Administrative Law

Legislative Agencies Not Required to Refer Potential Contractor Responsibility Determinations

Colonial Press Int'l, Inc. v. United States, 788 F.3d 1350 (Fed. Cir. 2015).

In June 2012, the Government Publishing Office (GPO), a legislative agency, issued an invitation for bids for an executive agency relating to a printing order. The GPO received nine bids in response; one was from Colonial Press International, Inc. Colonial was considered a "small business concern" for purposes of the Small Business Act, 15 U.S.C. §§ 631 *et seq*.

According to the Printing Procurement Regulation GPO Pub. 305.3 (Rev. 2-11) (PPR), the GPO was allowed to award contracts only to "responsible" bidders who must be able to comply with the proposed delivery schedules and have a satisfactory record of performance on previously awarded contracts. *See,* PPR, Ch. I. § 5.4. If the bidder cannot meet the standards, then it must be deemed non-responsible. *Id.* at § 6.

Normally, a government contract officer may not preclude a concern from being awarded a contract due to it being found non-responsible without referring the matter to the Small Business Administration (SBA) for final disposition under the SBA's Certificate of Competency Program. *See,* 15 U.S.C. § 637(b)(7) & 13 C.F.R. § 125.5. Under that program, the SBA certifies to the contract officer whether a concern is responsible with respect to a particular procurement.

In the immediate matter, the GPO contract officer reviewed Colonial's history relating to past GPO contracts, which included Colonial's recent performance history and other factors. During that period, Colonial was late on approximately 6 percent of deliveries. After an opportunity to respond and without referring the determination to the SBA, the contract officer wrote to Colonial stating that it was found non-responsible and awarded the contract to another bidder.

In response, Colonial filed a bid protest with the Government Accountability Office (GAO) under 31 U.S.C. § 3552 and alleged two points of error — first, that the contract officer's determination that Colonial was non-responsible was an abuse of discretion; and, second, that under the Act, the responsibility determination should have been referred to the SBA under the Competency Program. The GAO denied Colonial's protest and found that the GPO was not subject to the referral requirements of the program as a legislative agency; it determined that the contract officer had a reasonable basis for her determination.

After losing at the GAO, Colonial filed a bid protest in the United States Court of Federal Claims pursuant to 28 U.S.C. § 1491(b). Colonial generally argued the same two points, but that court ruled against it on both. Colonial then appealed that decision to the United States Court of Appeals for the Federal Circuit under 28 U.S.C. § 1295(a)(3).

The Federal Circuit was established in 1982 and assumed the appellate jurisdiction of the U.S. Court of Claims, now called the Court of Federal Claims. The Federal Circuit, recognizing whether the SBA applies to a legislative agency was an issue of first impression, considered essentially the same two issues argued before the GAO and the lower court. The legislative agency question is discussed below.

Legislative Agencies and the SBA

The court limited the issue to the definitions of two operative terms in the Small Business Act dealing with the Competency Program — "government procurement officer" and "government contract" in 15 U.S.C. § 637(b)(7). The court reasoned that "[i]f these terms are defined broadly, then § 637(b) could require *any* government procurement officer . . . to refer responsibility determinations to the SBA." Alternatively, the court reasoned that:

[i]f…defined narrowly, then § 637(b) could be limited to certain categories of government procurement officers, specifically those in the executive branch, and, as a result, only certain officers would be required to refer responsibility determinations to the SBA.

In examining this, the court evaluated the specific words in the Act "in their context and with a view to their place in the overall statutory scheme," as opposed to solely focusing on the specific language in § 637(b). *See, Davis v. Mich. Dep't of Treasury*, 109 S.Ct. 1500 (1989).

In determining whether the operative terms are broadly or narrowly defined, the court noticed that neither term was actually defined in the Act. It then, in looking to the general statutory scheme, stated that because under 15 U.S.C. § 637c(3) a "'Government procurement contract' is defined as 'any contract for the procurement of any goods or services by any Federal agency,'" that the term "'Federal agency' must have 'the meaning given the term — agency — by section 551(1) of title 5 . . . .'" Further, the court found that under § 551(1), the term "agency" does not include the Congress, and that, as a legislative agency, the GPO is included in the term "Congress." Therefore, the court reasoned that the language in § 637(b) should be defined narrowly, and that the Act's responsibility referral requirement under the program does not apply to the GPO. *See generally, United States v. IBM Corp.*, 892 F.2d 1006, 1009 (Fed. Cir. 1989); *Mayo v. U.S. Printing Office*, 9 F.3d 1450, 1451 (9 Cir. 1993).

Colonial took exception to the court's reasoning under two theories. First, Colonial proposed to avoid the court's analysis by suggesting that, instead of examining the GPO's duties under the Act, the court should examine the duties of the executive agencies on whose behalf the GPO was awarding contracts. The court found this to be an "unpersuasive dodge of the basic issue" and did not address it further. Second, Colonial argued that, because the terms the court focused on do not appear in § 637(b)(7), their definitions are irrelevant. The court also found this argument unpersuasive and noted that if it took Colonial's view on the issue, then it would have to:

interpret "Government procurement contracts" to exclude contracts solicited by legislative agencies in some portions of the Act, while interpreting "Government procurement officers" to include contracting officers of those same legislative agencies in another portion of the Act, namely § 637(b)(7).

Additionally, the court noted that the "GAO, GPO, and SBA have interpreted the Small Business Act consistently since 1983" in line with their present interpretation. *See, Fry Commc'ns, Inc.*, 62 Comp. Gen. 164, 167 (1983).

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Bankruptcy Law

Barton Doctrine Does Not Apply When Trustee Carrying Out District Court Orders

Carroll v. Abide, 788 F.3d 502 (5 Cir. 2015).

In the bankruptcy cases of William and Carolyn Carroll and their corporation, the Carrolls' children requested a determination that certain movables had been properly transferred to them. Samera Abide, the bankruptcy trustee for the debtors, filed a counterclaim seeking a determination regarding proper ownership. The dispute was withdrawn to the district court. During the case, the district court entered an order that the Carrolls turn over any computers of the debtor-corporation to Abide. The Carrolls asserted that one computer was their personal computer; however, the trustee took the computer. The plaintiffs filed a motion with the district court requesting the trustee turn over the computer. The district court deferred a ruling on the motion, allowing the trustee to obtain a forensic expert to evaluate the computer. The plaintiffs alleged the district court did not authorize the trustee to access the computer. After making its ruling on ownership, the district court ordered the computer returned. Upon receipt of the computer, the plaintiffs' forensic expert determined that the trustee had accessed the computer three times.

The plaintiffs brought a lawsuit in the district court against Abide claiming she violated their Fourth Amendment right against illegal search and seizure. The district court dismissed the complaint, ruling the plaintiffs were required to request leave of the bankruptcy court to file a lawsuit against the trustee pursuant to the Supreme Court decision *Barton v. Barbour*, 104 U.S. 126, 128 (1881), *citing Davis v. Gray*, 83 U.S. (16 Wall.) 203 (1872). In *Barton*, the Supreme Court held that in order to file a lawsuit against a receiver, a plaintiff must seek leave from the court that appointed the receiver.

> An action against a receiver without court permission, the [Supreme] Court reasoned, is an attempt "to obtain some advantage over the other claimants upon the assets in the receiver's hands." If such a suit were allowed, "the court which appointed the receiver and was administering the trust assets would be impotent to restrain him." *Carroll*, 788 F.3d at 505.

