to employees who have already been granted access

to the employer's email system in the course of their work and does not require employers to provide email access.

► Second, an employer may justify a total ban on non-work use of email, including Section 7 use on non-working time, by demonstrating that "special circumstances" necessary to maintain production or discipline justify restricting its employees' rights. Where special circumstances do not justify a *total* ban, the employer may nonetheless apply uniform and consistently enforced controls over its email system to the extent such controls are necessary to maintain production and discipline. The NLRB noted that an assertion of special circumstances will require the employer to articulate the interest at issue and demonstrate how that interest supports the email-use restrictions it has implemented.

► Finally, the NLRB noted its decision does not address either email access by *nonemployees* or any other types of electronic-communications systems.

Rather than ruling on the particular electronic-communications policy at issue, the NLRB ultimately remanded the case for the employer to present evidence of special circumstances justifying its restrictions on employee use of the email system.

New NLRB Rules for Representation-Case Procedures

The NLRB adopted a final rule regarding union representation-case procedures that will alter many of the board's prior procedures. *See*, 79 Fed. Reg. 74307. The new rule was published in the Federal Register on Dec. 15, 2014, and will take effect on April 14, 2015.

The new rule was approved by the board in a 3-2 vote. All three Democratic board members — NLRB Chair Mark Gaston Pearce, Nancy J. Schiffer and Kent Y. Hirozawa — voted in favor of the new rule and both Republican board members — Philip A. Miscimarra and Harry I. Johnson III — dissented. In a press release posted on the NLRB website, Pearce said, "I am heartened that the board has chosen to enact amendments that will modernize the representation-case process and fulfill the promise of the National Labor Relations Act. Simplifying and streamlining the process will result in improvements for all parties. With these changes, the board strives to ensure that its representation process remains a model of fairness and efficiency for all." Pearce's statements notwithstanding, many commentators have argued that the practical effect of the new rules will be to create several advantages for unions during the representation-case process.

Some of the changes in the new rule include:

► Elections may be held on an abbreviated time frame, in as little as 10 to 21 days.

► In many instances, voter eligibility and inclusion issues will not be addressed until after the conclusion of an election.

► Pre-election hearings will generally be set eight days after a hearing notice has been served. The day prior to the

pre-election hearing, non-petitioning parties will be required to provide a Statement of Position concerning the following: the board's jurisdiction to process the election petition; whether the petitioned-for unit is appropriate; whether a party has any proposed exclusions from the petitioned-for unit; whether any bar exists to the election; the type, dates, times and location of the election; and any other issues that a party intends to raise at hearing. The non-petitioning party would largely be precluded from litigating any issues inconsistent with the terms contained in a Statement of Position or from litigating most issues raised in a late-filed Statement of Position.

► As part of the Statement of Position, employers will be required to provide a list of prospective voters, including job classifications, work locations and shifts. Once the regional director approves an election agreement or decision directing an election, the employer must provide a voter list that includes employee's personal phone numbers and email addresses, if available to the employer.

The NLRB has provided a fact sheet on its website highlighting these and some of the other changes included in the new rule. As previously noted, many of the new procedures are a significant departure from prior processes in representation-case matters. Moving forward, both employers and unions would be well served to become familiar with the changes instituted in the NLRB's new rule.

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Joinder of Required Parties

Wilson v. Samson Contour Energy E&P, L.L.C., 14-0109 (W.D. La. 12/9/14), 2014 WL 6909416.

The plaintiff brought a claim in state court against Samson Contour Energy, asserting that Samson had paid her for only 17/48ths of the mineral production attributable to land that she owned. After removing the case to federal court, Samson conceded that it had paid the plaintiff for only 17/48ths of the mineral production, but asserted that this was the proper amount because the plaintiff's land was subject to mineral servitudes that entitled other persons to the remaining fraction. The plaintiff argued that the servitudes had prescribed.

