Google Agrees to Mediate Privacy Dispute

In October 2014, U.S. District Court Magistrate Judge Paul Grewal issued an order at the request of the parties requiring mediation in a dispute against Google based on 2012 changes to Google's privacy policy. The changes made to Google's privacy policy were intended to consolidate the more than 70 privacy policies that Google had in place at the time into a single unified policy that would govern all of Google's services. "Updating Our Privacy Policies and Terms of Service," GoogleBlog (Jan. 24, 2012), *http://googleblog.blogspot.com/2012/01/updating-our-privacy-policies-and-terms.html*.

Pursuant to these changes, users experienced a single sign-in experience, whereby signing into one Google application allowed a user to be seamlessly logged in to all other Google services, such as YouTube, Gmail, Blogger and Google Drive. This seamless integration, however, also allowed Google to compile user information from across its individual services to create a marketing profile and, additionally, to customize users' Google experiences, all without individual user consent.

In February 2013, the press began to report that individual application developers had access to identifying information about those who purchased their apps through Google Play, the company's marketplace for Android apps. The information provided to developers included user names, physical addresses and email addresses. Google defended its practice, citing an exception to the Google Wallet privacy policy that allows the company to share user information with third parties "as necessary to process your transaction and maintain your account." "Formal Complaint Regarding Google's Second Violation of Buzz Order," Consumer Watchdog (Feb. 25, 2013), *www.consumerwatchdog.org/resources/ltrftc022513.pdf*.

Although this information is often necessary to allow third-party merchants to fulfill Google Wallet orders — which are often tangible items that require shipment to a buyer's mailing address and delivery of a receipt — Google Play is an electronic-only app store, and "user transactions are routinely processed without developers even being aware of their access to user information, much less needing it." *Id.*

This unnecessary access to user information sparked concerns about how that information could be used and what it could reveal about users. According to a Consumer Watchdog complaint to the Federal Trade Commission, "Google Play apps deal with sensitive personal subjects, including health conditions and sexual activity. By disclosing personal user information to app developers, Google enables the identification of people who downloaded [these sensitive] apps." *Id.* Furthermore, the complaint expressed concern that developers — who are often younger people — may be motivated to profit from the information by selling it to others.

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A resulting lawsuit brought by users challenged this aggregation of user data as a violation of their privacy rights. Elizabeth Warmerdam, "Google Must Mediate Privacy Claims," Courthouse News Service (Oct. 3, 2014), *www.courthousenews.com/2014/10/03/72093.htm*.

In April, Google responded to user concerns by updating its commerce site to display less user information to developers; the website now displays an anonymous list of app purchases without disclosing the name of each individual purchaser.

In July, Judge Grewal issued a ruling dismissing all the complaints in the original suit, but allowing the suit to proceed under a breach-of-contract claim for the disclosure of user information to third-party-app developers and a claim for fraud under the California Unfair Competition Law. *In re Google, Inc. Privacy Policy Litigation*, ____ F.Supp. 2d ____ (N.D. Cal. 2014). In his written decision, Judge Grewal determined that the plaintiffs had sufficiently alleged that Google had "left a privacy policy in place which led consumers to believe that access to their data would be limited to certain groups, even though it knew that it planned to distribute the data outside of those groups." *Id.* Additionally, Judge Grewal determined that the plaintiffs had sufficiently pled that they relied on Google's policies in their decisions to use Google Play and to download applications.

Although the July decision allowed the claims to go forward, in September, the parties filed with the court a Stipulation and Proposed Order Selecting Mediation, *www.courthousenews.com/2014/10/03/Google%20Mediation.pdf*.

Judge Grewal signed the order giving the parties to the lawsuit until early February to submit to mediation. On Oct. 9, the parties filed notice with the court of their scheduled mediation, set for Jan. 22, 2015, at Durie Tangri Offices in San Francisco, Calif.

In their class action, the users sought damages and costs, as well as any other relief the court deemed necessary. Although it is unclear what the result of the impending mediation might be, users feel that their privacy has been violated. This, in turn, can lead to distrust in Google's respect for its users' data and threaten the company's reputation. Thus, both sides of the dispute have an interest in restoring user confidence, and issues such as these — where both parties seek a similar outcome — are particularly well suited for mediation. Through the mediation process, Google will be able to engage in a constructive dialogue with its users, in which both parties can venture outside the strict courtroom environment and explore new and unique possibilities for resolution.

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Lack of Subject Matter Jurisdiction over Litigation of Non-Estate Property

TMT Procurement Corp. v. Vantage Drilling Co., 764 F.2d 512 (5 Cir. 2014).

Prior to any bankruptcy proceedings, Vantage Drilling Co. filed suit in Texas state court against Hsin-Chi Su alleging, among other things, that Su induced Vantage to contract with companies owned by Su to acquire offshore drilling rigs in exchange for 100 million shares of Vantage stock (the Vantage shares). The Vantage shares were issued to F3 Capital, a company solely owned and controlled by Su. After Vantage filed the lawsuit (the Vantage litigation), Su removed the Vantage litigation to the District Court for the Southern District of Texas, alleging diversity jurisdiction. After the district court denied Vantage's motion to remand, the 5th Circuit reversed and remanded the decision with instructions to remand the Vantage litigation to state court.

Meanwhile, 23 companies (not including F3) owned directly or indirectly by Su filed for Chapter 11 bankruptcy in the Bankruptcy Court for the Southern District of Texas. After multiple motions to dismiss were filed, the bankruptcy court denied all of the dismissals and issued an order requiring the debtors to provide "non-estate property" to the estates of the debtors, including "at least 25,000,000" of the Vantage shares, to ensure compliance with the court order and to provide collateral for working capital loans. The debtors sought bankruptcy court approval on a proposed escrow agreement whereby F3 would deposit the Vantage shares to be held *in custodia legis* for the benefit of the debtors, and Vantage objected. The bankruptcy court entered an order approving the escrow agreement, and Vantage appealed. The district court denied leave to appeal, but on emergency motions, entered multiple orders regarding debtor-in-possession (DIP) financing, which Vantage also appealed. Thereafter, the bankruptcy court entered a final DIP order and a cash collateral order. Vantage appealed the two bankruptcy court orders, and the 5th Circuit accepted the direct appeals, consolidating them with the pending appeal of the district court orders.