The 5th Circuit vacated the district court's decision and remanded to the district court. While the 5th Circuit had previously applied *Barton* to lawsuits against bankruptcy trustees, it held that the *Barton* doctrine did not apply because the claims against Abide, as trustee, stemmed from her conduct while carrying out orders from the district court rather than the bankruptcy court. The 5th Circuit found that the concerns *Barton* implicated did not apply in this situation, *i.e.*, if parties could sue trustees, a foreign court could "turn bankruptcy losers into bankruptcy winners." *Id.* at 506, *citing In re Linton*, 136 F.3d 544, 546 (7 Cir. 1998). The reasoning is that the plaintiffs filed suit in the same court that presided over the adversary proceeding. The 5th Circuit further found another rationale behind the *Barton* doctrine did not apply, *i.e.*, bankruptcy courts have a strong interest in protecting trustees from personal liability as officers of the court. The 5th Circuit noted that Abide served as an officer in both courts; thus, the district court shared the same interest in protecting the trustee.

Golf Channel May Not Be Burned by Stanford's Ponzi Scheme After All

Janvey v. Golf Channel, Inc., 792 F.2d 539 (5 Cir. 2015), *certified question accepted* (July 17, 2015).

In 2006, Stanford International Bank negotiated a deal with the Golf Channel, Inc. regarding an advertising package. Stanford was apparently attempting to reach the Golf Channel's high-net-worth viewership that was likely to invest in its Ponzi scheme. Ultimately, an agreement was struck to, among other things, provide live coverage of a golf tournament hosted by Stanford. In total, Stanford paid the Golf Channel $5.9 million.

By 2009, the SEC uncovered the massive Ponzi scheme, one of the largest in the history of the United States. The SEC filed a lawsuit in the Northern District of Texas, and the district court appointed a receiver over Stanford. The receiver sued the Golf Channel to recover the $5.9 million as a fraudulent conveyance under the Texas Uniform Fraudulent Transfer Act (TUFTA), asserting the transaction provided no value to Stanford's creditors. The Golf Channel asserted an affirmative defense allowed under section 24.009(a) of the TUFTA — "(1) that it took the transfer in good faith; and (2) that, in return for the transfer, it gave the debtor something of 'reasonably equivalent value.'" The Golf Channel argued that it provided "reasonably equivalent value" for the transfers by providing advertising.

In March 2015, the 5th Circuit issued its original opinion, *Janvey v. Golf Channel*, 780 F.3d 641 (5 Cir. 2015) (original opinion), which was discussed in the *Louisiana Bar Journal* (June/July 2015). In the original opinion, the 5th Circuit held value is determined from the perspective of the creditors of the transferor, and proof of market value is insufficient. The 5th Circuit found the Golf Channel's advertising services that were purchased to extend a Ponzi scheme could not, as a matter of law, provide any value to Stanford's creditors. Accordingly, the 5th Circuit rendered judgment in favor of the receiver, and the Golf Channel was required to return the full $5.9 million.

The Golf Channel filed a petition for a panel rehearing, which the 5th Circuit granted, vacating the original opinion. The 5th Circuit found that it must determine under Texas law and the TUFTA the meaning of "value and/or reasonably equivalent value." The 5th Circuit reasoned that there were some discrepancies between the definitions in the TUFTA and the comments in the TUFTA, and that only the Texas Supreme Court could rule on this discrepancy. As there were no decisions from the Texas Supreme Court addressing this dispute, the 5th Circuit certified the following question to the Texas Supreme Court, which it accepted:

> Considering the definition of "value" in section 24.004(a) of the Texas Business and Commerce Code, the definition of "reasonably equivalent value" in section 24.004(d) of the Texas Business and Commerce Code, and the comment in the Uniform Fraudulent Transfer Act stating that "value" is measured "from a creditor's viewpoint," what showing of "value" under TUFTA is sufficient for a transferee to prove the elements of the affirmative defense under section 24.009(a) of the Texas Business and Commerce Code?

The Texas Supreme Court has not ruled as of yet. Stay tuned.

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Corporate and Business Law

LLC Shield Exceptions

Hohensee v. Turner, 14-0796 (La. App. 4 Cir. 4/22/15), ____ So.3d ____, 2015 La. App. LEXIS.

The plaintiff sought the services of an architect to design plans for her new home; the architect referred her to an unlicensed architectural designer, who designed the plans, but the architect stamped the design plans so the plaintiff could obtain a building permit. After the plaintiff hired a contractor and problems developed during construction, the plaintiff sued (among others) the architect, asserting deficiencies in the design. Although the architect was a member of a limited liability company, the plaintiff asserted he was personally liable under La. R.S. 12:1320(D), which provides that the

Louisiana LLC law does not derogate from any rights that any person may by law have against a member of an LLC because of, among other things, "any breach of professional duty or other negligent or wrongful act by such person."

In *Ogea v. Merritt*, No. 13-1085 (La. 12/10/13), 130 So.3d 888, 898-901, the Supreme Court interpreted R.S. 1320(D) as creating separate exceptions for a "breach of professional duty" and for a "negligent or wrongful act," and, as to the latter exception, identified four factors to be considered, one of which was "whether the conduct at issue was required by, or was in furtherance of, a contract between the claimant and the LLC." In *Hohensee*, the majority affirmed the trial court's grant of summary judgment in favor of the architect, reasoning that the plaintiff must prove that the architect "breached his professional duty to her by negligence or some other wrongful conduct." Noting unrebutted expert testimony supporting the architect, the majority concluded:

> Although [the architect] stamped the plans for the [plaintiff's] house, there is no evidence in the record that [the architect] breached any professional duty as an architect. As in *Ogea,* [the architect's] affixing his seal was in furtherance of the [plaintiff's] contract with [the contractor], a contract to which [the architect] was not a party. Conduct taken in furtherance of the legitimate goals of that contract does not subject [the architect] to personal liability.

LLC Assignee Issues

Succession of Scheuermann v. Scheuermann & Jones, L.L.C., 15-0040 (La. App. 4 Cir. 5/22/15), ____ So.3d ____, 2015 La. App. LEXIS 1030.

An attorney's will left her ownership interest in a law firm, a limited liability company, to an individual, whom she also appointed an independent executor of her estate. The Louisiana LLC law provides that "[i]f a member who is an individual dies . . . the member's membership ceases and the member's executor, administrator, guardian, conservator, or other legal representative shall be treated as an assignee of such member's interest in the [LLC]." La. R.S. 12:1333(A). The LLC law further provides that "[a]n assignment of a membership interest shall not entitle the assignee to become or to exercise any rights or powers of a member until such time as he is admitted," but does entitle the assignee to receive the assignor's allocations, share of profits, and distributions. La. R.S. 12:1330(A).

The legatee/executor filed suit against the LLC and its surviving manager member seeking inspection and demanding, among other things, that the two sections of the statute described above be declared unconstitutional, arguing that Section 1333(A) imposes a deprivation of property without due process of law because it transfers an interest in an LLC to the LLC, the surviving member of the LLC, or the executor, rather than to the decedent's heirs or legatees, and that it is unconstitutionally vague. The defendants alleged that the plaintiff was not entitled to inspection because of R.S. 12:1332(A)(1), which provides that "[a] n assignee of an interest in [an LLC] shall not become a member or participate in the management of the [LLC] unless the other members unanimously consent in writing." The district court rendered a partial summary judgment declaring Sections 1330 and 1333 constitutional and designated the judgment as appealable. The court of appeal found on *de novo* review that the judgment was improperly designated as appealable and dismissed the appeal without reaching the merits.

Single Business Enterprise

Bridges v. Polychim USA, Inc., 14-0307 (La. App. 1 Cir. 4/24/15, 2015 La. App. Unpub. LEXIS.

During the relevant time, the defendant was a Georgia corporation not qualified to do business in Louisiana. It owned two foreign subsidiaries that, in turn, owned a foreign partnership that owned property and was doing business in Louisiana. The Louisiana Department of Revenue sought to require the defendant to pay Louisiana franchise taxes, asserting (among other things) that Louisiana courts have repeatedly allowed creditors to use the single-business-enterprise doctrine to breach the corporate walls between corporations and their subsidiaries and affiliates.