The plaintiff had not joined as parties the putative owners of the servitudes that she asserted were prescribed. Samson filed a motion to dismiss for failure to join a required party. Federal Rule of Civil Procedure Rule 19 requires that a party subject to service of process be joined if that person's joinder will not destroy subject-matter jurisdiction and a judgment rendered in the person's absence might, as a practical matter, impair that person's ability to protect his interest. The court reasoned that a judgment in favor of the plaintiff might, as a practical matter, impair the ability of the putative servitude owners to protect their interests. Although a judgment would not have *res judicata* effect against them if they were not parties, the judgment would have precedential effect. The court denied Samson's request that the case be dismissed, but ordered the plaintiff to join the putative servitude owners.

Contamination Claims Against Servitude Owner

Crooks v. La. Pac. Corp., 14-0724 (La. App. 3 Cir. 12/10/14), ____ So.3d ____, 2014 WL 6967567.

The plaintiffs own land that is subject to mineral servitudes. A servitude owner had granted a mineral lease, and that lease was held by production. The plaintiffs brought suit against the servitude owners, seeking compensation for contamination allegedly caused by oil-and-gas activities. A defendant filed an exception of prematurity, arguing that the suit was premature because oil-and-gas operations still were ongoing. The district court sustained the exception and dismissed the case. The Louisiana 3rd Circuit reversed and remanded, relying in part on Louisiana Mineral Code article 22, which states that a servitude owner "is obligated, insofar as practicable, to restore the surface to its original condition at the earliest reasonable time." The 3rd Circuit also noted that, in certain cases, the Louisiana Supreme Court has held that a lessor need not wait until a lease terminates before bringing a contamination claim against the lessee.

Whether Servitude was Subject to Term

Moffett v. Barnes, 49,280 (La. App. 2 Cir. 10/1/14), 149 So.3d 475.

The parties disputed whether a mineral servitude was subject to a 10-year term. Under Louisiana law, a reservation of mineral rights in a sale creates a mineral servitude in favor of the seller. La. R.S. 31:15 and 31:21. The act creating a mineral servitude may set a term for the servitude, La. R.S. 31:74, but a mineral servitude need not have a term, and most do not. On the other hand, all mineral servitudes are subject to prescription of nonuse, with the prescriptive period being 10 years, unless the parties have agreed to a shorter prescriptive period. La. R.S. 31:27 and 31:74. A mineral servitude terminates upon the earlier of the running of prescription, the expiration of the term (if the servitude has a term) or certain other events. La. R.S. 31:27.

The plaintiffs own two tracts of land that they purchased from the defendants. The act of sale stated, "Vendor retains all oil, gas and other mineral rights in the land herein conveyed for ten (10) years." The defendants granted mineral leases covering the tracts. The lessees drilled and established produc-

tion on each tract before the 10th anniversary of the plaintiffs' purchase of the land.

The plaintiffs argued that the act of sale's statement that the defendants retained mineral rights "for ten (10) years" established a 10-year term. Accordingly, the servitudes terminated on the 10th anniversary of the act of sale. The district court disagreed, ruling that the servitudes were not subject to a term and that prescription had been interrupted by drilling and production. The Louisiana 2nd Circuit affirmed, stating the act of sale's reference to "ten (10) years" was simply a restatement of the 10-year prescriptive period established by law. The 2nd Circuit rejected the plaintiffs' contention that they should have been allowed to present evidence regarding the intent of the parties. The court stated that the act of sale was unambiguous, and therefore evidence of intent was not appropriate.

Whether Servitude was Subject to Term

Taylor v. Morris, 49,425 (La. App. 2 Cir. 10/14), ____ So.3d ____, 2014 WL 4854188.

A case with facts very similar to those in *Moffett* (discussed above) was decided by a different 2nd Circuit panel. This panel similarly held that an act of sale referring to a "period of ten (10) years" did not establish a term, and instead merely referred to the law's default prescriptive period. Notably, Judge Caraway submitted a concurring opinion stating that, under the court's decision, "the literal words for a term period of years are being avoided and effectively interpreted out of the contract," but that such a result was justified "[i]n this unusual setting."

