RECENT *Developments*

Administrative Law

Corrective Action, Presumption of Good Faith and Speculation at the GAO

Booz Allen Hamilton, Inc., B-414822.5, Oct. 13, 2017, 2017 CPD ¶ 315.

On June 19, 2017, Booz Allen Hamilton, Inc. protested the issuance of a task order to Raytheon Intelligence, Information & Services under Solicitation No. ID04160057 for services in support of the Army Research, Development and Engineering Command (Agency) at the Government Accountability Office (GAO). Ostensibly, Hamilton raised three primary protest grounds — (1) Raytheon had an un-mitigatable impaired-objectivity organizational conflict of interest (OCI) that should have disqualified it from award; (2) the Agency unreasonably evaluated the offerors' technical proposals; and (3) the Agency unreasonably evaluated the realism of Hamilton's proposed costs.

A protest is a written objection by an interested party to a solicitation or other federal agency request for bids or offers, cancellations of a solicitation or other request, award or proposed award of a contract, or termination of a contract if terminated due to alleged improprieties in the award. *See,* FAR subpart 33.101. Three fora are available to hear these challenges, and reasons for protesting in each are litigation-strategy dependent. The fora are the federal agency soliciting the requirement; the Court of Federal Claims; and the GAO. The GAO adjudicates protests under the Competition in Contracting Act of 1984 (CICA), 31 U.S.C. §§ 3551-56. The GAO hears the majority of reported protests, likely due to two unique characteristics of a GAO protest — the 100-day decision and the CICA automatic statutory stay of contract award. *See,* 31 U.S.C. §§ 3553(c)-(d); FAR subparts 33.104(b)-(c), (f).

On Aug. 30, 2017, the assigned GAO attorney conducted an outcome-prediction conference in response to a request by the Agency. An outcome-prediction conference is when the GAO attorney assigned informs the parties of his or her views regarding whether the protest is likely to be sustained or denied in an effort to facilitate resolution without a formal decision by the GAO. *See,* 4. C.F.R. § 21.10(e); *First Coast Serv. Options, Inc.*, B-409295.4, *et al.*, Jan. 8, 2015, 2015 CPD ¶ 33 at 3. In this case, the GAO attorney advised he would likely draft a decision sustaining the protest concerning protest grounds 1 and 2.

Corrective Action

On Sept. 1, 2017, the Agency advised the GAO that it decided to take corrective action in the procurement. Specifically, the Agency stated it would:

> [r]eview the scope of its analysis of Organizational Conflicts of Interest (OCI) and correct and/or supplement that analysis and/or take other action as it deems necessary to ensure the OCI analysis sufficiently addresses the impaired objectivity OCI concerns or otherwise satisfies the Federal Acquisition Regulation subpart 9.5. [Agency] also intended to review the evaluation record with respond to OCIs and Raytheon's proposal and Oral Question and Answers (Oral Q&A), with respect to both Raytheon and Hamilton proposals regarding Oral Q&A 18, to ensure they were evaluated in accordance with the stated evaluation criteria and perform evaluation(s) as it deems appropriate. Based on the corrective action results, [Agency] will make any required adjustments to the Quality Infused Pricing values and/or the determination of the offeror representing the best value.

Booz Allen Hamilton, Inc., B-414822.5, Oct. 13, 2017, 2017 CPD ¶ 315 at 3.

On Sept. 8, 2017, the GAO dismissed the initial protests as academic based on the Agency's proposed corrective action. On Sept. 11, 2017, Hamilton filed its protest challenging the terms of the corrective action, alleging that the Agency's corrective action could "be interpreted in a manner that allow[ed] the Agency to not undertake [corrective action] that addresses the protester's concerns regarding OCIs and the technical evaluation." Nonetheless, on Oct. 13, 2017, the GAO dismissed Hamilton's protest for essentially failing to state a legal and factual basis.

Corrective Action, Good Faith and Speculation

In rendering its decision, the GAO reiterated two protest maxims — the corrective-action standard and the presumption of good faith. First, agencies have broad discretion to take corrective action. *See, MSC Indus. Direct Co., Inc.*, B-411533.2, *et al*., Oct. 9, 2015, 2015 CPD ¶ 316 at 5. Corrective action need not address every protest ground, but must render the protest academic by granting the requested relief. *See, SOS Int'l, Ltd.*, B-407778.2, Jan. 9, 2013, 2013 CPD ¶ 28 at 2-3. A protest is rendered academic where a protester will be eligible for award in the agency's corrective action. *See, Best Foam Fabricators, Inc*., B-274803, Oct. 28, 1996, 97-1 CPD ¶ 152 at 1. In Hamilton's case, the GAO found that Hamilton's arguments did not provide a valid legal or factual basis to conclude that "the agency's proposed corrective action failed to render the protest academic," as Hamilton would be eligible for award based on the agency's corrective action, and concluded that Hamilton failed to state a valid basis for protesting.