The court of appeal reasoned that the doctrine allows certain businesses to be held liable only for "wrongful acts done in pursuit of [a common business] purpose," and that the Department was not seeking to hold the defendant liable for the "wrongful" acts of its subsidiaries, but merely for franchise taxes based on their actions. The court also noted that, in this context, the single-business-enterprise doctrine sounded very similar to the "unity of purpose" theory that the Louisiana Supreme Court had rejected in an earlier franchise-tax case.

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Criminal Law

Prosecutorial Use of Post-*Miranda* Silence

State v. Marshall, 13-2007 (La. 12/9/14), 157 So.3d 563.

The Louisiana Supreme Court addressed the applicability of *Doyle v. Ohio*, 96 S.Ct. 2240 (1976), when reviewing a prosecutor's cross-examination of a defendant regarding his alibi.

The U.S. Supreme Court held in *Doyle* that a defendant's right to due process is violated when a prosecutor impeaches a defendant's exculpatory alibi or defense by questioning why he did not provide it when first Mirandized by police, thereby implying that the defendant came up with the story over time and spoke with police only after developing a favorable set of facts.

On initial review, the Louisiana 4th Circuit Court of Appeal, in a 2-1 decision, vacated the defendant's conviction and reversed his sentence upon finding that the prosecutor's use of Marshall's post-arrest silence violated *Doyle* by using the exercise of his Fifth Amendment right to undermine his plausible self-defense claim. *State v. Marshall*, 12-0650 (La. App. 4 Cir. 7/31/13), 120 So.3d 922. However, a *Doyle* violation is a trial error that is subject to harmless-error analysis. *Doyle*, 96 S.Ct. at 2245.

Upon granting an application for certiorari from the State, the Louisiana Supreme Court reviewed all evidence presented at trial. Marshall was tried by a jury in Orleans Parish for second-degree murder and found guilty of the lesser-included offense of manslaughter for "end[ing] a love triangle" involving himself, the victim and the mother of the victim's three children.

While the victim was serving a six-month stint in the parish jail, Marshall began a romantic relationship with his children's mother. Upon the victim's release from jail, the woman decided to attempt reconciliation, but an enraged Marshall confronted them at their home. Described as "much smaller" at 5'6" and 140 pounds, Marshall resorted to a .40 caliber handgun to fight the victim, who "was nearly six feet tall and weighed over 200 pounds." Nine spent casings were found near the body of the victim, who suffered five gunshot wounds, including two to the back, among other wounds.

Marshall took the stand and testified that he shot in self-defense. "On cross-examination, the state confronted [the] defendant with his failure to stay on the scene and explain to the police" that he shot in self-defense. This violation of *Doyle*, which formed the basis for the 4th Circuit's decision, was weighed against mounds of forensic, ballistic and eyewitness evidence in light of the harmless-error test set forth in *Sullivan v. Louisiana*, 113 S.Ct. 2078 (1993). The Court reiterated the proper framing of the question:

> To say that an error did not "contribute" to the ensuing verdict is not, of course, to say that the jury was totally unaware of that feature of the trial later held to have been erroneous . . . . To say that an error did not contribute to the verdict is, rather, to find that error unimportant in relation to everything else the jury considered . . . .

Marshall, quoting Yates v. Evatt, 111 S.Ct. 1884, 1893 (1991).

Ultimately, the Louisiana Supreme Court adopted the position of the dissenting judge at the 4th Circuit, finding that "the overwhelming physical evidence render[ed] the improper questioning harmless." *Marshall*, 120 So.3d at 932 (Dysart, J. dissenting). Accordingly, the Court reinstated the verdict and re-imposed the original sentence.

However, the Court took care to clearly incorporate the principles of *Doyle v. Ohio* into Louisiana jurisprudence. Prosecutors throughout Louisiana are thereby on notice that using a defendant's post-*Miranda* silence to implicate an exculpatory alibi or defense as spurious is a clear violation of due process.

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Environmental Law

U.S. Supreme Court Reverses EPA's Mercury Rule

In one of its last opinions of a memorable year for the U.S. Supreme Court, the Court struck down the EPA's new rule regulating mercury and other air toxins — the Mercury and Air Toxics Standard (MATS) rule. In a 5-4 ruling, the Court declared in *Michigan v. E.P.A.*, 135 S.Ct. 2699 (2015), that the EPA acted unreasonably when it declined to consider the costs to implement its MATS rule. The MATS rule was issued in 2012 and established fairly stringent emissions limits for power plants. Power plants were to come into compliance with the rule by mid-2015, although a one-year extension was granted to coal-fired plants to either install control technology or shut down altogether.

The central issue for the Court was whether the EPA could reasonably refuse to consider cost when issuing the MATS rule. Under the Clean Air Act section 112(n)(1), the "Administrator shall regulate electric utility steam generating units under this section, if the Administrator finds such regulation is appropriate and necessary." The argument focused on the "appropriate and necessary" language from (n)(1), specifically whether the EPA was required to consider compliance costs.

In addressing the question of whether regulation of power plants for air toxins was appropriate and necessary, the EPA argued that regulation was appropriate because of risks these emissions posed to the human health and environment, and it found that controls were available that could reduce these harmful emissions. After the EPA issued its rule, multiple states and industry associations sued, arguing that a regulation is only "appropriate and necessary" if compliance costs are considered. The situation was particularly egregious here where the EPA did not consider benefits versus compliance costs, and the plaintiffs argued that the social benefits were valued at $4 million to $6 million while the actual costs to the power plant industry to comply with the rule was estimated to be *$9.6 billion*. Power plants argued that these outrageous compliance costs, particularly when compared to the estimated benefits, meant that the rule on its face could not be "appropriate and necessary."

The Supreme Court agreed with the power plants, holding that the EPA's interpretation of section 112(n)(1) was unreasonable. The EPA must consider compliance costs before issuing rules regulating the emissions of power plants. However, the ruling was limited to just the MATS rule; the Court stressed that a formal cost-benefit analysis was not called for, and no court has held that benefits of environmental rulings must necessarily outweigh the potential costs of compliance. There seems to be no consensus on whether this decision from the Supreme Court could impact other potential and dramatic expected rulemakings from the EPA on various air emissions.

Louisiana Supreme Court Agrees: New Owners Can't Sue Old Mineral Lessees

A late 2014 case, *Global Marketing Solutions, L.L.C. v. Blue Mill Farms, Inc.* (*Global 1*), 13-2132 (La. App. 1 Cir. 9/19/14), 153 So.3d 1209, applied the *Eagle Pipe* subsequent-purchaser doctrine to a Mineral Code claim. The Louisiana Supreme Court has now denied writs. *Global Marketing Solutions, L.L.C. v. Blue Mill Farms, Inc. (Global 2)*, 14-2572 (La. 4/23/15), ____ So.3d ____. In the underlying case, the new owner of a 144-acre parcel sued all former mineral lessees once that new owner discovered that the land was contaminated by toxic waste in the soil, claiming that the defendants — former oil and gas companies that were lessees or operators on the property since 1937 — were contractually obligated under their mineral leases to restore the land to its original condition.

The defendants filed a motion for summary judgment that was ultimately granted, based on the subsequent-purchaser doctrine spelled out by the Louisiana Supreme Court in *Eagle Pipe & Supply, Inc. v. Amerada Hess Corp.*, 10-2267 (La. 10/25/11), 79 So.3d 246. The 1st Circuit agreed and upheld the dismissal of the claims, holding that:

> an owner's right to sue for damage to his property is a personal right and is held by the person who was the owner at the time the damage was caused. This personal right is not transferred to a subsequent owner without a clear stipulation that the right has been transferred.

Global 1, 153 So.3d at 1215. Without evidence that Global had obtained a transfer of this personal right, Global could not sue for pre-existing damage.

