Bankruptcy Law

"Non-Statutory Insider" of a Debtor

U.S. Bank Nat'l Ass'n v. Vill. at Lakeridge, L.L.C., 138 S.Ct. 960 (2018).

The Supreme Court considered the standard of review to apply when analyzing whether a party is a "non-statutory insider" of a debtor. The debtor, Lakeridge, wholly owned by MBP Equity Partners, was attempting to reorganize under Chapter 11 of the Bankruptcy Code. Lakeridge owed substantial debts to MBP and U.S. Bank. Lakeridge proposed a plan that classified MBP and U.S. Bank into separate classes and impaired their claims. U.S. Bank objected, and Lakeridge sought to use a "cramdown" plan, which requires, among other things, a non-insider impaired class to support the proposed plan. MBP was an insider; therefore, that class could not provide the required consent to a cramdown plan.

Subsequently, Kathleen Bartlett, an MBP board member and Lakeridge officer, sold the claim of MBP to her boyfriend, Robert Rabkin. As the new holder of the MBP claim, Rabkin consented to Lakeridge's proposed plan.

U.S. Bank challenged the transaction, arguing that, as Bartlett's boyfriend, Rabkin was also an insider of the debtor, and that the transaction was not done at arm's length. The bankruptcy court rejected this argument, finding that Rabkin purchased the claim after adequate due diligence, and noting that, although dating, he and Bartlett lived and managed their finances separately.

The 9th Circuit agreed that Rabkin was not an insider and that the purchase was the result of an arm's length negotiation. The 9th Circuit held that the bankruptcy court's decision was entitled to the more deferential "clear-error" standard of review, rather than de novo, and, finding no error, it affirmed.

On appeal, the Supreme Court affirmed, noting that legal inquiries are subject to de novo review, but factual inquiries, such as those regarding the nature of Bartlett and Rabkin's relationship, are subject to review only for clear error. The Court found, however, that the question before it was a "mixed question" of law and fact, *i.e.*, whether the factual findings regarding Bartlett and Rabkin's relationship satisfies the legal inquiry of whether Rabkin was a non-statutory insider. Here, the Court found the inquiry almost wholly depended on the factual details surrounding the relationship, with little to no legal inquiry involved in analyzing whether the relationship prohibited an arm's length transaction. Thus, the bankruptcy court was entitled to deference of the clear-error standard of review.

Supreme Court Resolves Circuit Split

Lamar, Archer & Cofrin, L.L.P. v. Appling, 138 S.Ct. 1752 (2018).

Section 523(a)(2) of the Bankruptcy Code excepts from discharge debts incurred as the result of the debtor's false, written "statements . . . respecting the debtor's financial condition." The Supreme Court resolved a circuit split regarding whether a debtor's written statements as to a "single asset" may constitute such a statement respecting his financial condition under the Bankruptcy Code.

The 5th and 10th Circuits held that "statements respecting financial condition" are those that present a picture of the debtor's overall financial health. Therefore, a written statement regarding a single asset would not fall under the purview of Section 523(a)(2). The 11th and 4th Circuits, however, held that a written statement regarding a single asset may constitute a statement respecting the debtor's financial condition. Therefore, a debt arising from such a statement that proves to be false may be nondischargeable.

The debtor in *Lamar* retained the firm of Lamar, Archer & Cofrin, L.L.P., for assistance with various legal matters. The debtor failed to pay his legal fees but assured the firm he would be receiving a large tax refund that would cover his bills. Relying on this statement, the firm continued its representation. The debtor eventually received his refund but used it to pay his own business expenses rather than paying the firm. Meanwhile, the debtor continued to tell the firm he was still waiting to receive his refund in the mail. The firm later sued and won judgment against the debtor, who subsequently filed Chapter 7 bankruptcy. The firm sought to have the debt declared nondischargeable under Section 523(a)(2).

The bankruptcy court held that the debt was nondischargeable, reasoning that the debtor knowingly made two false representations to the firm regarding his financial condition. The 11th Circuit reversed, holding that, while statements regarding a single asset, such as the debtor's tax refund, may constitute statements respecting the debtor's financial condition, such statements must be in writing in order to be nondischargeable. The debtor's statements here were not in writing.

The Supreme Court affirmed, rejecting the 5th and 10th Circuits, and held that statements regarding a single asset may constitute statements respecting the debtor's financial condition under Section 523(a)(2). The Court reasoned that statements regarding a single asset impact the picture of the debtor's overall financial condition. The Court advised concerned creditors that to easily protect themselves from dishonest debtors, they can insist that such statements be made in writing.

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Corporate and Business Law

Amendments to Data Breach Notification Laws

Database Security Breach Notification Law, La. R.S. 51:3073 and 51:3074 (May 20, 2018).

On May 20, Louisiana Gov. John Bel Edwards signed into law a bill amending La. R.S. 51:3073 and La. R.S. 51:3074, the Database Security Breach Notification Law (2018 La. Sess. Law Serv. Act 382 (S.B. 361)). The law became effective on Aug. 1, 2018. It is a reaction to the numerous media reports surrounding data breaches in companies around the United States and similar measures that other states have taken. All 50 states have database breach notification laws. States are now scrutinizing these laws and amending them to ensure that they are up-to-date with currently accepted practices concerning data collection and that they hold companies that collect personal data to a higher standard in preventing these breaches.

The first notable change in the law is the expansion of the definition of personal information under database security breach notification law. Previously, personal information was limited to the first and last name of an individual in combination with his or her Social Security number, driver's license number or account number, and credit or debit card number, in combination with any required security code, access code or password that would permit access to an individual's financial account. There is an exception if the data elements making up the personal information are encrypted or redacted. The bill clarifies that the personal information must be of Louisiana residents and expands the data elements to include state identification card numbers, passport numbers or biometric data containing biological characteristics of individuals used to authenticate their identity.