Second, in response to Hamilton's argument that the Agency was "not committing to any reevaluation of Raytheon's impaired objectivity," and that the Agency's promise to reevaluate the offerors' technical proposals was just an "illusory promise," the GAO reminded Hamilton that government officials are presumed to act in good faith. In that regard, the GAO noted that an allegation that procurement officials are motivated by bias or bad faith must be supported by convincing proof and the GAO will not consider unsupported speculative allegations. *See, BAE Sys. Tech. Solutions & Servs., Inc.*, B-409914, *et al.*, Sept. 16, 2014, 2014 CPD ¶ 322 at 11. Here, the GAO found that "to the extent [Hamilton] is concerned that the agency's 'review' of the evaluation record might affirm the award to Raytheon, such is the case with all proposed [corrective action]." Furthermore, the GAO did not take the Agency's corrective action to mean the Agency could elect to utterly ignore the evaluation issues identified in the corrective action. Therefore, the GAO found Hamilton's arguments "merely anticipate adverse actions by the agency, and are thus premature," and dismissed the protest.

Disclaimer: The views presented are those of the writer and do not necessarily represent the views of DoD or its components.

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Appellate

Appellate Jurisdiction

Joseph v. Wasserman, 17-0603 (La. App. 4 Cir. 1/10/18), ____ So.3d ____, 2018 WL 360539; ***Forstall v. City of New Orleans***, 17-0414 (La. App. 4 Cir. 1/17/18), ____ So.3d ____, 2018 WL 459870.

The Louisiana 4th Circuit Court of Appeal recently issued two opinions that provide a helpful reminder that courts of appeal have a duty to determine if they have subject matter jurisdiction, regardless of whether the parties raise the issue. One of the opinions also provides a good example of the traps that can await parties if they do not make sure, before proceeding, that a court of appeal has appellate jurisdiction over a judgment.

The first case, *Joseph v. Wasserman,* involved a legal malpractice action. While the case was pending, the plaintiffs became involved in bankruptcy proceedings. The defendant filed an exception of no right of action, alleging that the plaintiffs' bankruptcy trustee was the real party in interest. The trial court sustained the exception "conditionally," pending the intervention of the bankruptcy trustee.

On appeal, the 4th Circuit found that it lacked subject matter jurisdiction and dismissed the appeal. At issue was whether the judgment was "precise, definite and certain," an essential element of finality. According to the court, "a conditional judgment, order or decree, the finality of which depends on certain contingencies which may or may not occur, is not final for the purposes of appeal." Based on that principle, the court found that the judgment lacked finality because it conditionally sustained the defendant's exception.

The defendant urged the court to consider the appeal because the condition in the judgment, the intervention of the bankruptcy trustee, had occurred. However, the court rejected this argument because the occurrence of the condition did not change the conditional nature of the ruling. The court also declined to convert the appeal to a writ application, finding that the defendant had an adequate remedy from an appeal of the final judgment.

The second case, *Forstall v. City of New Orleans*, involved an action by plaintiff to quiet a tax sale on immovable property. Plaintiffs brought the action against the City of New Orleans and another putative owner, alleging that they were the owners of the property in question because a prior tax sale by the City was null for lack of notice. Two judgments were at issue. The first judgment granted the other putative owner's motion for summary judgment and dismissed the putative owner. The second judgment was rendered after a bifurcated bench trial and involved solely the issue of whether the tax sale was null.

The court began its discussion of the judgments by noting that both judgments were partial judgments because they decided less than all issues in the case. Therefore, the question of whether the judgments were final depended on La. C.C.P. art. 1915.

The court had no trouble determining that the first judgment was a final judgment because the judgment dismissed a party. The judgment was therefore final and appealable pursuant to art. 1915(A)(1) without being designated as a final judgment. However, the second judgment was more problematic.

The second judgment decided one of three issues in the bifurcated trial, the other two being whether the plaintiffs had title to the property in question, and whether any taxes or tax refunds were due plaintiffs. Unlike the first judgment, the second judgment did not dismiss a party. As a result, it was not appealable unless expressly designated as appealable under art. 1915(B) after a determination that there was no just reason for delay. The trial court made no such certification in the judgment. Therefore, the judgment was not final and appealable.

The court then noted that it could review the judgment under its supervisory jurisdiction if the appeal was filed within the deadline for filing applications for supervisory writs. However, plaintiffs failed to file their motion for appeal within the deadline. Plaintiffs' motion was timely for appeal purposes because they had filed a motion for new trial, which was denied, and they filed their motion within 60 days of the judgment denying the motion for new trial. However, the pendency of the motion for new trial had no effect on the deadline for applying for supervisory writs, which expired 30 days after the judgment was rendered. Because plaintiffs failed to file their motion for appeal within that deadline, the court could not consider their appeal under its supervisory jurisdiction.

The *Forstall* case illustrates that if a party is not careful to determine whether a judgment is final before attempting an appeal, it may find itself with no remedy in the court of appeal, whether by appellate or supervisory review.

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Bankruptcy Law

Statement of Financial Condition

Haler v. Boyington Capital Group, L.L.C. (Matter of Haler), 708 F. App'x 836 (5 Cir. 2017).

