RECENT Developments

BANKRUPTCY LAW TO TAXATION

Bankruptcy Law

No Justification to Void the Order

Novoa v. Minjarez, No. 16-50955, 2017 WL 2438264 (5 Cir. June 5, 2017).

Julio Novoa, the Chapter 7 debtor (debtor), faced six pre-petition malpractice suits from former patients and subsequently initiated his bankruptcy proceeding. Debtor then filed for bankruptcy relief. The patients moved for relief from the automatic stay to recover from Novoa's insurance carrier. After Novoa failed to respond to the motion for relief, the court entered an order permitting the patients to settle their claims with the insurance carrier without Novoa's consent. Novoa argued that this provision of the court's order ignored a provision in his insurance contract requiring the insurance company to get Novoa's consent before settling any claims.

Novoa moved to vacate the order, arguing that the settlements could have an impact on his medical license. The court denied the motion due to lack of evidence supporting this argument. The district court dismissed Novoa's appeal, and the bankruptcy case was later closed.

Nearly one year after the court entered the lift-stay order, Novoa moved to reopen the case so that he could then file a motion to vacate the order as void. The bankruptcy court denied the motion, and Novoa moved for reconsideration, arguing that the bankruptcy court had exceeded its powers by "destroying" a covenant in his insurance policy. The court denied the motion to reconsider, and the district court affirmed.

On appeal to the 5th Circuit, the court noted that generally courts will declare that a judgment is void only if there is a jurisdictional error or violation of due process. Novoa argued neither of these but claimed the order was void due to the bankruptcy court's "usurpation of power" in "extinguishing" the consent provision of his insurance contract. The 5th Circuit

held that even if the bankruptcy court exercised its authority in a way that exceeded its non-jurisdictional limits under the Bankruptcy Code, it would still not justify the extreme remedy of declaring the order void. Finding no other reason to reopen the bankruptcy case, the 5th Circuit affirmed the lower court's decisions.

Community Property

Rosbottom v. Schiff, No. 16-31108, 2017 WL 3034261 (5 Cir. July 17, 2017).

Harold Rosbottom and his wife Leslie Fox lived together in their community-property home in Shreveport. In 1999, each spouse each created an individual trust bearing his or her own name and donated the undivided interest in the home to the respective trust.

In 2005, the pair decided to sell the home but were cautioned by counsel that the prior donations to the individual trusts were null, as a violation of community-property principles against donating an individual spouse's one-half share to a third party. Their counsel conditioned the sale on Fox and Rosbottom signing the sale deed in their individual capacities. The couple split the proceeds of the sale evenly, depositing the proceeds into each respective trust.

Fox and Rosbottom then moved to Texas and filed for divorce soon thereafter. Each used his or her share of the sale proceeds to purchase a new home in Texas. In 2009, Rosbottom filed for bankruptcy and was later convicted of conspiracy to commit bankruptcy fraud, illegally transferring and concealing assets and falsifying an oath. Because Rosbottom used the funds in his trust to purchase his Texas home, the home was not included in his Chapter 11 estate, as the trust technically held title. Fox and the Chapter 11 trustee, however, sought a declaratory judgment that the home belonged to the estate since the transactions creating the trust were null, as they violated Louisiana community-property law. The bankruptcy court agreed, finding the home was part of the bankruptcy estate. The district court reversed, finding that both spouses consented to the donations and that their conduct after the donations evidenced their intent to transfer their entire interests in the Shreveport home.

On appeal to the 5th Circuit, Fox and the trustee argued that the trusts never existed; therefore, Rosbottom's home was purchased with community property and should be included in the estate. La. Civ.C. art. 2337 prohibits a spouse from alienating his undivided interest in community property to a third party. The court explained that spouses wishing to divide community property have options for doing so, such as pursuing a voluntary partition. The intent of the parties is relevant where there is a clear indication that they truly intend to establish the separateness of their interests in the community property.

Here, the 5th Circuit found that Fox and Rosbottom's intent was not so clear. There was no agreement designed to establish that the Shreveport home was to be separate property, and they did not seek a partition. They instead sought to donate each of their individual, undivided interests in the property to the trusts, third parties, which article 2337 expressly prohibits. Thus, the court held that the transactions purporting to donate each spouse's interest into separate trusts were absolutely null because "[p]arties are not free to contract in violation of law." Therefore, the court held that the title to the Shreveport home never transferred to a trust, and the Texas home, which was purchased with community property, was included in the bankruptcy estate.

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Corporate and Business Law

Effect of "At Any Time" Provision for Withdrawal from an LLC

It's Golden, L.L.C. v. Watercolors Unit 6, L.L.C., 16-1362 (La. App. 1 Cir. 6/2/17), ____ So.3d ____, 2017 WL 2403015.

One of the members of Watercolors Unit 6, L.L.C., sent an email to the manager of the company on March 28, 2016, stating that the member was withdrawing effective April 29, 2016. The parties did not dispute that the email was sent to the manager at his business email address and that the manager received the email. The member's assignee, It's Golden, requested that the trial court fix and award it the fair market value of the member's interest.