The bill also expands on the timeline in which companies that experience a breach must notify the public. Previously this timeline was "the most expedient time possible and without unreasonable delay" following the discovery of the breach. This language has been consistent across many state breach notification laws. The bill adds to this language by adding a concrete deadline of 60 days. It also requires companies to inform the Louisiana Attorney General in writing of their reasons to delay notification under this hard deadline due to law enforcement requests, or additional time needed due to the complexity of the breach investigation and the reasonable restoration of the breached database. The notice to the attorney general must be given before the original 60-day deadline. Upon receipt, the attorney general shall allow for a reasonable extension of time to provide notification.

An exception under the current law provides that notification is not required when, after a reasonable investigation, the breach poses no likelihood of harm to the Louisiana residents. This exception now requires companies to retain this determination in writing with supporting documentation for five years. Upon request, companies must send this documentation to the attorney general.

Perhaps the biggest and most notable change to the law is the explicit requirement for companies that collect and use personal information in their computer databases to implement and maintain "reasonable security procedures and practices appropriate to the nature of the information to protect the personal information from unauthorized access, destruction, use, modification, or disclosure." Companies also must take reasonable steps to destroy personal information that is no longer to be retained. Previously, these requirements were implicit under Louisiana's unfair trade practices law (La. R.S. 51:1405). In the past, many states have used their version of unfair trade practices law to litigate against companies that have been breached and lost control of personal information. Currently, the Federal Trade Commission (FTC) enforces reasonable and adequate cybersecurity practices under its authority in Section 5 of the FTC Act to bring actions over unfair or deceptive acts or practices. States are now making this requirement explicit, and Louisiana goes so far as to make it express that violations under this law constitute an unfair act or practice.

An area of concern is that the requirement of "reasonable security procedures and practices" is vague. Some state laws are more prescriptive in this area. Although limited in scope to banks, insurance companies and other financial-services institutions, New York law requires a number of practices for effective cybersecurity programs. These practices include a written cybersecurity policy, an incident-response plan, employee cybersecurity training, encryption, multi-factor authentication, etc. (23 NYCRR § 500.00 *et seq.*). The FTC also has substantive materials on its website regarding this topic. States could look to the FTC's positions in this area to inform their interpretation of the law. Further changes and refinements down the road are likely as Louisiana's new law and others like it are tested around the country.

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Environmental Law

A Tale of Two Bayous: Bayou Bridge and Bayou Canard

Joseph v. Secretary, La. Dep't of Nat. Res., No. 38,163, 23rd Jud'l Dist. Ct., St. James Parish.

In a case centered around the state Coastal Use Permit (permit) granted by the Louisiana Department of Natural Resources (LDNR) for the Bayou Bridge Pipeline, the 23rd JDC recently found that that LDNR was arbitrary and capricious in granting the permit for the pipeline project. This case was initiated by a petition for judicial review under La. R.S. 49:214.35, which argued that LDNR failed to apply its own Coastal Use Guidelines in granting the permit and that LDNR violated its duty as the public trustee when it failed to consider the impacts that pipeline project would have on the people of St. James.

In reviewing an application for a permit, LDNR must apply its Coastal Use Guidelines found at 43 La. Admin. Code Pt. I. 701-719. Not all guidelines are necessarily implicated by every permit application, but the agency is responsible for determining which guidelines are applicable. Two particular guidelines, § 711(A) and § 719(K) — (K. Effective environmental protection and emergency or contingency plans shall be developed and complied with for all mineral operations) — were flagged by the plaintiffs as improperly ignored by LDNR. It is undisputed that LDNR did not apply those two guidelines, but the question raised by the plaintiffs was whether the facts of the permit application necessitated consideration under those guidelines.

In its permit decision, LDNR reasoned that § 711(A), which relates to surface alterations, did not apply because the more specific § 719(K), which covers oil, gas and mineral activity, applied. However, when reviewing the permit application under § 719(K), LDNR then determined that it too had no applicability. According to the court, the determination that § 719 did not apply upended the justification for not applying § 711. The court determined instead that both guidelines should have been applied and that the permit application should be reviewed for its impacts as a surface alteration to the coastal zone (§ 711) and as an activity that is directly involved in the exploration, production and refining of oil, gas and materials (§ 719). In light of LDNR's decision not to apply these two guidelines, the court determined, pursuant to La. R.S. 49:964(G)(5) of the Louisiana Administrative Procedures Act, that LDNR was arbitrary and capricious and remanded the case to the agency for further consideration. The court also ordered LDNR to "require Bayou Bridge Pipeline, LLC, to develop effective environmental protection and emergency or contingency plans relative to evacuation in the event of a spill or other disaster . . . prior to the issues of [a new] permit."

LDNR appealed the district court's ruling on May 22, 2018, to the Louisiana 5th Circuit Court of Appeal.

Bayou Canard, Inc. v. State, through Coastal Protection &Restoration Auth., 17-1067 (La. App. 1 Cir. 5/14/18), ____ So.3d ____.

In *Bayou Canard*, the Louisiana 1st Circuit overturned a decision by the 19th Judicial District Court, which had ruled in favor of an oyster company's challenge to the Coastal Protection and Restoration Authority's (CPRA) interpretation of the Oyster Lease Acquisition and Compensation Program (OLACP), La. R.S. 56:432.1, which allows CPRA to acquire state-issued oyster leases in the footprint of coastal projects prior to undertaking the construction.

