Mediated Settlement Between NFL and Former Players a Win-Win

On Aug. 29, shortly before the 2013 football season began, the NFL and 4,500-plus retired football players reached a $765 million settlement over the league's handling of neurological injuries. With retired federal judge Layn Phillip acting as a mediator, this agreement will get financial help to the retired players in need faster and cheaper than by continuing to litigate. "Judge Orders NFL Concussion Case to Mediation," *The New York Times* (July 8, 2013), *www.nytimes.com/2013/07/09/sports/football/judge-orders-nfl-concussion-case-to-mediation.html?_r=0&adxnnl=1&adxnnlx=1387319477-XNZ9dolIar1W2kKf+LkoVw.*

The former players needed a settlement sooner rather than later with the numbers of victims continuing to climb. Cases included 34 incidents of chronic traumatic encephalopathy, seven players living with Lou Gehrig's disease and many others living with dementia or Alzheimer's disease. "More Details Emerge about Proposed NFL Concussion Settlement," *The Washington Times* (Sept. 5, 2013), *www.washingtontimes.com/blog/screen-play/2013/sep/5/more-details-emerge-about-proposed-nfl-concussion-/#ixzz2nlbTsshw.*

Absent a certified litigation class, every case would have to be addressed individually, which would be complicated, time-consuming and expensive, with a highly uncertain outcome. These factors combined made a negotiated agreement through mediation a much more attractive prospect.

The biggest hurdle going to trial for the players was to prove head trauma from playing NFL football caused their impairments. Concussions are different from broken bones

or pulled muscles in that they often go unreported. The players would have the difficult task of proving that their concussions came from the NFL and not from high school, college or some other event. Additionally, they would have to prove the concussions caused the neurological problems they are currently suffering. In this settlement, players no longer have to link specific events to causation, but merely need to show signs of neurological problems to receive a payout. The difficulty with proving causation in court is believed to be the factor that kept this settlement from reaching into the billions. "For Retired NFL Players, Concussion Settlement a Safe Bet," *Time* (Aug. 30, 2013), *http://keepingscore.blogs.time.com/2013/08/30/for-retired-nfl-players-concussion-settlement-a-safe-bet/#ixzz2nlaqvPFc.*

If the critics of the deal are correct, the NFL benefited from not having to go forward with factual discovery. "A Mediated Settlement May Not Be the Best Solution to the NFL Concussion Crisis," *The Huffington Post* (July 18, 2013), *www.huffingtonpost.com/michael-v-kaplen/a-mediated-settlement-may_b_3616499.html*.

Lawyers who represent brain trauma victims allege in their blog that the league's Mild Traumatic Brain Injury Committee had engaged in fraudulent conduct to conceal a concussion epidemic. Now the committee will not have to disclose internal files detailing what it knew, and when, about concussion-linked brain problems.

The NFL argued that many of the retired players did not have the right to sue because they played under previous collective bargaining agreements. However, a few hundred players who played during years when there was no labor contract in place were parties to the suit. The expectation that these players were likely to win the right to sue could only have added to the NFL's desire to negotiate a settlement through mediation. "NFL, Players Reach Concussion Deal," ESPN (Aug. 29, 2013), *http://espn.go.com/nfl/story/_/id/9612138/judge-nfl-players-settle-concussion-suit.*

Perhaps most importantly, this settlement prevents long-term damage to the NFL's reputation and, in turn, its bottom line. The final bill will cost each team owner about $30 million. This is only 10 percent of the average franchise's 2013 revenue, which *Forbes* placed at $286 million. This is much less than the owners would have paid had they lost the concussion lawsuit, and probably less than most owners thought they would have paid in a settlement. "Concussion Lawsuit Settlement a Win for the NFL," *Sports Illustrated* (Aug. 29, 2013), *http://sportsillustrated.cnn.com/nfl/news/20130829/nfl-concussion-lawsuit-settlement/#ixzz2nlvzgsO9.*

Still, the retired players got a lot out of this agreement. The settlement sets up a $675 million fund to deal with currently existing cognitive impairments and those that currently retired players develop in the future. Players' awards are based on a diagnosis and the amount of time in the NFL. For example, a player diagnosed with ALS is eligible for the full compensation of $5 million if he spent five seasons in the NFL. Four seasons earn a player 80 percent, three seasons 60 percent, two seasons 20 percent and anything less 10 percent in compensation. "More Details Emerge about Proposed NFL Concussion Settlement," *The Washington Times* (Sept. 5, 2013), *www.washingtontimes.com/blog/screen-play/2013/sep/5/more-details-emerge-about-proposed-nfl-concussion-/#ixzz2nlbTsshw.*

The negotiated settlement will cover all of the estimated 15,000 to 18,000 living retired players, deceased players' authorized representatives and family members, even those who were not parties to the suit.

The $675 million will be paid in installments, with most coming from league and team insurance — half of it within three years and the remainder over the following 17 years. "In the End, Settlement Not Surprising," ESPN (Aug. 29, 2013), *http://espn.go.com/nfl/story/_/id/9612467/questions-answers-nfl-retired-players-lawsuit-settlement.*

Important to many retired players is that the determinations regarding who qualifies and the amount of the award will be made by independent doctors and fund administrators agreed on by the parties. The federal court in Philadelphia, and not the NFL, will retain ultimate oversight. Economists and actuaries who evaluated the fund believe that, through this process, the amount of money in compensation will last 65 years. In addition to the $675 million fund, retired players will have access to $75 million for baseline medical assessments and $10 million for research and education. The NFL also will pay the plaintiffs' attorney fees, which will be set by the judge.

The creative nature of the terms of this mediated agreement could never have occurred through a judgment had these cases gone through the litigation process. The combination of advances in medical research, greater understanding of concussion management and enhanced benefits should prevent similar lawsuits in the future. "Mediator Q&A on NFL Concussion Settlement," Yahoo! News (Aug. 29, 2013), *http://news.yahoo.com/mediator-q-nfl-concussion-settlement-230618418--spt.html.*

The hope is that this agreement truly helps those players who need it most and continues the NFL's work to make the game safer for current and future players.