Two issues were raised in the context of an exception of prematurity sustained by the trial court. The Louisiana 1st Circuit Court of Appeal considered whether, under La. R.S. 12:1325(B):

> (1) the provision in a limited liability company's operating agreement providing for withdrawal "at any time" eliminated the necessity for the "thirty days prior written notice" required under the statute; and
>
> (2) the email to the manager of the limited liability company eliminated the statutory requirement of "written notice to the limited liability company at its registered office as filed of record with the secretary of state."

In reversing the trial court, the 1st Circuit concluded that as the operating agreement provided the "time" and "event" for withdrawal, *i.e.,* "at any time," the language of the statute did not apply.

Further, as the email to the manager met the time and event requirement, "written notice to the limited liability company at its registered office as filed of record with the secretary of state" as set forth in La. R.S. 12:1325(B) was inapplicable.

The matter was remanded for further proceedings.

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Environmental Law

Environmental Whistleblower Statute

The Louisiana Environmental Whistleblower Statute, La. R.S. 30:2027, provides protection from retribution (via treble damages) for *employees* acting in *good faith* who disclose or threaten to disclose a violation of any environmental law, rule or regulation. Two recent decisions have helped clarify the proper interpretation of this statute.

Collins v. State, 16-1195 (La. App. 1 Cir. 4/28/17), 220 So.3d 92.

Collins arises out of a dispute between landman Dan Collins and the Louisiana Department of Natural Resources (DNR). Collins provided consulting services for land, title and environmental research for DNR's Atchafalaya Basin Program from 1997 to 2010. Beginning in 2007, Collins noticed and reported what he perceived to be violations of environmental laws, particularly his belief that the underlying purpose for two water-quality projects was actually to benefit the oil-and-gas-exploration opportunities for adjacent landowners. Collins' contract with DNR expired in 2009 and was not renewed in 2010, which precipitated the filing of this suit under, *inter alia*, La. R.S. 30:2027. The case eventually proceeded to a jury trial in the 19th Judicial District Court, where a jury found against DNR and awarded Collins $750,000 in damages.

On appeal, DNR argued that the jury erred in finding an employee relationship. Although he alleged that he was in fact an employee under § 2027, allowing the case to reach trial, Collins stated that he and his company were "employed as the *consulting* landman contractor" for DNR and they "provided *consulting* services for land-related research" (emphasis added). Although the whistleblower statute does not define the term *employee* and no cases directly define the term in this context, the 1st Circuit concluded that Collins had "conceded that their claims arise out of a contractual relationship. Thus, they cannot pursue an action under La. R.S. 30:2027, as it is a statute that is intended to protect employees . . . ." *Collins*, 220 So.3d at 96.

Although Collins' claim to an employee relationship under La. R.S. 30:2027 was probably a longshot, this case is relevant from a jurisprudential standpoint because the 1st Circuit conducted a meticulous analysis of how courts should distinguish between employees and independent contractors for the purposes of the environmental whistleblower statue. To that point, the court explicitly tied the interpretation of § 2027 to its previous decision in *O'Bannon v. Moriah Technologies, Inc.*, 15-1460 (La. App. 1 Cir. 6/3/16), 196 So.3d 127, which outlines a totality of the circumstances test to determine whether a person is an employee or a contractor. The relevant factors include: (1) whether a valid contract existed; (2) whether the work was independent in nature such that the contractor could employ non-exclusive means; (3) whether the contract calls for contractor to use its own methods without being subject to control and direction; (4) whether there was a specific price for the overall project; and (5) whether there was a specific timeline not subject to termination at will. More generally and in conjunction with these factors, the court reiterated that the principal factor is the degree of control over the work reserved by the employer.

Therefore, at least for cases in the 1st Circuit, the law is now clear on how courts should interpret the term "employee" in the Louisiana Environmental Whistleblower Statute.

Borcik v. Crosby Tugs, L.L.C., 16-1372 (La. 5/3/17), ____ So.3d ____, 2017 WL 1716226.

Siding with a terminated employee and the Louisiana Department of Environmental Quality (LDEQ), the Louisiana Supreme Court recently clarified the meaning of the phrase "good faith" in the context of the Louisiana Environmental Whistleblower Statute. The court found that in order for an employee to be entitled to protection under the statute, he or she must only have reported the employer under an honest belief that an environmental violation occurred, and it is irrelevant whether the employee also possessed malice against the employer.

At trial in the Eastern District of Louisiana, the core dispute was whether the plaintiff, a terminated tugboat crew member, acted in "good faith" when reporting what he believed to be environmental harm. The disagreement over the meaning of good faith played out in the submission of two different versions of proposed jury instructions. The employer proposed that good faith "means that plaintiff had no intent to seek an unfair advantage or harm another party in making his report of an environmental violation." The employee instead proposed that good faith be defined as "the plaintiff had an honest belief that an environmental violation occurred." The district court created its own hybrid of the two proposals and instructed the jury that good faith "means that the plaintiff had an honest belief that an environmental violation occurred and that he did not report it either to seek an unfair advantage or to try to harm his employer or another employee." Because the question turned entirely on Louisiana state law, the U.S. 5th Circuit certified the question to the Louisiana Supreme Court.

