Subcontractor's Unsuccessful Gamble Doesn't Create an Implied-in-Fact Contract with the Government

Engineering Solutions & Products, L.L.C., 17-1 BCA P 36822 (A.S.B.C.A. 8/4/17), No. 58633 2017 ASBCA LEXIS 309.

In 2004, Engineering Solutions & Products, L.L.C. (ESP) leased a warehouse in Haymarket, Va., to provide support to the U.S. Army under a contract issued by the Department of the Treasury. In 2005, the requirement was transferred to a geographically separated Army-contracting activity. However, ESP continued to provide the warehouse space to the Army as a subcontractor to various prime contractors.

At some point during the period of performance, various Army personnel indicated that they would be interested in leasing more warehouse space from ESP. ESP, without obtaining authorization from a warranted contracting officer, negotiated with its landlord to expand the warehouse. To this end, ESP entered into a 10-year lease that obligated it to pay an early-termination fee if the expanded warehouse was leased for less than seven years. Twice ESP unsuccessfully attempted to get the Army to accept liability for early termination of the lease in the prime contract. In March 2012, the Army vacated the expanded warehouse, five years into ESP's lease, thereby obligating ESP to pay the early-termination fee.

In response, ESP submitted a certified claim contending that an implied-in-fact contract existed between it and the Army requiring the Army to pay the early-termination fee and other costs totaling around $4.5 million. The contracting officer denied the claim, and ESP appealed to the Armed Services Board of Contract Appeals (ASBCA or the Board), asserting its implied-in-fact contract argument and two other theories of recovery not addressed herein.

The Board reviews administrative appeals of contracting officer's final decisions under the Contract Disputes Act, 41 U.S.C. §§ 7101-7109. This Board is one of a handful that are available to contractors dissatisfied with a contracting officer's final decision as an alternative to pursuing litigation at the Court of Federal Claims for contract disputes that occur after contract award. The Board has jurisdiction to decide appeals regarding contracts made by the Department of Defense or an agency that has designated the Board to decide its disputes (like the Central Intelligence Agency). Of the boards, the ASBCA is the largest and issues the vast majority of decisions.

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Authority by Ratification

The primary question before the Board was whether the actions of a few Army employees, with no contracting authority, created an implied-in-fact contract with the Government through their interactions with ESP. In its inquiry into the matter, the Board analyzed the four elements of an implied-in-fact contract with the Government: (1) mutuality of intent to contract; (2) consideration; (3) unambiguous offer and acceptance; and (4) actual authority on the part of the Government representative whose conduct is relied on. *See, e.g., City of El Centro v. United States*, 922 F.2d 816, 820 (Fed. Cir. 1990). While ESP asserted numerous unsuccessful theories as how the four elements of an implied-in-fact contract between it and the Army were satisfied, two theories it asserted to prove Government authority to contract stand out — institutional ratification and ratification by acceptance of benefits.

In its institutional ratification argument, ESP relied partially on the holding in *Janowsky v. United States,* 133 F.3d 888 (Fed. Cir. 1998). In that case, the plaintiff owned a vending machine business and was concerned with a possible decline in business value if he cooperated with the FBI on a sting operation. Janowsky received a verbal promise of indemnification from an FBI agent who lacked actual contracting authority for the Government; he had his lawyer prepare a written agreement, with input from the FBI. The FBI allowed the undercover operation to continue, and not until after capturing one of the targets of the probe did the FBI inform Janowsky that he would not receive the promised indemnification. The Federal Circuit reversed the grant of summary judgment in favor of the Government because there was a factual issue regarding whether the FBI had "institutionally ratified" the agreement.

The Board distinguished the facts in *Janowsky* and ESP's case. Specifically here, unlike in *Janowsky*, there was no ratification of a purported understanding of the parties that the Army would compensate ESP for early-termination costs. Indeed, the Army explicitly rejected ESP's attempts to include the liability for early termination of the lease in the Contract — twice. The Board found that the widespread institutional rejection of the contract terms proposed by ESP foreclosed any finding of institutional ratification of such terms.

In its ratification-by-acceptance argument, ESP alleged that a contracting officer's acceptance of the benefits of an implied-in-fact contract can constitute ratification. In its argument, ESP relied on two cases — *Healthcare Practice Enhancement Network, Inc*., VABCA No. 5864, 01-1 BCA ¶ 31,383 at 154,986, and *Sociometrics, Inc*., ASBCA No. 51620, 00-1 BCA ¶ 30,620. The Board distinguished those cases as involving situations where it should have been clear to the contracting officer that services were being provided without a contract, unlike in this case where the contracting officers were physically separated from the warehouse and did not know about the lease — except that they rejected it.

In the end, the Board commented that what the evidence did show was that ESP made a business decision to enter into a10-year lease for the expansion of the warehouse with the hope of growing its business with the Army. That ESP's gamble did not pay off did not create an implied-in-fact contract with the Army. Consequently, because ESP did not prove all of the elements of an implied-in-fact contract, the Board determined that ESP did not establish a contract with the Army and denied the appeal.

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Mediation on International Scale: Role of Bias in Brokering Peace in the Middle East

President Trump's endorsement of Jerusalem as Israel's capital has called into question whether the United States is a viable mediator between Israelis and Palestinians. The United States has maintained the main mediator role between Israelis and Palestinians for decades, but Trump's assertion has led to calls for the United States to step down. Though a large portion of the international community previously considered the United States biased toward Israeli interests, Trump's endorsement has sparked increasing concern for the future of a successful Israeli-Palestinian peace agreement.

On Dec. 6, 2017, Trump determined, consistent with the Jerusalem Embassy Act adopted by Congress in 1995, that it was "time to officially recognize Jerusalem as the capital of Israel." Trump found this recognition was a step toward peace between the Israelis and the Palestinians. Though Trump acknowledged the city's importance to Jews, Muslims and Christians, he found Jerusalem to be the "heart" of Israel's successful democracy, and, therefore, the capital of Israel. *https://www.whitehouse.gov/briefings-statements/statement-president-trump-jerusalem/.*

Trump did not outline the borders of Israel's capital or refer to an undivided capital. In addition, he stated that the United States would support a two-state solution if the Israelis and Palestinians agreed, leaving room for negotiation in his rhetoric. Nonetheless, his announcement has been widely perceived as confirmation that the United States officially aligns with Israel.