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Parties Cannot Consent to Waive Unconstitutional Jurisdiction of Bankruptcy Court

BP RE, L.P. v. RML Waxahachie Dodge, L.L.C. (In re BP RE, L.P.), 735 F.3d 279 (5 Cir. 2013).

On Nov. 11, 2013, the 5th Circuit vacated and remanded the decision of the district court finding that the bankruptcy court lacked Article III authority to enter final judgment as to the plaintiff's state-law tort and contract claims. The debtor, BP RE, L.P., filed for Chapter 11 bankruptcy and filed adversary complaints in the bankruptcy court alleging various state-law tort and contract claims against multiple RML entities (RML). The bankruptcy court entered a final judgment denying relief, and the district court affirmed.

On appeal, the 5th Circuit reviewed 28 U.S.C. § 157, under which district courts may refer "cases under title 11 and any or all proceedings arising under title 11 or arising in or related to a case under title 11" to the bankruptcy court. Those cases that are "otherwise related to a case under title 11" are deemed non-core proceedings, and the bankruptcy court has the authority to submit proposed findings of fact and conclusions of law to the district court as to those matters. 28 U.S.C. § 157(c)(1). However, the statute further provides that with the consent of the parties, the bankruptcy court can enter final, appealable judgments in non-core proceedings. 28 U.S.C. § 157 (c)(2).

Both the debtor and RML agreed that the proceedings were non-core proceedings, and the 5th Circuit, assuming that both BP RE and RML consented to the jurisdiction of the bankruptcy court, reasoned that the bankruptcy court's entry of a final judgment was appropriate under the *statute*. However, the 5th Circuit determined that it was bound by *Stern v. Marshall*, 131 S.Ct. 2594 (2011), which held that "regardless of *statutory* authority the bankruptcy court did not have the *constitutional* authority to enter a final judgment on claims that are so deeply at the heart of the federal judiciary's Article III powers and are not necessary to the resolution of the bankruptcy estate."

The 5th Circuit went on to adopt the reasoning of the 6th Circuit in *Waldman v. Stone*, 698 F.3d 910, 919 (6 Cir. 2012), *cert. denied*, 133 S.Ct. 1604 (2013), which further illustrated that the parties cannot consent to such circumvention of Article III. The 5th Circuit, therefore, determined that as the parties could not consent to the subject-matter jurisdiction of the bankruptcy court as to the state-law claims, the bankruptcy court lacked the *constitutional* authority to enter a final judgment on BP RE's state-law claims because they were not necessary to the resolution of the bankruptcy estate.

State-Law Counterclaims Against Attorney Fee Application is Core Proceeding Under *Stern*

Frazin v. Haynes & Boone, L.L.P. (In re Frazin), 732 F.3d 313 (5 Cir. 2013).

The debtor, Timothy Frazin, filed for Chapter 13 bankruptcy, and the bankruptcy court entered an order discharging the debtor. However, the case remained open pending the outcome of the debtor's state-court suit. On appeal of the state-court suit, Frazin hired Haynes & Boone, L.L.P., as special counsel to represent him. Thereafter, Haynes & Boone filed applications in the bankruptcy court seeking approval of its fees, and Frazin filed state-law counterclaims against the firm for malpractice, violations of the Texas Deceptive Trade Practice Act (DTPA) and breach of fiduciary duty. The bankruptcy court overruled Frazin's state-law counterclaims and awarded the

attorney's fees. The district court affirmed.

On appeal to the 5th Circuit, Frazin argued that under *Stern v. Marshall*, 131 S.Ct. 2594 (2011), the bankruptcy court lacked the authority to enter a final judgment on his state-law counterclaims. In *Stern*, the Supreme Court held that under 28 U.S.C. § 157(b)(2)(C), "counterclaims by the estate against persons filing claims against the estate" are "core proceedings." *Id.* at 2604-05. The Supreme Court went on, however, to hold that section 157(b)(2)(C) is unconstitutional "insofar as it allows bankruptcy courts to enter final judgments in state-law counterclaims that would not necessarily be resolved in the process of ruling on a creditor's proof of claim." *Frazin* at 318. The 5th Circuit determined that the debtor's state-law counterclaims were core proceedings, thereby raising the question of whether any of the debtor's counterclaims would necessarily be resolved in the claims-allowance process.

As to the malpractice counterclaim, the 5th Circuit reasoned that bankruptcy court had to review a common "nucleus of operative fact" to determine the "award of the professionals' fees and enforcement of the appropriate standards of conduct [which] are inseparably related functions of bankruptcy courts." *Quoting Osherow v. Ernst & Young, L.L.P. (In re Intelogic Trace, Inc.)*, 200 F.3d 382 (5 Cir. 2000); *Southmark Corp. v. Coopers & Lybrand (In re Southmark Corp.)*, 163 F.3d 925 (5 Cir. 1999). Therefore, the malpractice claim was not independent of federal bankruptcy law but was "necessarily resolvable" in order to rule on the attorneys' fees. Thus, the bankruptcy court had authority to enter a final judgment.

Regarding the breach-of-fiduciary-duty counterclaim, the 5th Circuit found that "[b]ecause the sole purpose of Frazin's breach of fiduciary duty action was to defeat the Attorneys' fee applications in the bankruptcy court, the bankruptcy court necessarily had to resolve every aspect of his breach of fiduciary duty claim to rule" on the fee applications. Thus, the bankruptcy court had jurisdiction to decide those claims as well.

The counterclaims regarding violations of the DTPA not only required the bankruptcy court to make necessary factual determinations but required several legal determinations as to whether the facts "could form an element of one or more state-law causes of action outside of the court's jurisdiction." Therefore, the bankruptcy court lacked jurisdiction to enter a final judgment as to that claim, but the 5th Circuit found the bankruptcy court acted within its constitutional authority as to the factual determinations made in the course of analyzing that claim.

The 5th Circuit held that the bankruptcy court had the authority to enter final judgments as to the state-law counterclaims regarding malpractice and breach of fiduciary duty, but reversed the bankruptcy court's decision as to the DTPA counterclaims and remanded those claims to the district court.

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Community Property

Drennan v. Drennan, 12-0503 (La. App. 5 Cir. 7/3/13), 121 So.3d 177, *writ denied*, 13-2200 (La. 11/22/13), 126 So.3d 493.