The Court noted that the Environmental Quality Act (which contains § 2027) is rooted in the Public Trust Doctrine, La. Const. Art. IX, § 1; thus, the whistleblower protection must be interpreted consistently with that context. As such, the Court adopted a broad definition of good faith — that "an employee is acting with an honest belief that a violation of an environmental law, rule, or regulation occurred." On June 1, 2017, the U.S. 5th Circuit accepted the Louisiana Supreme Court's definition and remanded the case for further proceedings. *Borcik v. Crosby Tugs, L.L.C.*, 858 F.3d 936 (5 Cir. 2017).

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Family Law

Child Support

Guste v. Guste, 16-0872 (La. App. 4 Cir. 4/19/17), 217 So.3d 542.

The trial court did not err in allowing Ms. Guste "straight line depreciation" regarding rental property, as La. R.S. 9:315C(3)(c) excludes only accelerated depreciation. The trial court was correct in not making the child support retroactive to the date of filing because there was an interim award in place; because of an agreement between the parties that Ms. Guste would receive the state and federal tax refunds for the years 2013 and 2014; and because the trial court did not abuse its discretion under the circumstances. The trial court also did not err in not making private-school tuition part of the child-support obligation because the trial court did not abuse its discretion under the circumstances of the case, which included its belief that the parties could work together to make educational decisions concerning the children. Regarding Ms. Guste's argument that the trial court erred in not admitting certain medical records in the possession of the custody evaluator, the court of appeal found that it could not review the matter because Ms. Guste failed to proffer the records.

Hammond v. Hammond, 51,316 (La. App. 2 Cir. 4/5/17), 217 So.3d 1198.

Although the trial court failed when rendering this custody decision to also address the child support, interim spousal support and income-tax dependency issues, although they were before the court, the court of appeal found that the trial court's failure to address these issues was not a rejection of them, but was an abuse of discretion in failing to address them. Consequently, the appellate court amended the judgment to reinstate the awards in accordance with the hearing officer's report, which had been adopted as an interim judgment.

Custody

State ex rel. Bushman v. Knapp, 16-0979 (La. App. 4 Cir. 4/12/17), 216 So.3d 130.

The trial court granted Knapp's rules for contempt against Bushman, denied Bushman's rules for contempt against Knapp, and changed domiciliary custody from Bushman to Knapp. The court of appeal stated that, although it might have ruled differently, the record supported the trial court's rulings. The court's primary focus was that Bushman had shown a pattern of unwillingness to facilitate the child's relationship with his father, had repeatedly thwarted efforts by the father to spend time with the child and had disregarded recommendations, whereas Knapp showed a greater willingness and ability to facilitate the child's relationship with the mother and to support the child both financially and through a family support system. The court of appeal found that there was much conflicting testimony but was unwilling to disturb the trial court's credibility determinations or evaluation of the testimony. Further, the trial court's rejection of the custody evaluator's opinion was supported by the record, particularly as the evaluation was over a year old, Bushman had not revealed relevant information to the evaluator and her situation had changed in several respects between the date of the evaluation and the date of trial.

Final Spousal Support

Freeman v. Freeman, 16-0580 (La. App. 1 Cir. 4/12/17), 218 So.3d 653.

The court rejected Mr. Freeman's argument that the final spousal support being paid to Ms. Freeman was actually "disguised child support" as it was set up to terminate on the child's graduation from high school. The court found that there was no evidence of an agreement to that effect, that she remained in need of final spousal support and that he had the ability to pay. Ms. Freeman was not required to deplete her assets in order to obtain final spousal support. The court rejected Mr. Freeman's argument that she was underemployed because as a pre-school teacher's aide she did not work year round as the court imputed income to her for the summer. The court also rejected his argument that the court erred in not considering her qualification for an earned-income tax credit as the court found the trial court had considered that credit.

Community Action Committee & 'WEEN DREAM Partnering for Halloween Costume Donations

The Louisiana State Bar Association/Louisiana Bar Foundation's Community Action Committee is assisting the 'WEEN DREAM program in the collection of new and/or slightly used Halloween costumes for children in need.

Law firms, attorneys and legal professionals wishing to donate should drop off costumes at the Louisiana Bar Center, 601 St. Charles Ave., New Orleans, on Wednesday through Friday, Nov. 1-10, during business hours (8:30 a.m.-4:30 p.m.).

Costumes may simply be placed in bags. There is no labeling or sorting process required. 'WEEN DREAM volunteers will handle the sorting process and match the costumes to children for Halloween 2018. (Costumes that were donated after Halloween 2016 are being distributed to children for 2017.)

