Bankruptcy Law

Judicial Estoppel

Cox v. Richards, Case No. 18-60394 (5 Cir. Feb. 7, 2019), 2019 WL 495136.

Cox sought repayment of a $251,550.14 loan she allegedly made to the defendants, Richards and Canucanoe Rental Cabins, L.L.C. Defendants moved to dismiss based on judicial estoppel, which the district court granted.

In October 2010, Cox filed for Chapter 7 bankruptcy protection. Prior to filing bankruptcy, she received a divorce settlement that included a $351,550.14 check from her ex-spouse. However, her original bankruptcy schedules listed only $6,550 in total assets and failed to mention the alleged loan to Richards. She later amended her schedules to include additional assets, but still failed to mention the alleged loan, leaving unanswered the question of where the divorce funds went.

The trustee moved to dismiss Cox's bankruptcy case for two reasons: (1) failure to disclose assets and (2) no entitlement to a discharge under § 727(a)(2)(A), (a)(4)(A), and (a)(5). Subsections (a)(2)(A) and (a)(4)(A) both require a showing that the debtor had fraudulent intent in hiding the assets; subsection (a)(5) allows the bankruptcy court to deny a discharge if the debtor "fails to satisfactorily explain a loss of assets" without proof of fraudulent intent. Cox represented to the bankruptcy court that the proceeds from the divorce settlement were used to pay living expenses and bills and to repay debts to friends, including Richards. After a trial, the bankruptcy court denied Cox a discharge under subsection (a)(5), finding that Cox failed to satisfactorily explain the loss of the divorce funds. However, the bankruptcy court denied the trustee's motions under subsections (a)(2)(A) and (a)(4)(A), finding that the trustee failed to establish the requisite fraudulent intent.

Years later, Cox filed suit seeking repayment of the alleged loan to Richards, which she claimed was based on an oral agreement.

The 5th Circuit affirmed the district court's ruling, finding that the three requirements to invoke judicial estoppel were met: (1) an asserted legal position plainly inconsistent to a prior position; (2) a judicial acceptance of the prior position; and (3) the party did not act inadvertently. The 5th Circuit held that Cox's representations to the bankruptcy court regarding her use of the divorce funds and her failure to disclose the loan in her original or amended schedules constituted representations plainly inconsistent with her claim that she loaned the divorce funds to Richards. The court also found that the bankruptcy court accepted those representations and that Cox had ample opportunity to correct the omission of the alleged loan and the use of the divorce funds, but did not. Cox argued that because the bankruptcy court dismissed her case, she reverted to her original position prior to filing and thereby negated her representations. The 5th Circuit disagreed, finding that the bankruptcy court accepted Cox's omission of the loan and her rep-

resentations of how she spent the divorce settlement when it denied the trustee's motion to dismiss under section 727(a)(2)(A) and (a)(4)(A) in the adversary proceeding. The 5th Circuit stated that the adversary proceeding and the underlying bankruptcy case, although related, were two distinct proceedings. As such, the dismissal of the bankruptcy case did not revoke her representations or the bankruptcy court's acceptance of those representations in the adversary proceeding. As to the third element, the court found that it is "almost always met if a debtor fails to disclose a claim or possible claim to the bankruptcy court . . . because of potential financial benefit resulting from the nondisclosure."

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Corporate and Business Law

Determining Fair Value under the LBCA

Kolwe v. Civil & Structural Eng'rs, Inc., 18-0389 (La. App. 3 Cir. 2/21/19), La. App. LEXIS 303.

From late 2014 through mid-2015, defendant Civil and Structural Engineers, Inc. (CASE), a closely-held business corporation, and plaintiff Joseph Kolwe, one of three shareholders, as well as a director, an officer and an employee of CASE, engaged in various discussions, disputes and negotiations relating to Kolwe's employment and, eventually, to his withdrawal from the corporation, none of which reached resolution. In November 2015, CASE provided notice of a special meeting of CASE's board to discuss a profitability incentive plan for CASE employees and officers. Upon receiving notice, Kolwe's attorney drafted and mailed his notice of withdrawal pursuant to La. R.S. 12:1-1435, *et seq.* Although Kolwe's notice of withdrawal was addressed to the president of CASE and sent by U.S. mail to be delivered to the corporation's principal office, CASE never received the notice. At the meeting, the board discussed and adopted the plan despite Kolwe's objection. At the end of November, CASE terminated Kolwe's employment and removed him as an officer and director of the corporation.

In December 2015, Kolwe filed suit against CASE and the remaining shareholders, alleging claims of shareholder oppression; however, the parties subsequently agreed to bypass a trial on the merits and instead litigate the effective date of Kolwe's withdrawal and the valuation of his shares. Among other issues, the trial court concluded that (1) the corporation's accounts receivable should not be tax-effected under the circumstances in connection with determining the "fair value" of Kolwe's shares; and (2) fair value should include CASE's claim to the BP Settlement Fund, even though at the effective date of the valuation, the claim had not yet been approved and the amount ultimately to be paid was not known. The 3rd Circuit affirmed each of these conclusions, as further detailed below. Additionally, though the trial court failed to allow Kolwe to recover interest on the amount owed for his shares, the 3rd Circuit awarded interest from the date of the final judgment, determining the amount to be paid for his shares and ordering payment thereof.