Unlike previous cases testing the limits of the state's shield from suits by oyster leaseholders who challenge coastal restoration activities, *(see, Avenal v. State*, 03-3521 (La. 10/19/04), 886 So. 2d 1085), this suit did not stem from physical harm to the leased property. Rather, Bayou Canard was challenging CPRA's methodology in determining the value of the lease acreage acquired through the program. Bayou Canard challenged CPRA's application of the so-called "harvest efficiency ratio," which resulted in a significant reduction in the value of the acquisitions. Bayou Canard argued (successfully at the 19th JDC) that CPRA's uniform application of the ratio amounted to a formal "rule" and CPRA was required to follow proper rulemaking procedures under the Louisiana Administrative Procedure Act (LAPA), La. R.S. 49:951, *et seq.*, which it did not. Bayou Canard successfully sought summary judgment to declare the state's informal rulemaking invalid.

On appeal, the 1st Circuit declined to overturn the district court's decision that CPRA adopted a rule without proper LAPA promulgation. However, the court quickly moved to the state's third assignment of error, which asserted that under the terms of the oyster lease agreements, Bayou Canard never had a right to bring the suit in the first place. On this point, the court handed CPRA a sweeping victory. In short, the court ruled that the language of the oyster leases in question (which are materially similar to all state-issued oyster leases), which contain two indemnity clauses related to coastal restoration, bars "*all claims against CPRA by an oyster lessee resulting from a coastal restoration project, which includes the claims brought by Bayou Canard herein*."

The 1st Circuit found that "[t]his lawsuit results from a coastal restoration project." And "[t]he language of the lease eliminates any right *whatsoever* of Bayou Canard to make any claims against CPRA as a result of the Shell Island West Restoration Project." The court relied on *Avenal v. State*, which related to physical damage caused by the Caernarvon Freshwater Diversion, thereby significantly extending the interpretation of the immunities and limitations of liability contained in state-issued oyster leases in favor of coastal restoration and protection.

Bayou Canard sought writs to the Louisiana Supreme Court on June 13, 2018.

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Family Law

Divorce

McCalmont v. McCalmont, 17-0644 (La. App. 3 Cir. 12/28/17), 236 So.3d 640.

Ms. McCalmont initially filed a petition for an article 102 divorce. Mr. McCalmont did not file any responsive pleadings. She then filed an amending and supplemental petition for divorce, seeking a divorce on the grounds of adultery, but not pleading any alternative grounds for divorce in that second petition. Mr. McCalmont moved to terminate the community regime retroactive to the date of the filing of the initial petition on the basis of the parties living separate and apart the required time. The court made the termination effective as of the date of the second petition. The court of appeal affirmed, finding that after the amendment of

La. Civ.C. art. 2375(C) in 2010, the retroactivity was not to the date of the filing of the "original" petition and, in this case, related back to the only pending petition, her second petition on the grounds of adultery. The court found that the amendment had the effect of canceling the original petition and starting the matter anew on a different ground for the divorce. His argument that the amended petition related back to the original petition was rejected, since the second petition did not arise out of the conduct, transaction or occurrence set forth in the initial petition, but set forth a different ground for the divorce.

Community Property

Knobles v. Knobles, 17-0233 (La. App. 5 Cir. 12/27/17), 236 So.3d 726.

During the parties' divorce proceedings, Mr. Knobles retired from his job with Chevron. A consent judgment of partition was later entered, in which his retirement plan was partitioned pursuant to a Qualified Domestic Relations Order. Years later, he was rehired by Chevron and began to participate in a retirement plan for highly compensated employees. The court found that Ms. Knobles was entitled to a portion of those benefits. His arguments that his entitlement under the second plan did not come into effect until after the termination of the community, and that his ability to participate was based on his post-termination efforts, were rejected, as the benefits were based, in part, on his prior credited service during the community. The court stated: "Although [Mr. Knobles] did not qualify for the Restoration Plan until his compensation from Chevron exceeded the applicable annual compensation limit, well after the community ceased to exist, the benefits [he] will receive under the Restoration Plan are calculated in part on his credited service years accumulated during the existence of the community with [Ms. Knobles]." Consequently, Ms. Knobles was entitled to share in the portion of the plan deriving from these community service years.

Webb v. Webb, 16-0567 (La. App. 5 Cir. 1/24/18), 238 So.3d 566, *writ granted*, 18-0320 (La. 4/27/18), ____ So.3d ____, 2018 WL 2049919.

Mr. Webb, an attorney, admitted to forging his wife's name to obtain a $250,000 bank loan, secured by the parties' home. The trial court found that the debt was his separate obligation, finding that admissions he made in disciplinary proceedings were a judicial confession that the obligation was his separate obligation.

The court of appeal found that because the statements were not made in the present proceeding, they were not judicial confessions, and, nevertheless, they could not change the classification of the debt, which was community, as it was incurred during the community and the funds were used for a community purpose.

The court noted that the inquiry when reviewing obligations arising from intentional wrongs is not on the wrongful activity but on whether it benefitted the community. Here, because the funds were used to pay other community obligations, the debt was a community obligation. As a result, the trial court's denial of his reimbursement claim for making post-termination payments on the obligation was reversed, and he was granted that reimbursement claim. The trial court did not err in denying his rental reimbursement claim for Ms. Webb's use of the former matrimonial domicile, and was within its discretion in finding that the parties' disparate financial circumstances and Ms. Webb's health issues and medical expenses related thereto supported the denial.

Custody

England v. England, 17-0493 (La. App. 4 Cir. 3/2/18), 238 So.3d 1064, *writ denied*, 18-0515 (La. 5/11/18), 241 So.3d 1008.