Randall Haler was an executive of an aircraft repair business. Boyington Capital Group, a potential customer, paid approximately $400,000 for repairs, but later terminated the contract. Haler agreed to refund Boyington for the work that had not been completed, but never tendered payment. Boyington brought a state court suit for fraud, wherein a Boyington representative testified that Haler had expressed that the company was in "very fine legally (sic) financial shape" with "plenty of cash to operate [the] business during the term that [it] was working on" the aircraft. The suit resulted in a judgment in favor of Boyington, and Haler subsequently filed a Chapter 7 bankruptcy proceeding.

Boyington initiated an adversary proceeding, requesting the court enter a judgment finding the state court judgment non-dischargeable as a debt incurred by a false representation. The court granted the motion, which was affirmed by the district court.

On appeal, the 5th Circuit noted that Section 523(a)(2)(A) of the Bankruptcy Code exempts from discharge debts incurred as the result of the debtor's fraud or false representations, but does not exempt from discharge debts incurred by false oral statements regarding the debtor's or insider's financial condition. Therefore, if Haler's oral statements constituted "statements of financial condition," the debt would be dischargeable.

The 5th Circuit, in line with the 10th Circuit, defines statements respecting financial conditions as those that "purport to present a picture of the debtor's overall financial health." It further held that "financial condition" means the overall financial condition of the entity, which is "the overall value of property and income as compared to debt and liabilities." Interestingly, the 5th Circuit continued that, conversely, an oral statement regarding a single asset (rather than the overall entity) would not constitute a statement regarding a debtor's financial condition, and therefore, such debt would be exempt from discharge under section 523(a)(2)(A).

Because the court found that Haler's statements were not in writing and represented the condition of the overall health of the company (not a specific asset), it was a statement of financial condition and, therefore, the debt was dischargeable.

The 5th and 10th Circuits, on the one hand, have held that orally misrepresenting the financial condition of a single asset can result in a finding of non-dischargeability. The 11th and 4th Circuits, on the other hand, have held that a false oral statement regarding a single asset must be in writing in order to constitute a statement of "financial condition" to result in a finding of non-dischargeability. On Jan. 12, 2018, the U.S. Supreme Court granted certiorari in an 11th Circuit case in which the Court will resolve the circuit split.

Frivolous Appeal

Kenneth Michael Wright, L.L.C. v. Kite Bros., L.L.C. (Matter of Kite), 710 Fed. App'x 628 (5 Cir. 2018).

In *Kite*, the bankruptcy court denied the objection of a creditor who challenged the allowance of another creditor's state-court-judgment-related claim against the debtor. The objecting creditor filed a notice of appeal one day after the 14-day appeal deadline, and appellees filed a motion to dismiss the appeal as untimely and frivolous because the appeal raised issues that had already been determined by the district and state courts. The district court granted the motion and awarded sanctions for filing an untimely and frivolous appeal.

On appeal to the 5th Circuit, appellant argued that the rule providing the 14-day limit to file a notice of appeal is not jurisdictional, and that the appeal was not frivolous. The appellees filed another motion for sanctions, arguing that the issues raised in the appeal to the 5th Circuit were similarly frivolous.

The 5th Circuit first noted that it, and every other circuit, has held that failing to timely file a notice of appeal within the 14-day time limit strips the court of jurisdiction to hear the appeal. The court cited to other circuits, stating that no other court had held otherwise, and thus the appeal was untimely.

In determining the frivolity of the appeal, the court considered whether "the result is obvious, or the arguments of error are wholly without merit and the appeal is taken in the face of clear, unambiguous, dispositive holdings of this and other appellate courts." Because here, the result of the appeal was obvious, *i.e.*, the court did not have jurisdiction to hear the appeal and the issues raised had already been litigated, the appeal was frivolous. The court, therefore, affirmed the district court's order imposing sanctions.

On the issue of sanctions with respect to the 5th Circuit appeal, the court used the same standard to determine the frivolity of the filing. The court noted that the result of this appeal was similarly obvious because appellant filed its notice of appeal outside

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October 2017

Result: All Charges Dismissed

- **Case:** Member of the Texas House of Representatives accused of ***public corruption***

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November 2017

Result: All Charges Dismissed

- **Case:** Leading national residential housing company accused of ***water pollution***

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the 14-day period depriving the court of jurisdiction. Also, the district court provided fair notice of the "ample legal authority" holding against the appellant's position on the timeliness issue. Nevertheless, the appellant still appealed the sanctions order with no indication that it had advanced its legal position with a good faith belief that the appeal was justified. Although the court found that the second appeal was also frivolous, the court imposed only one dollar in nominal damages, plus double costs, against the appellant, but not its counsel.

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Family Law

Interim Spousal Support

Larson v. Larson, 16-0695 (La. App. 5 Cir. 10/25/17), 229 So.3d 1043.