Unlike Trump's perceived message that Israel is the rightful owner of Jerusalem, many find the most realistic route to achieving peace is to award the western section of Jerusalem to Israel and the eastern section to a forthcoming Palestinian state. Likewise, the international community considers the city's status a primary point that negotiations between the Israelis and the Palestinians alone must resolve. In 2000, a peace compromise was nearly achieved, but negotiations stalled when the Israelis and Palestinians could not agree over who would have control of a labyrinth of underground tunnels underneath Jerusalem. No fruitful negotiations regarding the city have taken place since that time. Meanwhile, for more than two decades, U.S. presidents have remained neutral on the city's status by introducing waivers regarding the Jerusalem Embassy Act to avoid moving the U.S. embassy to Jerusalem and recognizing Jerusalem as Israel's capital. Therefore, Trump's recent statement, whether he intended it to or not, has tipped the scales.

Trump's perceived bias toward Israel's interest in Jerusalem has prompted Mahmoud Abbas, the Palestinian president, to find the United States no longer "fit" to mediate the dispute. Abbas stated Palestinians will not allow the United States to mediate the peace negotiations. He publicly announced at an Organization of Islamic Cooperation meeting in Istanbul that he plans simultaneously to seek full United Nations (UN) membership and request the UN take over the mediation process. Abbas found Trump's remark was "an announcement of the US administration's withdrawal from its role" as mediator. *https://www.theguardian.com/world/2017/dec/13/recep-tayyip-erdogan-unite-muslim-world-trump-east-jerusalem.*

Trump's endorsement further prompted Muslim nations to call for the international community to recognize east Jerusalem as the Palestinian state's capital.

Though many applauded Trump's announcement, others echoed concerns surrounding the United States' mediator role in the peace process. One main concern is that Arab governments may be forced to withdraw from the peace process out of the need to save face; cooperation in what may be considered a group effort by the United States and Israel to disadvantage Palestinians may lead to local unrest against current Palestinian leaders. Debra DeLee, president of Americans for Peace Now, associated with Israeli peace group Shalom Achshav, said that Trump's announcement has caused substantial damage to any potential peace agreement. In addition, Pope Francis publicly disapproved of Trump's statement.

Studies suggest, however, that establishing the United States' bias toward Israel does not necessarily make the United States a less effective international mediator. International mediation typically contemplates multiple international actors with individual interests coming together to manage an interstate or intrastate conflict through negotiations. Third parties, such as state actors, representatives of states and representatives of global organizations, may act as the mediator. Unlike in standard mediation, which generally requires mediators remain neutral and impartial throughout the negotiations, international mediation operates using a

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significantly different approach.

The mediator's impartiality may be less important than the mediator's leverage when state actors enter the mediation field. International-conflict-management scholar Sinisa Vukovic argues that the Arab world initially accepted the United States as a mediator not because it found the United States an unbiased third party, but because it believed that the combination of the United States' resources and its strong ties with Israel could leverage Israel to compromise. The 1979 hostage crisis is another example of this approach, in which the United States allowed Algeria to mediate rescue efforts precisely because of its close relationship with the Khomeini regime. Though bias may be one factor in international mediation, resources, leverage and technique nonetheless remain substantial reasons to partake in mediation with a biased state actor.

Trump's recent endorsement signifies a shift in the United States' approach to mediating the Middle East dispute. It remains unclear, however, whether Trump's announcement will ultimately help or hurt the United States' efforts to mediate peace between the Israelis and the Palestinians.

For more information, see: *https://www.nytimes.com/2017/12/09/world/middleeast/jerusalem-trump-capital.html?mtrref=www.google.com&gwh=9BDB834A65E75B124F67F3ED3E99560E&gwt=pay; https://www.vox.com/world/2017/12/6/16741528/trump-jerusalem-speech-israel-tel-aviv; http://www.emeraldinsight.com/doi/pdfplus/10.1108/IJCMA-02-2012-0015; http://elibrary.law.psu.edu/cgi/viewcontent.cgi?article=1026&context=jlia.*

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Circuits Split on Wage Garnishment Issue

In re Jackson, 850 F.3d 816 (5 Cir. 2017), *cert. denied sub nom. Tower Credit, Inc. v. Schott*, ____ S.Ct. ____, 2017 WL 4269679.

On Dec. 4, 2017, the Supreme Court denied certiorari of the 5th Circuit decision *In re Jackson*, wherein the 5th Circuit disagreed with three other circuit courts. The 5th Circuit held that, for preference purposes, the transfer of a Chapter 7 debtor's wages did not occur at the time the garnishment order was served, but rather occurred when an interest in the wages was acquired.

In *Jackson*, Tower Credit, Inc. obtained a money judgment against the debtor, Christon Jackson, in 2009, and, subsequently in 2012, obtained a garnishment order in

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an effort to collect. Jackson filed his Chapter 7 bankruptcy petition later that year.

The Chapter 7 trustee initiated an adversary proceeding against Tower Credit, seeking to void the pre-petition garnishments of Tower that occurred within the 90 days prior to the petition date as preferential transfers pursuant to 11 U.S.C. § 547(b). The Chapter 7 trustee sought to recover the garnished wages totaling $1,756.04. The bankruptcy court granted summary judgment in favor of the trustee, and the district court affirmed. Tower appealed, arguing that the garnished wages should be considered transferred on the date the garnishment order was served, which fell outside of the 90-day preference period.

On appeal, the 5th Circuit cited the Supreme Court's decision in *Barnhill v. Johnson*, 112 S.Ct. 1386 (1992), which held that federal law governs what a transfer is and when the transfer is completed. The court then pointed out that § 547(e) provides the rules for determining the timing of a transfer. As a general rule, a transfer is typically made at the time it is perfected, which for non-real property, occurs when the creditor on a simple contract can no longer acquire a lien superior to the interest of the transferee. Thus, Tower argued, at the time of the garnishment order, no creditor on a simple contract could have acquired a lien superior to Tower's interest. However, the 5th Circuit pointed out that § 547(e)(3) qualifies the general rule by providing that the transfer is not made until the debtor has acquired rights in the property being transferred.

Citing another Supreme Court case, the 5th Circuit noted that earnings do not become property, for bankruptcy purposes, until they come into existence. Therefore, in the wage-garnishment context, the debtor cannot obtain rights in future wages until he performs the services entitling him to those wages. In this case, because the debtor did not earn the disputed wages prior to the 90-day preference period, he had not acquired rights to the wages, and thus could not have transferred those rights to Tower before the preference period.