The trial court did not err in changing custody to award Mr. England sole custody and in suspending Ms. England's visitation for 90 days and ordering her to seek mental health counseling. However, it did err in ordering her to see a therapist named by the court, rather than a therapist of her own choosing. The court found that she had a history of making unsupported claims that Mr. England was abusing the parties' children. The court found that there was "ample evidence" that she was "unwilling or unable to encourage a close and continuing relationship between the children and Mr. England," and that she was "fabricating abuse allegations and encouraging the children to verify them." The court of appeal found that although the trial court could order her to obtain therapy, it could not designate the therapist that she had to see. Judge Lobrano concurred in the award of sole custody and visitation but wrote a well-reasoned partial dissent on the issue of mental health counseling. He asserted that *Bergeron* did not apply under La. C.C.P. art. 3945, under which this proceeding was brought, and the article provided no authority for a judge to require a litigant to seek mental health counseling.

Final Spousal Support

Thomas v. Thomas, 17-0760 (La. App. 4 Cir. 2/21/18), 238 So.3d 515.

The trial court did not err in finding that Ms. Thomas was a victim of domestic abuse. Further, Mr. Thomas' argument that she abandoned the family home was rejected, as, impliedly, she had good cause for leaving. The court's ruling that she was free from fault was affirmed, as was its award of final spousal support to her. As she was a victim of domestic abuse, the award could exceed one-third of Mr. Thomas' net income pursuant to La. Civ.C. art. 112.

Maternity

Chaisson v. State, Dep't of Health & Hosps., 17-0642 (La. App. 4 Cir. 3/7/18), 239 So.3d 1074, *writ denied*, 18-0540 (La. 5/25/18), ____ So.3d ____, 2018 WL 2441223.

Unbeknownst to Ms. Chaisson, her same-sex spouse, to whom she was married at the time Ms. Chaisson gave birth to a child, submitted their marriage certificate to the Louisiana Department of Vital Records and had the child's birth certificate amended to reflect the spouse's name as a parent. Ms. Chaisson filed a writ of mandamus to have the Department restore the birth certificate to its original form, which was denied. Because the spouse was entitled to the presumption that she was the parent of the child, the Department of Vital Records acted in its capacity to amend the birth certificate, just as it would have for an opposite-sex couple.

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Fidelity, Surety and Construction Law

Public Body Not Entitled to Withhold Final Payment

Woodrow Wilson Constr. L.L.C. v. Orleans Parish Sch. Bd., 17-0936 (La. App. 4 Cir. 4/18/18), ____ So.3d ____.

Orleans Parish School Board (OPSB) awarded a public works contract to Woodrow Wilson Construction, L.L.C. (WWC) for construction of the elementary school at North Kenilworth Park. In accordance with the terms of the contract, the project was to be completed in 548 days. The contract provided for $5,000 per day in liquidated damages for every day the project was late. The project began in February 2013, and the certificate of substantial completion was issued on Feb. 3, 2016. The project was late by 517 days. After receipt of the certificate of substantial completion, WWC issued a final payment application seeking retainage in accordance with the terms of the contract. OPSB refused to issue final payment, and as a result, WWC filed for a writ of mandamus in accordance with La. R.S. 38:2291 in an attempt to compel final payment.

After filing the writ of mandamus, OPSB filed an answer and reconventional demand against WWC. OPSB argued that it was entitled to withhold final payment under the contract due to its right to collect and assess liquidated damages, which OPSB claimed exceeded the final amount of retainage. The trial court denied WWC's writ of mandamus, finding that La. R.S. 38:2291 was not applicable because a question remained regarding whether final payment was due under the terms of the contract.

On appeal, the Louisiana 4th Circuit sought to determine "whether OPSB may withhold final payment due under La. R.S. 38:2291 on the basis that the project was completed behind schedule, despite the fact that liability for the delays has yet to be adjudicated." In reversing the ruling of the trial court and granting the writ of mandamus in favor of WWC, the court of appeal first looked to the statutory language of La. R.S. 38:2291.

In examining the language of the statute, the court of appeal reasoned that La. R.S. 38:2291 was applicable. In doing so, it looked to La. R.S. 38:2291(A), which provides that "all public entities shall promptly pay all obligations under public contracts when the obligations become due and payable under the contract." Thereafter, the court decided that it must determine when final payment is due under the contract.

The court of appeal then examined the contract, which provided that normal retainage was due:

> upon the following having occurred: 1) Substantial Completion is achieved; 2) the Architect and the Owner approve and accept the Certificate of Substantial Completion, including an attached punchlist; 3) the Contractor submits an application for payment for retainage; 4) the Contractor submits the lien waivers to accompany the application for payment; (5) the 45-day lien period in La. R.S. 38:2242 has expired; and 6) the Contractor provides the Owner and the Architect with a clear lien and privilege certificate.

Thereafter, the court of appeal determined that WWC had satisfied all of the requisites of the contract in order to receive final payment and that final payment had in fact become due and payable at that time.

In response, OPSB argued that payment was still not due because it had cause to withhold payment "as security" for its delay claim. In response, the court of appeal explained that OPSB's position failed to comport "with the legislative intent, the reasoning prompting the statute's enactment, or the express language of La. R.S. 38:2291." The court of appeal went on to reason that, although the contract permitted OPSB to withhold liquidated damages, withholding was permitted under the contract only when a payment became due. As a result, the court of appeal determined that OPSB could not withhold under the contract without also acknowledging that the final retainage payment was due. Therefore, because the final retainage payment was due, La. R.S. 38:2291 was implicated, and as a result, OPSB was statutorily required to tender the final retainage payment. Furthermore, OPSB was not permitted under La. R.S. 38:2291 to contractually waive the duty to pay.