Plaintiffs appealed to the Louisiana Supreme Court, again arguing that the *Eagle Pipe* decision was limited to predial leases and was inapplicable to mineral leases and Mineral Code claims. A victory for the plaintiffs would have meant the reversal of numerous post-*Eagle Pipe* suits that have applied the subsequent-purchaser doctrine to mineral leases and Mineral Code claims. The Supreme Court, however, denied the plaintiffs' writ application.

While the Court denied writs without an opinion, Judge Crichton wrote a separate concurrence on the issue, quoting *Eagle Pipe* and declaring:

> Under the "subsequent purchaser rule" articulated in *Eagle Pipe & Supply Inc. v. Amerada Hess Corp.*, "an owner of property has no right or actual interest in recovering from a third party for damage which was inflicted on the property before his purchase, in the absence of an assignment or subrogation of the rights belonging to the owner of the property when the damage was inflicted." Because there is no such assignment or subrogation here, I agree with the decision of the court of appeal.

Global 2 (Crichton, J., concurring) (citations omitted). Although he did not expressly state "*Eagle Pipe's* subsequent purchaser doctrine is equally applicable to both predial and mineral leases," Judge Crichton did add in a footnote citing *Frank C. Minvielle, L.L.C. v. IMC Global Operations, Inc.*, 380 F.Supp. 2d 755, 776 (W.D. La. 2004):

> The analysis is similar in the Mineral Code context . . . . Because a mineral right is a limited personal servitude, it does not pass with the property, and the subsequent landowner must have "privity of contract, assignment of rights, or be a beneficiary of a *stipulation pour autrui*" to sue.

The body of case law applying the subsequent-purchaser doctrine to legacy lawsuits continues to grow and has received a substantial boost from this latest decision.

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Family Law

Same-Sex Marriage

Obergefell v. Hodges, 135 S.Ct. 2584 (2015).

Following the U.S. Supreme Court's decision in *United States v. Windsor*, James Obergefell and John Arthur, a same-sex couple, married in Maryland. After learning that their state of residence, Ohio, would not recognize their marriage, they filed a lawsuit, alleging that Ohio's ban on recognition of same-sex marriages validly performed in other states was unconstitutional. The district court agreed, but the 6th Circuit Court of Appeals reversed, holding that Ohio's ban on recognition of same-sex marriages did not violate the U.S. Constitution. The U.S. Supreme Court consolidated *Obergefell* with cases from Tennessee, Michigan and Kentucky and held that the 14th Amendment requires a state to license a marriage between two people of the same sex and to recognize a marriage between two people of the same sex when their marriage was lawfully licensed and performed in another state.

Procedure/Service

Edwards v. Mathieu, 14-0673 (La. App. 4 Cir. 3/11/15), 163 So.3d 110.

Because service of the petition for paternity and child support was "served" by long arm to a post office box of Mathieu's employer, and signed for by someone who was neither his agent nor authorized to receive mail for him, the default judgment entered against Mathieu was vacated.

State v. White, 14-1269 (La. App. 3 Cir. 4/1/15), 162 So.3d 716.

Although Mr. White received a copy of the petition to establish child support, he was never actually served with that petition. Thus, the Rapides Parish judgments of paternity and child support against him were annulled. Moreover, since paternity and child-support matters had previously been filed in Ouachita Parish, which had entered an interim judgment, the matter was remanded to be transferred from Rapides to Ouachita. As the mother had assigned her child-support rights to the Department of Social Services, DSS was to be made a party after the transfer.

Child Support

Holleman v. Barrilleaux, 14-0499 (La. App. 3 Cir. 11/19/14), 161 So.3d 789.

In this child-support-calculation case, the trial court should have included undistributed income from Mr. Holleman's business as he had the ability to withdraw it or leave it in the business. Regular depreciation was excluded from the income calculation, but accelerated depreciation was added back. Distributions to him from another company also should have been included in his income. "Draws" that he received from his business, above his salary, also should have been included in calculating his income, as were "fringe benefits" paid for him by the company. After determining that his income was $37,720 per month, and Ms. Barrilleaux's income was $4,923 per month, for a combined income of $42,643 per month, the court of appeal stated that the "proper calculation" was to take the child support sum at $30,000 ($2,653), add it to the sum at $12,600 ($1,473), for a combined basic obligation of $4,126, then add child care and health-insurance costs, and then apportion the total by the parties' respective shares.

State v. C.B., 14-0360 (La. App. 5 Cir. 10/29/14), 164 So.3d 850.

The father was entitled to credit against future child-support obligations for a lump-sum disability payment made to the child. The court of appeal remanded to the trial court to determine the credit he received when the original child-support case was dismissed in order to determine any remaining credit to be applied to the current child-support order.

Final Spousal Support

Miller v. Miller, 13-1043 (La. App. 3 Cir. 4/2/14), 161 So.3d 690.

Ms. Miller's testimony as to what Mr. Miller allegedly said during a counseling session waived her claim of a patient health-care-provider privilege, and the trial court erred in refusing to allow the counselor to testify. Nevertheless, that error did not require reversal of the trial court's finding that she was free from fault in the breakup of the marriage because: (1) although Mr. Miller alleged that she had abandoned the marriage, he never asked her to return; therefore, he failed to prove abandonment; (2) she did not engage in cruel treatment of him because her comments that she did not love him or like him were reasonable reactions to her reasonable suspicions that he was involved with another woman; and (3) her refusal to have sex with him when he was drunk was justified, as was her refusal to have sex with him after her suspicions that he was involved with another woman. The trial court's award of $5,350 per month in final spousal support was reduced by the court of appeal to $3,350 per month because she should have been imputed an earning capacity relative to an income she could have earned working for someone else, rather than the income she was earning running her own unsuccessful business. Although Mr. Miller complained that Ms. Miller's expenses were excessive, the court did not consider that, given the great disparity in their incomes and the fact that his professional corporation paid most of his expenses.

Stowe v. Stowe, 49,596 (La. App. 2 Cir. 3/4/15), 162 So.3d 638.

Mr. Stowe argued that the award of final spousal support to Ms. Stowe was improper because no financial records of income or expenses were submitted as evidence. However, the court of appeal found that there was no abuse of the trial court's discretion because the record supported the trial court's reliance on the testimony alone even with no supporting documents. Moreover, since Mr. Stowe did not object that discovery had not been exchanged prior to the start of the case, he could not later complain. The court accepted his testimony as to his own income. It found that her testimony as to her expenses and her medical condition was credible. He provided no countervailing evidence. The court also confirmed her freedom from fault, finding that the disputes they had did not rise to a level of fault on her part sufficient to preclude her from final spousal support. The court did not err in not giving him credit against the support for payments he had made on the car note and insurance, finding that he was entitled to raise those claims as reimbursements in the property partition.

Community Property/ Pension

Ast v. Ast, 14-1282 (La. App. 3 Cir. 4/1/15), 162 So.3d 720.

After the parties reached a stipulation and a judgment was signed by their attorneys and the court, Ms. Ast began receiving her marital share of Mr. Ast's military retirement benefits. He then converted those benefits from retirement to disability benefits and ceased paying her share. Following her rule for contempt, he argued that the court did not have jurisdiction to enforce her claim against his disability benefits or to partition them. His arguments were rejected, and he was ordered to provide her those benefits, as he actively converted the benefit in an attempt to deprive her of her share. Moreover, the judgment provided that she would be entitled to her share of such benefits. His second argument was that the stipulation addressed only military retirement benefits, but that the judgment added references to additional benefits, which should have been struck from the judgment as not conforming to the stipulation. This claim, too, was rejected, as his attorney had signed the judgment, approving it as to form and content, before it was submitted to the court. Moreover, he did not timely file a motion for new trial or appeal concerning the language of the judgment, which had become final.

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Insurance, Tort, Workers' Compensation & Admiralty Law

5th Circuit Clarifies *Chandris* Temporal Requirement for Seaman Status

Alexander v. Express Energy Servs. Operating, L.P., 784 F.3d 1032 (5 Cir. 2015).