Tower relied on three older decisions from the 11th, 7th and 2nd Circuits that held that the transfer of garnished wages occurred at the time the employer was served with the garnishment order. However, each of those cases was decided before the Supreme Court's decision in *Barnhill*, and the cases either did not consider § 547(e), or, in the 5th Circuit's opinion, ignored its applicability. The 5th Circuit noted that numerous lower courts have largely criticized the holdings of these three older cases and joined in rejecting their reasoning, holding that a creditor's collection of garnished wages during the preference period is an avoidable transfer even where the garnishment order was served prior to the preference period.

The Supreme Court's denial means that the circuit split on this issue will continue until the lower courts resolve the issue themselves or until the issue is large enough for the Supreme Court to decide to resolve the split once and for all.

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Applicability of Oppressed Shareholder Remedy to Pre-Effective Date Acts

Cole v. Sabine Bancshares, Inc., 17-0272 (La. App. 3 Cir. 12/6/17), ____ So.3d ____, 2017 WL 6029783.

On Jan. 7, 2016, Cynthia Cole, a minority shareholder, filed suit against Sabine Bancshares, Inc., alleging that she was an oppressed shareholder under La. R.S. 12:1-435, the oppressed shareholder statute, and seeking to enforce her right under the statute to have Sabine purchase her shares at fair value. Sabine filed an exception of no cause of action because the acts alleged in Cole's petition occurred before the effective date of the statute, Jan. 1, 2015. The trial court ultimately issued an amended judgment granting Sabine's exception in part. It dismissed Cole's pre-Jan. 1, 2015, claims, ordered her to amend her petition to allege only acts of oppression occurring on or after Jan. 1, 2015, and certified the judgment as final and appealable. Cole appealed to the Louisiana 3rd Circuit Court of Appeal.

On appeal, Cole first argued that the oppressed shareholder statute was procedural in nature, not substantive as the trial court held, and thus should apply retroactively to acts of oppression that occurred prior to its effective date. The 3rd Circuit applied a two-part test. First, the court examined whether the Louisiana Legislature "expressed an intent concerning the retroactive or prospective application" of the oppressed shareholder statute, as the court must adhere to the intent of the Legislature. The 3rd Circuit found that neither the oppressed shareholder statute specifically nor the Louisiana Business Corporation Act as a whole expressed the Legislature's intent on that subject. The court thus applied step two, determining whether the law is substantive, procedural or interpretive. The 3rd

Circuit reasoned that neither the oppressed shareholder statute nor the rights provided thereby existed prior to its enactment. Because the statute created rights not previously available to shareholders, rather than an avenue by which such a right is enforced, the court held that the oppressed shareholder statute was a substantive law that applied prospectively only.

Cole next argued that even if the oppressed shareholder statute does not apply retroactively, pre-2015 acts of oppression can still be considered because the statute requires courts to consider actions that took place "over an appropriate period of time." In support of her argument, Cole cited the Louisiana Supreme Court's decision from *Walls v. American Optical Corp.*, 98-0455 (La. 9/8/99), 740 So.2d 1262, 1266, for the proposition that "a law may permissibly change the future consequences of an act and even the consequences of acts committed prior to the law's enactment without operating retroactively." Under *Walls*, the 3rd Circuit noted, a law operates retroactively only "when it goes back to the past either to evaluate the conditions of the legality of an act, or to modify or suppress the effects of a right already acquired" (quoting *Walls*, 740 So.2d at 1267).

In rejecting Cole's argument, the 3rd Circuit first reasoned that Cole could not acquire "a right in a cause of action for oppression prior to the statute's effective date since an oppression remedy failed to exist" before that date. Next, the court reasoned that "[c]onsideration of [Sabine]'s acts prior to January 1, 2015, would attach new legal consequences to [Sabine]'s conduct prior to enactment of the statute. This would operate as an impermissible retroactive application of the statute."

Lastly, Cole argued that even if the oppressed shareholder statute applies prospectively only, pre-Jan. 1, 2015, facts that are relevant to acts of oppression, such as motive and intent, should be considered under Louisiana Code of Evidence art. 404(B). To support this argument, Cole relied on *Monroe Medical Clinic, Inc. v. Hospital Corporation of America*, 622 So.2d 760 (La. App. 2 Cir. 1993), *writ denied*, 629 So.2d 1135 (La. 1993), in which the Louisiana 2nd Circuit allowed evidence of events occurring before the commencement of a peremptive period to demonstrate motive, intent or plan under art. 404(B). However, the 3rd Circuit rejected this argument, noting that it involved acts barred by preemption, not acts barred by retroactivity.

Thus, the 3rd Circuit affirmed the trial court's judgment granting Sabine's exception of no cause of action and assessed costs of the appeal to Cole.

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Eastern District Finds Pipeline Companies Owe Duty to Servient Estate Landowner

While most court watchers have been focused on the Southeast Louisiana Flood Protection Authority-East's pipeline damage case's rise to and burnout at the U.S. Supreme Court or on the 41 ambitious coastal land-loss cases brought by the parish and state governments, another pipeline damage case has been weaving its way through the Eastern District of Louisiana.

Vintage Assets, Inc. v. Tenn. Gas Pipeline Co., No. 16-713 (E.D. La. 2017), is a relatively focused pipeline-damage case brought by a single group of landowners against pipeline companies who executed servitudes across their property. Unlike the more high-profile cases previously mentioned, this case does not involve a government plaintiff or regulatory body and, although it was originally brought under theories of tort and breach of contract, the case was narrowed to focus on the responsibilities that pipeline companies had by virtue of their servitude agreements and the laws interpreting them.

The *Vintage* trial took place in September 2017 before District Judge Jane Triche Milazzo and, as of the writing of this update, the court had not ruled on the ultimate merits of the case. However, based on a pair of rulings on motions for summary judgment, this case is shaping up to be an important component in the jurisprudential development of the duties and liabilities related to pipeline operations in the Louisiana coastal zone.

The court's preliminary rulings were a mixed bag for both sides. On one hand, the court rejected several of the plaintiff's theories and claims like trespass. The plaintiff argued that the erosive widening of the canals since their construction amounted to a trespass that was not contemplated by the original agreement. The court found that Louisiana law required an intentional or active step to constitute a trespass and that the failure to maintain the width of the canals simply constituted the passive work of erosion. *Vintage*, 2017 WL 3601215, at *4 (E.D. La. 2017).