Shares in a family corporation were sold to Mr. Drennan by his mother during the community by a credit sale. Her subsequent forgiving of a part of the debt did not make that portion of the shares his separate property as a result of this donation/forgiveness. The shares remained community because they had already been sold to him and thus could not later be donated.

Ms. Drennan was entitled to reimbursement of one-half of the portion of community funds loaned to Mr. Drennan from the corporation to purchase a home. Although he later paid himself a bonus and repaid the loan with that money, she was entitled to one-half of the money used at the time of the purchase, not reduced for the tax he later had to pay on the bonus money. Because the home was acquired after the termination of the community, it was his separate property, so he was not entitled to reimbursement for funds he spent to renovate it.

To value the business, the trial court averaged the reports of the three experts, but one report used was not as of the stipulated valuation date. The court of appeal found the trial court's ruling to be a legal error, and it conducted a *de novo* review. It found that while each expert had used reasonable valuation methodologies, each had flaws, but it, too, averaged the valid reports. The court found the reports took goodwill into consideration, even though two of the reports did not address it at all. Ms. Drennan also was awarded legal interest on the sums due to her by Mr. Drennan.

Custody

Lawson v. Lawson, 48,296 (La. App. 2 Cir. 7/24/13), 121 So.3d 769.

The parties' stipulated interim agreement to modify the physical custodial arrangement pending trial was a final judgment, and Mr. Lawson's failure to show a change of circumstances once his motions were tried did not cause them to "revert" to the earlier agreement *in toto*. The court did not err in deferring a final decision on the child's school until after he completed middle school at the school he was attending. Although Ms. Lawson was the domiciliary parent and had the right to choose the school, Mr. Lawson had the right to present that issue to the court as part of his custody rule.

Hernandez v. Jenkins, 12-2756 (La. 6/21/13), 122 So.3d 524.

The Louisiana Supreme Court reversed the lower courts, who had denied the mother's request to relocate five hours away in Alabama, finding "that under the specific facts presented in this case, the family court failed to properly weigh and apply the relevant factors." The court found that the trial court improperly focused on the effect the relocation would have on the father, rather than on the benefits to the child. The court found that the father's physical custodial time would not be significantly affected, particularly as the mother had offered additional time. Moreover, it found that the trial court did not give sufficient weight to the father's failure to pay his child support timely and his history of being in arrears. Not only would the relocation allow the mother better job opportunities, but it would also allow her and the child to live together with her new husband and his children, all of which would benefit the child.

Child Support

Rutland v. Rutland, 13-0070 (La. App. 5 Cir. 7/30/13), 121 So.3d 776.

Good cause existed not to make the final child support award retroactive to the date of demand due to delays caused by both parties to allow the court to determine their incomes. The trial court properly found that Mr. Rutland was voluntarily underemployed due to his being fired for sleeping on the job. The court did not err in not using that prior income for child support because Mr. Rutland had obtained new jobs, and the trial court did not think he would reach the same income level. However, the court imputed some greater income to him than he was currently earning. Funds he received from selling his house and withdrawing his pension were not continuing sources of income and were properly excluded from his income calculation.

Paternity

Pociask v. Moseley, 13-0262 (La. 6/28/13), 122 So.3d 533.

La. Civ.C. art. 189 provides that if the husband lives separate and apart from the mother continuously for 300 days preceding the birth of the child, the father's right to seek an action for disavowal of paternity does not commence to run until he is notified in writing that it is being asserted he is the father of the child. The

Louisiana Supreme Court found that this provision must be read *in pari materia* with the same language regarding "living separate and apart continuously" in the divorce articles because divorce and disavowal actions were sufficiently related and because the Legislature was cognizant of that phrase when it amended and reenacted article 189 in 1999 and 2005. In this case, the court found that one or two overnight visits between the parties during that 300-day time period did not interrupt their living separate and apart continuously, especially because there were no claims of cohabitation, sexual relations, reconciliation or even attempted reconciliation.

Spousal Support

Roberson v. Roberson, 12-2052 (La. App. 1 Cir. 8/5/13), 122 So.3d 561.

The trial court denied Ms. Roberson's exceptions of improper venue, *lis pendens*, *res judicata* and no right of action to Mr. Roberson's petition to make a final spousal support judgment of the 24th Judicial District Court executory and to terminate the support in the 21st Judicial District. Her appeal was converted to a writ because a judgment denying such exceptions is interlocutory and nonappealable. Because the court of appeal found error in the trial court's judgment that it believed should be corrected in the interest of judicial economy, it converted the appeal to a writ application. Because support orders can be registered only for subsequent modification by the person awarded support, the parish where Ms. Roberson resided was in an inappropriate venue, and the 21st Judicial District Court lacked jurisdiction, unless the obligee filed for registration and confirmation of the judgment. The court remanded the matter to the 21st Judicial District Court with instructions to transfer the proceedings to the 24th Judicial District Court.

Biggers v. Biggers, 13-0127 (La. App. 5 Cir. 9/18/13), 122 So.3d 604.

Mr. Biggers was not in contempt for failing to pay Ms. Biggers's COBRA insurance premiums for medical, dental and vision coverage as their consent judgment was not clear that he was required to pay all three coverages, even though she had all three coverages during their marriage. She was partially to blame for failing to respond to his advising her that he was only going to pay the medical portion. Further, the trial court did not err in ordering him, even though he was not found in contempt, to pay her medical costs for the stipulated period of time that he was to pay for the COBRA coverage. The court stated, "In these limited circumstances, where a term of the judgment can no longer be enforced, we do not find that the trial court abused its discretion in enforcing the intent of the judgment that Bonnie Biggers receive health care." No attorney's fees were due because both parties were at fault for the loss of the COBRA coverage.

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Admiralty: Enforceability of Settlement Agreements

Hardison v. Abdon Callais Offshore, L.L.C., ____ Fed. Appx. ____ (5 Cir. 2013), 2013 WL 6659271.