Noting that "the term fair value does not have a commonly accepted meaning and is often incorrectly conflated with the term 'fair market value,'" the 3rd Circuit looked to the Model Business Corporation Act (the MBCA) for guidance on determining the meaning of fair value under the Louisiana Business Corporation Act (LBCA). Based on this, the 3rd Circuit determined that a fair value appraisal "should generally award a shareholder his or her proportional interest in the corporation *after valuing the corporation as a whole, rather than the value of the shareholder's shares when valued alone*." Further, the appellate court found that the Louisiana Legislature, in drafting the LBCA, expressly disallowed discounting in the context of purchasing a withdrawing shareholder's interest. Thus, the 3rd Circuit concluded fair value is determined by "valuing the company *as a whole* and by ascribing to each share its pro rata portion of that overall enterprise value," without accounting for (1) the "fair market value" that someone would hypothetically pay for the minority shareholder's interest; (2) the fair value of the whole company were it to be dissolved; or (3) the tax effect to either purchasers or sellers of the shares for which fair value is determined. Accordingly, the 3rd Circuit rejected CASE's argument that fair value be made in the context of "a hypothetical transaction with a third party," noting that to apply this rule would conflate "fair value" and "fair market value."

Additionally, in determining the fair value of Kolwe's shares, the court determined that the accounts receivable of the corporation should not be tax-effected, relying on the lower court's findings that tax-effecting would result in a discount of the shares' fair value, which, as the court explained, is prohibited under the LBCA. Moreover, the 3rd Circuit rejected CASE's argument that the appraisal of Kolwe's shares should exclude the value of CASE's claim to the BP Settlement Fund. CASE argued that the value of the claim was not "known or knowable" as of Kolwe's effective withdrawal date, and, as such, should not be included in the valuation of his shares, in accordance with relevant accounting standards. In rejecting CASE's argument, the court concluded that, though "an exact dollar figure of the BP claim was not approved as of the valuation date" [*i.e.*, the date of Kolwe's withdrawal], the settlement proceedings had completed, such that the forthcoming payment of the claim, though not the specific amount, was knowable. Therefore, the court affirmed the lower court's decision to include the settlement amount in the valuation of Kolwe's shares.

Finally, the 3rd Circuit allowed an award of interest in connection with the judgment ordering payment for Kolwe's shares pursuant to La. R.S. 12:1-1435. Though the statute does not contain "a positive statutory right to recover interest as a withdrawing shareholder," the 3rd Circuit found Section 1435 sufficiently analogous to other provisions of the LBCA under which such a right exists to permit the court to expand the right to recover interest to withdrawing shareholders. The court concluded that, in this case, interest began to accrue on the date of the final judgment ordering payment of fair value determined by the court, not from the date of Kolwe's judicial demand to enforce his right to withdraw.

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Coastal Zone Permitting: Did DNR Act Reasonably on Bayou Bridge Pipeline?

In a 4-1 decision, the Louisiana 5th Circuit Court of Appeal reversed a district court's remand of a state coastal-use permitting decision. In *Joseph v. Secretary, Dep't of Natural Resources*, 18-0414 (La. App. 5 Cir 1/30/19), ____ So.3d ____, 2019 WL 364466, at issue was the viability of a permitting decision by the Louisiana Department of Natural Resources' Office of Coastal Management (DNR) for the Bayou Bridge Pipeline in St. James Parish.

In April 2017, DNR issued a permit for the Bayou Bridge Pipeline, which runs from Lake Charles to a terminus in St. James Parish. The permit was accompanied by a 34-page decision document reviewing DNR's assessment that the project, as amended through the permitting process, complied with the Louisiana State and Local Coastal Resources Management Act (SLCRMA). On review before Judge Alvin Turner at the 23rd Judicial District, a cadre of plaintiffs challenged DNR's permitting action, alleging, among other things, that in order to comply with SLCRMA, DNR was required to assess and approve the evacuation plans for the pipeline in the event of an emergency and that DNR otherwise violated its constitutional and statutory obligations by arbitrarily and capriciously issuing the Bayou Bridge permit.

The district court agreed in part with the plaintiffs and remanded the permit, finding:

> DNR did not apply Coastal Use Guidelines 711(A) and 719(K), that these guidelines apply, and ordered Bayou Bridge "to develop effective environmental protection and emergency or contingency plans relative to evacuation in the event of a spill or other disaster, in accordance with guideline 719(K), PRIOR to the continued issuance of said permit."

Id. at 2-3. On appeal, these findings by the district court were reviewed as was the plaintiffs' cross-appeal alleging that DNR's permit decision violated Louisiana Constitution article IX, section 1.

DNR contended on appeal that Guidelines 711(A) and 719(K) were inapplicable to the Bayou Bridge permit and thus its decision not to apply those requirements was not arbitrary and capricious and that the agency's finding of the inapplicability of these regulations was, in fact, an application of them to the permit. The 5th Circuit agreed, finding that Guideline 711(A) was inapplicable to the Bayou Bridge pipeline permit. Guideline 711(A) limits surface alterations resulting from "[i]ndustrial, commercial, urban, residential, and recreational uses." Because DNR found that either there would be no permanent surface alterations from the pipeline (*i.e.*, the pipeline would be buried) or that the pipeline would traverse areas exempted from the requirement that surface alterations be avoided in the Coastal Zone (*i.e.*, in fastlands or in existing utility rights-of-way), this regulatory requirement was inapplicable to the pipeline. The 5th Circuit further agreed with DNR that Guideline 719(K) was inapplicable. Guideline 719(K) requires permit applicants to provide plans for evacuation and emergency response as part of their applications. This regulation applies only to coastal permits for "Oil, Gas, and Other Mineral Activities" in the Coastal Zone. The court agreed with DNR that a pipeline does not fall under activities considered "oil, gas, and other mineral activities" because that specifically-defined term applies only to "those uses and activities which are directly involved in the exploration, production, and refining of oil, gas, and other minerals." *Id*. at 8-9. Further, the court also recognized that evacuation and emergency matters were properly within the jurisdiction of emergency preparedness offices and the Louisiana Oil Spill Coordinator's Office and that, had DNR required plans for such eventualities, the agency would have exceeded its authority under SLCRMA. *Id*. at 11.