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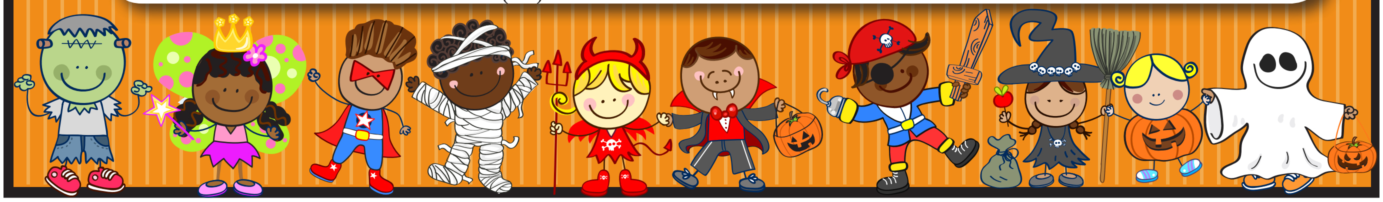

Community Property

Radcliffe 10, L.L.C. v. Burger, 16-0768 (La. 1/25/17), 219 So.3d 296.

The trial court ruled that the failure to file a joint petition under La. Civ.C. art. 2329 to commence an action to terminate a matrimonial agreement was an absolute nullity. The appellate court affirmed by an evenly split vote. The Louisiana Supreme Court reversed, finding that because the spouses' petition was styled as an adversary, rather than a joint, petition, the judgment terminating their community regime and allowing them to partition their property was a relative, not an absolute, nullity. The Court found that article 2329's requirement was a rule "intended for the protection of private parties," rather than a "rule of public order," and, consequently, resulted in a relative, rather than an absolute, nullity because it was designed to protect the "less worldly, economically vulnerable spouse from an overreaching spouse." *Id.* at 301.

As the judgment was relatively null, Radcliffe 10, L.L.C., a judgment creditor, lacked standing to attempt to nullify the judgment, allowing the termination of the parties' regime and their entering into a matrimonial agreement. Further, because Radcliffe limited its attack to article 2329 and did not pursue its initial revocatory action under La. Civ.C. art. 2036, and since it had failed to introduce any evidence regarding its revocatory action, that claim was denied for lack of proof. Two well-written dissents both argued that the requirement of article 2329 was one of public order, since matrimonial regimes and contracts affect more than only the parties and cannot be "viewed in a vacuum," as the parties' regime "affects the rights of far more people, classes, and institutions than just the parties themselves," including "creditors, heirs, and legatees," and affects "systems of property ownership, successions, inheritance, and obligations." *Id.* at 304-06. One of the dissenters also would have remanded for the court to consider plaintiff's revocatory action and claims for fraud.

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Fidelity, Surety and Construction Law

Writ of Mandamus

St. Bernard Port, Harbor & Terminal Dist. v. Guy Hopkins Constr. Co., 220 So.3d 6 (La. App. 4 Cir. 4/15/17).

St. Bernard Port, Harbor & Terminal District (District) sought review of a judgment granting a writ of mandamus to the contractor compelling the District to pay a $101,306 judgment previously rendered in favor of the contractor. Subsequent to the initial judgment becoming final, the contractor filed a Petition for Writ of Mandamus pursuant to La. R.S. 38:2191(D) to collect on the judgment. The District argued that the mandamus statute was not applicable since the suit was not one to collect final payment under the contract as outlined in the statute. The court found that the fact the contractor obtained the judgment pursuant to an ordinary proceeding did not bar its right to utilize a mandamus proceeding to thereafter collect the judgment. The district court granted the mandamus and directed the director of the District to pay the judgment.

La. Att'y Gen. Op. No. 17-0044 (2017)

A question was presented to the Attorney General regarding whether a person who makes a valid Public Records Act request to inspect documents is required to pay "copy costs" for such documents if actual copies of the documents are not made by the public entity. In response to a Public Records Act request, the custodian of the records produced the documents for inspection. Rather than request copies, a personal hand-held scanner was used and the individual made a scan copy of the documents instead of requesting Xerox copies. Pursuant to La. R.S. 44:32(C)(3), no fee may be charged for a person to "examine or review any public records." Since no actual copies were made by the public employee, the public body was unable to collect fees for the scanned documents.

Public Works Act

84 Lumber Co. v. FH Paschen, S.N. Nielsen & Assocs., L.L.C., No. 12-1748 (E.D. La. 8/8/17), 2017 WL 3425958.

La. R.S. 38:2247 provides that "any claimant having a directional contractual relation with a subcontractor, but not in direct contractual relation with the contractor," must provide notice by registered or certified mail to the contractor of its office in Louisiana. The claimant allegedly emailed a copy of its sworn statements of claims to the general contractor's attorney. While there was an issue as to whether in fact the email was received, the district court held that, regardless, sending a copy of the filed claims to the general contractor's attorney rather than directly to the general contractor does not comply with the Public Works Act. Therefore, the notice requirements under the Public Works Act were not met.

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Insurance, Tort, Workers' Compensation & Admiralty Law

Louisiana's Dram Shop Act

Tregre v. Champagne, 16-0681 (La. App. 5 Cir. 7/26/17), ____ So.3d ____, 2017 WL 3174697.