On appeal, the debtors asserted that Vantage's appeal of all of the orders was moot under 11 U.S.C. §§ 363(m) and 364(e). Under these provisions, a "failure to obtain a stay of an authorization . . . moots an appeal of that authorization where the purchaser or lender acted in good faith." While Vantage did not seek a stay of the orders appealed, it argued that those sections only authorize actions in connection with "property of the estate" and the Vantage shares were not "property of the estate." Vantage also asserted that the appeal was not moot as the DIP lender did not act in good faith.

The 5th Circuit reviewed its definitions of a good faith purchaser, namely as "one who purchases the assets for value, in good faith, and without notice of adverse claims," and noting that "misconduct that would destroy a purchaser's good faith status . . . involves fraud, collusion between the purchaser and other bidders or the trustee, or an attempt to take grossly unfair advantage of other bidders." The 5th Circuit reasoned that knowledge of objections to a transaction is not enough to constitute bad faith, because having knowledge of an adverse claim requires something more and extends beyond objections by the debtors' creditors. As the DIP lender had knowledge of the Vantage litigation whereby Vantage sought to recover the Vantage shares, the DIP lender was not a good faith lender.

Vantage also argued that the bankruptcy court lacked subject matter jurisdiction over both the Vantage shares and the Vantage litigation as the Vantage shares were not property of the estate or property of the debtors. The 5th Circuit reasoned that as the debtors had no legal or equitable interest in the Vantage shares, they could not be considered property of the estate under Section 541. The debtors argued that because they acquired the interest in the Vantage shares after they were deposited *in custodia legis*, the Vantage shares were "interests of the estate acquired after the commencement of the case," as defined by Section 547(a)(7). However, because F3 retained the title and voting rights to the Vantage shares, the debtors did not acquire the right to control or retain the Vantage shares. Furthermore, the Vantage shares were not property of the estate under Section 547(a)(7) because "they were not created with or by property of the estate, they were not acquired in the estate's normal course of business, and they are not traceable to or arise out of any prepetition interest included in the bankruptcy estate." The 5th Circuit further determined that the debtors could not use the orders as "jurisdictional bootstraps" to allow the courts to exercise jurisdiction that would "not otherwise exist." Therefore, the 5th Circuit concluded that the district court and the bankruptcy court lacked jurisdiction on that basis.

Lastly, Vantage argued that the bankruptcy court and district court lacked jurisdiction because the Vantage litigation was not "related to" the bankruptcy proceedings. The 5th Circuit found that a resolution of the Vantage litigation could not conceivably affect the debtor's estate, and because bankruptcy jurisdiction does not extend to state law actions between non-debtors over non-estate property, the Vantage litigation was not "related to" the bankruptcy. Finding that the appeals were not moot, the Vantage shares were not "property of the estate" and the Vantage litigation was not "related to" the bankruptcy proceedings, the 5th Circuit held that the district court and the bankruptcy court lacked subject matter jurisdiction to enter the orders. The 5th Circuit vacated the orders of both lower courts and remanded the proceedings.

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Civil Law and Litigation

Tolling of Prescription Class Action Cases

Smith v. Transport Servs. Co. of Ill., 13-2788 (La. 7/1/14), ____ So.3d ____, 2014 WL 2949293.

The question at hand is whether Louisiana Code of Civil Procedure article 596(A)(3) suspends prescription for putative class members when a class action is filed in state court and subsequently removed to federal court. The case has a long complex background involving three separate cases. A brief summary of the timeline follows.

Two separate class action lawsuits were filed against Transport Services Co. in Louisiana state court — *Fulford v. Transport Services Co.* and *Abram v. Transport Services Co.* The suits stemmed from an Aug. 7, 2002, incident, wherein a truck owned by the defendant emitted "spent caustic" vapors throughout a neighborhood. The suits were removed to federal court and consolidated; class certification was ultimately denied on June 1, 2004. Following the denial, the defendants took no action to notify the putative class members.

On June 8, 2004, three putative class members filed an action in state court, making the same allegations as were contained in the prior two suits. The defendants filed an exception of *lis pendens* and sought a stay of the proceedings pending the resolution of the federal court actions.

On Sept. 7, 2004, while defendants' exception was pending, the plaintiffs in the *Fulford* and *Abram* class actions attempted to provide notice to their putative class members of the denial of class certification through U.S. mail, and from Sept. 19-29, 2004, through publishing in the *Times Picayune*.

On Sept. 20, 2004, while notice was still running in the *Times Picayune*, the district court granted defendants' exception of *lis pendens* inasmuch as it was related to the class action claim, but granted the plaintiffs 30 days from the date of signing the judgment in which to amend the pleadings to add additional plaintiffs to the lawsuit. Notably, the judgment specifically stated "which additions will not affect or extend any prescriptive periods that have already run as to any new plaintiffs . . . ."

On Oct. 4, 2004, plaintiffs filed an amended petition that added approximately 500 plaintiffs. Leave to amend was granted on Oct. 7, 2004. As to the 500 plaintiffs added on Oct. 4, 2004, defendant raised the exception of prescription. Defendants' exception of prescription is the basis for this case and the holding that removal of a class action case from state court to federal court does not change the requirement that one of the three events in article 596 must take place to trigger the running of prescription, which, in this case, was the mailing of notice to the putative plaintiffs.

Private Right of Action Exists in the "Balance Billing Act"

Anderson v. Ochsner Health Syst., 13-2970 (7/1/14).

This case began as a personal injury case after the plaintiff was injured in an automobile accident. At the time of the accident, plaintiff was treated at an Ochsner facility and, at all relevant times, was insured by UnitedHealthcare. As an insured of UnitedHealthcare, plaintiff was entitled to discounted health care rates through a separate contract between Ochsner and UnitedHealthcare. Plaintiff provided Ochsner proof of insurance for her claims to be submitted to her insurer. Rather than file claims with her insurer, Ochsner asserted a medical lien for the full amount of undiscounted charges on any tort recovery plaintiff was entitled to as a result of the automobile accident.

As a result of Ochsner's refusal to provide the claims to UnitedHealthcare for the discount to be applied, plaintiff filed the instant suit under La. R.S. 22:1871, *et seq.*, the "Balance Billing Act." Ochsner filed a motion for summary judgment claiming the Balance Billing Act did not allow for a private right of action and, therefore, plaintiff's claims should be dismissed. The statute is notably silent on whether a private right of action exists; however, an administrative remedy exists. The Louisiana Supreme Court first turned to statutory interpretation to determine if there was a private right of action. Because the statute was silent, the legislative intent was examined. Through the title, "Health Care Consumer Billing and Disclosure Protection Act," the court was able to reason the consumer was in mind when this matter was enacted.