However, the court also found that a combination of the servitude agreements and the suppletive law imparted a duty on the pipeline companies to maintain the canals where the agreements possessed an internal inconsistency by allowing the pipeline company to leave the canals "open" but also contemplating a maximum width. The court further found that this duty was ongoing, and, in several of the agreements, the duty had been breached.

> There is no dispute that Defendants did not maintain the canals at issue and allowed the canals to widen to widths far exceeding that set forth in the servitude agreements. Indeed, some of the canals have eroded into open water. Defendants do not dispute these facts. Accordingly, this Court holds that Defendants had a duty to maintain the canals, and that duty was breached. *Id.* at 7.

For the contracts that did not contain language providing for a maximum width, the court also found that there was no duty.

Regardless of the outcome in the Eastern District, the *Vintage* case will likely make its way to the U.S. 5th Circuit and become a relevant jurisprudential signpost as Louisiana continues to reconcile historic oil and gas activities with coastal restoration.

LDEQ and U.S. EPA Settle Clean Air Act Allegations with ExxonMobil

On Oct. 31, 2017, the Louisiana Department of Environmental Quality (LDEQ) and the U.S. Environmental Protection Agency (EPA) filed a complaint and consent decree in case no: 4:17-cv-03302 in the Southern District of Texas to memorialize a settlement with Exxon Mobil Corp. and ExxonMobil Oil Corp. (collectively ExxonMobil) for alleged violations of the Clean Air Act.

The settlement concerns 26 flares at ExxonMobil's chemical, olefin, polymer and plastic manufacturing facilities located in or near Baton Rouge and Texas facilities located in Baytown, Beaumont and Mont Belvieu. It requires ExxonMobil to implement numerous pollution-control measures, pay civil penalties and contribute to environmental projects. These measures include a requirement to implement flare-gas-recovery systems and other technology at the facilities, which are expected to reduce emissions of volatile organic compounds by 7,000 tons and benzene by 1,500 tons. ExxonMobil will also

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be required to pay $2.5 million in civil penalties, $470,000 of which will go directly to LDEQ.

The settlement also contains requirements for fence-line-monitoring systems and for ExxonMobil to contribute $2.5 million to a federal supplemental environmental project to plant trees in Baytown and to purchase a mobile air-quality-monitoring laboratory for LDEQ. According to the proposed consent decree, "LDEQ expects the new [laboratory] will be deployed throughout the state of Louisiana on special monitoring projects to provide instantaneous, onsite data directly related to air quality issues. It will allow the LDEQ to provide a more proactive approach to improving Louisiana's air quality. . . ." All told, between the civil penalties and injunctive relief, including investments in new technology, ExxonMobil will spend nearly $300 million to resolve the allegations.

In the complaint alleging violations of its Title V permits, the Texas and Louisiana State Implementation Plans, the Clean Air Act, and its accompanying regulations, the regulators very clearly acknowledged ExxonMobil's cooperation with the EPA and mitigation measures undertaken prior to the consent decree. This mitigation and cooperation were likely significant contributors to the relatively low civil penalty compared to the scope of the allegations, the size of which created consternation among environmental organizations. But regardless of the civil penalty, the result of this consent decree will be a significant investment in new pollution controls and a large contribution of resources and money to LDEQ.

The public comment period for the proposed consent decree tolled on Dec. 7, 2017. Subject to a review of those comments, the consent decree will likely become final in 2018.

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Marriage Contract

Acurio v. Acurio, 50,709 (La. App. 2 Cir. 6/22/16), 197 So.3d 253, *rev'd*, 16-1395 (La. 5/3/17), 224 So.3d 935.

The trial court ruled that the parties' prenuptial marriage contract establishing a separation of property regime could not be introduced at the time of the property partition because it was not an authentic act and, although an act under private signature, was not duly acknowledged prior to the marriage. The court relied on *Ritz v. Ritz*, 95-0683 (La. App. 5 Cir. 12/13/95), 666 So.2d 1181, *writ denied*, 96-0131 (La. 3/8/96), 669 So.2d 395, and *Deshotels v. Deshotels*, 13-1406 (La. App. 3 Cir. 11/5/14), 150 So.3d 541, which held that the acknowledgment had to be accomplished before the marriage.

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The 2nd Circuit reversed the trial court, noting the above cases, but distinguishing them by holding that the acknowledgment had no statutory time requirement and was not required to occur before the marriage. The court stated that the "purpose of the acknowledgment is simply for the parties to recognize the signatures as their own." 197 So.3d at 256. In essence, the contract is effective upon the parties' signatures, and the need for acknowledgment arises only if a challenge is made to the validity of the signatures. Moreover, the parties had subsequently acquired immovable property in which they had acknowledged the existence of the separate property regime.

The Louisiana Supreme Court reversed, finding that the acknowledgment was a form requirement and had to occur before the marriage. Two justices dissented.

Neivens v. Estrada-Belli, 17-0225 (La. App. 4 Cir. 9/27/17), 228 So.3d 238.

A prenuptial agreement for a separate property regime, signed by the parties in Tennessee and valid under Tennessee law, was enforceable in Louisiana. Although the agreement was not in authentic form, it was valid under Tennessee law and appropriately acknowledged as an act under private signature at the time executed. The parties did not have to enter into a new separate property regime in Louisiana or record the Tennessee agreement in Louisiana to avoid a community property regime. That part of the prenuptial agreement providing for a waiver of interim support, although invalid under Louisiana law, was severable, pursuant to a severability clause in the contract. Defendant's requests for continued interim spousal support after the divorce and for final support were appropriately denied due to waivers in the contract. Fees and costs were appropriately awarded to plaintiff as provided in the contract.

Relocation

Singleton v. Singleton, 51,476 (La. App. 2 Cir. 6/21/17), 224 So.3d 1134.

The trial court did not err in denying Ms. Singleton's request to relocate five and one-half hours away in Texas with the 9-year-old child. Ms. Singleton's husband was being transferred to Texas for a better job there, and Mr. Singleton had a past history of theft and drug issues. The court found, however, that Mr. Singleton had a good relationship with the child, and that the 11-hour travel time would disrupt that relationship. Further, extended family members lived in the local area, the child attended school there, where he participated in extracurricular activities, and he had friends there. Although the court of appeal noted that it might have reviewed some of the relocation and article 134 factors differently than the trial judge did, the trial court did not abuse its discretion in its review or decision. The court also considered the child's preference not to move.