Arthur Tregre was southbound on La. Highway 52 in St. Charles Parish, following a vehicle driven by Dallas Veillon. Veillon, attempting a left turn, was struck by a northbound police cruiser driven by St. Charles Parish sheriff's deputy Jeff Watson, which then entered the southbound lane and struck Tregre's vehicle head-on. Watson was killed and Tregre suffered serious injury. Immediately preceding the accident, Veillon had been drinking at Boogie's Lounge, from which he was ejected in an intoxicated state. Suits were brought against Veillon, the sheriff's office, Boogie's and its owner, and their insurers. Tregre alleged that Boogie's employees ejected Veillon from the bar, which sits beside a busy highway, knowing he was intoxicated and was going to drive on that highway.

La. R.S. 9:2800.1 provides, in pertinent part:

> A. The legislature finds and declares that the consumption of intoxicating beverages, rather than the sale or serving or furnishing of such beverages, is the proximate cause of any injury, including death and property damage, inflicted by an intoxicated person upon himself or upon another person.
>
> B. Notwithstanding any other law to the contrary, no person holding a permit under either Chapter 1 or Chapter 2 of Title 26 of the Louisiana Revised Statutes of 1950, nor any agent, servant, or employee of such a person, who sells or serves intoxicating beverages of either high or low alcoholic content to a person over the age for the lawful purchase thereof, shall be liable to such person or to any other person or to the estate, successors, or survivors of either for any injury suffered off the premises, including wrongful death and property damage, because of the intoxication of the person to whom the intoxicating beverages were sold or served. . . .
>
> D. The insurer of the intoxicated

person shall be primarily liable with respect to injuries suffered by third persons.

E. The limitation of liability provided by this Section shall not apply to any person who causes or contributes to the consumption of alcoholic beverages by force or by falsely representing that a beverage contains no alcohol.

The trial court granted motions for summary judgment, dismissing with prejudice all claims against Boogie's Lounge, L.L.C., its owner and its insurer. Plaintiffs appealed, alleging, *inter alia,* that the bartender did not have a valid license.

In its ruling, the 5th Circuit quoted *Zapata v. Cormier*, 02-1801 (La. App. 1 Cir. 6/27/08), 858 So.2d 601, 606-07:

For the immunity provisions of La. R.S. 9:2800.1 to apply, the following requirements must be met: 1) the bar owner must hold a permit under Title 26 of the Louisiana Revised Statutes; 2) the bar owner, its agents and servants or employees sell or serve intoxicating beverages to a person over the age for lawful purchase thereof; 3) the purchaser thereof suffers an injury off the premises; and 4) this injury or accident was caused by the intoxication of the person to whom the intoxicating beverages were sold or served.

Finding all these requirements were indisputably met, the court affirmed the trial court's dismissal of the defendants, with prejudice.

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Labor and Employment Law

Updates in Labor and Employment Law

It was a busy summer for labor and employment law, both judicially and administratively. This article provides information on what labor and employment practitioners need to know about the ever-changing state of law and changes ahead.

New Overtime Regulations Ahead?

On Nov. 22, 2016, the Eastern District of Texas issued a last-minute injunction on the new Fair Labor Standards Act Regulations, which would have doubled the salary requirement for the "white collar" exemptions. *Nevada v. U.S. Dep't of Labor*, 218 F. Supp. 3d 520 (E.D. Tex. 2016). However, changes to the overtime exemptions are still possible. In July 2017, the DOL filed a Request for Information in the Federal Register seeking public comment on setting an appropriate salary level for the exemptions and several other interesting issues, including the possibility of instituting multiple salary levels depending on geographic regions and employer size, as well as reverting to a duties-only test. Wage and Hour Division, U.S. Department of Labor; Request for Information; Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, 82 FR 34616, (July 26, 2017). The comment period closed on Sept. 25.

Tip-Pooling Regulations Rescinded

On June 20, 2017, the federal government's Unified Agenda of Regulatory and Deregulatory Actions announced plans to rescind the DOL's 2011 tip-pooling restriction. Before the restriction, employers could collect employees' tips and redistribute them among the other staff members, typically those working in the "back of the house." In 2011, the DOL restricted employers from tip pooling and redistributing tips among a larger group of employees, even if the employer provided a "tip credit" ensuring that employees were paid at least minimum wage. 29 U.S.C. § 203(m); 76 Fed.Reg. 18,832, 18,841-42 (April 5, 2011). Numerous lawsuits across the country followed, and, at one point, the regulation's validity was poised for Supreme Court review. *See, Oregon Rest. & Lodging Ass'n v. Perez*, 816 F.3d 1080 (9 Cir. 2016), *petition for cert. filed,* 2017 WL 360483 (U.S. No. 16-920) (Jan. 19, 2017). The DOL's Notice of Proposed Rulemaking suggests rescinding the 2011 restrictions on tip pooling for employers who pay tipped employees the full minimum wage directly. Department of Labor, Wage and Hour Division; Tip Regulations Under the Fair Labor Standards Act (FLSA), RIN 1235-AA21.

DOL Administrator Interpretations Redacted

The Wage and Hour Division's "Administrator's Interpretations" were issued by the DOL but did not carry the force of law. In a June 7, 2017, news release, the DOL announced the redaction of two of its controversial Interpretations on "Joint Employment" and "Independent Contractors" and promptly removed the Interpretations from the Department's website. The Department cautioned that these withdrawals do not alter an employer's obligations under the FLSA's regulations and case law.