Although Mr. Larson argued that Ms. Larson had income and assets such that she was not entitled to interim spousal support, the court found that he failed to prove that she did, and, because she was in need and he had the ability to pay, ordered him to pay interim spousal support to her. Due to changes in the parties' employment, the award was broken into two segments, based on when Mr. Larson lost his job, and then was re-employed. Because no request for final spousal support was pending at the time of the divorce, her interim spousal support award terminated on the divorce, and the court's order that it extend past the date of the divorce was reversed. The trial court was correct in not assessing her share of his retirement benefits to her as income as she was not yet receiving those benefits. The trial court did not err in granting both his rule to reduce child support and her motion to increase child support, since the motions addressed different points in time but were heard on the same date.

Spousal Support

Taylor v. Taylor, 16-1682 (La. App. 1 Cir. 9/15/17), 227 So.3d 844.

Although the trial court awarded Ms. Taylor spousal-support arrearages based on an agreement between the parties, because that agreement was not entered into evidence at the hearing, the court of appeal vacated the judgment and remanded for additional proceedings. Although the agreement had been attached to her rule, it was not actually introduced into evidence.

Child Support

Martinez v. Martinez, 17-0074 (La. App. 3 Cir. 10/4/17), 228 So.3d 764.

The trial court did not err in denying Mr. Martinez's motion to reduce his child support obligation, finding that he was voluntarily underemployed. Although he lost his job as a tenured professor, he was partly at fault for failing to fill out paperwork; he had also declined to accept another professorial position that had been offered to him. There was no error in the trial court's questioning him, as trial courts are allowed to question witnesses.

Guardianship

In re L.M.M., 17-0345 (La. App. 5 Cir. 10/25/17), 230 So.3d 301, *writ granted*, 17-1988 (La. 2/9/18), 2018 WL 987699.

The trial court granted the biological mother's petition to terminate the guardianship of the paternal aunt, which petition had alleged numerous changes in the mother's situation, particularly, that she had been drug-free for over a year, had steady employment and was living in a stable environment. The court of appeal reversed, finding that the modification standard for a guardianship was controlled by Louisiana Children's Code article 74(D), which requires a showing of a substantial and material change in the circumstances of the guardian or child; the mother had only alleged changes in her own circumstances and had failed to show material changes in those of the guardian or the child. The child was doing well under the guardian's protection. The court of appeal noted that both custody evaluators failed to evaluate the situation under the appropriate standard.

Although the mother also alleged that the judgment of guardianship should be annulled for fraud and ill practice, the court of appeal noted that she had made the judgment, originally issued in Mississippi, a valid judgment in Louisiana and had failed to appeal or challenge it then; she was thus precluded from challenging it in this matter. The court of appeal reversed the trial court's order, reinstated the paternal aunt's guardianship and remanded for the court to set a visitation schedule for the mother.

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Insurance, Tort, Workers' Compensation & Admiralty Law

Salty Flavor of Maritime Contracts

Larry Doiron, Inc. v. Specialty Rental Tools & Supply, L.L.P., 879 F.3d 568 (5 Cir. 2018).

Apache Corporation and Specialty Rental entered into a master services contract (MSC). The MSC does not describe individual tasks but operates as a broadform blanket agreement that contemplates future tasks to be performed under subsequent work orders to be agreed upon as necessary. The MSC contains an indemnification provision that requires Specialty to defend and indemnify Apache and its "Company Group" against all claims for property damage or bodily injury.

Sometime thereafter, Apache hired Specialty to perform flow-back services on its offshore well located on a fixed production platform in the Atchafalaya Basin. The services were arranged by an oral work order, without written agreement. Peter Savoie, a Specialty employee, was sent to supervise the work. After the first unsuccessful day, Savoie informed Apache's representative that additional equipment was needed to continue the operation, requiring a crane to lift it to the wellhead. Apache arranged for Larry Doiron, Inc. to provide and operate the crane barge POGO. While "rigging down" after the second unsuccessful day, Savoie was struck by the crane and knocked to platform deck eight feet below, suffering injury.

Anticipating a claim, Doiron filed a limitation of liability proceeding. Savoie filed a claim, and Doiron, as Apache's contractor, filed a third-party complaint against Specialty, seeking indemnity under the terms of the MSC. Doiron moved for summary judgment, declaring that it was entitled to indemnity from Specialty under the MSC. Specialty filed a cross-motion for summary judgment seeking a determination that it owed no indemnity. The issue presented was whether the MSC was a maritime contract. If so, general maritime law would permit enforcement of the indemnity provision. If not, Louisiana law controlled, and the Louisiana Oilfield Indemnity Act, La. R.S. 9:2780(A), precluded indemnity. The district court concluded that maritime law applied and awarded indemnity. On appeal, a panel of the 5th Circuit affirmed; a majority of the active judges voted to hear the case *en banc*.