Recusal

Rodock v. Pommier, 16-0809 (La. App. 3 Cir. 2/1/17), 225 So.3d 512, *writ denied*, 17-0631 (La. 5/1/17), 221 So.3d 70.

Ms. Rodock moved to recuse the trial judge, alleging that, following a pretrial conference, he had "pre-judged this relocation matter." The court of appeal affirmed the denial of the motion to recuse, stating:

> Pretrial conferences in chambers frequently are sought by counsel to foster and promote settlement discussions. While it may be the better practice for these discussions to be held with a court reporter present so that a transcript can be available, statements made by a trial judge that he or she is "leaning" one way or the other are not, generally, evidence of bias. To the contrary, "adverse rulings alone do not show bias or prejudice."

Id. at 519, *quoting Earles v. Ahlstedt*, 591 So.2d 741, 746 (La. App. 1 Cir. 1991).

The court of appeal found that the trial court had not pre-judged the case. No facts showed that the court was biased or prejudiced, and the allegation emanated from rulings made within the case itself rather than statements of an extrajudicial nature.

England v. England, 16-0936 (La. App. 4 Cir. 6/28/17), 223 So.3d 582.

The trial court had ex parte communications with a detective investigating child abuse allegations, the parenting coordinator, the custody evaluator, social workers and a physician at Children's Hospital. These, however, were not sufficient bases to recuse her; as no actual bias or prejudice against Ms. England was shown, she failed to rebut the presumption that the judge was impartial. Moreover, Ms. England had waited over six months to raise the allegations, waiting until right before trial started. The 4th Circuit held that even though the communications "may have given the appearance of impropriety, . . . this is insufficient to mandate recusal under La. Code Civ. Proc. art. 151."

The trial court did not err in designating Mr. England the domiciliary parent and did not employ the "parental alienation syndrome theory" in awarding that designation to him, although it did find that Ms. England had engaged in attempts to alienate the children from him. The court of appeal affirmed the trial court's sanction of $95,450 in attorney's fees to Mr. England as a result of Ms. England's requests for protective orders. The court found that those requests were neither supported by evidence nor sufficiently investigated prior to filing, and that the testimony of Ms. England and the children was inconsistent and not credible. The granting of Mr. England's exception of no cause of action to Ms. England's petition to annul an earlier judgment denying her request for a protective order was upheld because she did not proffer evidence and failed to appeal the ruling. Furthermore, a petition for nullity is not a substitute for an appeal.

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Oil Pollution Act: Responsible Parties

United States v. Am. Commercial Lines, L.L.C., 875 F.3d 170 (5 Cir. 2017).

The tugboat M/V MEL OLIVER was pushing an oil-laden barge along the Mississippi when it started moving erratically and, despite warnings, veered into the path of an ocean-going tanker, the TINTOMARA, which collided with the barge, breaking it loose and causing it to sink, spilling 300,000 gallons of oil into the river.

The MEL OLIVER's crew consisted of Captain Terry Carver, Steersman John Bavaret and two deckhands. Only Carver had a valid United States Coast Guard Master of Towing Vessels license, authorizing him to lawfully operate tugboats on the lower Mississippi River. Bavaret's Apprentice Mate (Steersman) license authorized him only to serve under the direct supervision of a properly licensed master, not to operate the vessel without continuous supervision.

Two days after Carver had gone ashore, leaving Bavaret in charge of the vessel, American Commercial Lines (ACL) ordered the MEL OLIVER to pick up oil at a Gretna terminal. The MEL OLIVER, with Bavaret at the helm, proceeded on the mission. An hour after departing the terminal, the collision occurred. In addition to being unqualified to operate the vessel without proper supervision, Bavaret was found to be in violation of several Coast Guard crew-rest regulations.

The M/V MEL OLIVER was owned by ACL and, under complex contractual agreements, was chartered to DRD Towing Company, the operator. As the statutorily defined responsible party under the Oil Pollution Act (OPA), 33 U.S.C § 2704(a), ACL incurred approximately $70 million in removal costs and damages. The United States also incurred $20 million in removal costs and damages. The government prosecuted DRD, Carver and Bavaret for criminal violations of federal environmental law, resulting in guilty pleas to various counts of violating the Ports and Waterways Safety Act and the Clean Water Act. The government sued ACL and DRD to recover $20 million in cleanup costs. DRD promptly declared bankruptcy, and the district court granted the government's motion for summary judgment against ACL.

OPA was enacted in 1990 in response to the 1989 Exxon Valdez oil spill of 11 million gallons, with Congress enacting the final draft without a single dissenting vote. It "was intended to streamline federal law so as to provide quick and efficient cleanup of oils spills, compensate victims of such spills, and internalize the costs of spills within the petroleum industry." OPA places strict liability on the "responsible party," defined, in the case of vessels, as "any person owning, operating, or demise chartering the vessel." OPA has specified dollar-amount liability limits for a responsible party that do not apply if "the incident was proximately caused by . . . the violation of an applicable Federal safety, construction, or operating regulation by, the responsible party, an agent or employee of the responsible party, or a person acting *pursuant to* a contractual relationship with the responsible party . . . " (emphasis added). OPA also provides for a complete defense to liability if the party establishes by a preponderance of the evidence that the discharge and resulting damages were caused solely by: "(1) an act of God; (2) an act of war; (3) an act or omission of a third party, other than an employee or agent of the responsible party or a third party whose act or omission occurs *in connection with* any contractual relationship with the responsible party" or any combination of (1), (2) and (3) (emphasis added).

ACL contended that it was entitled to a complete defense to liability under 33 U.S.C. § 2703(a)(3) on the ground that the conduct of DRD, a third party, caused

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the spill. The 5th Circuit focused on the significance of the statutory language "pursuant to" and "in connection with," finding the terms not defined within the statute and their interpretation being of first impression. Following an exhaustive semantic analysis with reference to *Webster's Third New International Dictionary* (2002), the *Oxford English Dictionary* (2d ed. 1989) and *Black's Law Dictionary* (10th ed. 2014), the court affirmed the district court's grant of summary judgment, stating:

> Here, there is no dispute that the . . . spill was caused by DRD's wrongful conduct and regulatory violations, committed in the course of carrying out its contractual obligation to transport ACL's fuel-filled barge. Accordingly, the spill was caused by the gross negligence, willful misconduct or regulatory violations of "a person acting pursuant to a contractual relationship with" ACL, and ACL is therefore not entitled to limited liability.