Wage and Hour Opinion Letters Reinstated

On June 27, 2017, the DOL announced it would resume issuing Opinion Letters on wage-and-hour matters, which was suspended in 2010. Opinion Letters are penned by the Wage and Hour Division in response to questions it receives about the laws it enforces, such as the FLSA. Employers and employees alike can now submit requests for opinion letters through the Department's website or by mail to receive an official written opinion on how the DOL interprets the law.

Sexual Orientation Discrimination under Title VII

As the Labor and Employment Law Section reported in the August/September 2017 *Louisiana Bar Journal*, the 7th Circuit issued an en banc opinion on April 4, 2017, holding that Title VII of the Civil Rights Act of 1964's prohibition on discrimination "because of . . . sex" covers sexual-orientation discrimination. *Hively v. Ivy Tech Cmty. Coll. of Ind.*, 853 F.3d 339 (7 Cir. 2017), 42 U.S.C. § 2000e-2(a)(1). Meanwhile, the 11th Circuit Court of Appeal issued a panel decision in the case of *Evans v. Georgia Regional Hospital* denying Title VII coverage of sexual-orientation discrimination. 850 F.3d 1248 (11 Cir. 2017). Developments in federal courts this summer signal that the Supreme Court may rule on this legal question soon.

First, the 11th Circuit denied en banc review in *Evans* on July 6, 2017. As a result, there is officially a circuit split between the 11th and 7th Circuits on this matter and Lambda Legal, who represents Evans, quickly announced it would appeal the decision to the Supreme Court.

Second, the circuit split may widen or narrow depending on the outcome of *Zarda v. Altitude Express*, a similar case pending in the 2nd Circuit. 855 F.3d 76 (2 Cir. 2017). The district court and appellate court ruled that sexual-orientation discrimination is not covered by Title VII. *Id.* at 79. The 2nd Circuit granted en banc review on May 25, 2017, and the plot is beginning to thicken as *amicus curiae* briefs are filed. On July 26, 2017, the Department of Justice filed an *amicus curiae* brief stating its position that sex discrimination does not include sexual-orientation discrimination. This opinion, which directly contradicts the EEOC's 2017-2021 Strategic Enforcement Plan, adds to the state of confusion over this legal issue. Given the circuit split and uncertainty among federal agencies, this legal question will likely be before the Supreme Court soon.

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Mineral Law

Well Cost Reporting Statutes

La. R.S. 30:103.1 provides that, if a compulsory unit includes "lands . . . upon which the operator . . . has no valid . . . lease," the operator must provide certain financial reports to any unleased owner who requests them. Next, La. R.S. 30:103.2 provides that, if the operator fails to send those reports within a specified time, and the operator also fails to timely correct the omission after written notice, the operator will forfeit its right to demand contribution from the unleased owner for drilling costs.

In *Miller v. J-W Operating Co.*, No. 16-0764 (W.D. La. July 28, 2017), 2017 WL 3261113, Miller wrote to J-W Operating Co. to request financial reports. The plaintiff described herself as the owner of an unleased oil-and-gas interest in Bossier Parish, but she did not identify the interest that she owned or the unit in which the interest was located. J-W, which operates a number of wells in Bossier Parish, responded by requesting more information. Miller wrote a second letter to J-W, but the second letter similarly failed to identify the plaintiff's interest. Again, J-W responded by requesting more information.

The plaintiff then sent a third letter to J-W, finally identifying a five-acre tract that she owned. J-W responded by sending the plaintiff financial reports and a check for plaintiff's share of production, minus her share of drilling costs. J-W's response was timely if its obligation to provide financial reports was triggered by the plaintiff's third letter, but not if its obligation was triggered by the earlier letters. The plaintiff brought suit, asserting that J-W had forfeited its right to deduct well costs because the company failed to timely send the financial reports she requested.

The court disagreed. The court noted that the well-cost reporting statute does not specify what information must be contained in an unleased owner's request for financial reports. The court reasoned, however, that it would be unreasonable to interpret the statute as imposing a potentially harsh penalty on an operator for failing to send reports in response to a request that does not even identify the unleased interest that is at issue. Accordingly, J-W's reporting duty was not triggered until it had received the request in which the plaintiff identified her interest.

Liability of Lessee's Lender for Lease Obligations

In 2004, Gloria's Ranch granted an oil-and-gas lease to Tauren Exploration. Later, Tauren assigned portions of its lease rights to Cubic Energy and EXCO USA. *Gloria's Ranch, L.L.C. v. Tauren Exploration, Inc.*, 51,077 (La. App. 2 Cir. 6/2/17), ____ So.3d ____, 2017 WL 2391927.

In 2007, Cubic borrowed money from Wells Fargo Energy Capital and executed a credit agreement. The agreement required that the borrowed money be used for certain purposes, such as drilling. It also provided that Wells Fargo retained the right to approve the location and depth of wells, as well as certain actions that Cubic might take, such as its entry into new operating agreements or its alienation of its oil-and-gas lease rights. Wells Fargo also received certain other rights, but not a working interest.