In reaching its conclusion, the district court relied on the six-factor test enunciated in *Davis & Sons v. Gulf Oil Corp.*, 919 F.2d 313, 316 (5 Cir. 1990):

> 1) What does the specific work order in effect at the time of injury provide? 2) What work did the crew assigned under the work order actually do? 3) Was the crew assigned to work aboard a vessel in navigable waters? 4) To what extent did the work being done relate to the mission of that vessel? 5) What was the principal work of the injured worker? 6) What work was the injured worker actually doing at the time of injury?

Writing for the majority, Judge Davis noted that several judges and legal scholars have criticized this approach as confusing and concluded that "most of the prongs of the *Davis & Sons* test are unnecessary and unduly complicate the determination of whether a contract is maritime." *Doiron*, 879 F.3d at 572. Instead, the court relied on *Norfolk Southern Railway Co. v. Kirby*, 125 S.Ct. 385 (2004), which the court said "lights a path to a simpler, more straightforward method for determining whether a contract is maritime and avoids most of the unnecessary analysis required by *Davis & Sons.*" *Doiron*, 869 F.3d. at 574.

In *Kirby*, goods were transported by ship from Australia to Savannah, Ga., thence by rail to Huntsville, Ala., under two coextensive bills of lading. The question was whether a suit to recover for goods damaged during the land leg of journey fell within the Court's admiralty jurisdiction.The Court found that both bills of lading were maritime contracts because their primary objective was "to accomplish the transportation of goods by sea from Australia to the eastern coast of the United States." *Kirby*, 125 S.Ct. at 388. The Court stated that it could not look to "whether a ship or other vessel was involved in the dispute," as it would in a putative maritime tort case, or "simply look to the place of the contract's formation or performance." Instead, it held that the answer "depends upon . . . the nature and character of the contract." According to the Court, "the true criterion is whether it has reference to maritime service or maritime transactions." *Id.* at 393.

In *Doiron*, the 5th Circuit used the principles of *Kirby* — that contract, rather than tort, principles should be used to determine whether a contract being sued on is maritime. Based on those principles, the 5th Circuit adopted a two-pronged test to determine whether a contract in this context is maritime:

> First, is the contract one to provide services to facilitate the drilling or production of oil and gas on navigable waters? Second, if the answer to the above question is "yes," does the contract provide or do the parties expect that a vessel will play a substantial role in the completion of the contract? If so, the contract is maritime in nature. *Doiron*, 879 F.3d at 575-76.

Applying this test, the court found that the "use of the vessel to lift the equipment was an insubstantial part of the job and not work the parties expected to be performed." Thus, the court held the contract was non-maritime and controlled by Louisiana law, and the Oilfield Indemnity Act barred indemnity. *Id.* at 577.

Among all the criteria considered in these opinions, surely the most succinct (and charming) is Justice Harlan's observation that "the situation presented here has a more genuinely salty flavor." *Kossick v. United Fruit Co.*, 81 S.Ct. 886, 894 (1961), quoted by Justice O'Connor in *Kirby.*

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ANSWERS for puzzle on page 413.

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Update on Transgender Protections under Title VII

Tudor v. Se. Okla. State Univ., No. CIV-15-324-C, 2017 WL 4849118 (W.D. Okla. Oct. 26, 2017).

Courts continue to address whether Title VII protects transgender individuals against sex discrimination — with major consequences for employers. Recently, a federal district court in Oklahoma answered "yes," and a $1.165 million jury award against Southeastern Oklahoma State University soon followed.

The university hired Dr. Rachel Tudor as a tenure-track assistant professor in the English Department in 2004. Although Tudor presented as a man at that time, several years later, she began transitioning to female and notified the university of her transition. Tudor alleged in the complaint that the university prohibited her from using the women's restroom, restricted her wardrobe and makeup, and informed her that a certain administrator considered transgender individuals a "grave offense to his [religious] sensibilities." When Tudor applied for tenure in 2009, the faculty tenure committee recommended that she receive tenure, but the administration rejected the recommendation. Although Tudor requested a reason for the rejection, the university refused. Later, Tudor filed a grievance with the university and sent a letter to the U.S. Department of Education complaining about alleged discrimination. Subsequently, the university denied Tudor the opportunity to re-apply for tenure and discharged her for failure to attain tenure before her seventh year of employment, as required by university rules. Tudor sued, alleging sex discrimination, hostile work environment and retaliation under Title VII.

On a motion for summary judgment, the university revived its earlier argument that Tudor could not establish a Title VII claim because 10th Circuit precedent holds that Title VII does not bar discrimination based solely on transgender status. The court gave short shrift to this argument and referred to its earlier decision allowing Tudor to proceed on a sex-stereotyping theory, which prohibits sex discrimination against individuals whose behavior does not conform to gender stereotypes. The court then found sufficient evidence of pretext in support of Tudor's sex discrimination claim, noting her allegations of "substantial procedural irregularities in the decision to deny her tenure" and the refusal of several university decision-makers to provide her with reasons for the denial.

The court also allowed Tudor's hostile work environment claim to proceed to trial based on her allegations that the university refused to let her use the women's restroom and restricted her clothing and makeup, and that university administrators improperly referred to her with male pronouns. Further, the court rejected the argument that Tudor failed to take advantage of preventive and corrective opportunities by failing to report the alleged harassment and concluded that the university could not invoke the *Faragher/Ellerth* defense because its harassment and discrimination policies did not address transgender individuals.