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U.S. Department of Commerce

Imports of Common Alloy Aluminum Sheet from the People's Republic of China, Nov. 28, 2017.

The U.S. Department of Commerce (DOC) recently announced the first self-initiation of an international-trade-remedy case in more than 25 years. Following through on the Trump Administration's pledge to get tough on unfair trade practices, the self-initiated case alleges dumping margins between 56.54 percent to 59.72 percent and subsidy rates above *de minimis* (1 percent). The U.S. market has absorbed rising import volumes over the 2014 through 2016 period of investigation. Trade cases like this are usually launched by domestic producers through petition prepared by private counsel. In this case, the DOC prepared the petition and filed the case, which will now follow the usual bifurcated agency process with the DOC ruling on dumping and subsidy margins and the International Trade Commission ruling on injury. Critics of the self-initiation process complain the DOC has an inherent conflict of interest because it has partial jurisdiction over the case. This aluminum self-initiation arrives while the Section 232 national security investigation on aluminum imports remains stalled in the administration.

Imports of Aluminum Foil from the People's Republic of China, Oct. 27, 2017.

Aluminum sheet is not the only Chinese product to make waves in international trade circles. The DOC issued its affirmative preliminary determination in the antidumping investigation of aluminum foil imports from China. In the course of its analysis finding dumping by several Chinese producers, the DOC confirmed that it will continue to treat China as a non-market economy for the purposes of U.S. trade laws. This decision comes as China seeks a ruling by the World Trade Organization (WTO) that it must be treated as a market economy in trade-remedy cases. The stakes are high, with the United States Trade Representative stating that an adverse WTO ruling on this issue will be "cataclysmic" for the international trading system. China contends that its Protocol of Accession to the WTO requires it to graduate to market-economy status as of 2017. For now, the U.S. DOC will continue to apply non-market economy factors to China in AD/CVD cases.

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Customs and Border Protection

Notice of Issuance of Final Determination Concerning Roasted Coffee, 82FR 55387, 55387-55388 (Nov. 21, 2017).

U.S. Customs and Border Protection (CBP) issued a final ruling regarding the country of origin of roasted coffee for purposes of U.S. government procurement. Keurig Green Mountain sought the final determination concerning roasted coffee produced from raw green coffee beans roasted in Canada or the United States. Keurig imports the green coffee, after which it is roasted and packaged. The Keurig coffee must originate in the

United States to comply with, and be eligible for, U.S. government procurement. The issue is whether the roasting and packaging process substantially transforms the imported product into a domestic product. The CBP cited 30 years of precedent recognizing that roasting green coffee constitutes a substantial transformation into a new and different article of commerce. Accordingly, for purposes of U.S. government procurement, Keurig's coffee is considered a product of the country (either Canada or the United States) where the raw green coffee beans are roasted.

World Trade Organization

Korea — Import Bans, and Testing and Certification Requirements for Radionuclides, WT/DS495/7 (Sept. 29, 2017).

Japan sought the establishment of a WTO dispute-settlement panel on June 1, 2015, regarding temporary special measures undertaken by South Korea in September 2013 banning imports of seafood from eight prefectures in Japan located near the site of the Fukushima nuclear disaster. The panel issued a communication on Sept. 29, 2017, seeking additional time to formulate its opinion on the seafood-import ban. However, on Oct. 19, 2017, reports leaked that the panel distributed its full opinion on Oct. 17. According to press reports, the panel ruled against South Korea, finding that its import ban on seafood from the Fukushima area was unjustified under WTO rules. Details of the panel's findings will be reported once made public. This is an important case because it pits WTO Members' rights to protect citizens from potentially harmful foods with WTO Members' obligations to refrain from enacting trade barriers without sufficient scientific justification.

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Mineral Servitudes

Magee v. BHP Billiton Petroleum Props. (N.A.), L.P., 2017 WL 5472521 (W.D. La. 2017).

Members of the Magee family owned land in DeSoto Parish. Members of the Worley family asserted that they owned a mineral servitude covering the land, but the Magees believed that the servitude had terminated by prescription of nonuse. The Magees granted four separate leases covering different portions of the land to a predecessor of BHP Billiton (BHP). The leases each provided for compensation to the Magees, but also provided that if the Magees prevailed in establishing that the servitude was terminated, the lessee would pay them an additional bonus. The leases also each provided that the lessee's deadline to pay an additional bonus and start making royalty payments would be 30 days after the Magees furnished the lessee with a certified copy of an acknowledgment or judgment establishing that the servitude had terminated.

The Magees obtained a declaratory judgment against the Worleys from a district court, establishing that the servitude had terminated by prescription of nonuse. The Worleys appealed, but the Louisiana 2nd Circuit affirmed. After the 2nd Circuit's judgment became final, the Magees' lawyer sent BHP a certified copy of the trial court judgment and a copy (but not a certified copy) of the 2nd Circuit judgment. In the correspondence, the Magees' lawyer requested payment of royalties and the additional bonus. After more than 30 days had passed, the Magees' lawyer wrote to BHP again. About a month after the second letter, the Magees filed suit against BHP, seeking the amount they asserted was due under the leases, as well as penalties that they alleged were due under Mineral Code articles 137 and 139. Article

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137 provides that a lessor must give the lessee notice of an alleged failure to pay royalties before filing suit. Article 139 provides that, if the lessee then pays the royalties due, but that "the original failure to pay royalties was either fraudulent or willful and without reasonable grounds," the "court may award as damages double the amount of royalties due, interest on that sum from the date due, and a reasonable attorney's fee."

The United States District Court for the Western District of Louisiana rejected the Magees' argument and granted partial summary judgment in favor of BHP. The court noted that Mineral Code article 139 can apply if the lessee fails to timely pay the royalties that are due, but that had not occurred here. The parties' contract expressly provided that royalties would not be due until 30 days after the Magees provided a certified copy of any judgment resolving the dispute regarding whether the Worleys' servitude had terminated. The federal district court explained that it was the 2nd Circuit's judgment, not the state district court's judgment, that had resolved the dispute regarding the Worleys' mineral servitude. BHP had timely made payment within 30 days of receiving a certified copy of the 2nd Circuit judgment. Therefore, Mineral Code article 139 did not apply.