Based on the implied right of action, the Louisiana Supreme Court held that a private cause of action does exist under the Balance Billing Act.

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New Remedy for Oppressed Shareholders of Closely-Held Corporations

The recently adopted revisions to the Louisiana Business Corporation Law, La. R.S. 12:1 *et seq.*, scheduled to take effect on Jan. 1, 2015 (thereafter known as the Louisiana Business Corporation Act, LBCA), provide shareholders of a Louisiana corporation whose shares are not publicly traded or listed on a national exchange with a new remedy in cases of "oppression." This remedy is entirely new to Louisiana corporate law and may represent the most significant change in the adoption of the new LBCA.

A shareholder's remedy for oppression is to withdraw and require the corporation to buy all of the shareholder's shares at their fair value. Under Section 1435 of the LBCA, a shareholder is oppressed if "the corporation's distribution, compensation, governance, and other practices considered as a whole over an appropriate period of time are plainly incompatible with a genuine effort on the part of the corporation to deal fairly and in good faith with the shareholder." The LBCA names factors to consider in whether a shareholder is being oppressed by the corporation as the conduct of the shareholder alleging the oppression and the treatment a reasonable shareholder would consider fair under the circumstances. The comments to Section 1435 indicate that the LBCA's definition of oppression and the relevant factors to consider are intended to combine the two leading tests of oppression developed by case law in other states that provide a similar remedy: the "reasonable expectations" and "departure from standards of fair dealing" tests.

"Fair value" is defined by Section 1435 as the value of the shares determined as of the effective date of the shareholder's written notice of withdrawal, using customary and current valuation concepts and techniques, but with no discounts for lack of marketability or minority status.

The shareholder must give written notice

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to the corporation of his, her or its intention to withdraw from the corporation on grounds of oppression. This written notice constitutes an offer by the shareholder to sell the shares back to the corporation at their fair value. However, the written notice does not need to specify a price for the shares. The corporation has 60 days from the effective date of the written notice to either accept or reject the shareholder's notice of withdrawal, and the corporation may accept either both the withdrawal and the stipulated price (if any in the written notice) or only the withdrawal. If the corporation accepts both the shareholder's withdrawal and the price for the shares stipulated in the written notice, then a contract of sale is formed between the shareholder and corporation. The purchase of the shares is governed by the restrictions on distributions set forth in the LBCA. If the corporation rejects or otherwise fails to respond to the the shareholder's notice of withdrawal, the shareholder may bring an ordinary action against the corporation to enforce the right to withdraw. A court ruling on the issue of the shareholder's right to withdraw is only a partial judgment and does not determine the fair value of the shares.

Upon either acceptance of the shareholder's right to withdraw by the corporation or a judicial determination that grounds for withdrawal exist, the shareholder and corporation have 60 days to negotiate the fair value and other purchase terms for the shareholder's shares. The court shall stay its proceedings on the shareholder's withdrawal demand for such 60-day period pending these negotiations. If no agreement is reached mutually by the parties, then the corporation or the withdrawing shareholder may bring an action for valuation of the shares within one year from the expiration of the 60-day negotiation period. The court shall render judgment either in favor of the shareholder for the fair value of the shareholder's shares, or against the shareholder terminating the shareholder's ownership of the shares and ordering the shareholder to deliver within 30 days of the date of the judgment any certificate for the shares issued by the corporation or a lost share affidavit.

The corporation also may elect to convert the ordinary action for withdrawal and/or valuation of the shares into a dissolution proceeding, if the corporation's dissolution was approved as required by the LBCA's provisions on dissolution. Venue for any proceeding related to the shareholder's withdrawal for oppression is the district court of the parish where the corporation's principal office is located, or the location of a registered office if there is no principal office in Louisiana.

Finally, the shareholders of a corporation may elect by unanimous written consent to waive the right to withdraw from the corporation. Unless the unanimous written consent stipulates a shorter duration, the shareholders' waiver of the withdrawal right is valid for only 15 years from the date of its adoption. Share certificates must bear written notice of the waiver of the right of a shareholder to withdraw.

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Constrained Resources and Management of Juvenile Prosecution Dockets

State ex rel. L.D., 14-1080 (La. 10/15/14), ____ So.3d ____, 2014 WL 5394100.

The Louisiana Supreme Court issued a *per curiam* opinion addressing the importance of complying with the strict time delays set forth in the Children's Code, even in light of the overcrowded dockets and limited resources of the court system.

L.D. was charged with a felony-grade delinquent act and was placed in state custody. As he was not released to his parents at the continued-custody hearing, the State was required by Louisiana Children's Code art. 843 to file a delinquency petition within 48 hours, which was done timely. Unless the child is subsequently released, an answer hearing must then be held within five days. La. Ch. C. art. 854(A). However, the district court set the answer hearing for the next available court date dedicated to juvenile matters — 27 days later.

Due to the need for closed courtrooms, specialized personnel and coordination with juvenile-detention centers that are often run by private companies, some courts create specialized "tracks" for juveniles. In Lafayette Parish (part of the 15th Judicial District Court along with Acadia and Vermilion parishes), Local Rule 14.0 restricts juvenile matters to two judges who hear juvenile matters in addition to their civil dockets. Each track meets approximately one week each month, which means that some delays inevitably fall within weeks when no juvenile docket is being heard.

The "unwritten policy, known to the attorneys who regularly appear in juvenile matters in that district," was that the court's schedule would be considered good cause for an extension under art. 854(C). Likewise, the court observed that "another unwritten rule" of the district was that duty judges "are not consulted in juvenile matters."

The adjudication of L.D.'s delinquency was upheld because the objection was made at the belated answer hearing, and the juvenile did not seek immediate review via supervisory writs. Nevertheless, the Louisiana Supreme Court, citing *State v. Driever*, 347 So.2d 1132, 1134 (La. 1977), issued the *per curiam* opinion to reiterate that, as in context of adult criminal proceedings, "the court system cannot excuse itself from affording an accused a trial within the delays required by law, simply by relying upon internal operating procedures which result in noncompliance with the statutory mandate."

The court adopted much of the dissent by Chief Judge Ulysses Gene Thibodeaux of the 3rd Circuit, which emphasized the statements of legislative purpose in Children's Code articles 801 and 102, specifically that the purpose of the delinquency articles is "to accord due process to each child who is accused of committing a delinquent act," and that each Code provision "shall be construed to promote . . . the elimination of unjustifiable delay." Allowing the State simply to fail to adhere to mandatory time standards of the Children's Code was deemed "especially egregious where there is . . . an erroneous refusal to release an incarcerated juvenile, as here." *State ex rel. L.D.*, 14-1080 (La. App. 3 Cir. 5/7/14), 139 So.3d 679, 687.