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Bystander Damages

Castille v. La. Med. Mut. Ins. Co., 14-0519 (La. App. 3 Cir. 11/5/14), ____ So.3d ____, 2014 WL 5668204.

Complications arose during the delivery of Castille's daughter. The baby was weak and unresponsive at birth, and she died 36 days later.

Castille filed suit against several defendants, claiming damages for her child's damages and her own, including her own claim for bystander damages pursuant to La. Civ.C. art. 2315.6. The trial court sustained the defendants' peremptory exceptions of no cause of action as to the bystander claim.

Castille contended on appeal that the trial court erred by sustaining the exception as to only the bystander claim because that claim was not an independent cause of action and was thus improperly dismissed by a partial judgment.

The appellate court disagreed. Survival and wrongful death claims are two separate causes of action, as are bystander damages. Bystander injuries occur at different times from wrongful death and survival claims and compensate for different injuries. Survival claims compensate the "direct victim" for the damages sustained, begin at the time of injury, and continue until death; wrongful death damages begin from the moment the victim dies; bystander injuries occur from the moment of witnessing (or becoming contemporaneously aware of) the event that caused injury to the direct victim. As the court stated, "Thus, by the same jurisprudential logic by which a wrongful death and survival claim are separate causes of action, a bystander claim is also a separate cause of action."

Castille also contended that her petition stated a valid claim for bystander damages. The appellate court found otherwise in that Castille was "silent" as to what she saw, became aware of, or when either of those things occurred. Describing the infant upon delivery as "limp, apneic, cyanotic," without reference to whether Castille personally made those observations or learned about them in some other way, made it "hard to gauge the severity or foreseeability of any resulting" damages. Nevertheless, the court ruled that the petition was "not beyond repair," and pursuant to La. C.C.P. art. 934, the peremptory exception of no cause of action was sustained and the case remanded to the district court to permit a remedial amendment.

Service of Process

Velasquez v. Chesson, 13-1260 (La. App. 4 Cir. 10/8/14), ____ So.3d ____, 2014 WL 5034609.

During the medical-review-panel proceedings, Velasquez was notified by the Division of Administration that Chesson was a qualified *state* health care provider. Following panel proceedings, Velasquez filed a lawsuit, naming only Chesson as a defendant.

Chesson filed a declinatory exception of insufficiency of service of process, contending that the "State" must be served within 90 days of filing of a lawsuit against it or any of its employees. The exception was sustained.

Velasquez argued on appeal that service on the State was not necessary because Chesson was not sued in his "official capacity as a qualified State health care provider."

When the State, a state agency and any of its officers or employees are named parties to a lawsuit, service on the State or agency must be requested within 90 days of filing suit. La. R.S. 13:5107(D) and La. C.C.P. art. 1201(C). Absent "good cause," the failure to request service within 90 days requires dismissal of the action. Plaintiffs are held strictly to serving the correct agent for service of process, which includes serving the named state defendants. *Barnett v. La. State Univ. Med. Ctr.-Shreveport*, 02-2576 (La. 2/7/03), 841 So.2d 725. Service was required on:

(1) the head of the department for the Board of Supervisors or Louisiana State University Agricultural and Mechanical College; (2) the Office of Risk Management; *or* (3) the Attorney General of Louisiana. La. R.S. 13:5107; La. R.S. 39:1538; *Whitley v. State ex rel. Bd. of Sup'rs of Louisiana State Univ. Agr. Mech. Coll.*, 11-0040, p.18 (La.7/1/11), 66 So.3d 470, 481.