The court of appeal also examined whether OPSB's defense of a separate claim for damages was a basis to withhold payment. In determining that the claim for damages was not a valid basis, the court of appeal examined the contract and determined that the "provisions of the contract demonstrate that OPSB's 'right' to liquidated damages is in fact not a right at all." It went on to explain that, under the contract, OPSB simply had a "claim" for damages, a claim that had not been "judicially determined." As a result, the court of appeal held that "a public entity's separate claims against a contractor are secondary to the contractor's right to prompt payment under La. R.S. 38:2291."

Therefore, the court of appeal reversed

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the ruling of the trial court and granted the writ of mandamus in favor of WWC on the basis that "the OPSB had a ministerial duty to issue final payment and had no discretion to withhold based on a separate claim against WWC."

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Insurance, Tort, Workers' Compensation & Admiralty Law

Tort

Fornah v. Schlumberger Tech. Corp., No. 17-30910, ____ F.3d ____ (5 Cir. June 5, 2018), 2018 WL 2715147.

Chevron Corp. hired Schlumberger to assist, as an independent contractor, in a plugging and abandonment project on its fixed platform in the Bay Marchand Field on the Outer Continental Shelf in the Gulf of Mexico, about five miles off the coast of Louisiana. Chevron also hired Tetra Applied Technologies as an independent contractor to provide crew for plugging and abandoning services. Alliance Offshore, which owned and operated the M/V MISS LYNNE, a liftboat adjacent to the platform, and a crane to lift and move the equipment, was also hired as an independent contractor.

Fornah was employed by Tetra as a rigger, responsible for handling the hoses for the coiled tubing job. Once Alliance began operating its crane on the adjacent liftboat to raise Schlumberger's coiled tubing injector head into position, Fornah's job was to guide the tubing hoses during the lift. While he was guiding the tubing, acting alone, he jerked an attaché hose to untangle it from scaffolding and felt a pain in his back and shoulder. Two days later, he reported the injury, but not to Schlumberger.

Almost a year later, Fornah filed suit in federal district court against Tetra, Alliance, the M/V MISS LYNNE, Chevron and Schlumberger, seeking to recover maintenance and cure under general maritime law. He also made claims of Jones Act negligence against Tetra; unseaworthiness of the vessel; and negligence claims under general maritime law against Alliance, Chevron and Schlumberger, alleging, *inter alia,* that Schlumberger was negligent in conducting unsafe coiled tubing operations and failing to provide a sufficient coiled tubing crew. Schlumberger moved for summary judgment on grounds that Schlumberger and Tetra were co-independent contractors of Chevron, that Schlumberger exercised no supervisory control over Tetra personnel, and that Schlumberger owed no duty to Fornah besides that of ordinary care and did not breach that duty. Before ruling on the motion, Fornah settled with all parties except Schlumberger. The district court granted Schlumberger's motion for summary judgment, finding that Fornah's claims were governed by Louisiana law. A duty-risk analysis concluded that, because Schlumberger and Tetra were co-independent contractors, Schlumberger did not have a duty to protect Tetra's employee, Fornah. Thus, as Schlumberger owed no duty, it could not be in breach. The 5th Circuit Court of Appeals agreed.

Fornah further contended that the district court erred in applying Louisiana law to his claim and urged instead the application of general maritime law. Three requirements must be met for state law to apply as surrogate federal law under the Outer Continental Shelf Lands Act (OCSLA), 43 U.S.C. § 1333(a)(1): 1) the dispute must arise on a situs covered by OCSLA; 2) federal law must not apply of its own force; and 3) the state law must not be inconsistent with federal law.

Fornah was injured on a fixed platform in federal waters on the Outer Continental Shelf and thus the first requirement was met as the situs was covered by the OCSLA. There is no dispute that Louisiana negligence law is consistent with federal maritime negligence law, so the third requirement was met. The only dispute was whether federal maritime law applied of its own force.

For maritime law to apply of its own force, there must be both a maritime location and a connection to general maritime activity. Fornah contended, unpersuasively, that the negligence of the Alliance crane operator gave rise to federal admiralty jurisdiction and the application of general maritime law, noting the traditional maritime activity of transporting and unloading vessel cargo.

The Supreme Court and the 5th Circuit previously concluded that work performed on oil production platforms affixed to the Outer Continental Shelf is not maritime in nature because it is primarily related to oil-and-gas exploration and production. "Thus, we agree with the district court that maritime law does not apply of its own force . . . and, consequently, that Louisiana law applies to Fornah's negligence claims."

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International Law

United States

Animal Sci. Prods., Inc. v. Hebei Welcome Pharm. Co., 138 S.Ct. 1865 (2018).

The U.S. Supreme Court reversed a 2nd Circuit ruling in an antitrust case involving vitamin C price fixing. That ruling vacated a $147 million judgment against two Chinese companies. Central to the Supreme Court's decision was the question of what deference federal courts should give to a foreign sovereign's interpretation of its own domestic law under Federal Rule of Civil Procedure 44.1.