The court clarified that Children's Code articles that set forth time delays but do not provide a remedy should be read *in pari materia* with other articles mandating release of juveniles in continued custody and directed the 15th JDC to reevaluate its practices to ensure compliance.

Failure to Dismiss "Obnoxious Juror" Vacates Capital Sentence

State v. Mickelson, 12-2539 (La. 9/3/14), ____ So.3d ____, 2014 WL 4356305.

Eric Mickelson was convicted of first-degree murder by a 1st Judicial District Court jury and sentenced to death. On direct appeal, Justice Hughes described it as a "tremendously difficult case with which all the justices have invested much effort," evident in the opinion which stretches to 50 pages, including dissents and additional concurrences from *all seven* justices. The court found that there was sufficient evidence to convict Mickelson, but pretermitted discussion of numerous other assignments of error because it was "constrained by [the] statutory requirements" of Louisiana Code of Criminal Procedure art. 800 and thus was required to reverse and remand.

The court has repeatedly held that prejudice is presumed when a defendant is forced to use a peremptory challenge to correct an erroneous denial of a challenge for cause and thereafter exhausts all nine peremptory challenges on others in the venire. Forcing the defendant to "burn a perempt" weakens a substantial right of the defendant, guaranteed by the Louisiana Constitution, and will automatically be reversed. (*See*, *State v. Jacobs*, 99-1659 (La. 6/29/01), 789 So.2d 1280, 1283-84, for a discussion of the automatic reversal rule and the Legislature's elimination of the "obnoxious juror rule.")

The defense challenged juror Roy Johnson for cause because he expressly refused to consider relevant statutory mitigating circumstances during the penalty phase if Mickelson was convicted. In Louisiana criminal trials, two requirements are necessary to challenge a juror for cause: (1) that "the juror is not impartial, whatever the cause of his partiality;" and (2) that "the juror will not accept the law as given to him by the court." La. C.Cr.P. art. 797(2) and (4). Johnson refused to accept the direction of La. C.Cr.P. art. 905.5, which mandates intoxication "shall be considered" as a mitigating circumstance. Because the trial court refused to grant the challenge for cause, and the defendant subsequently exhausted his peremptory challenges, art. 800 mandates a finding of reversible error.

Accordingly, the court reversed and vacated the conviction and death sentence and remanded for a new trial.

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Army Corps, EPA Actions not Final within Meaning of Administrative Procedure Act

The U.S. Supreme Court's decision in *Sackett v. EPA*, 132 S.Ct. 1367 (2012), seemed to open the door to Administrative Procedure Act (APA) challenges of agency actions when the court found that a U.S. Environmental Protection Agency (EPA) compliance order could be appealed in court. But, the 5th Circuit closed that door to U.S. Army Corps of Engineers (Corps) Clean Water Act jurisdictional determinations, *Belle Co., L.L.C. v. U.S. Army Corps of Engineers*, 761 F.3d 383 (5 Cir. 2014); and EPA's pre-suit notice of violation under the Clean Air Act, *Luminant Generation Co. v. EPA*, 757 F.3d 439 (5 Cir. 2014).

Belle Co., L.L.C., asked the Corps to determine whether a proposed landfill site contained wetlands, subject to Clean Water Act jurisdiction. Section 404 of the Clean Water Act, 33 U.S.C. § 1344, requires a permit from the Corps before filling jurisdictional wetlands. As the court pointed out, the Corps may "issue formal determinations concerning the applicability of the Clean Water Act . . . to activities or tracts of land and the applicability of general permits or statutory exemptions to proposed activities." *Belle Co.*, 761 F.3d at 386 (quoting 33 C.F.R. §§ 320.1(a)(6); 325.9). This is known as a "jurisdictional determination." The Corps determined that part of the Belle site was wetlands, subject to Clean Water Act jurisdiction.

Belle sued the Corps under the APA, claiming the jurisdictional determination was arbitrary, capricious and invalid. The district court dismissed for lack of subject-matter jurisdiction because the jurisdictional determination was not a final agency action under the APA. Belle appealed, claiming that the *Sackett* decision compels a reversal. The 5th Circuit affirmed the district court's decision.

As in *Sackett*, the 5th Circuit analyzed two prongs for a final agency action: 1) whether the action "marks the consummation of the agency's decisionmaking process" and is not "merely tentative or interlocutory;" and 2) whether the action determines "rights or obligations" or is one "from which legal consequences will follow." *Belle Co.*, 761 F.3d at 388 (quoting *Bennett v. Spear*, 111 S.Ct. 1154 (1997)). The 5th Circuit found that the jurisdictional determination met the first prong because once the Corps makes a determination and it goes through the administrative appeals process, it is final "and not subject to further formal review by the agency." *Id.* at 389-90 (citing 33 C.F.R. §§ 331.2; 331.9). The 5th Circuit rejected the Corps' argument that its determination is the *beginning* of an administrative process with the possibility of a future proceeding and changes. *Id.* The court explained that "[t]he mere possibility that an agency might reconsider . . . does not suffice to make an otherwise final agency action nonfinal." *Id.* (quoting *Sackett*, 132 S.Ct. at 1372).

With regard to prong two, the 5th Circuit affirmed pre-*Sackett* holdings that a jurisdictional determination does not determine rights or obligations or have legal consequences. *Id.* at 391 (citing 5th, 6th and 9th Circuit decisions). The court drew distinctions between the *Sackett* compliance order and jurisdictional determinations — namely, that "the compliance order independently imposed legal obligations because it ordered the Sacketts promptly to restore their property," whereas the jurisdictional determination "is a notification of the property's classification as wetlands but does not oblige Belle to do or refrain from doing anything" even though section 404 permits "can be costly." *Id.* Even if Belle had not requested the jurisdictional determination, "it would not have been immune to enforcement by the Corps or EPA." *Id.*

Belle argued that the jurisdictional determination has consequences under Louisiana law because it would now have to modify its state solid-waste-permit application. *Id.* at 392. But the court found that "state-agency action does not transform nonfinal federal-agency action into final action for APA purposes." *Id.* The court also found that, unlike an EPA compliance order, the jurisdictional determination does not state that Belle is in violation of the Clean Water Act or invoke any penalty scheme. *Id.* 392-93. The court concluded, therefore, that the jurisdictional determination "is not reviewable final agency action under the APA." *Id.* at 394.