Similarly, the court found that Tudor presented sufficient evidence of retaliation based on her allegation that the university refused to let her re-apply for tenure after she filed an internal grievance and sent a letter to the U.S. Department of Education complaining about discrimination.

Although the jury ultimately rejected Tudor's hostile-work-environment claim, its $1.1 million award based on her claims of sex discrimination and retaliation highlights the potential exposure for employers in discrimination lawsuits by transgender employees. Further, *Tudor* shows that employers should develop and implement specific policies addressing discrimination against transgender employees to increase their chances of a successful *Faragher/Ellerth* defense.

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Mineral Law

Oil Pollution Act

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

Oil was spilled into the Mississippi River from a barge owned by American Commercial Lines, but operated by DRD Towing. Later, the parties disputed the extent of American's liability under the Oil Pollution Act (OPA). The OPA states that "each responsible party for a vessel or a facility from which oil is discharged . . . is liable for the removal costs and damages . . . that result from such incident." 33 U.S.C. § 2702(a). For spills from vessels, the "responsible party" is "any person owning, operating, or demise chartering the vessel." 33 U.S.C. § 2701(32)(A). American was a person "owning . . . the vessel," but American argued that a "third party" defense available under OPA protected it from liability because Towing caused the spill. The United States 5th Circuit disagreed, concluding that this defense does not shield a "responsible party" if a third party's conduct that causes a spill is "in connection with any contractual relationship with the responsible party." The court concluded that conduct is "in connection" with a contract if the conduct "would not have occurred but for that contractual relationship." Here, the third-party defense did not apply.

American also argued that the quantum of its liability was capped by a limitation on liability that is contained in the OPA. Again, the court disagreed. The liability cap does not protect a party that causes a discharge by gross negligence, willful misconduct or a violation of federal regulations. Here, multiple regulatory violations by Towing appear to have contributed to the accident. The court essentially attributed that conduct to American for purposes of determining whether the cap applied. The court held that a responsible party's liability is not capped under the OPA if a spill is caused by the gross negligence, willful misconduct or regulatory violation of a person who commits such an act "in the course of carrying out the terms of the contractual relationship with the responsible party."

Prescription of Nonuse

Black River Crawfish Farms, L.L.C. v. King, No. 17-0672 (La. App. 3 Cir. 2/7/18), 2018 WL 739408.

The plaintiffs acquired ownership of land in Concordia Parish in 2003. The defendants previously had been owners of a mineral servitude that covered this land, but the servitude had terminated by prescription of nonuse in 2000. The plaintiffs brought suit, alleging that the land was contaminated and seeking restoration of the property pursuant to Louisiana Mineral Code article 22. The defendants sought dismissal based on various grounds. The district court rejected the subsequent-purchaser defense, reasoning that the obligations of a servitude owner are real obligations that follow the property, but the court dismissed based on "prescription of nonuse." On appeal, the Louisiana 3rd Circuit stated that the objection on which the defendants obtained dismissal should have been characterized as an exception of no right of action, rather than prescription,

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but the appellate court affirmed the dismissal. The court explained that a real obligation, such as a servitude owner's obligation to restore the property, cannot exist without a real right. Thus, when the defendants' servitude terminated by prescription of nonuse, their duty to restore terminated. Because this occurred before the plaintiffs acquired the property, they never acquired a right of action against the defendants.

Attorney's Fees

J&L Family, L.L.C. v. BHP Billiton Petroleum Properties (N.A.), L.P., No. 16-1193 (W.D. La. 2/6/18), 2018 WL 734684.

Plaintiff owns land within two compulsory drilling units operated by BHP Billiton. Plaintiff brought various claims, including claims for alleged underpayments on production and relief for alleged breaches of a statute requiring that certain information appear on check stubs of certain oil and gas payments. The defendants sought a partial summary judgment that the plaintiffs were not entitled to attorney's fees under any of plaintiff's four theories. The court noted that, under Louisiana law, an award of attorney's fees is not proper unless it is authorized by statute or contract. The court then considered the plaintiff's theories. First, following U.S. 5th Circuit jurisprudence, the district court held that the owner of unleased land in a production unit is not the owner of a production payment or a royalty. Thus, the plaintiffs were not entitled to attorney's fees under Mineral Code arts. 212.21-.23. Second, because there was no contract between the parties, the court held that the plaintiffs were not entitled to attorney's fees under La. Civ.C. art. 1958, which authorizes such fees for a party that is entitled to rescission of a contract on grounds of fraud. Further, the court rejected the plaintiffs' argument that, by analogy, the Civil Code article would support an award of attorney's fees if a party is obligated in quasi-contract. Third, because La. Civ.C. art. 2315 does not authorize attorney's fees for tort claims, the court held that the plaintiffs were not entitled to attorney's fees for "tort fraud." Finally, the court held that, because Mineral Code art. 212.31 (which requires that certain information be contained on check stubs) does not authorize attorney's fees, the plaintiffs could not recover attorney's fees under that statute.