The lease covered portions of five sections in Caddo Parish. Tauren drilled wells on the leased premises in three of the sections. In the other two sections, an unrelated company drilled wells that served as unit wells for units that included the portion of the leased premises in those sections. Gloria's Ranch eventually concluded that the lease had terminated for lack of production in paying quantities. In early 2010, it wrote a letter to the lessees (Tauren, Cubic and EXCO) and to Wells Fargo, demanding that they execute a recordable act recognizing that the lease had terminated. They declined to do so, and Gloria's Ranch sued them. EXCO settled, but the case went to trial against the other defendants.

The trial court determined that, in four of the five sections, the lease had terminated for lack of production in paying quantities (the lease contained a vertical Pugh Clause). The court also concluded that Gloria's Ranch had lost valuable leasing opportunities because of the defendants' failure to execute an act recognizing partial lease termination. As for the fifth section, the court concluded that Tauren and Cubic had failed to pay royalties to Gloria's Ranch for the portion of unit production that was attributable to the leased premises.

The trial court entered judgment holding that the lease had terminated in its entirety and granting a money judgment for the sum of: the unpaid royalties; statutory penalties equaling twice the unpaid royalties; millions of dollars for lost leasing opportunities; interest and attorney's fees. Notably, the trial court held that Wells Fargo was solidarily liable with Tauren and Cubic for the entire money judgment, even though Wells Fargo never owned a working interest.

The Louisiana 2nd Circuit affirmed. Wells Fargo applied for rehearing, but a five-judge panel denied the application by a 3-2 vote. In a strongly worded opinion, the two judges who dissented from the denial of rehearing asserted that the judgment is erroneous and that it will bring trouble for the banking industry.

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Professional Liability

Not Charted, Not Done?

Royal ex rel. Mott v. Blanch, 16-1215 (La. App. 4 Cir. 6/14/17), ____ So.3d ____, 2017 WL 2570926.

Royal was triaged by an emergency-room physician (Blanch) who did not document in any record that a pulse oximetry test (SpO2) was performed prior to Royal's discharge that same day. Royal died the next day from a pulmonary embolism, the presence of which might have been detected a day earlier by an SpO2 test. A medical-review panel found that the hospital breached the appropriate standard of care because an SpO2 test was required, and there was no record that it had been done.

During a bench trial against Blanch, the plaintiffs relied on the panel opinion and claimed that "not charted, not done" was a medical maxim that required a finding that the absence in the record of the SpO2 result meant that it was not run. The Royals called no expert witness to testify. Blanch called two expert emergency-medicine physicians and testified on his own behalf.

Blanch claimed that he had an independent recollection of treating Royal and that he did measure her SpO2, adding "there was no doubt in his mind that he tested her oxygen saturation level" and got a result greater than 95 percent "because had it been less, [his] course of treatment would have been different," *e.g.*, he would have then ordered a specialized test (ABG), whereas he ordered only routine testing.

Blanch agreed that not running an SpO2 would have been negligent, but he disputed the applicability of "not charted, not done," which he said does not reference the care rendered but rather "is a saying associated with billing, admonishing health care providers to document the treatment and testing they perform, but it is not the standard of care."

Why, Blanch was asked on cross-examination, if he had run the test, did he not include that information in his brief to the panel? Blanch replied that he told his attorney that he had performed the test, but thereafter "no one asked" him about it, and he did not know what rules applied to medical-review panels. Blanch's brief to the panel was not offered as evidence.

Blanch also testified that his normal practice was to record the SpO2 results, but he did not do so in this case because there was no easy way to record the result at the spot he ran the test, and he forgot to record it later.

A panel member testified that the basis for the panel's finding of breach was the lack of a record of the test, but if he had known that Blanch performed the test, he would have found no breach. He added that "not charted, not done" is a term used in the legal community that doctors use as a teaching tool for the premise that if it is not recorded, "people are going to assume that you didn't do it." Another of Blanch's expert witnesses testified that the phrase is an axiom or admonition used to train physicians about the importance of documentation and that it is not related to whether testing was actually done.

The Royals called in rebuttal an expert witness in forensic pathology who testified that if, at the time of the emergency room visit, the pulmonary emboli that caused Mrs. Royal's death were in the same condition as they appeared at the time of autopsy, the pulse oximetry results would probably have been abnormal. He also testified that he was trained as a physician to document all significant medical information. He stated that while he was unwilling to say that the testing was not done simply because it was not recorded, before he could accept that it was done but not charted, "he would have to be shown 'some other good evidence to state that it in fact was'" done.

The hospital objected to additional questioning of the pathologist to whether "not charted, not done" was the standard of care. The objection was sustained, and the Royals proffered the testimony that it was, in fact, the standard to which healthcare providers adhere.

On appeal from the trial court's judgment for the defendant, the Royals argued that the hospital should not have been allowed to raise the "done but not charted" defense at trial as it was not considered by the medical-review panel. The appellate court noted that it was prevented from reviewing the unintroduced panel submission, and Blanch testified that he had run the test. Thus, the court concluded that because the Royals failed to raise as error on appeal the exclusion of the pathologist's proffered testimony that "not charted, not done" is "a standard by which healthcare providers conduct themselves," it was unable to say that the lower court's finding that the test had been run was clearly wrong. The court added, "Moreover, we decline to interpret [the failure to chart] as absolutely conclusive that the testing was not done."