Domestic purchasers of vitamin C filed a class action lawsuit against several Chinese companies that manufacture and export the vitamin. The plaintiffs alleged that the Chinese companies conspired to fix the price and quantity of vitamin C exported to the United States, in violation of the Sherman Act. *Id.* at 1870. The initial lawsuit and others were consolidated into a Multidistrict Judicial Panel for pretrial proceedings. Two of the Chinese merchants moved to dismiss the litigation on the grounds that they were immune from Sherman Act liability because the Chinese government requires them to engage in price and quantity restraints. *Id.* The district court denied the Chinese sellers' motion to dismiss, despite acknowledging that the interpretations of Chinese law contained in the Chinese Ministry of Commerce *amicus brief* were "entitled to substantial deference." *Id.* at 1871. The district court did not regard the Chinese submission as conclusive on the issue of Chinese law, noting the contrary evidence submitted by the U.S. purchasers. *Id.*

The Chinese sellers moved for summary judgment after discovery regarding the Chinese law issue. Expert testimony was given regarding the Chinese Ministry's deference to interpret its own laws and regulations. *Id.* The U.S. purchasers countered with official Chinese statements at the World Trade Organization wherein China admitted that it "gave up export administration of . . . vitamin C." *Id.* The district court denied summary judgment, finding that Chinese law did not require the sellers to fix the price or quantity of vitamin C. *Id.*

The 2nd Circuit reversed the district court. The central issue on appeal was the "amount of deference" the court owed to the Chinese Ministry's characterization of Chinese law. *Id.* at 1872. The 2nd Circuit determined that a "highly deferential" standard applies when a foreign government directly participates in U.S. legal proceedings and provides an official statement regarding the construction of its own laws. *Id.* Applying the highly deferential standard to the facts, the 2nd Circuit concluded that the Ministry's interpretation of Chinese law was reasonable, and therefore the Chinese sellers were immune from Sherman Act liability because Chinese law required the price and quantity measures. *Id.*

The U.S. Supreme Court granted certiorari to resolve a circuit conflict over the appropriate deferential standard to apply under Federal Rule of Civil Procedure 44.1. Justice Ruth Bader Ginsburg delivered the opinion of a unanimous Court on the issue. Summarizing the complex issues involving interpretation of foreign law, the Court noted:

> Given the world's many and diverse legal systems, and the range of circumstances in which a foreign government's views may be presented, no single formula or rule will fit all cases in which a foreign government describes its own law. Relevant considerations include the statement's clarity, thoroughness, and support; its context and purpose; the transparency of the foreign legal system; the role and authority of the entity or official offering the statement; and the statement's consistency with the foreign government's past positions.

Id. at 1873-74.

Judging the Chinese statement in this light, the Court found that the court of appeals erred in determining that the Ministry's submission was binding because it was facially reasonable. *Id.* at 1874. The Court admonished the court of appeals for failing to address other relevant evidence, including the official statements of the Chinese government at the World Trade Organization. *Id.* The Court concluded that, while a federal court interpreting or determining foreign law under Rule 44.1 should accord respectful consideration to the foreign government's position, U.S. courts should not accord conclusive effect to the foreign government's statements. *Id.* at 1870.

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Mineral Law

Mineral Leases

Rainbow Gun Club, Inc. v. Denbury Res., Inc., 17-0997 (La. App. 3 Cir. 5/23/18), ____ So.3d ____, 2018 WL 2326189.

On May 23, 2018, the Louisiana 3rd Circuit Court of Appeal affirmed a district court ruling that imposed liability on SKH Energy Partnership, L.P., a former mineral lessee, for a one-fourth share of more than $10 million in damages. In this case, more than 170 mineral lessors and royalty owners sued SKH, as well as Denbury Resources, Inc., Denbury Onshore, L.L.C., and Specter Exploration, Inc., for damages arising from Denbury's imprudent operations in the drilling of a well. SKH had assigned its interest in the mineral leases and, in 2003, Denbury, as operator, spud a well that produced dry gas until it was plugged and abandoned in 2008. Plaintiffs alleged that, during the drilling of the well, pipe became stuck in the original hole. As a result, plaintiffs claimed that "extraneous water invasion" ruined the gas reservoir. Plaintiffs asserted damages based on negligence and breach of obligations pursuant to various mineral leases.

Denbury and Specter settled prior to trial, and several other defendants were dismissed on summary judgment, leaving SKH as the only defendant to proceed to trial. After trial, the district court awarded more than $2.5 million in damages against SKH, holding it responsible pursuant to the mineral leases even though it had assigned its interests. SKH appealed.

Section 31:129 of the Louisiana Revised Statutes does not relieve an assignor of its obligations under a mineral lease unless the lessor expressly discharges him in writing. The appellate court reasoned that because there was no evidence of any such discharge, the trial court properly held SKH solidarily liable for the breach of the obligation to act as a prudent operator. The appellate court also found that SKH should be held liable for a one-fourth share of damages where the other defendants settled because the Louisiana Civil Code provides that the payment of a debt by one solidary obligor benefits the other obligors *only in the amount of the paying obligor's portion*. So, because only three of the four obligors in this case had settled, the 3rd Circuit held SKH to be responsible for a one-fourth share of the obligation.

Oil and Gas Lease

In re ATP Oil & Gas Corp., 888 F.3d 122 (5 Cir. 2018).

ATP Oil & Gas Corp. held an oil and gas lease granted by the federal government on the Outer Continental Shelf. Several service companies performed work for ATP. Pursuant to the Louisiana Oil Well Lien Act (LOWLA), which applied as surrogate federal law under the Outer Continental Shelf Lands Act (OCSLA), the service companies obtained a privilege on ATP's operating interest. Later, ATP sold "term overriding royalty interests" to OHA Investment Corp. In 2012, ATP filed a petition for bankruptcy. OHA and the service companies then disputed whether the service companies could enforce their privileges against OHA's overriding royalties. The U.S. 5th Circuit Court of Appeals quoted the bankruptcy judge's interpretation of the "safe harbor" provision found at La. R.S. 9:4869(A)(1)(a), which stated that the LOWLA privilege does not apply to "hydrocarbons that are . . . transferred in a bona fide onerous transaction by the lessee or other person . . . if the transferee pays for them before he is notified of the privilege by the claimant." *Id.* at 125. The parties did not dispute that the overriding royalty interests were transferred to OHA in an onerous transaction. Further, the service companies did not notify OHA of the privileges before it purchased the overriding royalties. Thus, the only question was whether the purchase of an overriding royalty is a purchase of hydrocarbons. The 5th Circuit concluded that it is. Thus, the service companies' privileges did not attach to OHA's overriding royalties.