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Professional Liability

Prescription

In re Medical Review Panel Proceedings of Glover, 17-0201 (La. App. 5 Cir. 10/25/17), 229 So.3d 655.

Ms. Glover died at Ochsner Clinic on April 12, 2015. A June 17 autopsy report revealed the primary cause of her death to be chemical peritonitis caused by a dislodged PEG tube.

A *pro se* panel request was filed on April 11, 2016, against Ochsner and "Dr. Obie" or "Dr. Arden." The PCF responded that Ochsner was "qualified" but that complete names of doctors and the filing fees "must be" provided within 45 days of the April 15 postmark of its letter, *i.e.*, May 31.

On May 27, plaintiffs' counsel amended the complaint by fully identifying Dr. Obie and adding three respondents. The amendment and a copy of the fee check were fax filed, and the check and amendment were sent via certified mail. The mailed originals were received June 2, and on that same date the PCF sent the plaintiff a letter advising that her original filing was "invalid and without effect" because the fees and "complete name" of either doctor were not timely provided. Then, on June 8, the PCF acknowledged that it received the May 27 request and filing fees, and it confirmed that all five defendants were qualified.

The defendants then filed an exception of prescription to dismiss the original and amended complaint as untimely. The defendants argued that the initial request filed on April 11 was invalid and that prescription was not suspended. The trial court sustained the exception of prescription.

On appeal, the plaintiffs argued that the original request of April 11 was not untimely because the fee was sent by certified mail on May 27, within 45 days of the postmark of the PCF's April 15 letter. Thus, prescription was suspended against all joint and solidary obligors. The defendants responded that, despite fees having been "mailed" within 45 days, they were not "received" until after 45 days, as required by La. R.S. 40:1231.8(A)(1)(c).

In 2015, when these events occurred, La. R.S. 40:1231.8(A)(1)(c) stated that a claimant "shall have 45 days from the mailing date of receipt of the request for review" to pay the fees. (N.B. The statute was amended in 2016 to provide that a claimant must pay the fee 45 days from the date of *receipt* of the PCF letter.) The court referenced La. R.S. 40:1231.8(e), which provided that failure to timely *pay* fees rendered invalid the complaint and did not suspend prescription, whereas La. R.S. 40:1231.8(A)(1)(c) did not specify whether a payment *sent* by certified mail within 45 days was compliant with the requirement "to pay," or whether the payment had to be *received* within the 45-day period. "Interpretation of the term 'to pay' is crucial to a determination of whether the filing fee was timely paid." *Id.* at 660.

The defendants relied on *In re Benjamin*, 14-0192 (La. App. 5 Cir. 11/25/94), 165 So.3d 161, wherein a plaintiff thrice sent by certified mail his filing fees — the first returned for insufficient postage, the second for insufficient funds, and the third received long after the 45-day period. The 5th Circuit found that the fees were not timely paid, ruling that "the filing fees must be received, within 45 days from the mailing date of the confirmation." *Id.* at 164.

The plaintiffs countered with *Davis v. State Health Sciences Center-Shreveport*, 41,273 (La. App. 2 Cir. 8/25/06), 939 So.2d 539. Davis mailed her filing fee via United States Express Mail prior to the 45-day expiration, but it was received after the 45-day period. The 2nd Circuit, reversing the trial court's grant of prescription, found that the "mailbox rule" should apply, reasoning that, while the statute was not specific, "the filing of the complaint and the payment of the fee are inexorably joined . . . and that statute provides a mailbox rule for filing the complaint." *Id.* at 543. Thus, "it is logical that the same mailbox rule would apply to the 45-day period for paying the [filing] fee." *Id.*

In *Glover*, the court found the facts more akin to *Davis* than *Benjamin*. It acknowledged its dicta in *Benjamin* that payment occurs when the fees are received by the PCF, but that statement was not germane to the case at bar, as the payment in *Benjamin* was not properly mailed prior to the deadline. Thus, the mailbox rule applied to the instant case.

The court then discussed prescription in the wrongful death and survival actions. Wrongful death actions begin to run on the date of injury and thus cannot arise until the victim dies. Ms. Glover died on April 12, 2015, and the panel request was filed within one year of death. Therefore, the trial court erred by granting an exception of prescription for the death claim.

Survival actions arise simultaneously with the tort and are not transmitted to the beneficiaries until the victim's death. *Taylor v. Giddens*, 92-3054 (La. 5/24/93), 618 So.2d 834, 840. La. R.S. 9:5628 is the one year/three year "prescriptive" statute. A discussion of the "tripartite prescriptive provision" was provided by the court. Space limitations prevent full discussion here, but the *Glover* court found that, during the time the patient was hospitalized, the treating physicians continued to advise the family that they were providing good care. The earliest date the survival action could have started to run was the date of death. Therefore, the trial court erred by granting the exception of prescription for the survival action.