In *Luminant Generation*, power plant operators challenged notices for violations of the Clean Air Act's Prevention of Significant Deterioration provisions and other requirements. The EPA filed a motion to dismiss on the ground that a notice of violation is not "final action" as required by 42 U.S.C. § 7607(b)(1). In examining whether it had jurisdiction, the 5th Circuit noted that final action "under section 7607(b)(1) has the same meaning as 'final agency action' under the" APA and applied the two-prong test. *Luminant Generation*, 757 F.3d at 441. The court distinguished *Sackett*, finding that a notice of violations "does not create any legal obligation, alter any rights, or result in any legal consequences" because, among other things, "adverse legal consequences will flow only if the district court determines that Luminant violated the Act or" state laws implementing the Act and "if the EPA issued notice and then took no further action, Luminant would have no new legal obligation imposed on it and would have lost no right it otherwise employed." *Id.* at 443. The court further explained that the "Clean Air Act and the Texas [laws implementing the Act], not the notices, set forth Luminant's rights and obligations." *Id.*

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Custody

Koussanta v. Dozier, 14-0059 (La. App. 5 Cir. 5/21/14), 142 So.3d 202.

Mr. Koussanta's motion to modify custody, brought four months after the previous trial and judgment, failed to state a cause of action under *Bergeron* because many of the allegations had previously been made and addressed in that prior trial, and insufficient time had passed for the court-ordered counseling to have had an impact on the child's continuing behavioral problems, which were the root of the problem.

Owens v. Owens, 14-0165 (La. App. 3 Cir. 6/4/14), 140 So.3d 865.

The court of appeal affirmed the trial court's granting of the mother's request to relocate the parties' child with her new husband to Tennessee. His hours worked at his job in Louisiana had been cut due to federal government budget cuts, and he would make more money at a new job in Tennessee, plus the mother could be a stay-at-home mother and not have to work. She and her husband were willing to foster the child's relationship with the father, and the father could be given additional extended time in the summer. Improvements to the child's quality of life and other benefits supported the relocation.

Pelias v. Pelias, 13-0853 (La. App. 5 Cir. 5/14/14), 142 So.3d 153.

The parties' consent judgment provided that Mr. Pelias could have additional physical custody of the children one night per week "to be mutually agreed upon by the parties." The trial court granted her contempt rule for his failure to exercise this time, but the court of appeal reversed, finding that there was no agreement on any specific night. It also reversed the trial court's award of attorney's fees, costs and child-care costs and its modification of their physical custody schedule (*see* La. R.S. 9:346).

Community Property

Tanana v. Tanana, 12-1013 (La. App. 1 Cir. 5/31/13), 140 So.3d 738.

Although the parties' judgment provided that the former community property matrimonial domicile would be listed for sale, it did not sell after being on the market on and off for five years. Mr. Tanana then filed in the St. Tammany Parish district court a petition to sell the property by licitation, and the district court denied her various exceptions and ordered the property sold by licitation. The court of appeal reversed and remanded for the matter to be transferred to the St. Tammany Parish family court division and for that division to address the matter in accordance with La. R.S. 9:2801.

Shaheen v. Khan, 13-0998 (La. App. 5 Cir. 5/21/14), 142 So.3d 257.

The parties' marriage contract in India

did not establish a separate property regime, so after she joined him in Louisiana, a community property regime was established. Further, they did not opt out of the community regime during the first year they were both here. His donations to his family in India after the community regime was established were not usual and customary gifts, so there was no trial court error in awarding her reimbursement for one-half. She did not willingly consent, even though she filled out the checks, because the court believed her claim that she was forced by him to do so. His claim for payments for her education were properly denied because he compelled her to go to school, she got no benefit from the degree, he had no expectation of a shared benefit and he suffered no detriment in making the contributions. The trial court did not err in ordering him to return her separate property wedding jewelry, which he claimed he did not have.

Eschete v. Eschete, 12-2059 (La. App. 1 Cir. 2/27/14), 142 So.3d 985.

The court of appeal affirmed the trial court's finding that a donation by Mr. Eschete to Ms. Eschete of his one-half interest in the former matrimonial domicile was null and void for form because it was not signed before a notary and two witnesses. The notary testified that she was in an office 12 feet away from the reception room and saw Mr. Eschete sign a document, which she "assumed" was the donation. One witness was making copies at the copy machine but testified that she could see him in the waiting room. The other witness acknowledged that only she and Mr. Eschete were in the waiting room when he signed the document, that the notary and the other witness could have seen his hand moving to sign the document, even though they could not have seen the actual signature. The dissent argued that their visual observance was sufficient, especially given the high standard of proof required to negate a presumptively valid authentic act, his acknowledgment that he did sign the act, and because his was the only testimony offered to dispute that of the notary and two witnesses.

Adoption

In re Adoption of N.B., 14-0314 (La. App. 3 Cir. 6/11/14), 140 So.3d 1263.

The trial court granted this petition for intrafamily adoption between two women who had been married in California. Although the attorney general was aware of the suit, it did not appear at the hearing when the adoption was granted. Nevertheless, the attorney general was allowed to appeal because it was entitled to service of the hearing date and to an opportunity to be heard. The court of appeal reversed the judgment and remanded for the trial court to hear all constitutional arguments.

Child Support

Rigaud v. DeRuise, 13-0376 (La. App. 4 Cir. 5/21/14), 141 So.3d 917.

Almost 10 years after reaching a consent judgment to modify an earlier judgment for child-support arrearages, Ms. Rigaud filed a motion to amend or set aside the second judgment or to reinstate the original judgment, claiming that interest and attorney's fees were inadvertently left out of the amended judgment. Mr. DeRuise's exception of no cause of action was maintained, but the trial court remanded to allow her the opportunity to amend.

Paternity

Succ. of Byrd, 48,996 (La. App. 2 Cir. 6/11/14), 142 So.3d 1058.

Children of Mr. Byrd's deceased illegitimate son proved by sufficient evidence that they were entitled to be recognized as his heirs over the objections of the legitimate son's children. The court of appeal addressed the history of Louisiana's filiation statutes, the sufficiency of proof and peremption issues.

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Jones Act and General Maritime Law: Punitive Damages

McBride v. Estis Well Serv., L.L.C., ____ F.3d ____ (5 Cir. 2014).