The 5th Circuit revisited the requirements for a plaintiff to qualify as a Jones Act seaman. In *Alexander*, the court affirmed a motion for summary judgment granted in favor of Express Energy Services, ruling that the plaintiff did not fulfill the requirements to be a Jones Act seaman because he did not spend more than 30 percent of his time in service of a vessel in navigation. Under the ruling, a plaintiff must *actually work on a vessel* at least 30 percent of his total work time in order to qualify as a seaman under the Jones Act.

The plaintiff was employed as a lead hand/operator for Express Energy Services, plugging decommissioned oil wells off the coast of Louisiana. Plaintiff's duties involved ensuring the plugging operation's success by setting up and running the plugging operation on the deck of oil-production platforms. As many of the platforms were too small to accommodate the crew and their equipment, plaintiff's work also frequently involved the use of Aries Marine Corp. lift boats in conjunction with his platform-related duties to accommodate the additional needed space. Plaintiff was injured while working on a platform when a crane wire snapped, causing a bridge plug/tool combination to drop and roll onto plaintiff's foot. The crane was permanently attached to an Aries lift boat and operated by an Aries employee for the use and benefit of the Express crew.

Plaintiff filed a Jones Act claim against his employer, Express, in the Eastern District of Louisiana. Express filed a motion for summary judgment, arguing that Alexander was a platform-based worker who thus failed to satisfy the *Chandris* test to qualify as a seaman.

To maintain a claim under the Jones Act, 46 U.S.C. § 30104 *et seq.*, the plaintiff must qualify as a seaman, a status that requires meeting a two-pronged test set forth by the Supreme Court in *Chandris, Inc. v. Latsis*, 115 S.Ct. 2172 (1995). *Chandris* establishes that first a plaintiff must prove that his work duties "contribut[e] to the function of the vessel or to the accomplishment of its mission." The plaintiff need not necessarily aid in the navigation or transportation of the vessel so long as he is "doing the ship's work." Second, *Chandris* requires that a seaman have a significant connection to a vessel in navigation, a requirement that separates land-based workers "whose employment does not regularly expose them to the perils of the sea." Generally, this prong requires that workers spend approximately 30 percent of their time in service of a vessel in navigation.

Express asserted that Alexander did not contribute to the function of a vessel as he worked on non-vessel fixed platforms and, although Alexander spent 35 percent of his plug-and-abandonment job time using a lift boat, he did not satisfy the requirement set forth in *Chandris* that a plaintiff spend at least 30 percent of his *total work time* on a vessel. Alexander argued that he did contribute to the function of a vessel, namely the Aries lift boat, and that he should be allowed to count all of his time on jobs where an adjacent vessel was used in order to satisfy the 30 percent temporal requirement of *Chandris*.

The district court granted Express's motion, concluding that Alexander's duties did not contribute to the function of a vessel because they were related to the fixed platform and not the vessel. The court wrote, "Alexander was only a passenger on the lift boat and . . . the lift boat was merely a support vessel for the platform operations." The 5th Circuit affirmed the district court's ruling without addressing the first prong, contributing to the function or mission of a vessel. The 5th Circuit found that Alexander failed to satisfy the second prong under *Chandris*, the temporal-connection requirement that a seaman must spend a substantial amount of time, ordinarily 30 percent, actually working *on a vessel*. Additionally, the 5th Circuit clarified that it was not sufficient that the plaintiff performed "some incidental work on a vessel" while on the job; rather, the plaintiff must show that he actually worked on a vessel at least 30 percent of the time in order to be classified as a Jones Act seaman.

The 5th Circuit made it clear that plaintiffs cannot qualify as seamen under the Jones Act if their only connections to vessels in navigation are to vessels in support of other operations, such as work on a platform. This decision falls in predictable form under *Chandris* that a worker must perform a substantial part of his work aboard a vessel in navigation. *Alexander* acts as a reminder of the intricacies inherent in maritime law, and of the fact-specific inquiries in determining seaman status of injured employees. The case is instructive for both plaintiff attorneys vetting future clients/cases and for maritime/oil employers, their insurers and their legal team in trying to determine benefits available to employees injured on the job.

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International Law

U.S. Court of Appeals for the Federal Circuit

Int'l Custom Prods., Inc. v. United States, 791 F.3d 1329 (Fed. Cir. 2015).

After 10 years of litigation, the U.S. Court of Appeals for the Federal Circuit hammered a U.S. food importer with a $28 million duty bill. Appellant International Custom Products (ICP) imported a "white sauce" for sale to food manufacturers. *Id.* at 1332. ICP sought a tariff classification from Customs & Border Protection (CBP) in order to establish what tariff, if any, was owed as a result of the importation of the sauce. *Id.* CBP classified the import under the Harmonized Tariff Schedule as "sauces and preparations therefor." *Id.* Six years after the classification, CBP notified ICP of a new investigation into the classification of white sauce. *Id.* at 1333. In 2005, CBP issued a Notice of Action reclassifying the white sauce under a different classification, "[d]airy spreads." *Id.* CBP informed ICP that the reclassification applied to all pending and future entries of white sauce. *Id.* The reclassification ultimately created an astounding tariff increase to ICP of almost 2,400 percent. *Id.*

The ensuing years of litigation began in 2005 when CBP liquidated some of ICP's pending entries of white sauce under the terms of the 2005 reclassification notice. *Id.* ICP did not file a protest with CBP about the liquidation. *Id.* ICP did file suit against CBP at the U.S. Court of International Trade seeking to overturn the 2005 reclassification notice. *Id.* That court is a court of limited jurisdiction with specific trade boundaries established by Congress. *See,* 28 U.S.C. § 1581 (2000). It has a residual jurisdiction provision that is not available when jurisdiction under another subsection of § 1581 is appropriate, or where the remedy under the applicable subsection of § 1581 is manifestly inadequate. *Id.* at 1332. The applicable subsection in this case is (a), which requires that an aggrieved importer first file a formal protest with CBP, which protest must be denied. *Id.* Once CBP denies the protest, the importer must pay all liquidated duties owed before commencing suit in that court. *Id.*

ICP did not file a protest with CBP but invoked the Trade Court's residual jurisdiction, arguing that any remedy under subsection (a) is manifestly inadequate because payment of the liquidated duties would put the company "on the brink of bankruptcy" and out of business. *Id.* at 1333. The court exercised its residual jurisdiction and found the 2005 reclassification invalid for failing to comply with notice and comment procedures. *Id.* The Federal Circuit reversed and vacated on appeal, finding that the Trade Court lacked residual jurisdiction because "mere allegations of financial harm . . . do not make the remedy established by Congress manifestly inadequate." *Int'l Custom Prods., Inc. v. United States,* 467 F.3d 1324, 1327 (Fed. Cir. 2006). The Federal Circuit ruled that ICP should have protested the CBP reclassification, paid the liquidated duty and then commenced the lawsuit. *Id.* at 1328.

Several other waves of litigation ensued after CBP liquidated additional entries of white sauce. The 2008 liquidations resulting in the duty bill of $28 million were the subject of the final appeal. The Federal Circuit upheld the Trade Court's dismissal of ICP's challenge to the pre-payment requirement. ICP argued that the pre-payment requirement is an unconstitutional violation of the Fifth Amendment Due Process Clause inasmuch as it creates an "insurmountable financial barrier to judicial review." *Int'l Custom Prods*., 791 F.3d at 1335. The Federal Circuit noted that "pre-payment of duties owed undoubtedly burdens an importer, and we appreciate the harsh reality that requirement imposes here, as ICP must pay almost $28 million before it can commence suit in the Trade Court." *Id.* However, the court's decision rested on ample precedent holding that pre-payment is an allowable conditional waiver of the United States' sovereign immunity. *Id.* at 1335-38. ICP's failure to pay foreclosed any effort to seek a judicial remedy.