Hardison injured his foot while using a milk crate to climb into his bunk aboard a vessel owned by Abdon Callais. The injury grew progressively worse, and he was sent ashore for treatment, resulting in amputation of a portion of his lower right leg and foot. The injury was aggravated by circulatory problems, apparently caused by Hardison's diabetes, diagnosed nine years earlier, for which he discontinued insulin treatment after six years, a pre-existing condition he concealed on his job application.

Hardison engaged an attorney, George Byrne, who filed suit against Abdon Callais based on negligence claims under the Jones Act and a claim that use of the milk crate as a climbing aid constituted unseaworthiness, and requesting damages and future maintenance and cure. The district court granted Abdon Callais's motion for summary judgment, dismissing the future maintenance and cure claim based on the *McCorpen* defense of concealment of a pre-existing condition.

One week before the scheduled trial, the parties reached an agreement where Hardison would receive $90,000 gross in settlement of the remaining claims. The court held a hearing to put the agreement on record, with Hardison participating via telephone because of his medically related mobility issues. All parties acknowledged understanding and acceptance of the settlement terms as previously agreed. The judge informed Hardison that he would receive the settlement documents by mail and, upon signing and returning them, would get a check from Abdon Callais. Hardison took the documents to a local law firm, where he was advised not to sign them. He fired Byrne, engaged the other attorney, and refused to sign or accept payment.

Abdon Callais moved for summary judgment to enforce the settlement. Hardison opposed the motion, arguing that he had never agreed to settle the case. Byrne's firm intervened, contending that the settlement was valid and that it was entitled to receive costs, fees and compensation. The district court granted Abdon Callais's motion to enforce the settlement, and Hardison appealed.

The 5th Circuit opened its discussion by quoting *Strange v. Gulf & S.A. S.S. Co.*, 495 F.2d 1235, 1236 (5 Cir. 1974): "In the absence of a factual basis rendering it invalid . . . an oral agreement to settle a personal injury cause of action within the admiralty and maritime jurisdiction of the federal courts is enforceable and cannot be repudiated." The court then quoted *Borne v. A & P Boat Rentals No. 4*, 780 F.2d 1254, 1256 (5 Cir. 1986): "Seamen such as [Hardison] are wards of admiralty whose rights federal courts are duty-bound to jealously protect." The proper inquiry is whether Hardison relinquished his claims for personal injury with "an informed understanding of his rights and a full appreciation of the consequences." *Id.* at 1256-57. Examining the record, the court found that negotiations were at arms' length and conducted in good faith by both parties, with adequate legal and medical counsel, the amount was not patently inadequate and Hardison accepted it with a full understanding of its terms and consequences. Thus, the judgment enforcing the settlement was affirmed.

No precedent here, but a trenchant reminder that the courts' paternalism toward "wards of the admiralty" has (arguably reasonable) limitations.

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Louisiana's New Home Warranty Act

Shaw v. Acadian Builders & Contractors, L.L.C., 13-0397 (La. 12/10/13), ____ So.3d ____, 2013 WL 6474946.

This case arose when a homeowner filed an action under Louisiana's New Home Warranty Act (NHWA) against the construction company that originally built her house. At trial, the plaintiff's expert testified that the exterior walls of the house fell woefully short of providing the requisite weather-resistant envelope. The most significant construction defect was the builder's improper application of moisture-resistant Tyvek paper under the house's stucco façade. The plaintiff's expert claimed that this defect permitted water intrusion into the structure and ultimately brought about the decay of the house's load-bearing walls.

The specific issue facing the court was whether the builder's failure to properly waterproof the stucco exterior of the plaintiff's house constituted a "major structural defect" under the terms of the NHWA simply because that faulty construction eventually caused "actual physical damage" to the home's load-bearing walls. Thus, the resolution of this case turned on the court's interpretation of La. R.S. 9:3143(5), which defines the term "major structural defect" as:

> any actual physical damage to the following designated load-bearing portions of a home caused by failure of the load-bearing portions which affects their load-bearing functions to the extent the home becomes unsafe, unsanitary, or is otherwise unlivable:
>
> (a) Foundation systems and footings.
>
> (b) Beams.
>
> (c) Girders.
>
> (d) Lintels.
>
> (e) Columns.
>
> (f) Walls and partitions.
>
> (g) Floor systems.
>
> (h) Roof framing systems.

The majority opinion, authored by Justice Knoll, concluded that the defect in the house's stucco cladding was a "major structural defect" under the NHWA because the stucco exterior was an incorporated component part of the load-bearing wall that sat beneath it. According to the majority, the fact that the stucco exterior had no "structural bearing" of its own was wholly irrelevant because it did not constitute an independent portion of the home. The majority considered its interpretation of the term "load-bearing wall" in La. R.S. 9:3143(5) to be consistent with both the purpose of the statute and the intention of the Legislature. In an impassioned dissent, Justice Guidry disagreed with the majority's conclusion that a house's stucco exterior forms part of the same "wall" as the load-bearing studs and plywood located beneath it. The dissent found that the majority's interpretation of La. R.S. 9:3143(5) "expands the scope of the warranty protection intended by the legislature" and "will lead to absurd results."

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World Trade Organization

Ninth Ministerial Conference, Bali, Indonesia (Dec. 3-6, 2013).

The 159 members of the World Trade Organization (WTO) met for the ninth time as the Ministerial Conference to again address the fledgling Doha Development Agenda (DDA) proposed in 2001. After a decade of starts and stops, the WTO membership agreed to a series of decisions and declarations in Bali representing the first substantive multilateral WTO agreement since the creation of the organization in 1984.

The most significant result is the WTO Trade Agreement on Trade Facilitation (WT/MIN(13)/W/8). Trade facilitation involves guidelines and procedures to streamline trade by reducing costs and delays associated with border procedures. For years, WTO members have sought binding commitments on trade facilitation with little success. The Agreement on Trade Facilitation addresses numerous disciplines to expedite movement of goods through customs, including efficiency and transparency. Some of the important disciplines subject to harmonization throughout the WTO include the following:

► publication of customs laws, regulations and procedures to increase transparency and predictability of shipment;

► one inquiry point for trade information;

► publication and comment period on new customs laws and regulations prior to implementation;

► enhanced rights to appeal customs decisions;

► disciplines on customs charges and fees;

► procedures for expedited shipments;

► efficient and speedy release of perishable goods; and

► reduction in necessary documentation and formalities.