Velasquez contended that the service requirements of La. R.S. 13:5107 and 39:1538 were inapplicable, as Chesson was sued only in his individual capacity. The court noted, however, that Velasquez was notified that Chesson was a qualified *state* provider by the Division of Administration at the onset of panel proceedings. Thereafter, a petition to institute discovery was filed by the State, LSU Board of Supervisors, LSU Health Sciences Center, LSU Health Care Services Division and Dr. Chesson. Another militating factor, it said, was that the plaintiff voluntarily underwent a surgical procedure at University Hospital, a state-owned facility.

Although not a central issue in its opinion, the court nevertheless mentioned that service at a party's place of business is effective only if that party is served personally (citing *Roper v. Dailey*, 393 So.2d 85, 87 (La. 1980)). In *Velasquez*, the plaintiff requested service at the wrong business, and despite the sheriff's return stating that Chesson was personally served, Chesson contended that the service address was not his correct address and that he was never personally served.

The exception was sustained, and the suit dismissed without prejudice.

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Recent 5th Circuit Tax Cases

In December 2014, the 5th Circuit affirmed the Tax Court's decision on the disallowance of the use of the installment method to report income attributable to unrealized receivables and the IRS's ability to change a taxpayer's accounting method. The taxpayers in *Mingo v. Comm'r of Internal Revenue*, ____ F.3d ____ (5 Cir. 2014), 2014 WL 6914367, received a convertible promissory note in exchange for a partnership interest that contained unrealized receivables from consulting services rendered. The taxpayers reported the sale of the partnership interest as an installment sale on their 2002 federal income tax return and did not recognize any income relating to the note other than interest income on their tax returns until 2007, when they converted the note and reported long-term capital gain from the conversion.

The Tax Court found in favor of the commissioner's position that the portion of the gain realized on the sale of the partnership interest attributable to unrealized receivables was ineligible for the installment method, and, consequently, the taxpayers should have reported ordinary income in 2002. The 5th Circuit agreed and concluded that the proceeds from the unrealized receivables, classified as ordinary income, were not eligible for installment method reporting because they did not arise from the sale of property. Both courts found that the installment method did not adequately reflect the taxpayers' income from the unrealized receivables. Since I.R.C. § 446 grants discretion to the commissioner to change a taxpayer's accounting method upon determining that a different accounting method should have been used, and I.R.C. § 481(a) permits the commissioner to make any necessary adjustments to prevent taxable income from being omitted or duplicated following a change of accounting method, the courts also allowed the commissioner's adjustments to be made to the taxpayers' 2003 return as the statute of limitations on assessment had expired on the 2002 return.

In September 2014, the 5th Circuit ruled on the use of various discounts for determining the value of a decedent's fractional interest in works of art for federal estate-tax purposes. In *Estate of Elkins v. Comm'r of Internal Revenue*, 767 F.3d 443 (5 Cir. 2014), the IRS assessed an estate-tax deficiency based on its disallowance of the estate's use of a "fractional-ownership discount" to determine the taxable values of the decedent's fractional interests in various works of art. Although the Tax Court rejected the commissioner's argument that no fractional-ownership discount was allowable, it also rejected the estate's evidence of discount quantum and concluded that, instead, a nominal fractional-ownership discount of 10 percent should apply across the board to the decedent's ratable share of the stipulated fair market value of the art.

The central issue on appeal was whether the estate was (1) taxable on the decedent's undiscounted ratable share of the fair-market value of the art, or (2) taxable only on the values reduced by fractional-ownership discounts of either (a) a uniform 10 percent or (b) the percentages the estate argued and supported through testimony and expert-witness reports. Both courts agreed that the application of the willing buyer/willing seller test for determining fair-market value ("the price at which the property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or sell and both having reasonable knowledge of relevant facts") warranted fractional-ownership discounts. However, the 5th Circuit took issue with the lack of factual or legal support for the Tax Court's nominal 10 percent discount and noted that nominal discounts are appropriate in cases with a lack of proof by the taxpayer that any greater discount should be applied. Since only the estate presented evidence as to quantum of the discounts, which were eminently correct, the court reversed the Tax Court's decision to reject the estate's fractional-ownership discount quantum and adopt its own percentage.

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