The public trust doctrine, embodied in Louisiana Constitution article IX, section 1, states (in pertinent part), "[t]he natural resources of the state, including air and water, and the healthful, scenic, historic, and esthetic quality of the environment shall be protected, conserved, and replenished insofar as possible and consistent with the health, safety, and welfare of the people." Arguing that DNR has a positive obligation to ensure the compliance of its decisions with the public trust doctrine, the plaintiffs alleged that the agency failed in its permitting decision. Although briefed, the district court did not rule on this issue. In order to pass muster under this constitutional provision, Louisiana courts have held that a decision must show that the agency considered:

> (1) whether the proposed [project] fully minimizes adverse environmental effects; (2) whether alternate projects, alternate sites, or mitigating measures would offer more protection for the environment than the [project] as proposed without unduly curtailing non-environmental benefits; (3) whether the potential and real adverse environmental effects of the proposed [project] have been avoided to the maximum extent possible; and (4) whether a cost benefit analysis of the environmental impact costs balanced against the social and economic benefits of the proposed [project] demonstrate that the latter outweighs the former.

Id. at 13. The 5th Circuit's majority disagreed with the plaintiffs, stating that "DNR's thirty-four page Basis of Decision shows that its conclusions were made based on 'thorough and careful review of the coastal use permit application, all comments, responses, data and documents submitted for consideration to this office, along with in-house data, maps, knowledge, familiarity and experience in the project area.'" *Id*. at 14.

It was on this point that Judge Johnson dissented. He did not believe that DNR had discharged its public trust duties, but rather that "[t]he review of the alternative sites/methods mentioned in the 34-page DNR decision was solely an analysis provided by Bayou Pipeline, which was adopted by DNR as its own conclusions." *Id*. at 17. Believing that DNR did not conduct a meaningful independent analysis, Judge Johnson stated, "I find that DNR's adopted decision gave significant consideration to the economic benefits and minimal consideration to the environmental effects on the wildlife and habitats; yet, it gave virtually no consideration to the impact on the human lives in that area." *Id*. at 18. Further, Judge Johnson opined that, because the district court had not ruled on the public trust issue, the decision below was not final and not ripe for appellate review. The majority disagreed with both of Judge Johnson's points and concluded that DNR had discharged its public trust obligations in its permitting decision and accordingly rejected the plaintiffs' cross-appeal. At the time of this article, the plaintiffs have sought writs from the Louisiana Supreme Court on the 5th Circuit's decision.

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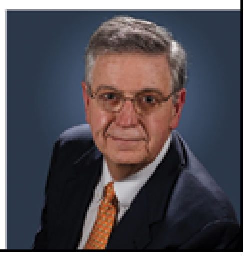

Family Law

Custody

Burds v. Skidmore, 19-0263 (La. App. 4 Cir. 3/22/19), ____ So.3d ____.

Following the child's coming to Louisiana from Georgia for holiday visitation, the father filed an ex parte order for temporary custody. The mother, who was the domiciliary parent, filed exceptions of lack of subject matter jurisdiction and forum non conveniens, as the child had been residing with her in Georgia for more than six months, such that Georgia was the child's home state under the UCCJEA. The trial court found that the earlier interim judgment provided Louisiana with exclusive, continuing jurisdiction; however, the court of appeal found that that initial judgment, which was not a considered decree and concerning which no evidence of the best interest of the child had been taken, was not sufficient under the UCCJEA to establish jurisdiction in Louisiana; and in any event, Georgia was the home state. Further, Georgia had the most significant connections with the child and was the most convenient forum for litigation.

Community Property

Webb v. Webb, 18-0320 (La. 12/5/18), 263 So.3d 321.

Mr. Webb, an attorney, forged Ms. Webb's name on a loan secured by a mortgage on the family home, which he kept secret from her until his forgery was discovered. In disciplinary proceedings before the Supreme Court, he admitted his misconduct and told the court that he would take sole financial responsibility and would make right what he had done. However, in the parties' subsequent community-property partition, he claimed that the debt was a community obligation and that Ms. Webb should be responsible for her share of that obligation. The district court ruled that his admissions in the Supreme Court were a judicial confession and held that he was responsible for the debt. The court of appeal reversed.

The Supreme Court reversed the court of appeal, finding that Mr. Webb was estopped from attempting to make Ms. Webb responsible for the debt as a community obligation. The Court stated:

> Applying the doctrine of judicial estoppel, which serves to prevent a party from manipulating the court system, we hold that, in the community property litigation, Mr. Webb cannot shift to the position of a creditor as to Mrs. Webb or to the Webbs' former community property for his fraudulent loan — a position which is contrary to the position of "sole financial responsibility" for the loan that he previously expressed to this court.

Id. at 324. Both a concurring justice and dissenting justice raised issues with the court's use of the common law doctrine of judicial estoppel.