This case provides a stark reminder to importers and their counsel to carefully watch all import timelines and deadlines for protests. One available option to minimize the financial impact of an adverse classification is to timely pay the duties owed on the first entry and then timely request suspension of all remaining liquidations pending final resolution of litigation.

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Labor and Employment Law

New Proposed Regulations on FLSA Overtime Protections

This summer, the U.S. Department of Labor (Labor) proposed new regulations that will dramatically increase the number of employees who must be paid on an hourly basis under the Fair Labor Standards Act (FLSA). Whereas in the past employees who earned $455 per week (or $23,660 per year) could qualify as exempt, the new rule would make the salary threshold for exempt status $970 per week (or $50,440 per year). In addition, the proposed regulations increase the "highly compensated" threshold from $100,000 to $122,148. Finally, to prevent the new salary levels from becoming stale over time, Labor is, for the first time, proposing to include an automatic annual update to the salary and compensation thresholds using either a fixed percentile of wages or the Consumer Price Index for urban consumers. It is still up in the air whether non-discretionary bonuses and incentive payments should be included to determine whether the new salary thresholds have been met.

As background, the FLSA generally requires that employers pay overtime for every hour an employee works in excess of 40 in a particular workweek. 29 U.S.C. § 207(a). The FLSA exempts certain groups of employees from the overtime pay requirements. One of the most common exemptions relates to employees working in jobs that are executive, administrative or professional — the so-called "white collar" exemptions. 29 U.S.C. § 213(a)(1). In order for an employee to fall within one of the white-collar exemptions, the employee must perform executive, administrative or professional duties (the duties test) *and* make a certain weekly salary. The regulations also exempt "highly compensated" employees who "customarily and regularly" perform one of the exempt duties of an administrative, executive or professional employee, but who do not otherwise meet the duties test. 29 C.F.R. § 541.601. It is the salary and compensation threshold for these employees that Labor is targeting with the new proposed regulations.

Labor has admitted the proposed rulemaking will "transfer income from employers to employees in the form of higher earnings." In fact, Labor estimates that "average annualized direct employer costs will total between $239.6 and $255.3 million per year . . ." and "average annualized transfers are estimated to be between $1.18 and $1.27 billion . . . ." Department of Labor, Frequently Asked Questions: *www.dol.gov/whd/overtime/NPRM2015/faq.htm.*

Labor estimates that nearly 4.6 million workers who are exempt under the current white-collar exemption would no longer be exempt under the new rules. Similarly, Labor estimates that 36,000 workers currently exempt under the "highly compensated" category will no longer qualify. Finally, Labor estimates that as many as 6 million workers currently classified as white-collar workers and who earn at least $455 per week but less than the proposed salary level would have "their overtime protection strengthened because their non-exempt status would be clear based on the salary test alone, without any need to review their duties." *Id.*

The obvious impact for employees reclassified as non-exempt is that they will begin being paid time-and-a-half if they work more than 40 hours in a week. However, there may be other unintended negative consequences for the employee, possibly including a loss of benefits available only to exempt employees, such as vacation or paid time off or eligibility for certain managerial bonuses.

In addition to the obvious increased monetary cost of compliance for employers, many likely will also suffer additional administrative and record-keeping headaches in figuring out how to adjust their workforce to comply with the rules, while keeping their businesses financially viable. Many employers operating in industries that have relied heavily in the past on lower-level managers previously classified as exempt (such as retail stores and restaurants) will have to reclassify large groups of their workforce and pay them on an hourly basis.

In order to avoid paying overtime to a large number of now non-exempt employees, the employer may decide to increase the total number of employees and decrease work hours, which would likely increase transactional costs, such as onboarding, training and benefits. The administrative headache would not stop there. Because exempt employees normally do not track their hours, many employers do not have adequate data on the number of hours their formerly exempt employees worked. Employers will need to institute processes to ensure accurate timekeeping for these employees. This may be particularly difficult because non-exempt managerial-type employees often perform a variety of potentially compensable job-related activities during their "off" time, such as receiving and responding to work calls and emails from home, taking work home, working through lunch, etc. All of these activities must now be taken into account by the employer when tracking time and determining its payroll budget and allocation of employee responsibilities.

The regulations will not become final until the 60-day comment period elapses and Labor has had a chance to consider the comments. It will then decide whether to proceed with the proposed changes, issue a new or modified proposal or take no action on the proposed rule. If a substantive change is made to the proposal after the comments, Labor is required to provide the public with further opportunity for comment. If Labor proceeds with the proposed rule, it will be published in the Federal Register and will become effective no less than 30 days after publication.

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Mineral Law

Mediation of Legacy Disputes

Acts 2015, No. 448, enacts La. R.S. 30:29.2, which requires parties to legacy disputes to "meet and confer" within 60 days after the end of the automatic stay required by La. R.S. 30:29 "in an effort to assess the dispute, narrow the issues, and reach agreements useful or convenient for the litigation of the action." In addition, the new statute establishes a procedure by which any party to a legacy lawsuit may compel mediation after the earlier of the close of discovery or approximately 18 months after the litigation is commenced. Responsibility for the cost of mediation will be based on the parties' agreement or, in the absence of agreement, will be borne by the party that moved to compel mediation.

Cross-Unit Wells

Louisiana law generally prohibits a wellbore from being drilled any closer than 330 feet to a property line, unless the well is within a unit, in which case the law generally prohibits the well from being drilled any closer than 330 feet from the unit boundary, though the Commissioner of Conservation has authority to grant exceptions to this rule. Because fractures tend to propagate in a particular direction in a given shale formation, the region near a unit boundary that is parallel to the direction of propagation tends to remain unfractured, and hydrocarbons in that area are not recovered.

To allow for the recovery of those hydrocarbons, the Commissioner of Conservation sometimes issues orders allowing a horizontal lateral for one unit to extend beyond that unit and into the neighboring unit. Such a well is called a "cross-unit well." The orders authorizing such wells have provided that the production from the well will be allocated between the units in proportion to the length of horizontal lateral in each. A concern arose among some people that a cross-unit well could extend only a short distance into a second unit, but hold all leases in the second unit and interrupt prescription of nonuse for mineral servitudes and mineral royalties covering land in the second unit.

Acts 2015, No. 253, enacts La. R.S. 30:9.2. The new statute provides that the Commissioner of Conservation generally may authorize a cross-unit well, but if a horizontal lateral will extend less than 500 feet into the "short unit," the Commissioner cannot approve the well unless: (1) the operator's pre-application notice and hearing application expressly state that interested persons may express an objection; and (2) either no person with an interest in the short unit mails an objection to the Commissioner 15 days or more in advance of the application hearing, or the short unit already has one or more horizontal laterals with a combined length of perforated lateral of at least 500 feet.

Fees to the Office of Conservation

Acts 2015, No. 362, amends La. R.S. 30:4 to add a subsection "P" that authorizes the Commissioner of Conservation to develop a program whereby permit applicants may pay an extra fee for expedited processing of their application. Act 362 also amends La. R.S. 30:21(B) to increase the ceiling on the statewide aggregate amount of fees that the Office of Conservation may collect on "capable oil wells" and "capable gas wells," Class I, II and III wells, and certain other facilities. Finally, Act 362 amends La. R.S. 30:21(d) to authorize certain fees and amends 30:136.1(D) to increase fees on state mineral leases.

Parish Coastal Erosion Lawsuits

Plaquemines Parish v. BEPCO, L.P., 13-6704 (E.D. La. July 7, 2015), 2015 WL 4097062.

Multiple parishes each filed multiple lawsuits against various oil and gas companies, alleging that the defendants' activities have violated state and local regulations and permits granted pursuant to the State and Local Coastal Resources Management Act, and that in doing so the defendants have caused harm to the coastal areas. The defendants removed the various lawsuits to the United States District Court for the Eastern District of Louisiana. Upon removal, the multiple cases were assigned to different sections of the court. *Plaquemines Parish v. BEPCO, L.P.* was assigned to Judge Nannette Jolivette Brown. The plaintiffs in the various cases moved to remand.