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Taxation

Purchases Found to Not Qualify for Sale for Resale Exclusion

Impala Terminals Burnside, L.L.C. v. West, BTA Docket No. L00189 (2/8/18).

The Ascension Parish Sales & Use Tax Authority and the Louisiana Department of Revenue (collectively the Respondents) conducted a sales/use tax audit of Impala Terminals Burnside, L.L.C. Respondents asserted Impala failed to pay sales taxes on assets purchased in Ascension Parish and proposed to assess sales tax on the transactions. Impala paid the taxes under protest and filed suit to recover at the Louisiana Board of Tax Appeals. Impala contended that the assets were purchased for resale to the Ascension Parish Industrial Development Board (AIDB) and thus were not subject to sales/use tax.

The dispute arose from a sale-leaseback agreement between Impala and AIDB. In 2011, Impala decided to construct and operate a bulk multi-modal terminal in Ascension Parish to facilitate the transfer of commodities. Based on a need for capital and certain tax benefits, Impala sought the assistance of AIDB in financing the development of the project. Through a series of agreements, Impala transferred the project to AIDB, and AIDB leased the project back to Impala. Impala claimed that it was obligated to transfer ownership of all property it acquired and installed at the facility to AIDB pursuant to a lease agreement.

Respondents moved for partial summary judgment asserting that: 1) the assets were not purchased for resale, and 2) Impala failed to obtain a Resale Dealer Exemption Certificate as required under Louisiana law. Impala filed a cross motion for summary judgment.

The Board found that the failure to obtain a resale certificate does not constitute a failure to strictly comply with the rules and regulations to qualify a transaction for the sale-for-resale exclusion. Respondents' motion was denied to the extent it sought a declaration that Impala was required to obtain an advance resale certificate to avail itself of the sale-for-resale exclusion.

The next question before the Board was whether Impala purchased the assets for the purpose of resale as tangible personal property. The lease gave Impala the right to possess and operate the project; however, the Board noted that there was no suggestion Impala purchased the assets and then surveyed the market for a secondary purchaser. The Board found that Impala did not establish a dealer-purchaser relationship with AIDB. Instead, the Board found that Impala established a relationship with AIDB "because of the need for capital and because of the potential tax benefits." The accounting and tax-reporting treatment of the assets was also found not to support Impala's contention that it intended to resell the assets to AIDB as Impala (1) listed the assets on its books as if it were the owner; (2) did not report the sales on its tax returns either as deductions or as gross sales; and (3) failed to obtain resale certificates to show an intent to resell the assets. The Board found that the sole reason for the transfer title of the project to AIDB was to provide tax advantages to Impala so Impala would not have to pay property taxes on the project property as well as income tax on the income received from the bonds. The Board granted Respondents' motion for partial summary judgment, holding that the assets were not purchased for resale, and denied Impala's cross motion.

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Supreme Court May Overturn *Quill*

State v. Wayfair, Inc., 901 N.W.2d 754, *cert. granted sub nom. S. Dakota v. Wayfair, Inc.*, 138 S.Ct. 735 (2018).

The Supreme Court recently granted South Dakota's petition for certiorari in *South Dakota v. Wayfair, Inc.*, setting the stage for a long-awaited challenge to the rule of *Quill v. North Dakota*, 504 U.S. 298 (1992). Since 1992, *Quill* has prohibited states from requiring out-of-state vendors that do not have a physical presence in the taxing jurisdiction to collect and remit use tax on Internet sales. In the aftermath of *Quill*, cash-strapped states have increasingly sought to create legislative or regulatory workarounds that would allow them to force out-of-state vendors to collect and remit the tax. More recently, states have begun to bring legal challenges to *Quill* by enacting unconstitutional tax laws that violate the case's holding.

Supreme Court Justice Kennedy likely encouraged these recent actions in his concurring opinion in *Direct Mktg. Ass'n v. Brohl*, 135 S.Ct. 1124, 1135 (2015) (Kennedy, J., concurring). In that case, the Court permitted an out-of-state vendor to bring suit in federal court to challenge a Colorado law requiring vendors to report sales made to in-state residents, similar to Louisiana's new information and reporting statute, La. R.S. 47:309.1, effective July 1, 2017 (*see also*, La. Revenue Information Bulletin No. 18-006, Jan. 2018). In his concurrence in *Direct Marketing*, Justice Kennedy indicated a willingness to re-examine *Quill* in light of the development of Internet commerce, suggesting that it may be time to discard the physical-presence standard. *Wayfair* is the first of these challenges in which the Court granted certiorari.

Should the Court overturn *Quill*, it could well mark a sea change in the online retail market. Individual states could enact their own regulatory schemes that could present dramatically increased compliance costs for online vendors. While larger, more well-resourced online retailers might be able to absorb these costs, small- and medium-sized ventures could find compliance prohibitively expensive. Enacting a uniform interstate regulatory system would likely require congressional action. Thus, the decision in *Wayfair* may have significant consequences for a large number of online retailers.

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