Servitudes

Vintage Assets, Inc. v. Tenn. Gas Pipeline Co., ____ F.Supp.3d ____ (E.D. La. May 5, 2018), 2018 WL 2078606.

Plaintiffs are the owners of land in Plaquemines Parish. The defendants were companies that had been granted servitudes to construct and operate pipelines and dredge canals. Some of the servitude agreements placed limits on the width of the canals authorized by those agreements. The plaintiffs filed suit, alleging that the defendants' failure to maintain the canals had caused the loss of land to erosion.

In pretrial rulings, the court dismissed the plaintiffs' claims for trespass and negligence, leaving the claims for breach of contract. The court determined that the defendants had breached their obligations and that some (though not all) of the land loss that had occurred would have been avoided if the defendants had performed their obligations. The defendants asserted that their liability should be limited to paying the fair market value for the lost land, while the plaintiffs asserted that they were entitled to complete restoration.

The court found that, for certain portions of the land loss, the cost of restoration would be greatly disproportionate to the benefits of restoration. For that land loss, the court declined to require restoration. Instead, the court concluded that the defendants would be required to pay the fair market value of that land. The court also concluded that the plaintiffs were entitled to an injunction requiring the defendants to restore 9.6 acres whose restoration was practical.

An appeal to the U.S. 5th Circuit Court of Appeals was filed June 4, 2018.

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Prescription

In re Med. Review Panel of Benoit, No. 17-0802 (La. App. 4 Cir. 4/11/18), ____ So.3d ____, 2018 WL 1750521.

Ms. Benoit filed a panel request against four healthcare providers, alleging that she sus tained a malpractice-caused injury in 2013 when her broken foot was too tightly bound. The panel process proceeded in the usual fashion, including an extension of the life of the panel until Feb. 25, 2017.

On Feb. 9, 2017, Ms. Benoit amended her panel complaint by adding two additional respondents to the pending panel request, claiming that these newly-added defendants were jointly and solidarily liable for the injuries to her foot.

The new defendants filed an exception of prescription, showing that the amended complaint was on its face prescribed because the three-year prescriptive period set forth in La. R.S. 9:5628(A) had expired. Ms. Benoit countered that the three-year period was prescriptive, not peremptive, and that her amendment was timely, pursuant to La. R.S. 40:1231.8(A)(2)(a), because the new defendants were jointly and severally liable with the original defendants.

The trial court sustained the exception of prescription, commenting: "I think the law is clear. You've got to file [a request for a MRP] at the absolute latest, in three years."

On appeal, Ms. Benoit proposed the same arguments as she had to the trial judge: Panel proceedings were ongoing, and until completed, prescription is suspended against all joint and solidary obligors.

The defendants responded that La. R.S. 9:5628(A) imposes a "strict deadline" of three years to bring a medical malpractice claim and no statutory or case law allows suspension or interruption of prescription beyond three years from the date of the malpractice.

The appellate court first observed that *LeBreton v. Rabito*, 714 So.2d 1226, 1230 (La. 7/8/98), "conclusively established" that the MMA applies to the exclusion of general Louisiana Civil Code articles concerning suspension and interruption of prescription in medical malpractice claims and that the timely filing of a panel request suspends, but does not interrupt, liberative prescription until 90 days following notification of the panel opinion.

The court then noted that the Louisiana Supreme Court was faced with an issue similar to that of Ms. Benoit's in *Borel v. Young*, 07-0419 (La. 7/8/98), 989 So.2d 42 (La. 11/27/07), where the plaintiffs filed a lawsuit within 90 days after the conclusion of the panel proceedings against a hospital but not against a physician who had been named in the panel proceeding. Then, over 90 days after notification of the panel opinion, the physician was added to the lawsuit, following which the Supreme Court sustained the physician's exception of prescription because more than 90 days (plus the remainder of the one-year prescriptive period that was unused) had elapsed. The *Benoit* court distinguished *Borel* because in *Benoit* the panel was pending when the new defendants were added. Prescription was suspended for a minimum of 90 days after the panel proceedings concluded, and thus the trial court erred in granting the exception of prescription.

Continuing Treatment Exception

McCauley v. Stubbs, 17-0933 (La. App. 3 Cir. 4/25/18), ____ So.3d ____, 2018 WL 1940524.

Mr. McCauley's treatment with Dr. Stubbs, including two surgeries, began in 2010 and continued until January 2015. In August 2016, McCauley named Stubbs in a panel request. Stubbs filed an exception of prescription. McCauley argued in opposition that neither the one-year nor three-year malpractice prescriptive periods began to run until January 2015, when the doctor-patient relationship was terminated, that he had one year from the date he discovered the malpractice (April 29, 2016) within which to timely file, and that prescription was suspended for one year from that April 29, 2016, date of discovery.

The trial court sustained the exception of prescription, finding that the one-year "date of discovery" doctrine applied only when the claim is brought within three years of the alleged malpractice.

One question on appeal was whether the third category of the *contra non valentum* doctrine served, in this case, to suspend prescription. The appellate court discussed its earlier interpretations of this third category, insofar as it applied to interrupt prescription only "where the debtor himself has done some act effectually to prevent the creditor from availing himself of his cause of action."