OCSLA Regulations

United States v. Moss, 872 F.3d 304 (5 Cir. 2017).

In 2012, a welding accident caused an explosion on an offshore platform, killing three people, injuring others and leading to a discharge of pollutants into the Gulf of Mexico. Three years later, criminal indictments were filed against the lessee-operator, as well as certain contractors and individuals, charging them with violations of the Clean Water Act and various safety regulations promulgated under the Outer Continental Shelf Lands Act (OCSLA). In addition, the lessee and two contractors were charged with manslaughter. The defendants moved to dismiss all charges. The district court dismissed the charges against persons other than the lessee for breaches of OCSLA regulations, but left the other charges in place. The federal government appealed.

The United States 5th Circuit affirmed. The court noted that 43 U.S.C. § 1348(b) states: "It shall be the duty of any holder of a lease or permit under this subchapter . . ." to comply with regulations governing workplace safety and health for their own employees and those of any "contractor or subcontractor." Thus, the only persons identified by § 1348(b) as being obligated to comply with OCSLA regulations are the holders of a lease or permit. Further, OCSLA's welding regulations refer to "you" being obligated to comply with the regulations, and 30 C.F.R. § 250.105 states: "*You* means a lessee, the owner or holder of operating rights, a designated operator or agent of the lessee(s), a pipeline right-of-way holder, or a State lessee granted a right-of-use and easement."

The federal government pointed to various provisions in support of its argument that persons other than a lessee can be criminally liable. One of the provisions was 30 C.F.R. § 250.146(c), which states that "the person actually performing" an activity is jointly and severally liable with the lessee-operator for complying with requirements governing the activity. The 5th Circuit concluded, however, that when such provisions are read in context with OCSLA and the regulations promulgated under it, the better conclusion is that only lessee-operators are bound by the OCSLA welding regulations. Therefore, the court affirmed dismissal of the OCSLA charges against the defendants other than the lessee.

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Health Care Provider Claim Non-Qualified HCP Status

In re: Med. Review Panel Proceeding of Lyons, 51,750 (La. App. 2 Cir. 11/15/17), ____ So.3d ____, 2017 WL 5473698.

The same day that Lyons, a dementia-resident at St. Joseph's Home, was returned to her room after being found wandering in a parking lot, she was discovered unconscious on the ground below an open third-story window. Weeks earlier, Lyons was diagnosed with severe dementia, and Christus Health Central (owner of St. Joseph's) advised Lyon's sister that she needed to transfer her to a more appropriate facility, but Lyons was injured before her sister took any action.

In response to a panel request, the PCF advised that St. Joseph's was "qualified for acts of medical malpractice . . . for the claim." Christus disagreed and moved for dismissal, contending that its assisted living facility was not a "health care provider" and did not provide "health care" as defined by the MMA. Thus the claim was one of ordinary negligence, outside the scope of the MMA and had by then prescribed. The trial court agreed with Christus and dismissed the panel proceeding.

Was the defendant a health care provider? The appellate court wrote that a certificate of PCF enrollment establishes a *prima facie* case for the applicability of the MMA, and "[t]his presumption also applies to a letter from the PCF identifying a party as enrolled in the PCF." The burden then shifts to the defendant to prove it was not covered by the MMA.

Christus provided no PCF document indicating that its assisted-living section was not included in the certification, nor any evidence to prove St. Joseph's was a separate legal entity. Christus argued that the assisted-living facility operated under a license different from St. Joseph's, but it did

not produce the license at trial.

After determining "qualified" status, the appellate court turned to "the more difficult and pivotal question" of whether Christus provided health care *services* to Lyons. While the court agreed that the contract with Lyons did not provide for health care services for dementia, the facility routinely accepted such patients and transferred them when the symptoms became severe. The court suspected the transition to severe dementia occurred over time, as Lyons was diagnosed with "severe dementia" two weeks before her family was notified. By virtue of the contract to monitor Lyons and provide care as needed to secure her safety, the omission to do so was a failure to provide treatment under the MMA, and Lyons became a "patient" when the dementia progressed to the point that a higher level of care was required.

Evans v. Heritage Manor Stratmore Nursing & Rehab. Ctr., L.L.C., 51,751 (La. App. 2 Cir. 9/27/17), ____ So.3d ____, 2017 WL 4273693.

Following a severe stroke, Evans was admitted to Heritage, with standing orders to prevent the development of decubitus ulcers. Two months later, a nursing assistant (NA) tried to change Evans' diaper and undershirt. Evans resisted; the NA became "more aggressive," and the plaintiff then struck the NA, who (describing her own response as "an immediate reflex type") struck Evans with her "fist and long acrylic fingernails." The NA was immediately fired.

The State (DHH) investigated and reported that Heritage had violated regulations, among which were the failure to obtain references before hiring the NA and the failure to exercise reasonable supervision. The NA had disclosed in her employment application a prior simple battery conviction; thus, Heritage failed to follow its own policy of not employing anyone convicted of a crime.

A medical-review panel found that Heritage failed to "adequately vet the ACNA for past history and employment record[s] . . . . However, the action of hitting Mr. Evans was the ACNA's action alone. The resulting injury . . . is related to this incident. However, no long-term complications, change in behavior, or other detrimental effects resulted from the incident."

The panel later issued a "supplemental opinion" that stated:

> The panel finds that [the ACNA] was an employee of Heritage Manor when the conduct . . . occurred . . . . [T]he conduct of [the ACNA] failed to comply with the appropriate standard of care. That conduct caused the injuries to the patient, as described in the panel's [earlier opinion]. Thus both Heritage Manor and [the ACNA] were at fault . . . .

After Evans filed suit, Heritage claimed that the battery did not arise from medical treatment and, therefore, was not a "malpractice" claim. The otherwise timely filed panel request did not interrupt any statute of limitations, and the claim was prescribed.

At the hearing on the exception of prescription, Evans' treating physician testified that the changing of a patient's clothing was "good medical care," but not considered "medical treatment," despite Evans' admission form that called for him to be turned periodically and kept clean and dry.

The trial court sustained the exception, finding that striking a patient, even when it occurs during the confinement or handling of a patient in a nursing home, was an intentional tort, not medical malpractice. Evans appealed.