Mason v. Mason, 180299 (La. App. 3 Cir. 11/7/18), 260 So.3d 609.

The court of appeal affirmed the trial court in finding that the parties entered into an oral agreement to modify a previous property partition agreement, in which oral agreement Mr. Mason waived any rights he may have had to Ms. Mason's retirement benefits, in exchange for her dismissing a rule for contempt and arrears for child support against him. The parties disagreed on the terms of their agreement, and the court of appeal affirmed the trial court's discretion regarding the parties' demeanor and credibility. The court of appeal did not consider Mr. Mason's argument for unjust enrichment, as it could not be raised for the first time on appeal.

Acurio v. Cage, 52,309 (La. App. 2 Cir. 9/26/18), 257 So.3d 824.

There can be no enforceable oral contract to agree to enter into a pre-nuptial matrimonial agreement. Because a pre-nuptial matrimonial agreement must be in a statutorily defined written form, any antecedent contract must be in the same written form. Further, one cannot detrimentally rely on an unenforceable oral contract, particularly when that party is able to determine the true facts, and when it is inherently unreasonable to rely on the other party to prepare a legal document when that other person lacks the expertise to be able to prepare such a contract.

Appeal

Graver v. L.G., 18-0557 (La. App. 5 Cir. 10/3/18), ____ So.3d ____, 2018 WL 4782148.

The trial court awarded visitation with the minor child to his paternal grandparents. The mother moved to stay execution of the judgment pending appeal, which was denied. She then sought writs on the denial of the stay and further sought a stay of the judgment pending the court's resolution of the merits of the appeal. The court found that she was entitled to expeditious consideration of her appeal even though it did not specifically involve a change of custody but provided for grandparent visitation. The court ordered that the record be lodged expeditiously and issued an expedited briefing schedule and special docket setting.

Parenthood

Boquet v. Boquet, 18-0798 (La. App. 3 Cir. 4/10/19), ____ So.3d ____, 2019 WL 1549704.

When Brittany and Nicole married, Nicole was pregnant and Brittany was aware of it. Subsequently, after Brittany filed a petition for divorce, she filed a petition for declaratory judgment and disavowal of the child. The court of appeal found that numerous constitutional issues were not raised in the trial court and could not be raised for the first time before it. It further found that Nicole's exception of prescription was properly granted, as Brittany, "the female spouse of a birth mother, has the same 'constellation of benefits' and obligations as those of a male spouse of a birth mother." Thus, Brittany was presumed to be the parent of the child and had one year from the date of the child's birth to file a disavowal action.

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Fidelity, Surety and Construction Law

Surety Owes No Duty to Principal on Bonds, No Duty to Indemnitors

U.S. Specialty Ins. Co. v. Strategic Planning Ass'n, No. CV 18-7741, ____ F.Supp. 3d ____ (E.D. La. Jan 23, 2019), 2019 WL 296864.

The surety on a subcontract payment-and-performance bond settled performance claims brought by the general contract and paid payment claims brought by subcontractors and suppliers on a project. The surety then brought suit against the bond principal, Strategic Planning Associates (SPA), and the other individual indemnitors under the general agreement of indemnity (GIA) executed by them in favor of the surety for the losses and expenses it incurred as a result of having issued the bonds for SPA.

In response to the lawsuit, the indemnitors brought several counterclaims against the surety alleging that the surety's actions in settling claims constituted bad faith breach of the bonds, bad faith breach of the indemnity agreement, and bad faith breach of its fiduciary duty to the indemnitors. The surety filed a motion to dismiss these counterclaims, arguing that the surety had no such obligations to the indemnitors.

The court first addressed the indemnitors' claims that the surety acted in bad faith under the bonds when settling the general contractor's claims and paying the various payment claims. The court reviewed the language of the bonds and found that the "plain terms of the payment bonds reveal that these surety contracts impose no obligations" upon the surety in favor of the indemnitors. As a result, the court dismissed the indemnitors' bad faith claims with regard to the bonds.

The court next examined the indemnitors' allegations concerning the breach of the GIA. The court reviewed the language of the GIA and concluded that, similar to the bonds, the GIA did not impose any obligations on the surety in favor of the indemnitors. As such, the court found that the indemnitors failed to state a claim for bad faith breach of the GIA.

Finally, the court reviewed the indemnitors' claim that the surety breached its fiduciary duty to them. They argued that when exercising the power of attorney granted to it by the GIA, the surety was acting as a mandatory who owed them a fiduciary duty. The court found that the power of attorney did not constitute a mandate, as it did not require the surety to undertake any performance, but allowed the surety to carry out the rights assigned to it. Further, because the surety had the right, "in its sole and absolute discretion," to settle SPA's claims, it followed that the surety owed no fiduciary duty to SPA in carrying out that right. Thus, because no fiduciary duty existed, the indemnitors' claim was dismissed.

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ANSWERS for puzzle on page 38.