Estis owned and operated Rig 23, a barge supporting a truck-mounted drilling rig operating in Bayou Sorrell, a navigable Louisiana waterway. The truck toppled over, killing one crew member and injuring three others. Suits were filed by, or on behalf of, all four crew members, stating causes of action for unseaworthiness under general maritime law and negligence under the Jones Act and seeking compensatory as well as punitive damages under both claims. The cases were consolidated, and Estis moved to dismiss the claims for punitive damages as not being an available remedy as a matter of law where liability is based on unseaworthiness or Jones Act negligence. The district court granted the motion and dismissed all claims for punitive damages. On rehearing, a panel reasoned that, because the unseaworthiness cause of action and the punitive damages remedy pre-existed the Jones Act and the Jones Act did not address either, then both the cause of action and remedy of punitive damages are available to injured seamen and survivors of deceased seamen. The 5th Circuit granted rehearing *en banc* "to determine whether the Supreme Court's decision in *Miles v. Apex Marine Corp.*, 498 U.S. 19 (1990), holding that the Jones Act limits a seaman's recovery for unseaworthiness under that Act or the general maritime law to 'pecuniary losses,' is still good law and whether that holding precludes plaintiff's claims for punitive damages."

The Jones Act, 46 U.S.C. § 30104, enacted by Congress in 1920, extended to seamen the same negligence remedy for damages afforded to railroad workers under the Federal Employers' Liability Act, 45 U.S.C. § 51-59 (FELA). Damages available under FELA were defined by the Supreme Court in *Michigan Central Railroad Co. v. Vreeland*, 227 U.S. 59 (1913), as ". . . liability for the loss and damage sustained by relatives dependent upon the decedent. It is therefore a liability for the pecuniary damage resulting to them and for that only."

In deciding the case of *Miles*, a wrongful death action under the Jones Act and general maritime law, the Supreme Court harkened back to its reasoning in *Vreeland*.

> When Congress passed the Jones Act, the *Vreeland* gloss on FELA, and the hoary tradition behind it, were well established. Incorporating FELA unaltered into the Jones Act, Congress must have intended to incorporate the pecuniary limitation on damages as well. We assume that Congress is aware of existing law when it passes legislation. There is no recovery for loss of society in a Jones Act wrongful death action. The Jones Act . . . limits recovery to pecuniary loss.

Further, the court's place in the constitutional scheme does not permit it:

> to sanction more expansive remedies in a judicially create(d) cause of action in which liability is without fault than Congress has allowed in cases of death resulting from negligence. We must conclude that there is no recovery for loss of society in a general maritime action for the wrongful death of a Jones Act seaman.

The 5th Circuit concluded that:

> In the words of the Supreme Court, "Congress has struck the balance for us." On the subject of recoverable damages in a wrongful death case under the Jones Act and the general maritime law, it has limited the survivor's recovery to pecuniary losses. Appellants have suggested no reason this holding and analysis would not apply equally to the plaintiffs asserting claims for personal injury.

Based on *Miles* and other Supreme Court and circuit authority, pecuniary losses are designed to compensate an injured person or his survivors.

Punitive damages, which are designed to punish the wrongdoer rather than compensate the victim, by definition, are not pecuniary losses.

That summarizes the majority's six-page opinion, a brief exegesis on the subject. The full, 40-page opinion — a scholarly dissertation including two concurring opinions by five judges (19 pages) and a dissent by Judges Graves and Dennis (five pages), plus 10 pages of footnotes — is commended to the interested practitioner.

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U.S. Treasury Department: Office of Foreign Assets Control

Revised Guidance on Entities Owned by Persons Whose Property and Interests in Property are Blocked (Aug. 13, 2014).

Companies and their counsel engaged in international business should carefully consider their current due-diligence, sanction-screening processes to ensure compliance with the Office of Foreign Assets Control's (OFAC) Revised Guidance issued to replace the 2008 guidance. The 2008 guidance is widely known as the "50 Percent Rule" regarding treatment of entities owned or controlled by persons blocked by Executive Orders and regulations administered by OFAC. The ever-increasing number and complexity of U.S. sanctions, including the recent Sectoral Sanctions Identification List as part of the Ukraine-Russia sanctions program, generated the need for revised guidance.

The 50 Percent Rule created in the 2008 guidance held that if a blocked person owns 50 percent or more interest of an entity, either directly or indirectly, then that entity would automatically also be blocked by operation of U.S. law. The Revised Guidance maintains the 50 Percent Rule, but now requires aggregation of ownership interests. Aggregation means that an entity is automatically blocked if one or more blocked persons together own 50 percent or more of the entity in the aggregate, even if the entity itself is not blocked by OFAC. This will likely increase the number of entities subject to OFAC-blocking sanctions, including U.S. entities acting in the sectors identified in the Sectoral Sanctions List issued as part of the Ukraine-Russia program.

World Trade Organization

WTO General Council Meeting (July 24-25, 2014).

The World Trade Organization (WTO) entered full crisis mode after its Members failed to adopt the Protocol of Amendment to add the Trade Facilitation Agreement (TFA) to the WTO Agreements. The TFA was agreed to by the Members at the 9th Ministerial Conference in Bali, Indonesia, in December 2013. However, between the December Ministerial Conference and the July WTO General Council meeting where the Protocol of Amendment was introduced, India's government changed its mind and decided to block consensus of the TFA to which India had already agreed. India is blocking consensus on the package until Members provide agreement on "food security" measures for agricultural-producing countries.

The failure to adopt the TFA is widely seen as fatal to the long-suffering Doha Development Agenda, which was launched in 2001. Since that time, the Members have completely failed to achieve any progress on the Doha issues. The TFA represents a non-controversial agreement to streamline customs and border rules to facilitate cross-border trade. The TFA was especially important for least-developed and developing countries, which have the most to gain from more efficient trade procedures. The Organization for Economic Cooperation and Development estimates a 14.5 percent reduction in total trade costs for low-income countries that implement trade-facilitation improvements. The damage is now done and the WTO's role as a negotiating forum could be over as WTO Members will continue to move away from multilateral trade negotiation to competitive liberalization through bilateral and regional Free Trade Agreements.

China: Measures Related to the Exportation of Rare Earths, Tungsten and Molybdenum, WT/DS431/AB/R (Aug. 7, 2014).