The Organization for Economic Co-operation and Development (OECD) estimates that for every 1 percent reduction in global trade costs, income associated with international trade can increase by as much as $40 billion. A fully implemented WTO Agreement on Trade Facilitation can cut trade costs by nearly 14.5 percent for low-income countries and 10 percent for high-income countries.

The WTO members also reached an agreement on food security, but agreement in other contentious areas such as agriculture, and specifically cotton, remain elusive.

Iran Economic Sanctions

Joint Plan of Action to Resolve Iran Economic Sanctions, Geneva, Switzerland (Nov. 24, 2013).

China, France, Germany, Russia, the United Kingdom and the United States (collectively referred to as E3+3) reached agreement with Iran on a plan of action to end various economic sanction regimes against Iran in exchange for a freeze of Iran's nuclear programs. The first step of the plan consists of a renewable six-month period during which Iran would, *inter alia*, agree not to enrich uranium more than 5 percent and dilute half of its existing uranium enriched to 20 percent to no more than 5 percent. Iran also agrees to enhanced monitoring by and cooperation with the International Atomic Energy Agency (IAEA), including IAEA monitor access to centrifuge assembly workshops, centrifuge rotor production workshops and storage facilities and uranium mines and mills.

In exchange for Iran's concessions, the E3+3 agrees to allow repatriation of an agreed amount of revenue held abroad and to suspend U.S. and E.U. sanctions on Iran's petrochemical, gold and precious metal exports. The United States further agreed to refrain from imposing new nuclear-related concessions and sus-

pended sanctions on Iran's auto industry. The E3+3 will establish a financial channel to facilitate humanitarian trade for Iran's domestic needs using Iran's oil revenues held abroad. This trade could include food and agriculture products, medicine, medical devices and medical expenses.

The Joint Plan of Action contains a final step proposal to reach a comprehensive solution, with plans to negotiate and implement the final step details no more than one year after the adoption of the Joint Plan of Action. As sanctions slowly recede and trade with Iran opens up, U.S. businesses should be careful to obtain the necessary export control and other licenses to supply Iran with the limited categories of goods released from sanction.

U.S. Supreme Court

BG Group, P.L.C. v. Republic of Argentina, Docket No. 12-138 (argued Dec. 2, 2013).

The U.S. Supreme Court held oral argument on an issue of first impression regarding U.S. federal court authority to review investor-state disputes. The precise issue before the court is whether a federal court may review an arbitrators' jurisdictional conclusion in a dispute settlement proceeding under a Bilateral Investment Treaty (BIT). This case is one of the many pieces of litigation resulting from the implosion of Argentina's economy in 2002 and the resulting government decisions regarding debt holdings, nationalization of foreign assets and currency linkages. The United Kingdom and Argentina concluded a BIT in 1993 providing the investors from each nation certain protections and guarantees, including due process, fair compensation and limited expropriation. The BIT includes arbitration procedures for claims brought by an investor against the other host state. Prior to initiating arbitration, Article 8(2)(a) of the BIT requires the aggrieved investor to first seek resolution before a competent tribunal in the host state for a period of at least 18 months.

BG Group, a British corporation, entered into a series of investments in MetroGAS, a private company distributing natural gas in the province of Buenos Aires. The investments contain a linking clause tying investment returns to U.S. currency and price indexes. BG had a 45 percent investment stake in MetroGas when Argentina's economy collapsed. Argentina subsequently enacted a series of laws and issued decrees decoupling the U.S. currency and index links. BG initiated arbitration in the United States under the BIT in 2003 because of the diminished value of its investment resulting from the decoupling laws. BG did not seek recourse before a competent tribunal in Argentina before arbitration, in part, because Argentina passed a law staying all lawsuits arising out of emergency measures, such as the decoupling law, taken to abate the economic crisis.

A panel of three arbitrators issued a ruling in favor of BG in 2007, noting that despite BG's failure to comply with Article 8(2)(a), it still retained jurisdiction to arbitrate the dispute. The arbitral panel cited Argentina's emergency measures restricting access to its courts as "absurd or unreasonable" under Article 32(b) of the Vienna Convention on the Law of Treaties, and therefore BG's application for arbitration was proper despite the 18-month temporal precondition of the BIT. The panel awarded BG $185 million in damages.

Argentina filed a complaint with the U.S. District Court for the District of Columbia seeking to vacate the award due to significant procedural deficiencies, namely failure to comply with Article 8(2)(a). The D.C. court upheld the award and sanctioned the arbitral tribunal's ability to rule on its own jurisdiction. Argentina sought and obtained relief at the U.S. Court of Appeals for the District of Columbia Circuit, which overturned the decision, finding that the tribunal lacked jurisdiction because the parties failed to satisfy the Article 8(2)(a) preconditions. The award was vacated under Section 10(a) of the Federal Arbitration Act for BG's failure to file a lawsuit in Argentina and satisfy the BIT's temporal requirement.

The U.S. Supreme Court granted BG's petition for a writ of certiorari on June 10, 2013. The court entertained briefs from numerous *amicus curiae*, including the Professors and Practitioners of Arbitration Law, United States Council for International Business. Generally speaking, U.S. Supreme Court cases limit judicial review narrowly to the threshold question of dispute arbitrability, reserving most other issues to the arbitration. One particularly interesting question before the court is the interpretation of Article 8(2)(a) itself. Interpretation of treaty language requires application of the rules of the Vienna Convention on the Law of Treaties, to which the United States is not a signatory. However, the United States generally accepts that many of the provisions in the Vienna Convention are customary rules of international law that apply in the United States automatically. The court may not reach this issue as it may accept the federal government's request to remand the case with instructions for judicial review of cases involving BITs.

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5th Circuit Approves Sexual Stereotyping as Fourth Way to Prove Same-Sex Sexual Harassment

EEOC v. Boh Bros. Const. Co., 11-30770 (5 Cir. 2013), 731 F.3d 444.