1 R	E	2 S	G	3 E	S	4 T	A	5 E	■	6 D	D	7 T
I	■	P	■	V	■	U	■	M	■	A	■	R
8 G	L	A	C	I	A	L	■	9 O	F	U	S	E
■	■	I	■	D	■	I	■	T	■	B	■	A
10 M	O	N	D	E	■	11 P	R	E	S	E	N	T
C	■	■	■	N	■	S	■	■	■	R	■	I
12 C	O	13 U	N	T	Y	■	14 S	15 P	A	T	E	S
O	■	P	■	■	■	16 L	■	R	■	■	■	E
17 R	E	S	I	18 P	S	A	■	19 O	A	20 T	H	S
M	■	E	■	E	■	R	■	S	■	R	■	■
21 I	N	T	E	R	■	22 I	M	P	E	A	C	23 H
C	■	B	■	D	■	A	■	E	■	I	■	U
24 K	E	Y	■	25 U	T	T	E	R	A	N	C	E

Labor and Employment Law

Court Implicitly Recognizes Whistleblower Privilege

IBM provoked the ire of a federal court for seeking the identity of current/former employees who leaked damaging documents to a former employee suing the company for age discrimination under the ADEA.

In *Langley v. Int'l Bus. Machines Corp.,* A-18-CV-443-LY (W.D. Tex. Apr. 10, 2019), ____ F.Supp.3d ____, 2019 WL 1559146, the plaintiff asserted that IBM's termination of his employment as part of a reduction-in-force was part of a strategy to systematically replace older workers with younger workers. In support of his claims, Langley relied in part on documents that he testified he received from current or former IBM employees, which included "slides from presentations made to high level decision makers" and planning documents from various units within IBM. *Id.* at *1.

During Langley's deposition, IBM inquired as to the identity of the individuals who gave him the documents. Langley's attorney instructed him not to respond on the basis of "informant's privilege." IBM moved to compel this testimony and requested sanctions. *Id.* at *2.

Langley argued the informant's privilege attached to him as a "conduit" to the EEOC because the identities of those who gave him the documents were later provided to the EEOC. Langley further argued that the identity of the "leakers" was irrelevant to IBM's defense because the documents belonged to IBM and were, therefore, accessible to IBM.

The court noted that IBM carefully avoided disputing that these documents were IBM documents. *Id.* at *3-4. Although the claim of informant's privilege was a creative attempt to shield the testimony, it is clear that the privilege is the government's evidentiary privilege. *Roviaro v. United States*, 77 S.Ct. 623, 627 (1957). The court agreed with IBM that Langley could not avail himself of the "informant's privilege," which belonged solely to the EEOC, but it blasted IBM for pursuing the motion to compel and request for sanctions. The court agreed with Langley that the identity of the "leakers" was irrelevant to IBM's defense, that IBM was in possession of all relevant information about the documents, and that "IBM surely knows where it can find the documents," as well as the "ability to locate the originals, drafts, and original authors of the 'leaked' slides and reports — assuming it has not already done so." *Id.* at *2 & n. 1.

The court couched its decision in its determination that the identities of the leakers were not relevant to IBM's defenses. The court found that IBM mischaracterized Langley's testimony in its motion, especially the fact that Langley did not testify that he relied on "statements" from the leakers to support his claims, and that Langley's testimony did not suggest that any relevant information would be gained from determining the leakers' identities. The court noted that IBM understandably wanted to plug its leaks, but that a motion to compel was not a legitimate basis to do so. *Id.* at *2.

The court blamed IBM for not foreseeing this issue before Langley's deposition. The court indicated that IBM "knew well" going into Langley's deposition that Langley would object to disclosing his sources. *Id.* at *3. The court determined that IBM should have raised the issue with Langley's counsel prior to the deposition and sought a ruling from the court prior to the deposition, which would obviate the need to reopen his deposition. *Id.*

There are several troubling problems with the decision, which seems to contradict the Federal Rules of Civil Procedure. First, relevance is not a legitimate objection to instruct a witness not to answer a question during a deposition. Second, seeking a motion to compel was IBM's appropriate remedy. The Federal Rules of Civil Procedure provide that when a witness fails to answer a question — either upon instruction from counsel or by his own refusal — a motion to compel is the appropriate remedy. Fed. R. Civ. P. 37(a)(3)(B)(i) and (5). Rule 30(c)(2) provides that an attorney may instruct a witness not to answer only to preserve a privilege, to enforce a court limitation or to present a motion under Rule 30(d)(3). Rule 30(d)(3) relates to a motion to terminate or limit the deposition on the basis that it is conducted in bad faith or in a manner calculated to annoy, harass, embarrass or oppress the deponent.

The judge noted that IBM was already on "thin ice" when it pursued this motion to compel and requested sanctions, noting that IBM's previous conduct in discovery had been "less than exemplary." *Id*. at *3. IBM had not yet produced the damning documents Langley produced, making IBM's objections in support of withholding the documents suspect, and IBM did not deny that it created the documents. Further, IBM recognized the problematic content and quickly sought a motion to seal the documents from public view. IBM had previously incurred the ire of this judge and sought to hide its skeletons rather than get ahead of them, and it paid the price in a ruling that is inconsistent with the Federal Rules of Civil Procedure. Ultimately, this case amounts to an implicit recognition of a whistleblower's privilege, under the shield of a relevancy ruling to justify the privilege.

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Mineral Law

Unleased Owner Not Responsible for Post-Production Costs

Johnson v. Chesapeake La. L.P., ____ F.Supp.3d ____ (W.D. La. 2019), 2019 WL 1301985.

The parties disputed whether the operator of a compulsory drilling unit can charge an unleased owner with a proportionate share of post-production costs. The U.S. District Court for the Western District of Louisiana (Hicks, J.) held that such an operator cannot.