Recent Legislation

The amendments to La. R.S. 40:1231.8(A)(2)(b) and 1237.2(A)(2) (b) retain existing law and provide further clarification that a request for panel review, when sent to the Division of Administration, is:

(aa) Sent, if the request is electronically sent by facsimile transmission or other authorized means, as provided by R.S. 9:2615(A), to the division of administration.

(bb) Mailed, if the request is delivered by certified or registered mail to the division of administration.

(cc) Received, if the request is delivered by any means other than as provided by Subitem (aa) or (bb) of this Item.

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Taxation

Prescription: Each Claim for Refund Stands on Its Own

Cajun Indus., L.L.C. v. Sec'y Dep't of Revenue, No. 9898D (La. Bd. Tax App. 4/12/17).

Cajun Industries, L.L.C., and Cajun Construction, Inc. (collectively, Cajun) appealed to the Board of Tax Appeals the Louisiana Department of Revenue's denial of a sales-tax refund request in the amount of $1,695,801.92 for the period of 1/1/10 to 1/31/11 (Cajun II). The Department denied the requested refund because it was not timely filed as required by La. R.S. 47:1623. Cajun's refund claim was mailed to the Department on April 28, 2016. The claim was not timely and was clearly prescribed in its face. The only question was whether Cajun had fulfilled the burden of establishing the prescriptive period was interrupted or suspended as provided by La. R.S. 47:1623.

Cajun had previously filed with the Department a claim involving a similar sales-tax issue for the same period but involving other transactions. That other claim was denied and appealed to the Board (Cajun I).

Taxpayers claimed that the refund requested in Cajun II is for similar but distinct transactions from those in Cajun I, but that it had been left out of the calculation and supporting schedules of Cajun's request for the Cajun I refund. Cajun I's refund request was presented to the Department on Department of Revenue Form R-20-127 (2/11). That form asked for the total amount of tax paid for the period; Cajun's answer was $2,442,843.53. The form asked for the amount of tax requested to be refunded; Cajun's answer was $2,442,843.53.

The Board reasoned:

> Refund claims are not made for time periods but for transactions that make up the claim. In the present case, those transactions were identified to the Department and a specific dollar amount was listed. This is not the case of a potential clerical error on a form; the transactions in dispute in the prior claim are distinct from the transactions involving the later claim.

The Board held Cajun II must stand on its own, and there was no statutory basis for the argument that prescription had been suspended and interrupted. The Cajun II claim was held to be untimely and, in fact, prescribed.

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Different Valuation Approaches for Affordable Rental Housing Projects

Williams v. Opportunity Homes Ltd. P'ship, 16-1185 (La. App. 4 Cir. 5/10/17), 220 So.3d 188.

Opportunity Homes Limited Partnership operates a scattered-site, low-income affordable rental housing development composed of 32 separate single and double houses located throughout Orleans Parish. These properties are all interconnected through a Tax Credit Regulatory Agreement and are qualified for Low Income Housing Tax Credits (LIHTCs) under IRS Code § 42 because the rent is capped at 60 percent of the area median income. Opportunity Homes challenged its *ad valorem* tax assessments on the grounds that Erroll Williams, the parish assessor, failed to follow the duly promulgated rules of the Louisiana Tax Commission that recommended use of the income approach in assessing affordable rental-housing properties and instead used a purported "market" approach that relied on sales and averages of market rate properties rather than actual comparison properties with similar rent restrictions and transfer limitations. The Commission ruled in favor of Opportunity Homes, and the assessor appealed to the Orleans Parish Civil District Court, which affirmed. The assessor then appealed to the 4th Circuit Court of Appeal.

The assessor first argued that the Commission exceeded its statutory authority in limiting the assessment methodology to only the income approach. An earlier panel of the 4th Circuit approved the use of only the income approach (*see, Williams v. The Muses Ltd. I*, 16-0250 (La. App. 4 Cir. 10/19/16), 203 So.3d 558); nevertheless, this panel found that the Commission's rule was only a recommendation and that the assessor was authorized to use any of the three statutorily approved assessment methodologies to determine fair-market value.

Next, the assessor contended that use of the market approach was required to satisfy the constitutional requirement of uniformity of assessment. The assessor stated that, while he ordinarily assessed multi-unit properties with more than 10 units under the income approach, he assessed single and double units under the market approach. Opportunity Homes responded that, although the units were not under a single roof, they were all part of a single affordable-housing development subject to a single rent-capping TCRA, and thus should be assessed like other multi-unit properties in Orleans Parish.

The court agreed with the assessor, finding that focusing on the characterization of the housing as affordable or not would result in different fair-market values for single or double unit homes based on their designation, resulting in similarly situated properties being taxed differently. Accordingly, the court reinstated the assessor's values.

The Commission has proposed revisions to its rules regarding assessment of affordable-rental housing in response to this case.

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