Ironworker Kerry Woods worked for Boh Brothers on an all-male crew on the Twin Spans Bridge in New Orleans. One day, Woods told his co-workers he regularly brought Wet Wipes with him to work and used that instead of toilet paper. Woods' supervisor, Chuck Wolfe, found this odd and, as he explained to the EEOC later, "[Woods' co-workers] all picked on him about it. They said that's kind of feminine to bring these, that's for girls . . . . You keep that to yourself . . . ."

Wolfe and the crew regularly used "very foul language" and "locker room talk." Wolfe, a primary offender in this, was rough and mouthy and often kidded his workers. After three months on the crew, Wolfe targeted Woods frequently with his abuse. Wolfe would often call Woods pussy, princess and faggot two or three times a day. He would approach Woods while he was bent over working and simulate anal sex with him two or three times a week. Over about a 10- month period, Wolfe urinated on the bridge in front of Woods about 10 times and, while doing so, would sometimes smile and wave at Woods. Once, Wolfe suggested to Woods that he would have placed his penis in Woods's mouth had Woods not been in a locked vehicle.

After Woods was with the crew for about 10 months, a superintendent investigated Woods for the fireable offense of trying to acquire his co-workers' time-sheets. The superintendent met with Woods about this but did not disclose the purpose of the meeting. Woods brought up Wolfe's harassment of him and told of possible theft by Wolfe. The superintendent placed Woods on leave without pay and, upon request of Woods's foreman, a few days later brought him back to work on another crew. The superintendent spent a total of 20 minutes checking into the sexual harassment complaint. Woods's theft charges against Wolfe were assigned to a private investigator who spent almost 85 hours evaluating those charges.

Months after Boh Brothers transferred him, Boh Brothers laid off Woods. Woods sued Boh Brothers for sex discrimination and harassment. A jury found for Woods on the harassment charge and for Boh Brothers on the discrimination charge. Boh Brothers appealed, and the 5th Circuit reversed, finding, as a matter of law, error by the jury. On rehearing en banc, the 5th Circuit affirmed the jury's judgment of harassment, overturned the $201,000 punitive damage award and remanded to the court for the review of the $50,000 compensatory damage award.

The 5th Circuit found that Wolfe harassed Woods because of sex and, more specifically, because Wolfe had taunted Woods tirelessly and thought Woods not a "manly-enough man." Given the review standards, the court could not say "that no reasonable juror could have found that Woods suffered harassment because of his sex." Prior to this case, sexual harassment could be proven three ways in the 5th Circuit in a same-sex work environment, which were provided in *Oncale v. Sundowner Offshore Servs., Inc.*, 118 S.Ct. 998 (1998). In this case, the 5th Circuit used sexual stereotyping as described in *Price Waterhouse v. Hopkins,* 109 S.Ct. 1775

(1989), to prove harassment. No evidence was presented that the harasser or victim was homosexual or that the victim was effeminate. Although the harassment included homosexual taunts, the court cited Wolfe's testimony that he did not think Woods homosexual and that his taunts were because of Woods's lack of masculinity. The court found this subjective proof that Wolfe's harassment incidents were attempts to denigrate Woods because Woods fell outside Wolfe's manly man stereotype and was not just rough talk among an all-male crew.

Regarding the *Ellerth/Faragher* affirmative defense available where there is no adverse employment action, the court reasoned that had Boh Brothers implemented suitable institutional policies and educational programs regarding sexual harassment, it likely would have prevailed.

Louisiana Wage Payment Act

Davis v. St. Francisville Country Manor, L.L.C., 13-0190 (La. App. 1 Cir. 11/1/13), ____ So.3d ____, 2013 WL 5872030.

Licensed practical nurse Yolunda Davis worked for the St. Francisville Country Manor. In 2012, she gave her employer notice of her resignation and, that same day, quit. She asked her employer for payment of her unused paid days off (PDO), and the employer refused. Davis filed suit seeking the unpaid PDO under the Louisiana Wage Payment Act, La. R.S. 23:631-634. Her employer filed a motion for summary judgment arguing that PDO was not vacation pay, that it provided Davis PDO as a mere gratuity, and that Davis's hasty departure violated policy that required proper notice of resignation before any payment is made for the employee's unused PDO. The court ruled for the employer, and Davis appealed.

The appellate court analyzed whether PDO was protected under the Act by first determining whether PDO was vacation pay under La. R.S. 23:631(D)(1). It noted that the triggering event for making vacation pay protected under that subsection was when the employee earned the right to be compensated when not at work. The court found that the employer's PDO policy stated that an employee would accrue 3.33 hours per pay period and was entitled to it if certain conditions were met. The court found no difference between PDO and "vacation time with pay" as defined under 23:631(D)(1). It found nothing in the employer's policy stating that PDO was not earned. The court concluded, therefore, that Davis's unused PDO was not a gratuity and was protected under the Wage Payment Act as vacation time with pay.

As to whether the employer could forgo payment of PDO as its policy dictated no payment under the circumstances, the court found that such action would violate the anti-forfeiture requirements of La. R.S. 23:634 and the holding from *Beard v. Summit Inst. of Pulmonary Med. & Rehabilitation,* 97-1784 (La. 3/4/98), 707 So.2d 1233. The court remanded the case for trial.

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Mineral Law

"Legacy" Lawsuit; Improper Cumulation Exception

Dietz v. Superior Oil Co., 13-0657 (La. App. 3 Cir. 12/11/13), ____ So.3d ____, 2013 WL 6488247.

This "legacy" lawsuit involved two pieces of property with two different mineral lease chains in Acadia Parish. Plaintiffs, the Dietz family, claimed soil and groundwater contamination ruined their property. Plaintiffs sought restoration damages and injunctive relief prior to the termination of the leases. Defendants filed two exceptions — prematurity (La. Min. Code art. 136) and improper cumulation (La. C.C.P. art. 464) — in response to plaintiffs' first

amended petition. The trial court reserved ruling on the prematurity exception but granted the exception of improper cumulation. Plaintiffs were ordered by the court to amend their petition to include the proper parties and causes of action. Plaintiffs filed a second amended petition but failed to delete any parties or causes of action as the court directed. Defendants filed the same exceptions. Plaintiffs amended their petition a third time and added a family member and owner in indivision (McDonald) as an additional plaintiff. The Dietz family plaintiffs eventually settled; McDonald was then the only plaintiff. The trial court granted defendants' exceptions. McDonald's request for a new trial was denied. She appealed.