The WTO Appellate Body issued its decision in August on an important case that will benefit producers of downstream products that incorporate rare earth minerals. The WTO Appellate Body upheld the Dispute Settlement Panel's decision finding Chinese export duties and quotas on rare earth minerals a violation of China's Protocol of Accession to the WTO. Specifically, the panel and Appellate Body found that China's export restrictions were not allowed as an Article XX exception to either protect human, plant and animal life and health or to conserve natural resources. The case was initiated by the United States, the European Union and Japan as its domestic producers of high-

technology and defense goods, including wind turbines, electric car batteries and guided missiles, were facing significant market distortions creating unsustainable price increases in raw materials. The decision should help restore market conditions in these important areas.

International Criminal Court and MERCOSUR

Framework Cooperation Agreement (Aug. 4, 2014).

An exchange of letters between the International Criminal Court (ICC) and the office of the President of the Parliament of MERCOSUR (a free trade and customs union between Argentina, Brazil, Paraguay, Uruguay and Venezuela) formally established a Framework Cooperation Agreement between the ICC and all MERCOSUR Member nations. The Framework Agreement seeks to foster understanding and compliance by MERCOSUR Members with the ICC. Each MERCOSUR Member has adopted the Rome Statute that establishes the ICC. Through the Framework Agreement, the ICC hopes to, *inter alia*, promote and disseminate information on international criminal law, promote the principles and values of the Rome Statute, improve public and political support for the mandate and activities of the ICC, and improve enforcement of sentences, witness relocation, provisional release and release agreements in the context of the ICC.

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Prudent Operator Claim

Hayes Fund for First United Methodist Church of Welsh, L.L.C. v. Kerr-McGee Rocky Mountain, L.L.C., 13-1374 (La. App. 3 Cir. 10/1/14), ____ So.3d ____, 2014 WL 4851729.

The plaintiffs were mineral lessors who brought suit against multiple defendants who held rights under a mineral lease. The plaintiffs alleged that the defendants had constructed two oil and gas wells in an imprudent manner, thereby causing the wells to produce less oil and gas than the wells should have produced. The plaintiffs argued that the defendants' alleged imprudence constituted a violation of Mineral Code art. 122 and had caused the plaintiffs to earn less in royalties than they otherwise would have earned.

The case was tried before a judge, who heard approximately 25 days of testimony, including testimony from several expert witnesses. After post-trial briefing, the district court entered a judgment in favor of the defendants, rejecting the plaintiffs' claims. The court explained in written reasons that the plaintiffs had not proven that the defendants had acted imprudently and that the plaintiffs had not shown that they had incurred damages. The plaintiffs appealed.

The Louisiana 3rd Circuit reversed, holding that the trial court's judgment was manifestly erroneous. The 3rd Circuit concluded that the plaintiffs proved that the defendants acted imprudently, even though the plaintiffs did not actually have to prove imprudence. The court noted that the parties had used a printed lease form, with the original language stating, "Lessees shall be responsible for all damages to timber and growing crops of Lessor caused by Lessee's operations." The court stated that this clause would have made the lessee liable for any damages it caused to timber or crops, even if the lessee had not acted negligently or unreasonably. But the parties had stricken the reference to "timber and growing crops" so that the revised clause stated, "Lessee shall be responsible for all damages caused by Lessee's operations." The 3rd Circuit stated that the effect of the revised clause was to make the lessees strictly liable for any type of damages caused by their operations.

Next, the 3rd Circuit rejected the trial court's conclusion that the plaintiffs failed to prove any damages. The plaintiffs' damages calculations were based on an assumption that boundaries of the hydrocarbon reservoirs at issue corresponded to the boundaries of units created by the Commissioner of Conservation. In contrast, the defendant offered expert testimony regarding the actual size of the reservoirs at issue.

The plaintiffs argued that the defendants' evidence constituted a collateral attack on the Commissioner's unitization orders. The defendants disputed that, noting that the units at issue were not geologic units and instead were geographic units. The defendants acknowledged that the Commissioner establishes the boundaries of *geologic* units based on his conclusions about *geologic* features, such as the location of reservoirs. But the Commissioner establishes the boundaries of *geographic* units based on *geographic* features, such as the boundaries of government survey sections and subsections. Therefore, expert testimony regarding reservoir boundaries is not a collateral attack on an order setting the boundaries of geographic units. The 3rd Circuit rejected that argument, holding that the Commissioner's orders establishing the boundaries of geographic

units conclusively established reservoir boundaries.

Based on the plaintiffs' expert's calculation of damages, the 3rd Circuit rendered judgment in favor of the plaintiffs for approximately $13.4 million.

Challenges to Orders of Commissioner

Gatti v. State, 14-0863 (La. 8/25/14), 146 So.3d 196.

Several plaintiffs who own mineral rights in north Louisiana brought suit against the Commissioner of Conservation and other defendants, challenging the Commissioner's creation of 640-acre units for the Haynesville Shale. The plaintiffs asserted that a single well cannot drain 640 acres in the Haynesville Shale and that 640-acre units, therefore, are inconsistent with La. R.S. 30:9(B), which states in part: "A drilling unit, as contemplated herein, means the maximum area which may be efficiently and economically drained by one well." The plaintiffs requested a declaratory judgment that the unit orders were absolutely null and never had any effect.

The defendants sought dismissal, asserting that the plaintiffs' challenge to the Commissioner's unitization orders was not timely. La. R.S. 30:12(A) allows a party who is aggrieved by an order of the Commissioner to seek judicial review of the order, but 30:12(A)(2) requires that any action for judicial review "must be brought within sixty days." It was undisputed that the plaintiffs had not brought their action within 60 days. The trial court dismissed the plaintiffs' action on that basis, but noted that Louisiana law would allow the plaintiffs to ask that the Commissioner hold a hearing to consider a prospective revision to the challenged units.

As previously reported in the Mineral Law Section's April/May 2014 Recent Developments article, the Louisiana 1st Circuit reversed the dismissal. The 1st Circuit did not rule on the merits of the plaintiffs' claim, but reversed the judgment of dismissal and remanded, holding that the plaintiffs' action was not time-barred. The Louisiana Supreme Court recently granted supervisory writs and issued a short order that reinstated the trial court's judgment. The Supreme Court did not issue written reasons.

Disclosure: Keith B. Hall authored an amicus brief arguing to the Louisiana Supreme Court that the plaintiffs' action was time-barred.

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Patient's Refusal to Cooperate in Appointment of Chair

Keating v. Van Deventer, 14-0157 (1 Cir. 9/19/14), ____ So.3d ____, 2014 WL 4656482.

The plaintiffs filed a medical-review-panel request on Feb. 29, 2012, against three healthcare providers.