La. R.S. 30:10(A)(2) states, "In the event pooling is required, the cost of development and operation of the pooled unit chargeable to the owners therein shall be determined and recovered as provided herein." Section 30:10(A)(3) provides that owners of unleased mineral rights in a tract in a unit are liable, out of production, for their "tract's allocated share of the actual reasonable expenditures" incurred by the unit operator in drilling the well and producing oil or gas. The statute does not expressly address post-production costs that the operator may incur in handling and transporting oil or gas prior to selling it.

Nevertheless, unit operators often incur such post-production costs in handling and arranging the sale of hydrocarbons attributable to unleased interests, particularly if a unit well produces natural gas. This occurs because many owners of unleased interests do not make their own arrangements to sell the portion of gas attributable to the tracts in which they own interests. In such circumstances, the operator has authority to sell the gas attributable to the unleased interests, subject to an obligation to account to the owners of the interests. Typically, operators choose to exercise that authority because the alternative of letting an unleased owner's share of gas accumulate is not practical.

Post-production costs that operators commonly incur include expenses for treating and compressing gas, then transporting it to the place of sale. This leads to the question disputed in *Johnson*: If the unit operator sells natural gas attributable to an unleased interest, is the owner of that interest responsible for a proportionate share of the post-production costs reasonably incurred by the operator in handling the gas? In *Johnson*, the operator (Chesapeake) argued that it was entitled to charge the unleased owner with a proportionate share of these costs. Otherwise, the unleased owners would be unjustly enriched at Chesapeake's expense.

The court rejected that argument, noting that 30:10(A)(3) states:

> If there is included in any unit created by the commissioner of conservation one or more unleased interests for which the party or parties entitled to market production therefrom have not made arrangements to separately

dispose of the share of such production attributable to such tract, and the unit operator proceeds with the sale of unit production, then the unit operator shall pay to such party or parties such tract's pro rata share of the proceeds of the sale of production within one hundred eighty days of such sale.

Chesapeake argued that the only purpose of 30:10(A)(3) is to set a deadline for payment, not to govern liability for post-production costs. The court held otherwise. Section 30:10 does not define "pro rata share," but the court concluded that it means a pro rata portion of gross proceeds, from which the operator may subtract only the costs that Section 30:10 expressly authorizes the operator to recover. The district court granted summary judgment in favor of the unleased owners, holding that Chesapeake may not charge them with a share of post-production costs.

Court Allows Extrinsic Evidence in Interpreting Unambiguous Settlement Agreement

White v. Cox Operating, L.L.C., 18-0755 (La. App. 4 Cir. 3/20/19), ____ So.3d ____, 2019 WL 1291883.

Wade White was the owner of oyster leases in St. Bernard Parish. In 2000, White entered into a "Receipt and Release" (2000 R&R) with Cox in return for $100,000 for a well drilled by Cox. In 2012, when Cox sought to drill three more wells, it negotiated a settlement with White that incorporated the 2000 R&R (Letter Agreement) in return for $175,000. The settlement complied with Oyster Lease Damage Evaluation Board statutes (La. R.S. 56:700.10, *et seq.*) governing the relationship between the oil and gas industry and the oyster industry.

Later, White discovered that Cox drove pilings in an area covered by one of his leases. White complained, and Cox removed the pilings. White later sued Cox for alleged oyster lease damage, despite the Letter Agreement. The district court granted summary judgment, dismissing White's claims based on the Letter Agreement. White appealed.

The Louisiana 4th Circuit reversed, concluding that the Letter Agreement incorporated certain restrictions that the parties' prior settlement had imposed on the location of Cox's activities, and that White had a claim for an alleged breach of those restrictions. The 4th Circuit also stated that, even if the Letter Agreement was not interpreted as incorporating those restrictions, summary judgment would still be improper. Although extrinsic evidence generally cannot be considered in interpreting an unambiguous settlement agreement, Louisiana courts have crafted an exception that allows consideration of extrinsic evidence if it shows that a party did not intend for the settlement to cover certain claims. Here, White offered testimony that he did not intend for the Letter Agreement to release the type of claims presented in his lawsuit.

Disclosure: Author Colleen C. Jarrott is of counsel at Baker, Donelson, Bearman, Caldwell & Berkowitz, P.C., which represented Cox Operating.

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Professional Liability

Immunizing Credentialing Committees

Tebault v. E. Jefferson Gen. Hosp., 18-0539 (La. App. 5 Cir 3/25/19), ____ So.3d ____, 2019 WL 1339471.

Presented to the court was the *res nova* issue of whether the Health Care Quality Improvement Act (HCQIA), 42 U.S.C. § 11101 *et seq.*, La. R.S. 13:3715.3, or both immunize hospitals from suits brought by or on behalf of patients who allege negligent credentialing. East Jefferson General Hospital claimed it was provided immunity by either statute. The district court denied the defendant's motion for summary judgment based on *Gauthreaux v. Frank*, 95-1033 (La. 6/16/95), 656 So.2d 634, cautioning against an expansive reading of the privileges afforded hospitals in La. R.S. 13:3715.3.