The 3rd Circuit held that the prematurity exception was improperly granted because Article 136 of the Mineral Code does not govern claims for restoration and, therefore, "notice," pursuant to that article, was not required. Additionally, the court found that prematurity was improperly granted because neither the Mineral Code nor the Civil Code provides that claims for soil and groundwater contamination arise only at the end of a lease. *See*, *Marin v. Exxon Mobil Corp.*, 09-2368 (La. 10/19/10), 48 So.3d 234.

As to the improper cumulation exception, although the 3rd Circuit did not agree with the trial court's reasoning for granting the exception, it found that the dismissal of plaintiffs' case without prejudice was proper because the plaintiffs failed to follow the court's order when they filed the second amended petition. Therefore, the case was properly dismissed pursuant to the mandatory language of La. C.C.P. art. 464, which states: "The penalty for noncompliance with an order to amend is a dismissal of plaintiff's suit." As to McDonald's motion for new trial, the 3rd Circuit found that the appeal was really on the merits of the exceptions rulings, not on the request for new trial. Because the court dealt with the merits of those exceptions, it did not address the new trial issue any further.

Valid Oral Transfer of Immovable Property

Harter v. Harter, 48,426 (La. App. 2 Cir. 10/2/13), ____ So.3d ____, 2013 WL 5477227.

In a complicated and twisted case involving financial maneuverings by various family members following the death of their mother, the 2nd Circuit held that certain mineral interests orally conveyed by Mike Harter to his brother and sister, David Harter and Jan Harter Pipkin, as working interest owners, were valid conveyances pursuant to La. Civ.C. art. 1839 because evidence at trial showed (1) that the property (mineral interests, incorporeal immovables) was actually delivered, and (2) that the transferor (Mike Harter) recognized the transfer when he was interrogated under oath at trial.

The appellate court found the following evidence to be conclusive that a valid oral transfer of mineral interests occurred: (1) Mike Harter admitted at trial that he issued monthly revenue payments to David Harter and Jan Pipkin from January 2008 until August 2008, which were generated by the mineral leases; (2) Mike Harter admitted he instructed his secretary to make entries in his oil company's internal records evidencing transfer of 25 percent interests of the working interest to David and Jan and to add them as working interest owners to the ownership decks; and (3) Mike Harter stated under oath at trial that both of these events occurred.

Mike Harter argued that because the parties agreed to later reduce the interests to writing, the transfer was not perfected as he had not yet provided his consent. The court found this argument unavailing, however, because Mike had performed his obligations pursuant to their oral contract. Thus, the 2nd Circuit found the oral transfer of the working interests to David Harter and Jan Pipkin was complete and reversed the trial court's involuntary dismissal, remanding the case for further proceedings.

Update on Louisiana's New Rules Relating to Salt Caverns

On Nov. 26, 2013, the Louisiana Department of Natural Resources (LDNR) held a public hearing to accept comments relating to the new rules for solution-mining (Docket No. IMD-2013-07) and storing of hydrocarbons in salt dome cavities (Docket No. IMD-2013-08). The hearing lasted approximately two hours. Fifteen people — residents of Bayou Corne, representatives of various environmental groups and some local political officials — spoke. The comments included, but were not limited to, support for (1) requiring that the cavern owner/operator or the State properly reimburse residents who were evacuated/relocated; (2) requiring that variances be made a part of the public record and made known to residents; (3) requiring that operators perform environmental-impact studies; (4) doubling spacing parameters (*e.g.*, from periphery of salt and from top of salt stock); and (5) requiring that 3-D seismology be used near usable sources of drinking water. The new rules have not yet been approved by LDNR. The LDNR is currently going through the comments. Look for further action in the upcoming issues of *Louisiana Register*.

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Informed Consent

Snider v. La. Med. Mut. Ins. Co., 13-0579 (La. 12/10/13), ____ So.3d ____.

A medical-review panel decided that the defendant physician did not comply with the appropriate standard of care and that this conduct was a factor in causing "minor damage." The case was then tried to a jury, which disagreed with the panel's opinion and rendered a verdict for Dr. Yue.

Mr. Snider appealed and urged a number of assignments of error, including an independent assignment concerning the failure to obtain informed consent. The 3rd Circuit reversed the jury's verdict, basing its opinion — and discussion — on only this assignment of error, referencing no others: The physician failed to properly obtain informed consent. Despite Snider's having signed the consent form, the court decided the consent was not *informed,* as it related to implanting a pacemaker. It would have been reasonable for a patient to withhold consent for the placement of a pacemaker if adequately informed that there was a low-risk alternative of doing nothing, given the non-emergency nature of his condition.

The issues of liability and damages had been bifurcated. The appellate court remanded to the district court to decide the issue of damages, but the Louisiana Supreme Court granted certiorari. The Supreme Court's opinion contains an extensive discussion of the Uniform Consent Law, La. R.S. 40:1299.40. The pacemaker procedure requires specific disclosures pursuant to 48 La. Admin. Code § 2349.

Some lines on Snider's form where remarks about his particular situation should have been listed were left blank. Information listing reasonable alternatives and the risks of those alternatives should have been explained on other lines, which were otherwise left blank, except for the following: "SYMPTOMS FROM THE ABNORMAL HEARTRATE WILL CONTINUE."

Dr. Yue testified that he had provided and explained to Snider the required information and had answered all of his questions. The consent form signed by Snider did not state, and there was no evidence other than Dr. Yue's own testimony to prove, that the explained consent was being obtained pursuant to the lists formulated by the Louisiana Medical Disclosure Panel concerning risks and options. Absent this evidence, in order for Dr. Yue to be covered by that subsection, La. R.S. 40:1299.40)(E)(7)(c)(iv), the health-care provider who will actually perform the procedure must advise the patient that he has obtained consent "pursuant to the lists formulated by the" disclosure panel.

The first paragraph of the consent form stated the risks required to be disclosed were "as defined by the Louisiana Medical Disclosure Panel *or* as determined by" the physician. The consent form did not list the risks identified by the panel but instead listed the risks as those "identified by the physician."