No agreement was reached between the plaintiffs and defendants about which attorney would serve as chair of the panel, following which the defendants initiated the "strike procedure," as provided by La. R.S. 40:1299.47(C)(1)(a). Part (C)(1)(a) calls for the plaintiffs and defendants to alternatingly strike attorneys' names from a list of five attorneys selected at random by the clerk of the Louisiana Supreme Court and for the unstricken attorney to serve as chair. The plaintiffs did not strike any potential nominee from the list, causing defendants to request the Louisiana Supreme Court to make the strikes on plaintiffs' behalf, as provided in the "strike" statute.

La. R.S. 40:1299.47(C)(1)(a) suspends the time for filing suit after a request for review is filed and allows the parties one year from the date of filing to select a chair, after which the time limits for filing suit resume. With the one-year deadline fast approaching, the defendants agreed to the plaintiffs' earlier — and only — proposed candidate, and they notified the PCF of their consent on Feb. 21, 2013. The plaintiffs notified the PCF the next day that they would not consent to their earlier nominee.

On Feb. 25, the PCF advised the parties that the nominee would not be appointed, absent consent of all, and asked the plaintiffs to advise of their choice to allow the appointment to be made prior to the one-year deadline. The plaintiffs did not respond.

Two days before the deadline, the defendants obtained a writ of mandamus from the district court, ordering the plaintiffs immediately to provide the names of the three attorneys they would accept. The plaintiffs did not respond.

On the date of the one-year deadline (Feb. 28), the defendants advised the PCF

that they had no intention of waiving their statutory right to proceed before a panel; nevertheless, the PCF dismissed the claim on March 4, citing as its reason the failure to have a chair timely appointed.

The plaintiffs then filed a lawsuit; the defendants responded with exceptions of prematurity. The district court sustained the exceptions, dismissed the suit without prejudice, and remanded the case to the PCF. The plaintiffs appealed, arguing that § 1299.47(A)(2)(c) is clear and unambiguous in its instruction that a panel is waived if no chair is appointed within one year of the date of filing of the request for review and that the court engaged in its own "statutory construction" to justify its finding of prematurity. They relied on Louisiana jurisprudence to support their position, including the Supreme Court's opinion in *Turner v. Willis-Knighton Med. Ctr.*, 12-0703 (La. 12/4/12), 108 So.3d 60, 67.

The defendants responded that their continued and persistent efforts to select a chair, supported by extensive evidence of the plaintiffs' failure and refusal to cooperate, satisfied their burden to appoint a chair. They also argued that they had exhausted all other procedural remedies, including their writ of mandamus, followed by notifying the PCF that they had no intention of waiving their panel rights. The appeals court agreed that the defendants had taken these actions and commended them for their efforts, but observed:

> It is also apparent, and even rational, that the defendants wish to cloak themselves with the legal limitations and procedures set forth by the Medical Malpractice Act, including potentially receiving a favorable opinion from the MRP. Just as understandably, it is the plaintiff's desire to avoid the legal limitations of the Act, as well as a potentially adverse opinion by the MRP.

The appellate court noted agreement with the district court's ruling insofar as it said that the legislative intent of the MMA was not to allow the plaintiffs to sidestep the medical-review panel by failing to cooperate; nevertheless, a plaintiff's refusal to participate in the process of the appointment of a chair provides no basis for circumventing the express language of § 1299.47(A)(2)(c): "Failure to appoint a chair within one year from the date the Request for Review is filed results in a waiver of the panel procedure by both parties."

Although clearly reluctant to issue any confirmation that the "simplest way to remove the claim from the purview of the Medical Malpractice Act is to refuse to cooperate with the formation of a Medical Review Panel," the court explained that the defendants' failure to comply strictly with the Act left it with no choice but to strictly construe the MMA, because it constitutes special legislation in derogation of the general rights available to a tort victim. *McGlothlin v. Christus St. Patrick Hosp.*, 10-2775 (La. 7/1/11), 65 So.3d. 1218, 1215. The absence of confusion and ambiguity in the statutory language led the court to reverse the ruling on the defendants' exceptions of prematurity and dismissal of the plaintiffs' suit and to remand the case to the district court.

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Waste Removal Services Held to Be Part of the Taxable Gross Proceeds of Leases

Pot-O-Gold Rentals, L.L.C. v. City of Baton Rouge, 13-1323 (La. App. 1 Cir. 9/17/14), ____ So.3d ____, 2014 WL 4651127.

The 1st Circuit Court of Appeal reversed a trial court's decision granting Pot-O-Gold Rentals, L.L.C.'s motion for summary judgment, which held that waste-removal services were not taxable as gross proceeds derived from the lease or rental of portable toilets and ordered the City of Baton Rouge to refund taxes that had been paid under protest. The 1st Circuit held that Pot-O-Gold's charges for cleaning and sanitation services were subject to the city's sales-and-use tax because they were provided in connection with, and incidental to, the lease or rental of tangible personal property.

Pot-O-Gold owns portable toilets and holding tanks that it leases to customers and offers cleaning and sanitation services for these rented toilets and tanks. Pot-O-Gold also offers cleaning and a sanitation service for portable toilets and tanks owned by others and does not require rental customers to purchase its sanitation or cleaning service. If a rental customer chooses to reject sanitation or cleaning services, the customer is charged a higher rental fee. A compliance audit revealed that, although Pot-O-Gold collected taxes on its rentals, it had not collected taxes for the cleaning or sanitization services it provided in connection with these rentals. The city issued an assessment for additional sales taxes, which Pot-O-Gold paid under protest and filed the present suit to recover.

The city's ordinance imposed a tax on the lease or rental of tangible personal property. Such taxes are levied on the gross proceeds derived from the lease or rental of tangible personal property, where the lease or rental of such property is an established business, or part of the same is incidental or germane to the business.

The 1st Circuit looked to its prior jurisprudence that held when assessing the taxability of an agreement involving the lease of tangible personal property, there is ordinarily no breakdown into taxable or nontaxable elements. Instead, an examination of the "essence of" or the "true object of" the transaction must be done. The 1st Circuit found the "true object" of the transactions at issue was the furnishing of toilets and tanks and held that the cleaning and sanitation services were provided in connection with, and incidental to, the rental of such tangible personal property. Finding that the taxability of the services should have been determined by the taxability of the entire transaction, the 1st Circuit found that the district court's holding was not in accord with established jurisprudence. The 1st Circuit also held it is of no import whether the services were optional for leases, whether the services could be purchased from another party, whether services could be rejected or whether the services could be purchased independently from Pot-O-Gold by others.

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