In *BEPCO*, the defendants argued that three independent bases existed for federal subject matter jurisdiction. First, the defendants asserted that there was diversity jurisdiction, notwithstanding the existence of non-diverse parties, because the non-diverse parties had been fraudulently joined. Judge Brown disagreed, holding that the standard for fraudulent joinder was not met. The defendants also argued that subject matter jurisdiction existed, based on the Outer Continental Shelf Lands Act. Judge Brown rejected that argument, concluding that the plaintiffs' claim(s) did not arise from an operation on the Outer Continental Shelf. Finally, she held that removal was not proper based on maritime jurisdiction, even though the plaintiff complained about dredging activities conducted by vessels on navigable waters, because the claim was brought in state court under the savings-to-suitors clause. Accordingly, the court remanded.

Judge Brown's order remanding to state court is consistent with orders issued by several other sections of the United States District Court for the Eastern District of Louisiana, which have remanded similar cases brought by parish governments against oil and gas companies.

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Professional Liability

Suspension of Prescription: Two Cases

Correro v. Caldwell, 49,778 (La. App. 2 Cir. 6/3/15), 166 So.3d 442.

Dr. Ferrer, Glenwood Medical Center and two unidentified employees of Glenwood were named in Correro's panel request. Dr. Ferrer acknowledged his liability, waived panel proceedings, and was dismissed from the panel proceeding on Aug. 22, 2013. The panel against Glenwood proceeded.

In Glenwood's panel brief, it argued against any responsibility for Caldwell and Greer (the unidentified employees) because they were not Glenwood employees.

On the date of the panel hearing, Correro amended her panel request and specifically named Caldwell and Greer as additional tortfeasors with Dr. Ferrer and Glenwood. Ultimately, the "initial panel" concluded, without awareness of the amendment, that Glenwood failed to meet the standard of care. The panel opinion was mailed to the plaintiff on Dec. 27, 2013. On July 31, 2014, the PCF advised Correro that "[u]nknowing to the [PCF] an opinion was rendered on the [initial panel] when the recently submitted amendment dated November 19, 2013 was filed," and that the amendment "will be processed as a new request for a medical review panel." The new panel was assigned a separate PCF number and referenced as the "second panel."

Caldwell and Greer filed exceptions of prescription, arguing that claims against them prescribed on April 7, 2014. They conceded that the "initial panel" suspended prescription during the pendency of the initial panel but, as the plaintiff never filed suit against Ferrer or

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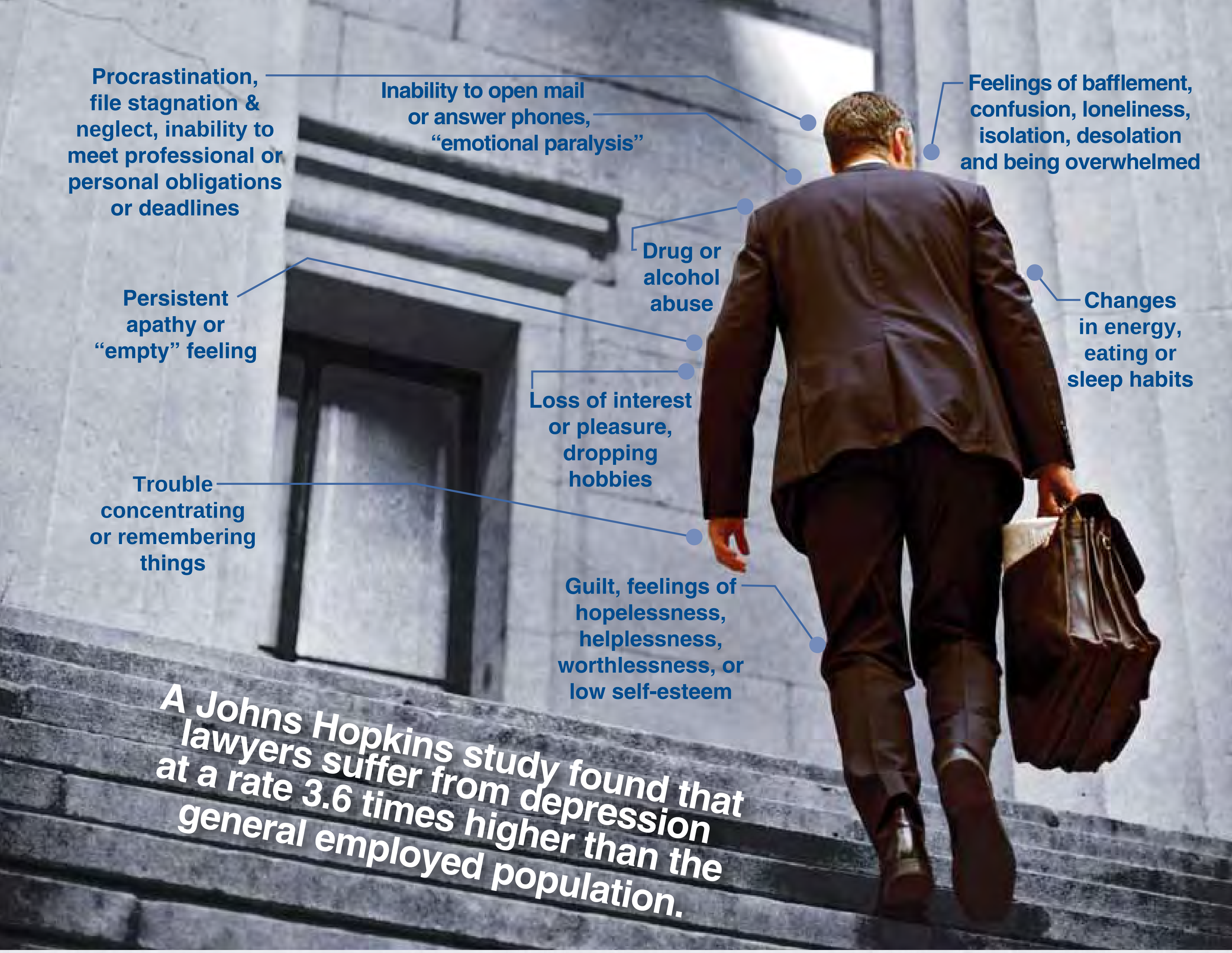

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Glenwood after the initial panel opinion had been issued, the claims against the exceptors and any other joint tortfeasors had prescribed. The trial court agreed.

The court of appeal reversed, referencing La. R.S. 1299.47(A)(2)(a), which recites that a request for review suspends prescription "against all joint and solidary obligors, and all joint tortfeasors," including health-care providers, irrespective of their qualified status under the Act, to the same extent that prescription is suspended against the parties who are subject to the request for review, adding that since the Supreme Court's opinion in *Borel v. Young*, 07-0419 (La. 11/27/07), 989 So.2d 42, 68, a "special rule of suspension of prescription" in medical malpractice cases applies to all joint tortfeasors, irrespective of whether they are named in the initial panel proceeding.

Caldwell and Greer argued that the suspension ended on April 7, 2014, 90-plus days after the panel opinion was received by the plaintiff, because no suit had been filed against Dr. Ferrer, Glenwood or any other joint tortfeasor. But the appellate court noted that when the plaintiff filed a panel complaint against the exceptors, the panel was still pending as to Glenwood, which served to suspend prescription against all joint tortfeasors, including unnamed ones. The exceptors then relied on *Robin v. Hebert*, 12-1417 (La. App. 3 Cir. 5/1/13), 157 So.3d 63, which held that upon dismissal of a defendant deemed to be not liable, the "late-added defendants were no longer joint tortfeasors, and the special prescriptive periods under the LMMA no longer applied."