Certain information required for compliance with § 40(E) was omitted, thus requiring the jury to be instructed pursuant to paragraph (E)(7)(a)(ii) that there was a rebuttable presumption the surgeon *was negligent* in his duty of full disclosure. However, the district judge instead "instructed the jury that in a medical malpractice suit against a doctor 'a signed, written consent form provides a rebuttable presumption of *valid consent*'" (emphasis added).

The court then wrote: "[P]resumably, the district court judge did not conclude that Subsection (E) compliance was an issue in this case." Thus, the appellate court erred in ruling that Dr. Yue's failure to comply with all of the requirements of (E) was a lack of informed consent as a matter of law. Consent could have been obtained by Dr. Yue's having complied with Subsections (E), (A) or (C). The court reasoned the jury had ample evidence to decide that the written consent, combined with the verbal information Dr. Yue said he gave his patient, equated to valid informed consent.

The court also wrote that the jury instructions given by the district court judge were more in line with the requirements of Subsections (A) and (C), which require the physician to advise the patient of the nature, purpose and known risks associated with the procedure. As a result of this interpretation, the Supreme Court then concluded that the de novo standard of review used by the appellate court was inappropriate, and the manifest error standard should have been used. As result of that conclusion, the court ruled that rather than being allowed to substitute its own opinion in place of the fact-finder's under a de novo review, the manifest-error rule compelled the appellate court, before it could reverse, to find instead that there was no factual basis for the judgment of the trial court and that the record established the finding was clearly wrong/manifestly erroneous. In other words, the reviewing court should have asked whether the fact-finder's conclusion was reasonable. *Rosell v. ESCO*, 549 So.2d 840,844 (La. 1989); *Stobart v. State,* 612 So.2d 880, 882 (La.1993).

The court observed there was conflicting testimony on every assignment of error argued by the plaintiff. When the fact-finder's determination is based on the credibility of one or more witnesses versus another witness or witnesses (including expert witnesses), the trial court's finding "can virtually never be manifestly erroneous." *Bellard v. Am. Cen. Ins. Co.*, 07-1335 (La. 4/18/08), 980 So.2d 654, 672.

The case was remanded to the appellate court with instructions to consider and rule on all of the plaintiff's assignments of error.

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Federal: U.S. Supreme Court Resolves Circuit Split on Valuation-Misstatement Tax Penalty

In *United States v. Woods*, 134 S.Ct.157 (2013), the U.S. Supreme Court upheld an IRS determination that the gross-valuation penalty applied to the liabilities of partners in certain transactions entered into primarily for tax avoidance purposes. In *Woods*, the taxpayers participated in an offsetting-option tax shelter designed to generate large paper losses by contributing option spreads to partnerships and creating an artificially high basis in a partner's partnership interest as the result of taking into account only the long component of the option spread and not the nearly-offsetting short component. The IRS determined that the partnerships had been formed solely for tax avoidance purposes and lacked economic substance and that the partnerships should be disregarded for tax purposes. Because there were no valid tax partnerships, the IRS concluded that the taxpayers had not established adjusted bases in their respective partnership interests in an amount greater than zero and any resulting tax underpayments were subject to the 40 percent I.R.C. § 6662(b)(3) accuracy-related penalty for gross valuation misstatements.

The tax-matters partner for both partnerships sought judicial review. The district court held that the partnerships were properly disregarded as shams but that the valuation-misstatement penalty did not apply. The 5th Circuit affirmed. The Supreme Court reversed the decision of the 5th Circuit with respect to the applicability of the accuracy-related penalty and determined that the § 6662(b) penalty for tax underpayments attributable to valuation misstatements is applicable to an underpayment resulting from a basis-inflating transaction subsequently disregarded for lack of economic substance.

The Supreme Court also resolved a jurisdictional-related issue and held that TEFRA gives courts in partnership-level proceedings jurisdiction to determine the applicability of any penalty that could result from an adjustment to a partnership item, even if imposing the penalty would also require determining affected or non-partnership items such as outside basis.

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State: Solar Energy Systems Tax Credit

The Louisiana Department of Revenue issued Revenue Information Bulletin No. 13-026 (RIB), which summarized numerous changes made in Act No. 428 of the 2013 Regular Session of the Louisiana Legislature to the former Wind or Solar Energy Systems tax credit (Solar Energy Credit) provided in La. R.S. 47:6030. Act No. 428 enacted the following changes:

► **Elimination of credit for wind energy systems**. The current Solar Energy Credit provides only two types of eligible systems — solar electric and solar thermal.

► **Elimination of credit for residential rental apartment complexes**. The current Solar Energy Credit provides only for installations at a "residence" or "home," which the Act defines as a "single-family detached dwelling."

► **Added licensing requirement.** Under the amended law, all energy systems must be purchased from and installed by a person who is licensed by the Louisiana State Licensing Board for State Contractors.

► **Added American Recovery and Reinvestment Act (ARRA) compliance.** All eligible system components purchased on or after July 1, 2013, must be compliant with the ARRA of 2009, and all non-ARRA-compliant components purchased before July 1, 2013, must be installed in a system that is placed in service before Jan. 1, 2014.

► **Added sunset date.** The current Solar Energy Credit includes a sunset date of Jan. 1, 2018.

► **Added per residence limitation.** Each residence is limited to one credit for the purchase and installation of a system, including residences for which a Solar Energy Credit was claimed prior to July 1, 2013.

► **Additional restrictions/requirements for leased energy systems**. The RIB provides that leased energy systems shall receive a credit equal to the *lesser* of the following two amounts:

> (1) effective Jan. 1, 2014, the credit is reduced from 50 percent to 38 percent of the first $25,000 of the cost of the purchase of a system; or
>
> (2) a system shall provide for no more than six kilowatts of energy and: for a system purchased and installed on or after July 1, 2013, and before July 1, 2014, the system shall cost no more than $4.50 per watt; for a system purchased and installed on or after July 1, 2014, and before July 1, 2015, the system shall cost no more than $3.50 per watt; for a system purchased and installed on or after July 1, 2015, and before July 1, 2018, the system shall cost no more than $2 per watt.

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