In its writ application to the appellate court, the hospital asserted that both statutes provided immunity. The hospital argued that credentialing is defined statutorily and jurisprudentially as "peer review" and that both statutes provide immunity to hospitals for peer review. The appellate court quoted *Patrick v. Burget*, 108 S.Ct. 1658, 1665 (1988), and recognized that the purpose of each of those statutes is to incentivize and protect physicians engaging in effective peer review, "essentially immuniz[ing] peer-review action from liability if the action was taken 'in the reasonable belief that [it] was in the furtherance of quality health care.'" But the court noted that these statutes were enacted because of the significant number of cases filed by the "disgruntled doctors whose staff privileges have been suspended" by peer-review committees. It observed that the Louisiana Supreme Court discussed "the identical policy underpinnings of both conditional privilege and the qualified immunity" as they pertain to inhibiting communication for liability fears, if the communication later turns out to be inaccurate. *Smith v. Our Lady of the Lake Hosp.*, 93-2512 (La. 7/5/94), 639 So.2d 730, 742-43. But *Smith* made no suggestion that either the privilege or qualified immunity applied when a patient sues a hospital for its failure to adequately and properly investigate a physician before granting credentials to practice in its facility:

> To the contrary, the underpinning of both is the protection of those who properly investigate from the ire of the investigated, not to protect those who fail to investigate from complaints of later victims of physician incompetency.

The *Tebault* court denied the writ, opining that HCQIA and relevant state immunity provisions do not apply to patient-brought suits for negligent credentialing of healthcare professionals.

*Re*credentialing

Thomas v. Reg'l Health Sys. of Acadiana, L.L.C., 18-0215 (La. App. 3 Cir. 2/27/19), ____ So.3d ____, 2019 WL 986699.

In another credentialing case, the plaintiffs alleged that the defendants were liable under general tort law because they negligently *re*credentialed a physician and allowed her to practice in their hospitals. The defendants filed exceptions of prematurity, arguing that the claim sounded in medical malpractice, and the trial court agreed.

The appellate court noted that the "narrow question" was whether negligent "*re*credentialing" would fall under the auspices of the MMA. The defendants claimed that, while the "initial credentialing" of a physician was general tort, recredentialing a physician for the same privileges that had previously been granted "implicates a peer review and supervision component such as to fall within the gambit of medical malpractice." *See generally*, *Billeaudeau v. Opelousas Gen. Hosp. Auth.*, 16-0846 (La. 10/19/16), 218 So.3d 513 (holding that credentialing sounded in general negligence, not malpractice).

The appellate court explained that "[h]iring and credentialing are one and the same, as are retention or recredentialing." To interpret the Louisiana Supreme Court's decision in *Billeaudeau* in any other way would lead to unreasonable results. The granting of the exception was reversed and the case was remanded to the district court.

Recusal

Raborn v. Albea, 18-1132 (La. 11/5/18), 255 So.3d 1045 (*per curiam*).

A district court dismissed Raborn's claims against a healthcare center on a motion for summary judgment. Three weeks later, Raborn filed a motion to recuse the judge.

Raborn claimed that the judge should have disclosed during the time the case was pending in his court that he had a relationship with a physician-member of Raborn's defendant healthcare center — the physician was the judge's personal physician and had testified at the judge's personal injury trial. Raborn contended that the doctor-patient relationship was close and personal and that a judgment against Raborn's malpractice defendant could adversely affect the judge's position. He also argued that the judge should have made Raborn aware of the situation and should have self-recused.

The defendant countered that there was no finding of actual bias or prejudice pursuant to La. C.C.P. art. 151, adding that in reality all judges see physicians and have relationships with many in the community at various levels. Thus, it argued, no precedent should be set that would require recusal simply because a judge was treated by a doctor who worked at the same medical center as another doctor named in a lawsuit. Following an adverse trial-court ruling on the recusal motion, Raborn's writ application to the appellate court was denied, and he applied for a supervisory writ to the Louisiana Supreme Court. The court granted the writ and in a *per curiam* opinion wrote:

> Considering the unique circumstances presented, it is ordered that the trial judge be recused. The case is remanded to the district court for random re-allotment of the case to another judge.

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Taxation

La. Supreme Court Reverses Ruling that Solar Tax Credit Cap is Unconstitutional

Ulrich v. Robinson, 18-0534 (La. 3/26/19), ____ So.3d ____, 2019 WL 1395316.

In 2015, Justin and Gwen Ulrich and Raymond and Pam Alleman (taxpayers) purchased and installed residential solar systems with the expectation of receiving an income tax credit of up to $12,500 pursuant to La. R.S. 47:6030(B)(1) (solar tax credits). In 2016, when the taxpayers filed their Louisiana income tax returns for the 2015 year, asserting entitlement to the solar tax credits, the solar tax credits were denied or reduced by the Louisiana Department of Revenue, citing Act 131 of the 2015 Regular Session. Act 131 limited the maximum amount of the solar tax credits the Department could grant to $25,000,000 and imposed yearly caps on the credits. The taxpayers filed a class action suit against the Department seeking a declaration that Act 131 was unconstitutional.

The district court held Act 131 was unconstitutional because it retroactively deprived the taxpayers of a vested property right. The court implicitly found the taxpayers had standing to bring the constitutional claim and a justiciable controversy existed because the constitutional issue was not moot. The Department sought a direct appeal to the Louisiana Supreme Court.

The Louisiana Supreme Court reversed the district court's ruling. The Court held the district court erred in overruling the Department's peremptory exception of mootness that was filed based on a statutory amendment that cured the alleged constitutional issue and rendered the instant controversy moot. Specifically, in 2017, the Louisiana Legislature enacted Act 413, which provided additional funding for solar tax credits (Act 413). The court held Act 413 remediated the alleged unconstitutional aspect of Act 131, *i.e.*, the taxpayers' claim that imposition of the aggregate cap eliminated their right to receive solar tax credits by providing for full repayment of the solar tax credits, albeit over a three- or four-year period. The Court found that there was no doubt that Act 413 corrected or cured the condition of which the taxpayers complained, the deprivation of the solar tax credits by virtue of the cap imposed in Act 131, because Act 413 mandated payment of the "full amount of the credit" to "any taxpayer whose claim for credit was denied." Act 413 clearly reinstated the taxpayers' right to the full amount of the solar tax credits.