Stubbs argued that Louisiana jurisprudence allows for the continuing treatment doctrine to suspend prescription "only when there is proof of fraud, concealment, misrepresentation or ill practice on the part of the defendant physician." The appellate court relied on its earlier observations that, while the three-year period is prescriptive, it nevertheless affixes an overall three-year time limit on the discovery rule that "cannot be suspended or interrupted" unless the defendant does something to conceal the wrongful conduct, thus preventing the plaintiff from acting. The court noted that the Supreme Court "has often failed to declare" whether a plaintiff may invoke the third category of *contra non valentum* in a medical malpractice case, but "it has strongly implied that if the defendant's conduct arises to the level of fraudulent concealment, misrepresentations, or ill practices, the three-year prescriptive period can be suspended." Thus, the trial court did not err in granting the exception of prescription.

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Taxation

Cleaning of Oil Field Drilling Tube Found to Be a Taxable Repair

Duncan Oil, Inc. v. Calcasieu Parish Sch. Bd., 17-0488 (La. App. 3 Cir. 2/28/18), 239 So.3d 367.

Duncan Oil, Inc. specializes in oil and gas exploration and development. It owned three active wells in Calcasieu Parish during the relevant time period. The Calcasieu Parish School Board (CPSB) assessed Duncan with sales and/or use tax, interest, penalties and audit costs covering the December 2010 through December 2013 tax period. Duncan filed a petition with the Louisiana Board of Tax Appeals for a redetermination of the assessment, arguing that CPSB had improperly classified non-taxable cleaning services as taxable repair services; improperly classified non-taxable charges as taxable gross proceeds in conjunction with a lease or rental; and improperly classified other non-taxable services and charges as taxable services. The Board denied in part and granted in part Duncan's petition for redetermination. Duncan appealed.

On appeal, Duncan asserted the Board erred in finding non-taxable cleaning services as taxable repairs under La. R.S. 47:301(14)(g). Specifically, Duncan asserted that the Board erred in finding that its invoices concerning the removal of paraffin deposits from the tubing used to extract the hydrocarbons from their source to its wells were taxable repairs. Duncan asserted that the paraffin removal should be classified as a non-taxable cleaning service rather than a taxable repair. Duncan relied on *Intracoastal Pipe Service, Co. Inc. v. Assumption Parish Sales & Use Tax Dept.*, 558 So.2d 1296 (La. App. 1 Cir. 1990), where the court held that cleaning oil field pipe or tubing was not a taxable service.

CPSB argued that the present facts differed from *Intracoastal Pipe* in that the removal of the paraffin from the pipe was a taxable repair as hydrocarbons cannot flow through the pipe without the paraffin removal, and the Board and court both agreed. CPSB also made the distinction that the cleaning in *Intracoastal Pipe* was aesthetically helpful but was not functionally required. CPSB argued that, without the paraffin removal, the pipe would be unusable for the purpose for which it was intended. The court upheld the Board's ruling that the paraffin removal was a repair as contemplated by La. R.S. 47:301(14)(g) and was, therefore, a taxable service.

Duncan also asserted the Board erred in finding non-taxable services in conjunction with rentals as taxable services under La. R.S. 47:302(B). CPSB countered that the entire amount of the invoices are gross proceeds of the rentals and that the services in connection with the rentals cannot be separated from the rentals. The court dismissed Duncan's argument, finding that the argument was general in nature and that no particular invoices were singled out for discussion. The court held it was not shown that the lessee had the option to decline the services at issue and that the services were severable from the lease.

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INDEX TO ADVERTISERS

Department Provides Operating Rules for Exceptions to Louisiana's Add-Back Statute

In April 2018, the Department promulgated LAC 61 § I.1115(B)(5), which provides "Operating Rules" governing the exceptions to Louisiana's corporate add-back statute, La. R.S. 47: 287.82. Generally, the add-back statute requires that otherwise deductible interest, intangible expenses and costs, and management fees paid to a related entity be "added back" to a corporation's gross income. Adding back the expense essentially denies the deduction for that expense to the taxpayer. The add-back statute is subject to four exceptions, as well as a fifth regulatory exception. Taxpayers and their advisors should be aware of these rules now because of requirements of contemporaneous documentation in order to qualify for exceptions in some instances.

The two "subject-to-tax" exceptions apply if the item of income corresponding to the expense was subject to tax in Louisiana, another state or certain foreign nations. The regulation states that these exceptions are allowed only to the extent the related member includes the corresponding item of income in post-allocation income or apportioned income reported to the taxing jurisdiction(s). If the income is offset or eliminated via combined reporting, it does not qualify. The "non-tax business purpose" exception applies if the transaction giving rise to the expense between the taxpayer and the related member did not have as a principal purpose the avoidance of Louisiana tax.

The regulation specifies that the Department may request "contemporaneous" documentation to support this exception. Documentation is contemporaneous if it is in existence and compiled before the filing date (including extensions) for the return containing the transaction(s). The "passed through" exception applies if the expense was "passed through" to an unrelated third party in an arms-length transaction via a corresponding expense. The regulation limits this exception for management fees when the related member pays fees to unrelated third parties in excess of the fees it receives from related members.

The regulation provides a fifth exception if the taxpayer establishes that, based on the entirety of the particular facts and circumstances, the add-back would increase Louisiana income-tax liability to an amount that bears no reasonable relation to the taxpayer's Louisiana presence. The regulation states that if the interest or intangible-expense rate charged the taxpayer by the related member exceeds the rate charged the related member by third-party payees, the excess expense will not qualify for the "unreasonable" exception. If multiple arrangements exist between the taxpayer and the related member, or the related member and the third-party, a weighted-average rate formula is used to determine non-qualifying excess. The regulation also provides a "debt-over-asset test" solely for interest expense. If the taxpayer's debt-over-asset percentage exceeds the consolidated unrelated third-party debt over asset percentage of its federal consolidated group, the interest expense associated with the excess debt must be added back.

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