Heritage argued that Louisiana appellate courts have consistently found that diaper changing is not medical treatment. However, the appellate court found such cases distinguishable because Evans' injury occurred during a diaper change, which was medical-treatment-related (to prevent the development of decubitus ulcers), as it involved assessment of the patient's condition and required medical evidence to determine whether any standard of care had been breached. The court determined this was "more in the nature of gross negligence rather than an intentional act and, thus, is susceptible to a claim for medical malpractice."

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Constitutional Sales Tax Exemption for Prescription Drugs Does Not Extend to Medical Devices

Willis-Knighton Med. Ctr. v. Robinson, BTA Docket No. 9734D (11/8/17).

Acts 25 and 26 of the 2016 1st Extraordinary Session (Acts) suspended almost all exemptions and exclusions from two pennies of Louisiana sales-and-use tax and added an additional penny that was imposed with a similarly reduced set of exemptions and exclusions. The only exemptions or exclusions that were not suspended were those explicitly retained by a list in those Acts (Retained Exemptions List). Those that were not maintained included the statutory exemptions provided by La. R.S. 47:305(D)(1)(j) and (s), which separately exempted prescription drugs and medical devices, respectively. In recognition of the constraints of article VII, section 2.2 of the Louisiana Constitution, the Legislature excluded from temporary suspension the exemption for prescription drugs by including them on the Retained Exemptions List. Consequently, the question arose as to whether the scope of the constitutional exemption included medical devices.

Beginning with the April 2016 period, Willis-Knighton Medical Center (taxpayer) paid the sales taxes due on medical devices under protest to the Board of Tax Appeals. The parties filed cross motions for summary judgment on the issue. The taxpayer contended that the term "prescription drugs" in the constitutional exemption should be read to also include medical devices. The taxpayer's argument was primarily based on La. R.S. 47:301(20), which defined "drugs" for purposes of the

statutory sales-tax exemptions as "all pharmaceuticals and medical devices which are prescribed for use in the treatment of any medical disease" and that such definition should be applied to the constitutional exemption.

The Louisiana Department of Revenue countered by relying on the common or ordinary meaning of the phrase "prescription drugs." The Department relied on Louisiana Supreme Court jurisprudence that has held that the words and terms of Louisiana's Constitution are to be interpreted by the courts by using definitions that would have been given to those terms by the people. It contended the presumption in favor of the natural and popular meanings in which words are usually understood by the people who adopt them should be followed and the courts should generally first look to the dictionary definition.

The Board agreed, granting the Department's motion for summary judgment and denying the taxpayer's cross motion. The Board found the phrase "prescription drugs" was clear and unambiguous. Based on the definitions offered and ordinary understanding of the meaning of "prescription drugs," the Board found no basis for including medical devices within the scope of the constitutional exemption. The Board recognized that the Legislature knows how to import statutory definitions into this particular constitutional section but did not do so in this case. The Board also noted that, in 2017 through Act 426, the Louisiana Legislature reinstated the statutory medical-device exemption by adding it to the Retained Exemptions List, effective July 1, 2017. Finding that when the Legislature changes the wording of a statute it is presumed to have intended a change in the law, the Board held there would have been no need for Act 426 under the taxpayer's reading of the 2016 enactments.

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Claim for Refund and Assessment of Use Taxes

Turner Bros. Crane & Rigging, L.L.C. v. Ascension Parish Sales & Use Tax Auth., 16-0673 (La. App. 1 Cir. 7/5/17), 2017 WL 2875914, *writ denied*, 17-1367 (La. 11/6/17), 229 So.3d 470.

Turner Bros. Crane and Rigging, L.L.C., appealed Ascension Parish's denial of a claim for refund and assessment of use taxes. Turner's crane company leased and imported large cranes into Louisiana for use on various jobs throughout the state. In connection with its business, Turner stored several cranes in a yard in Ascension Parish. The parish assessed $130,937.87, inclusive of tax, penalties and interest, for the use of nine of Turner's cranes. The district court upheld the assessment. Turner then appealed to the 1st Circuit.

Turner advanced a number of arguments on appeal. First, Turner asserted that five of the nine cranes were transferred in an "isolated and occasional" sale not subject to use tax under La. R.S. 47:301(10)(c)(ii)(bb). However, the 1st Circuit held that Turner had introduced no persuasive evidence supporting that assertion because, among other things, none of the trial witnesses (including the current controller and chief financial officer of Turner) had contemporaneous and personal knowledge of the transaction itself and the former officer of the taxpayer who signed the transaction documents did not testify. Because the burden of proof was on the taxpayer, and in the absence of convincing evidence to the contrary, the 1st Circuit held that the district court's characterization of the transaction was not manifestly erroneous.

Second, Turner claimed it was entitled to a tax credit for amounts paid under a settlement agreement resulting from a previous audit that had revealed use tax due on cranes used in Ascension Parish during a prior tax period. However, the assessment appealed from identified nine specific cranes subject to use tax, and the settlement agreement relied on by Turner was silent as to which cranes it applied. Turner failed to otherwise demonstrate that the settlement agreement applied to the cranes at issue. Accordingly, the 1st Circuit upheld the district court's factual determination that Turner failed to prove what, if any, amounts paid under the settlement agreement were for taxes on the specific cranes identified in the assessment and therefore had not demonstrated its entitlement to a credit.

Third, Turner argued that it was entitled to a credit for taxes paid on the cranes to other jurisdictions. The 1st Circuit held that the district court erred in holding that, under La. R.S. 47:337.86, the taxpayer was first required to seek a refund for taxes paid to another jurisdiction. The 1st Circuit reasoned that while La. R.S. 47:337.86(E) requires a taxpayer to demonstrate an attempt to obtain a refund for taxes paid to the wrong taxing authority, no such requirement exists when the taxes paid were for different taxable moments, concerning different events, and were paid to the correct taxing authority. Because the sales tax paid on the purchase of the cranes was correctly paid for the separate taxable event (the sale), the 1st Circuit held that the statute did not apply. Notably, the 1st Circuit also appeared to rely in part on the parish's allowance of some credit even without the existence of a refund claim, apparently contradicting the parish's stated position that an attempt to obtain a refund was a prerequisite to obtaining the credit. The 1st Circuit then remanded the case for a determination of the proper amount of credit due.

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