The taxpayers' petition was held to present no justiciable controversy following the passage of Act 413. As a result, the court held the Department's exception of mootness should have been granted and reversed the district court's declaration that Act 131 was unconstitutional.

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Tax on Excess Compensation for Nonprofit Employees

IRC § 4960 was enacted as part of the Tax Cuts and Jobs Act of 2017. Effective for tax years beginning in 2018, this section imposes an excise tax at the corporate tax rate for the amount of any excess compensation paid to a covered employee, which is any one of the highest five compensated employees of the organization for tax years after 2016. Excess remuneration means the amount paid to the covered employee in excess of $1 million in a tax year or, if the covered employee is receiving parachute payments, the amounts paid after his termination of employment, in amounts in excess of the "base amount of the employee's compensation while he was actively employed."

The Internal Revenue Service provided interim guidance in IR Notice 2019-09. The Notice clarified that the excise tax applied to amounts that were paid during the year and to amounts that the employee became vested in during the year. Accordingly, an employee who became substantially vested in deferred compensation that was not to be paid until a later year would have the amount included for purposes of the tax in the year of the vesting, notwithstanding that the payment of the amount was deferred. Generally, this would include amounts under an ineligible deferred-compensation plan governed by IRC § 457(f). Amounts that were actually deferred by the employee and not included in income under § 457(b), or under § 401(k) or a similar plan, would not be included in determining the amount subject to the tax. The Notice provides a grandfather provision for amounts that ceased to be subject to a substantial risk of forfeiture in a year prior to 2018. It provides that the common-law employer of the covered employee is the entity liable for the excise tax and that the common-law employer may not avoid treating an amount as remuneration by reason of a third-party payor or arrangement. In determining the amounts subject to the excise tax, amounts paid by certain related organizations, even if they are not tax-exempt, will be taken into account. The related entity, even if not tax-exempt, would be subject to the excise tax, as would a governmental entity that is related.

With regard to deferred compensation, the amount taken into account is the amount no longer subject to a substantial risk of forfeiture. The portion of the remuneration paid by a related organization results in the organization's liability for a ratable share of the tax. For amounts that are payable as deferred compensation, the amount taken into account is the present value of the deferred compensation that becomes vested during the year. Present value is generally determined by using a discount rate equal to 120% of the applicable federal rate as determined under § 1274(d) and compounded semiannually. For purposes of determining the applicable rate, the period is the term between the date as of which the deferred compensation is no longer subject to a substantial risk of forfeiture and the date as of which payment is to be made. If the likelihood of payment is less than 50%, the amount will be discounted. If the likelihood of payment exceeds 50%, there will be no discount in determining the value of the anticipated payments.

Tax-exempt organizations and related employers need to be aware of the excise tax under § 4960 when designing deferred-compensation programs and severance plans and entering into employment contracts with employees or prospective employees.

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Trusts, Estate, Probate & Immovable Property Law

Do Water Meter, Water Lines Create a Predial Servitude by Destination of Owner?

Carpenter v. Guillory Inv., Inc., 18-0571 (La. App. 3 Cir. 2/27/19), ____ So.3d ____, 12019 WL 949515, involved a dispute over whether a predial servitude was created by destination by ancestors in title. The northern property housed two water meters on the northwest corner and was owned by Guillory Investments, Inc., while the Carpenters owned the southern property and obtained water from the second water meter on Guillory Investments' property. The dispute arose when the Carpenters' water supply was interrupted. Later, the water supply was disconnected and remained disconnected. The trial court found that an apparent servitude existed in favor of the Carpenters' property.

The two requirements to create a predial servitude by destination of the owner are: (1) a relationship between two estates that belong to the same owner that would be an apparent servitude if there were two different owners, and (2) a transfer of ownership of one estate by an act that does not negate the creation of a servitude by destination of the owner. The court stated that while water lines are non-apparent because they are buried under the ground, the water meter is a perceivable work and is apparent because it is visible above ground. Gerald Lee Guillory, an officer of Guillory Investments, testified that the realtor who showed him the property pointed out the water meters and told him both water meters serviced his property. There was uncontroverted evidence that the Carpenters received a water bill since they purchased the property in 2013. Likewise, the Carpenters testified that the Water Department records dating back to 2004 show two separate meters on Guillory Investments' property. The court found it inconsequential that Guillory Investments had no particularized knowledge that the water meter on its property serviced the water line connected to the Carpenters' property. The 3rd Circuit affirmed the trial court's judgment, holding that the water line constituted an apparent predial servitude created by destination of the former owner.

In a dissenting opinion, Judge Kyzar opined that the plaintiffs did not meet their burden of proof that the underground water lines servicing the Carpenters' property were an apparent servitude. Kyzar would have held that the existence of the water meter was an insufficient visible work or sign to be considered an apparent servitude. In support, Kyzar noted that the majority relied on *Wagner v. Fairway Villas Condominium Associates*, 01-0734 (La. App. 3 Cir. 3/13/02), 813 So.2d 512. Kyzar stated the language the majority relied on was "pure dicta."

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