The appellate court found the case *sub judice* factually different from *Robin*, as that case dealt with prescription when a "not liable defendant is dismissed," whereas in the present case, when Dr. Ferrer waived the panel process, there was no finding that he was "not liable." The same was found to be true as to Glenwood: When the exceptors were added by the filing of the amended panel complaint, there had been no determination made that it was "not liable." In fact, as to either of the originally named joint tortfeasors, there was never a finding that they were not liable to the patient. Thus during the pendency of an allegation of solidary liability or joint liability, the exception of prescription is premature.

The court added, in a footnote, that the exception of prescription could still be raised at trial, and if the exceptors proved that neither Dr. Ferrer nor Glenwood were liable to the plaintiff, their exception of prescription could then be reconsidered.

Maestri v. Pazos, 15-0009 (La. App. 5 Cir. 5/28/15), ____ So.3d ____, 2015 WL 3440341.

The plaintiffs were notified by the PCF that two of the respondents in their request for review (Oceans and Parikh) were qualified health-care providers but the third (Pazos) was not. More than 90 days after notification that he was not qualified, the plaintiffs filed a lawsuit against Pazos, who then filed an exception of prescription. The plaintiffs countered with an amended petition in which they claimed that the qualified providers (Oceans and Parikh) were joint tortfeasors with Pazos, and thus their claim was timely filed, pursuant to the second sentence of La. R.S. 40:1299.47(A)(2)(a). The plaintiffs also argued that the medical-review panel was still pending as to the qualified health-care providers; therefore, the claim against Pazos could not be prescribed. The trial court, however, disagreed and granted the exception.

The plaintiffs did not dispute that their petition was filed beyond the "90-day plus" period of suspension, but they argued that, in addition to the language of R.S. 40:1299.47(A)(2)(a), and the continuing suspension of prescription during the life of a panel, the Supreme Court's opinion in *Milbert v. Answering Bureau, Inc.*, 13-0022 (La. 6/28/13), 120 So.3d 678, explained and buttressed their argument that the suspension of prescription applied to all joint tortfeasors and solidary obligors, irrespective of their qualified or non-qualified status. The court of appeal agreed that *Milbert* held that a non-qualified, health-care provider may be a joint tortfeasor with a qualified health-care provider who is before a medical-review panel; thus, the suspension of prescription "may" apply to the filing of suit against the non-health-care provider. *Id* at 689.

Yet, it distinguished *Milbert* from the instant case in two ways. First, the plaintiff in *Milbert* did not initially file a complaint against a non-qualified provider within one year of the alleged negligence, as had the plaintiffs in *Maestri*, and, second, the *Milbert* plaintiffs filed suit against the non-qualified provider in district court within 90 days of notice from the PCF that Pazos was not a qualified provider, whereas the *Maestri* plaintiffs had not. Therefore, because the plaintiffs in *Maestri did* initially name Pazos in their panel request but did not file suit within a year from the tort, they could not rely on the language of the statute to extend the time to file suit beyond the 90-day plus notification by the PCF of Pazos's non-qualified status. The court added that La. C.C.P. art. 934 prohibits defeat of a peremptory exception by an amendment to the pleadings.

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Taxation

Sand and Limestone Are Not Materials for Further Processing in Power-Generation

Bridges v. Nelson Indus. Steam Co., 14-1253 (La. App. 3 Cir. 6/24/15), 169 So.3d 711.

The 3rd Circuit Court of Appeal affirmed a trial court decision that found Nelson Industrial Steam Co.'s (NISCO) purchases of sand and limestone for its power-generating process were not exempt or excluded from sales taxes under the further-processing statute, La. R.S. 47:301(10)(c)(i)(aa). The court upheld the state collector's assessment of additional sales taxes and the parish collector's denial of NISCO's claims for refund of sales taxes based on the statute.

NISCO operates power-generation facilities in the Lake Charles area and sells steam and electricity manufactured from those facilities. The process used by NISCO to produce steam and electricity uses sand and limestone and produces ash as a by-product thereof. NISCO sells the ash that is produced to a third party.

NISCO asserted the sand and limestone at issue were not taxable based on the further processing statute, La. R.S. 47:301(10)(c)(i)(aa), which states, "The term 'sale at retail' does not include sale of materials for further processing into articles of tangible personal property for sale at retail." The court applied the test enunciated in *International Paper v. Bridges*, 07-1151 (La. 1/16/08), 972 So.2d 1121: "The raw materials, or their component molecular parts, (1) must be of benefit to the end product; (2) must be a recognizable and identifiable component of the end product; and (3) must have been purchased for the purpose of reprocessing into the end product."

It was undisputed that the sand and limestone did not appear in any form in the steam and electricity produced and sold by NISCO, and NISCO did not contend that it purchased the sand and limestone for further processing into steam and electricity. Rather, NISCO argued that the materials appear in and benefit the ash and that NISCO intentionally purchased the materials for the additional purpose of manufacturing ash that NISCO sells to third parties. The taxing agencies argued that the ash was a residue, not a purposefully created product; that no manufacturer produces ash alone as a product; and that no business would spend $46 million on sand and limestone to manufacturer ash that sold for only $6.8 million.

The court looked to the testimony of a professor of tax and cost accounting, who "essentially confirmed that NISCO did not treat the ash as a co-product." Instead, the ash was an incidental by-product that was saleable because the purpose of the sand and limestone was to comply with regulations controlling sulfur emissions. The fact that NISCO found a revenue stream for the ash did not mean the purpose for buying the limestone was changed. The court held the sand and limestone were not purchased for further processing into an end-product — steam or electricity — but were instead part of an incidental by-product. As a result, the court affirmed the trial court's finding that NISCO's purchases of sand and limestone were subject to sales tax and not exempt or excluded from tax under the further-processing statute.

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Consistent Basis Reporting Between Estates and Persons Acquiring Property

Consistent tax-basis reporting by the executor of an estate on the federal estate-tax return and the beneficiaries of the estate on their individual income-tax returns will be required under section 2004 of H.R. 3236, *Surface Transportation & Veterans Health Care Choice Improvement Act of 2015* (P.L. 114-41), which was signed into law on July 31, 2015.

Previously, the values reported on the federal estate-tax return were "deemed" to be the fair-market values of the property passing from the decedent for the purpose of determining the income-tax basis for the property under IRC § 1014 (Treas. Reg. 1.1014-3(a)), but it was not an absolute requirement that the same values be used for federal estate-tax and income-tax purposes, and there were no specific reporting requirements or specific penalties for applying inconsistent values. H.R. 3236 adds (1) a new subsection 1014(f), which states that the basis of property acquired from a decedent cannot exceed the value finally determined for estate-tax purposes; (2) new section 6035, requiring basis reporting by persons required to file estate-tax returns; and (3) inconsistent basis reporting to the list of actions for which a 20 percent accuracy-related penalty is imposed under IRC § 6662.

New IRC § 6035 requires executors of estates and other persons who are required to file returns under IRC § 6018(a) or 6018(b) to now furnish the IRS and the estate's beneficiaries with statements reporting the value of estate assets within 30 days of the estate-tax return's due date. These new statements are added to the definition of "information return" and "payee statement" under IRC § 6724(d), making failure to furnish them subject to penalty under IRC §§ 6721 and 6722.

Although these new provisions apply to property for which an estate-tax return is filed after the date of enactment, according to Notice 2015-57, effective on Aug. 21, 2015, the IRS has postponed the due date for any statement that IRC § 6035 requires to be filed with the IRS and estate beneficiaries before Feb. 29, 2016, until Feb. 29, 2016, to allow the IRS time to issue guidance addressing the requirements of IRC § 6035.

The IRS is requesting comments on the guidance to be issued, which can be submitted electronically and should refer to Notice 2015-57.

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